

# Age discrimination (1)

New legislation coming into force in autumn 2006 will protect against discrimination on the grounds of age in the fields of employment and vocational training. This guidance note, the first in a series of four on age, introduces the legislation and examines its scope.

The Employment Equality (Age) Regulations 2006 (SI 2006/1031) are the final step in the UK's implementation of Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation.

Having undertaken a number of regulatory impact assessments, the government commenced consultation on the age aspects of the Equal Treatment Directive in 2003 with its *Age matters*<sup>1</sup> consultation paper. This resulted in draft Regulations<sup>2</sup> being published in 2005, along with a further consultation, *Coming of age*<sup>3</sup>, inviting views on them.

The final version of the Regulations was published in March 2006 and has now been approved for implementation by both the House of Commons and the House of Lords. The Regulations will come into force on 1 October 2006. Acas has published guidance on the Regulations<sup>4</sup>.

Although the government has been criticised for its delay in finalising the Regulations – leaving employers with a considerably shorter period of time than was initially promised to prepare for their implementation – the delay is indicative of the huge cultural and legal adjustments that need to be made if age discrimination is to be eliminated.

The new age discrimination legislation is likely to represent the single biggest change to employment law for decades. When Age Concern, in partnership with the University of Kent, undertook a detailed study examining ageism in Great Britain<sup>5</sup>, the results showed that more people considered that they had suffered from age discrimination than from any other form of discrimination. The results also indicated that from the age of 55 onwards people were more than twice as likely to suffer from age discrimination as they were to suffer from any other form of discrimination.

In countries where age discrimination legislation has already been implemented, the number of age discrimination cases brought has been considerable and awards – particularly in cases involving older workers – have been high. During 2004, 17,837 claims of age discrimination were filed with the Equal Employment Opportunity Commission in the US. This was only slightly fewer than the number of sex discrimination claims, and more than the number of disability discrimination claims.

In Ireland, where age discrimination laws have been in force since 1998, age discrimination claims are common.

Employers in the UK should, therefore, be taking steps to familiarise themselves with the legislation, and to adapt their policies and procedures in preparation for its coming into force.

## Overview

The Employment Equality (Age) Regulations 2006 cover the entirety of the employment relationship from recruitment to termination, as well as extending to events following the end of the relationship, such as the provision of references.

In addition, the Regulations cover ancillary matters including the provision of training, further education and the bestowing of qualifications, since it is accepted that inequality in these areas would directly undermine equality in employment.

The Regulations cover four types of discrimination:

- direct discrimination;
- indirect discrimination;
- harassment; and
- victimisation.

## Direct discrimination

Direct discrimination occurs where a decision is made on the basis of a person's age, or perceived age. Direct discrimination is not always, and does not need to be, intentional.

For example, if a shop selling clothes marketed at young people rejects a candidate because she is over 40, and therefore older than its target market, the candidate is being directly discriminated against on grounds of her age, ie because she is over 40. If the candidate is actually 35, but is rejected because the employer perceives her to be over 40, she is also suffering direct discrimination.

Another example of direct age discrimination would be where a small business decides not to recruit anyone between the ages of 28 and 38 because it believes that individuals in this age group are likely to have small children and, as a result, be less committed to the business. A job applicant who falls into this age group and who is not recruited as a result will be the victim of direct discrimination.

## KEY POINTS

■ Regulations outlawing age discrimination will come into force on 1 October 2006, and experience in other countries suggests that they are likely to result in a significant number of claims.

■ As with other discrimination laws in the UK, direct and indirect discrimination, harassment and victimisation will be covered. However, unlike the other discrimination laws, under the age Regulations direct discrimination will be lawful if it is objectively justified.

■ Employers will need to review their policies and practices to ensure that no inferences of discrimination can be drawn; such inferences would result in a reversal of the burden of proof on to them to prove that they did not discriminate.

■ The legislation will cover not only employees, but other workers such as agency workers and the self-employed who contract personally to do work. Its geographical scope is wide.

■ Age discrimination claims will be brought in the employment tribunals and compensation is unlimited.

This feature was contributed by Lucy Lewis, a member of the age discrimination team at Lewis Silkin, an ius laboris member firm.

**Indirect discrimination**

Indirect discrimination occurs when an employer applies a provision, criterion or practice that results in a disadvantage to people of a particular age or age group. As with direct discrimination, the disadvantage does not need to be intentional and usually is not.

If, for example, an employer advertises for an HR manager with 10 years' experience, this will indirectly discriminate against younger workers because it imposes a criterion of a number of years of service, and a considerably larger number of younger workers than older workers will be unable to comply.

A company that advertises for a "recent graduate" would also be indirectly discriminating against older workers, who are far less likely than individuals in their early 20s to have graduated recently.

**Harassment**

The definition of harassment in the Regulations follows the same format as that in the other discrimination legislation. Harassment is defined as unwanted conduct that has the purpose or effect of:

- violating a person's dignity; or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

Conduct will have this effect only if, having regard to all the circumstances and, in particular, the perception of the individual complaining of it, it should reasonably be considered as having this effect.

At present, ageist "banter" is broadly considered to be socially acceptable. For example, cards that mark certain birthday milestones often carry – in the name of humour – a derogatory message about people who have reached the age in question. It is this sort of thing that may, in the future, be used to found an age harassment claim.

For example, an employee who receives an "over the hill at 50" birthday card, and is excluded from work-related social invitations to a fashionable bar with a youthful clientele, may well succeed in demonstrating that she has been subjected to harassment on the grounds of age.

Even where this sort of conduct falls short of harassment, it will be of huge evidential value if the employee wishes to assert that other less favourable treatment has been on grounds of her age. If, for example, the woman was selected for redundancy and wishes to claim that this was because of her age, her prospects of success will be significantly improved by evidence of her treatment at the hands of her colleagues.

Although the Regulations do not come into force until 1 October 2006, taking steps now to change the attitude of people in their organisation

towards age is one important way in which employers can help protect themselves from age discrimination claims after this date.

**Victimisation**

In common with the existing anti-discrimination legislation, the Regulations include protection from victimisation. This makes it unlawful for an employer to treat an employee less favourably as a result of his or her making a complaint of age discrimination – whether to the employment tribunal or the employer – or assisting another in making such a complaint. For example, an employee who raises a grievance concerning age discrimination and, as a result of having done so, is subsequently treated less favourably in a redundancy selection process will have been subjected to unlawful victimisation.

**Proving age discrimination**

The burden of proof in age discrimination claims will reflect that now found in other forms of UK discrimination law.

To discharge the burden of proof, an employee bringing an age discrimination claim need only prove facts from which the employment tribunal could infer, in the absence of an adequate explanation, that there has been discrimination.

If the employee fails to prove such facts, the age discrimination claim will fail. However, if the employee does prove facts from which the employment tribunal could infer that there has been age discrimination, the burden of proof passes to the employer to prove that there has been no discrimination.

Inferences of discrimination can be drawn from a number of different sources, and race and sex discrimination cases indicate that, generally speaking, the burden on the employee is relatively easy to discharge.

Tribunals have been prepared to draw inferences of discrimination in cases where the employer has been unable to demonstrate a commitment to equal opportunities, for example by failing to have an equal opportunities policy or train staff in equal opportunities. An employer that has failed to deal properly and appropriately with complaints of discrimination may also find that inferences are drawn in favour of the employee. This may be a problematic area with regard to age discrimination because, owing to cultural attitudes, managers are likely to find it harder to identify age-related issues than, for example, sex-related or race-related issues.

It is best practice for an employer to monitor its workforce to ensure that practices that it considers to be age neutral do not in fact have a discriminatory impact. For example, an employer would be expected to monitor age with regard to recruitment to make sure that older candidates are not routinely being rejected. An employer that fails to undertake any monitoring is likely to have

inferences of discrimination drawn against it. Equally, if monitoring is undertaken and the statistics are not favourable, the employer can expect inferences of discrimination to be drawn, unless it can show that it is taking steps to address the problem.

### **Defending a claim of discrimination**

Employers should ensure that they will be in a position to prove that decisions were not taken on age discriminatory grounds.

Contemporaneous notes and records are generally given much greater weight than oral evidence in an employment tribunal. For example, in a recruitment situation, it is important not only that employers make decisions on non-discriminatory grounds, but also that they properly record the reasons for one candidate being preferred over another. This will be particularly important in industries such as the media where the age profile is generally young, with the result that discrimination may be inferred.

Equally, at the point of termination, employers need to ensure that clear and objective reasons are given for decisions to terminate. This will be particularly important where, as is often the case, an older employee is being replaced by someone younger, making it very likely that an inference of discrimination will be drawn.

### **Justifying age discrimination**

The main difference between the Regulations and the existing anti-discrimination legislation is that it will be possible for an employer to justify direct, as well as indirect, age discrimination if it can show that the discriminatory treatment was a proportionate means of achieving a legitimate aim. Under the existing anti-discrimination legislation, it is possible to justify direct discrimination only if a genuine occupational qualification or requirement exists in relation to the job in question.

The framework Directive gives the following examples of differences in treatment that may be “objectively and reasonably justified” by a legitimate aim, provided that the “means of achieving that aim are appropriate and necessary”:

- the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions for young people or older workers to protect or promote their vocational integration or ensure their protection;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; and
- the fixing of a maximum age for recruitment that is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

Although the government included this list of examples from the Directive in the 2005 draft of the Regulations, it does not appear in the final version.

The *Age matters* and *Coming of age* consultation papers also gave a non-exhaustive list of the kind of specific aims that might justify differences of treatment, as follows:

- health, welfare and safety, including protection of young or older people;

### **Employment Equality (Age) Regulations 2006**

#### **3 Discrimination on grounds of age**

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

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

(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 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.

(2) A comparison of B’s case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(3) In this regulation –

(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; and

(b) the reference in paragraph (1)(a) to B’s age includes B’s apparent age.

#### **4 Discrimination by way of victimisation**

(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –

(a) brought proceedings against A or any other person under or by virtue of these Regulations;

(b) given evidence or information in connection with proceedings brought by any person against A or any other person under or by virtue of these Regulations;

(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,

or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

(2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

...

#### **6 Harassment on grounds of age**

(1) 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 –

(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 (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.

**Employment Equality (Age) Regulations 2006****7 Applicants and employees**

- (1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person –
- in the arrangements he makes for the purpose of determining to whom he should offer employment;
  - in the terms on which he offers that person employment; or
  - by refusing to offer, or deliberately not offering, him employment.
- (2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person –
- in the terms of employment which he affords him;
  - in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;
  - by refusing to afford him, or deliberately not affording him, any such opportunity; or
  - by dismissing him, or subjecting him to any other detriment.

...

**8 Exception for genuine occupational requirement etc**

- (1) In relation to discrimination falling within regulation 3 (discrimination on grounds of age) –
- regulation 7(1)(a) or (c) does not apply to any employment;
  - regulation 7(2)(b) or (c) does not apply to promotion or transfer to, or training for, any employment; and
  - regulation 7(2)(d) does not apply to dismissal from any employment, where paragraph (2) applies.
- (2) 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.

## LEGISLATION

- facilitation of employment planning;
- particular training requirements;
- encouraging and rewarding loyalty;
- the need for a reasonable period of employment before retirement; and
- recruiting or retaining older people.

Although this list does not appear in the Regulations – the government accepted representations that it would be unduly restrictive – it does give an indication of what the government considers might be legitimate aims. However, ultimately, it will be up to the courts and tribunals to decide this issue.

Whether preventing an impact on cost can itself be a legitimate aim is a vexed question. There are two main circumstances in which a company is likely to wish to argue that this is a legitimate aim. The first is where the cost to the employer of providing a benefit to an older – or younger – employee is significantly increased. This could include, for example, the cost of providing medical insurance to an older worker, or car insurance to a younger worker. The second is where the company is concerned that customer prejudice might result in an impact on sales. For example, an employer may fear that a young shop assistant working in a store with an older clientele may be less successful

than an older shop assistant who can empathise with the customers.

Both the *Age matters* and the *Coming of age* consultation papers make it clear that the government does not consider that preventing additional cost will itself be able to justify discrimination. It is expressly stated that discrimination will not be justified merely because it may be more expensive not to discriminate. This is in keeping with decisions on justification in other areas of discrimination law, for example *Cross and others v British Airways plc*. However, the *Coming of age* consultation paper also says that economic factors such as business needs and considerations of efficiency may be legitimate aims. If the employment tribunals accept that these sorts of economic factors can be legitimate aims, the distinction with the broad prohibition on cost as a legitimate aim will be a difficult one to draw.

Having established a legitimate aim, an employer will then need to show that the means adopted to achieve it were proportionate. An employment tribunal is likely to consider whether any less discriminatory means could have been used to achieve the same aim. For example, where an employer makes it a condition of a promotion to the position of IT manager that the successful candidate has a qualification for which training on up-to-date computer software is required, the employer will be applying a criterion that may indirectly discriminate against older workers who are less likely to have studied the new software. Knowledge of the new software may well be a legitimate aim. However, it may be that the employer could have achieved the same aim in a less discriminatory way, perhaps through providing the successful candidate with training on the new software. It may be that the length of time that any such training would take would mean that it would not be a proportionate means of achieving the aim. However, in defending any tribunal claim, it will be important for the employer to show that it considered alternatives. In addition, it may not be permissible for the employer to say that the training would have taken only a short time but the cost of it was considered to be too high.

The only guidance we have so far on the courts' approach to justification comes from the European Court of Justice (ECJ) decision in *Mangold v Helm*. Here, a German law reducing protection for older fixed-term workers was held to be incompatible with the Directive. The ECJ accepted that the vocational integration of older workers was a legitimate aim that could potentially justify the reduced protection. However, it did not accept that the rule was proportionate, because it applied to all older workers on fixed-term contracts and not just to those who had difficulty in securing employment.

There can be no justification for harassment or victimisation.

As an alternative to justifying direct discrimination, an employer may be able to use the genuine occupational requirement exception contained in reg. 8. This would apply where age represents a genuine and determining occupational requirement, having regard to the nature of the employment. However, other than for acting and modelling positions, it is difficult to envisage when this exception might apply. It also seems unlikely that there would be cases where the exception would apply, but the age-based discriminatory treatment would not be justified.

### Extent of the new obligation

The obligation not to discriminate on the grounds of age will fall widely.

■ **Employers:** Most claims will arise from the employment relationship. However, it is not only employers – in the broadest sense – that are governed by the Regulations. Some of the most important of the other bodies covered are listed below.

■ **Employees:** Individual employees can be liable under reg. 26(2) for acts of discrimination for which their employer is vicariously liable under reg. 25.

■ **Trade unions:** It is unlawful for trade unions to discriminate on the grounds of age in the way that they treat their members or applicants for membership. It will not, for example, be permissible for a union to refuse to admit an applicant to membership on grounds of age.

■ **Barristers and their clerks:** It is unlawful for barristers or their clerks to discriminate on the grounds of age against pupils or tenants, or applicants for pupillages or tenancies. Protection from discrimination by those instructing barristers is also included.

■ **Police:** Police constables enjoy the same protection from age discrimination as employees. The chief constable of a force will ordinarily be treated as the employer, unless the act is done by the police authority.

■ **Further and higher education:** It is unlawful for institutions – including universities – that provide further or higher education to discriminate against students or those who have applied to be students on the grounds of age.

■ **Qualifications bodies:** It is unlawful for a body that confers professional or trade qualifications to discriminate against a person on grounds of age. For example, the Law Society must not discriminate on grounds of age in the way that it confers and renews practising certificates.

■ **Others:** Other bodies with obligations not to discriminate include pension scheme trustees, employment agencies and vocational training providers.

### Scope of protection

The scope of protection under the Regulations is wide and includes actual and prospective

employees, contract and agency workers, some office-holders, partners and people undergoing, or applying to undergo, vocational training.

■ **Employees:** For the purposes of the Regulations, an “employee” is defined in reg. 2 as someone working under: a contract of service; a contract of apprenticeship; or a contract personally to do any work.

This is wider than the definition of “employee” in some other pieces of employment legislation, including the Employment Rights Act 1996, and will extend to the self-employed who contract personally to do work.

For example, where a television production company hires a freelance technician to work on a television show for six months, and the company contracts directly with the technician, who is required to carry out the work personally, the technician will be protected by the Regulations.

In addition, where a company engages a builder to do occasional odd jobs, the builder will be protected by the Regulations even though he works only when needed and there are periods when he does no work at all.

■ **Contract and agency workers:** Contract and agency workers are protected from age discrimination, not only where the discriminator is the company with which they have a direct relationship, but also where the discriminator is the end user of their services. For example, where a temporary secretary is supplied to a company by a secretarial agency, neither the agency nor the end-user company will be able to discriminate against the secretary.

■ **Office-holders:** Protection under the Regulations extends to any person appointed to an office or post, provided that the person is subject to direction as to when and where he or she performs his or her functions, and is paid. Political offices are specifically excluded.

■ **Partners:** Partners and members of limited liability partnerships – as well as applicants for partnership and membership – are protected by the Regulations.

■ **Job applicants:** Individuals who apply for work or for some other protected position, such as an office, are covered by the Regulations. Discrimination claims may be brought by those who have been discounted at the application, short-listing or interview stage.

■ **Relationships that have ended:** In common with other forms of anti-discrimination legislation, the Regulations provide limited protection from discrimination after the relationship has ended, provided that the act of discrimination arises out of, and is closely linked to, the former relationship. The most obvious example of such discrimination is where an employer refuses to provide a reference for an ex-employee on grounds of his or her age or, more likely, because he or she has made a complaint of age discrimination while still in the employer’s employment.

**Other than for acting and modelling positions, it is difficult to envisage when [the genuine occupational requirement] exception might apply**

■ **Vocational training:** The Regulations specifically protect those applying for vocational training. Training for these purposes means “all types and all levels of training which would help fit a person for any employment”. It also includes vocational guidance, facilities for training, practical work experience and assessments related to the award of any professional or trade qualification. Protected individuals will include those on, or applying for, work placements or work experience, and those who are volunteering for the purposes of receiving training.

### Geographical scope

The Regulations cover Great Britain. Equivalent Regulations – the Employment Equality (Age) Regulations (Northern Ireland) 2006 – cover Northern Ireland.

The Regulations have a wide geographical scope. Under reg. 10, as well as applying to those who do all of their work in Great Britain, they apply to those who:

- do part of their work in Great Britain; or
- work wholly outside Great Britain for an employer with a place of business at an establishment in Great Britain, provided that they do their work for the purpose of the Great Britain business and they were resident in Great Britain when they were offered the job or at any time during their employment.

Where, for example, a sales director is employed by a British company but is based in France and travels to London once or twice a month for meetings with colleagues and clients, part of her work is carried out in Great Britain and she would therefore be covered by the Regulations.

In addition, where a British newspaper offers a journalist living in Great Britain a job as its US correspondent and the journalist moves to New York immediately afterwards to write a daily column for publication in the British newspaper, the journalist will be covered by the Regulations.

Conversely, where an HR manager works in the Republic of Ireland office of a company with offices in Great Britain and the Republic of Ireland, but has never been resident in Great Britain or done any of his work in Great Britain, he would not be covered by the Regulations, although he may be covered by Irish age discrimination laws.

### Employment tribunal claims

In common with the existing forms of anti-discrimination legislation, the Regulations enable employees who believe that they have been subjected to discrimination or harassment to ask questions of their employer by issuing an age discrimination questionnaire. The employer has eight weeks to respond to the questionnaire and if it fails to do so, or its answers are evasive or equivocal, adverse inference of discrimination may be drawn by an employment tribunal. Answers to

the questions will be admissible as evidence in any tribunal proceedings.

The time limit for bringing a complaint of age discrimination is the same as that for claims under the existing anti-discrimination legislation. A claim must be brought within three months of the date of the act complained of, although the employment tribunal has jurisdiction to extend time if it thinks it is just and equitable to do so.

In the case of a person to whom the statutory grievance procedures apply, the individual must raise a grievance before any proceedings can be issued, and then wait 28 days to give the employer a chance to resolve the grievance before issuing proceedings. The dispute resolution procedures will not apply to claimants who are not employees and will not apply to retirement.

Provided that the grievance is made within three months of the date of the act complained of, the time limit for bringing a claim will be extended by a further three months. If an employee issues proceedings within the normal time limit but without submitting a grievance, the claim will be rejected. Provided that a grievance is made within one month of the normal time limit expiring, the time limit will be extended until six months from the date of the act complained of.

As with compensation for other discrimination claims, compensation for a successful age discrimination complaint is uncapped. The claimant may also be awarded damages for injury to feelings.

### Summary

The age discrimination laws are likely to represent the most important development in UK employment law since the sex and race discrimination laws came into force a generation ago. They are likely to present a particular challenge to employers, both because ageism does not yet have the social stigma attached to racism, sexism or homophobia, and because it is likely to be several years before the courts and tribunals have clarified some of the issues involved including, in particular, the scope of the justification defence.

Our next guidance note in this series will focus on age discrimination in the sphere of recruitment and selection, and training and promotion.

1. [www.dti.gov.uk](http://www.dti.gov.uk).
2. [www.dti.gov.uk](http://www.dti.gov.uk).
3. [www.dti.gov.uk](http://www.dti.gov.uk).
4. [www.acas.org.uk/media/pdf/d/t/6683\\_Age\\_and\\_the\\_Workplace\\_AWK.pdf](http://www.acas.org.uk/media/pdf/d/t/6683_Age_and_the_Workplace_AWK.pdf).
5. *Happy retirement? The impact of employers' policies and practice on the process of retirement*, published for the Joseph Rowntree Foundation by the Policy Press, ISBN 1 86134 584 4.

### CASE LIST

Cross and others v British Airways plc  
[2005] IRLR 423  
Mangold v Helm [2006] IRLR 143