

Age discrimination (2)

New legislation coming into force on 1 October 2006 will protect against discrimination on the grounds of age in the fields of employment and vocational training. This guidance note, the second in a series of four on age, concentrates on age discrimination issues in recruitment.

Directive 2000/78/EC provides a general framework for member states to combat – among other things – age discrimination. Article 3 states that the Directive applies in relation to “conditions for access to employment ... including selection criteria and recruitment conditions”. The Employment Equality (Age) Regulations 2006 (SI 2006/1031) have been introduced to implement the Directive in the UK, and will come into force on 1 October 2006. They incorporate the requirements of art. 3 by making it unlawful, under reg. 7, for an employer to discriminate against a person:

- in the arrangements it makes for the purposes of determining to whom it should offer employment;
- in the terms on which it offers that person employment; or
- by refusing to offer, or deliberately not offering, that person employment.

“Arrangements” in this context is likely to be construed widely to include the entire recruitment process, including advertisements, application forms, job requirements, person specifications and the procedures for shortlisting, interviewing and selection.

“Employment” in this context is also wide. The Regulations cover not only the recruitment of employees under a contract of service, but also the recruitment of freelancers and the self-employed who contract personally to do work.

Recruitment agencies

The Regulations extend to age discrimination by employment agencies, making it unlawful – subject to objective justification – for a recruitment agency to offer its services to, for example, only older workers. It would also be unlawful for a recruitment agency to refuse to put forward an individual for a position because the employer required someone of a certain age – again subject to objective justification. In such circumstances, as well as having a discrimination claim against the agency, the individual might also have a claim directly against the employer, if the agency could be said to be acting as “agent” for the employer with its authority.

An agency that accepts unlawful discriminatory instructions from an employer may be liable under the Regulations for knowingly aiding another person to do an unlawful act. However, the agency will escape liability if it can show that it relied on a

statement from the employer that the instruction would not be unlawful, and it was reasonable for it to rely on that statement. In such circumstances, the employer will be subject to criminal sanctions if it knowingly or recklessly made a false statement.

The Regulations also cover discrimination against a contract worker by a principal. A principal is a person who makes work available for doing by individuals who are employed by another person, who supplies them under a contract made with the principal. Therefore, where an end-user employer unlawfully discriminates in the selection of temps employed by and supplied by an agency, a temp who is discriminated against may bring a claim directly against the end-user employer even though he or she is not employed by it.

Exceptions

There are a number of exceptions to the prohibition on age discrimination in recruitment.

Proximity to retirement

Under reg. 7(4), the law against discrimination in the arrangements for determining employment and refusal of employment on a discriminatory basis does not apply in relation to a person 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. This exception is also applicable where a person would, within a period of six months from the date of his or her 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.

As a result, an employer with a normal retirement age of 70 may lawfully state on a job advertisement that it will not accept applications from applicants over the age of 69 and a half. Similarly, an employer with a normal retirement age of 65 may interview and reject a candidate solely because he or she is over the age of 64 and a half.

This exception is consistent with the government’s approach to retirement, namely that retirement ages at or above the age of 65 will be lawful. It would make little sense if an employer was allowed by law to retire an individual at the age of 65, but would be discriminating unlawfully if it refused to employ that same individual if he or she applied for the position that he or she had just vacated.

KEY POINTS

■ The Employment Equality (Age) Regulations 2006, which come into force on 1 October 2006, prohibit discrimination in relation to recruitment, promotion and training.

■ Employers are, however, permitted to refuse to employ applicants who are – or will be within six months – over the employer’s normal retirement age or, if the employer does not have one, the age of 65.

■ There are exceptions to the prohibition on age discrimination in recruitment where the employer is taking “positive action” or where possessing a characteristic related to age is a “genuine and determining occupational requirement” of the post.

■ Age discriminatory requirements, such as age limits or experience requirements, may be justified in limited circumstances. Employers are advised to dispense with such requirements unless they are confident that they can be objectively justified.

■ Shortlisting and selection for employment or promotion opportunities should be based on transparent, written, non-discriminatory and objective criteria, which should be applied consistently.

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The exception applies only to those persons to whom, if recruited, the retirement exception would apply. Therefore, while it applies to the recruitment of individuals who work under a contract of employment, it does not apply to the recruitment of individuals who contract personally to do work. Neither does it apply to contract workers.

In addition, the exception applies only where the employer's normal retirement age is 65 or over. If the employer adopts a retirement age of, for example, 60 – which would be subject to

objective justification – the employer would have to justify objectively any refusal to consider or recruit an applicant for a position because the individual was over the age of 60.

The exception does not apply in relation to the terms on which an employer offers employment. For example, an employer with a normal retirement age of 65 could not offer employment to an individual aged 66 on the condition that he or she agreed to less favourable terms of employment than those of employees under the age of 65.

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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 –
 - (a) in the arrangements he makes for the purpose of determining to whom he should offer employment;
 - (b) in the terms on which he offers that person employment; or
 - (c) 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 –
 - (a) in the terms of employment which he affords him;
 - (b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;
 - (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
 - (d) by dismissing him or subjecting him to any other detriment.
- (3) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment a person whom he employs or who has applied to him for employment.
- (4) Subject to paragraph (5), paragraph (1)(a) and (c) does not apply in relation to a person –
 - (a) 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
 - (b) 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.
- (5) Paragraph (4) only applies to a person to whom, if he was recruited by the employer, regulation 30 (exception for retirement) could apply.
- (6) Paragraph (2) does not apply to benefits of any description if the employer is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public which includes the employee in question, unless –
 - (a) that provision differs in a material respect from the provision of the benefits by the employer to his employees; or
 - (b) the provision of the benefits to the employee in question is regulated by his contract of employment; or
 - (c) the benefits relate to training.
- (7) In paragraph (2)(d) reference to the dismissal of a person from employment includes reference –
 - (a) to the termination of that person's employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms; and
 - (b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer.
- (8) In paragraph (4) "normal retirement age" is an age of 65 or more which meets the requirements of section 98ZH of the [Employment Rights Act 1996].

Genuine occupational requirements

Under reg. 8, it will not be unlawful for an employer to adopt discriminatory arrangements or refuse employment based on age if, 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 must be proportionate to apply the requirement in the particular case, and either the person to whom the requirement is applied must not meet it, or the employer must be satisfied, and in all the circumstances it must be reasonable for it to be satisfied, that the person does not meet it. This exception does not extend to the terms on which an employer can offer employment to a successful candidate.

The most likely case where the genuine occupational requirement exception will apply is where possessing a characteristic related to age is necessary for the purposes of authenticity. For example, a television company recruiting someone to play a pensioner in a soap opera might be able to rely on the genuine occupational requirement exception, and require applicants for the position to look over the age of 65. Such a requirement would otherwise be discriminatory.

In some circumstances, employers seeking to defend a directly discriminatory recruitment practice may plead objective justification and, in the alternative, the genuine occupational requirement exception. However, it is expected that the tribunals will interpret the genuine occupational requirement exception narrowly. Certainly, the government, in its consultation paper *Coming of age*, stated that it considered that age will be a genuine occupational requirement in only very few cases.

Positive action

Under reg. 29 an act done by an employer in connection with encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work will not be unlawful. It is necessary only that it "reasonably appears" to the employer that the act will compensate for the disadvantages suffered by those persons. This practice is known as taking "positive action", and allows employers to

encourage applicants of a particular age to apply for positions. Without reg. 29, this practice would be discriminatory.

It is important to distinguish between “positive action” and “positive discrimination”, ie discriminating in favour of people of a certain age. An employer with few employees over the age of 50 that wished to have a more diverse workforce might, in its next recruitment round, limit applications to individuals over the age of 50. This would be positive discrimination and would amount to unlawful direct age discrimination, unless objectively justified.

In determining whether this requirement was objectively justified, a tribunal would consider the importance of the aim. Arguably, the aim would be important, provided that the employer could show that it was genuinely trying to promote diversity. However, the tribunal would balance this against the discriminatory impact of the requirement. This too would be high, as all those under the age of 50, regardless of ability, would be excluded from the recruitment process. The tribunal would also consider whether a less discriminatory requirement could have been used. No doubt this would include consideration of whether positive action could have been used as an alternative.

While it is possible that an employer would be able to justify a requirement of this kind, it is unlikely, and this type of course of action would be financially risky. The employer would, therefore, be better advised to rely on the safer option of taking positive action.

Positive action can take various forms. It could involve placing job advertisements on websites or in publications that are read by people of the particular age or age group targeted. Alternatively, it could involve stating in job advertisements that individuals of that particular age or age group are encouraged to apply. The employer would, however, still have to accept applications from candidates of all ages and recruit based on individuals’ ability to carry out the role and not age.

Requirements of the job

It is quite common at present for employers to stipulate job requirements that are directly or indirectly age discriminatory. Of particular concern to employers are the use of age limits, experience requirements and graduate recruitment schemes. Each of these is considered below.

Age limits

The use of age limits – including age ranges – as a requirement for a post is directly discriminatory under the age Regulations, and subject to objective justification. Whether or not an age requirement is objectively justified will be determined by the tribunals and will depend on

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

Article 6 Justification of differences of treatment on grounds of age

1 Notwithstanding article 2(2), member states may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are proportionate and necessary.

Such differences of treatment may include, among others:

...

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

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the particular circumstances of the case in question. However, the Directive and the government’s consultation papers do provide some useful guidance as to when the use of age limits may be justified.

Article 6 of the Directive provides examples of differences in treatment that may be objectively justified. These include “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement”.

The Law Society requires a person who wishes to become a solicitor to work as a trainee solicitor for two years. As a result, a law firm with a retirement age of 65 should be able to justify objectively limiting applications to those under the age of 63, based on the training requirements of the post. The same law firm might seek to limit applications to those under the age of 60 on the basis that it wishes trainees to work for it for a reasonable period before retirement. This latter requirement might be more difficult for the law firm to justify, particularly if, in practice, few trainees stay with the firm on qualification.

In its consultation paper *Age matters*, the government stated that “the facilitation of employment planning” might be an aim that could justify differences in treatment. In practice, however, employers would be best advised to take a cautious approach to discriminating on grounds of age to achieve a particular age profile in their organisation for employment planning purposes. It is usually difficult to predict turnover of staff accurately, and strong evidence would be required to support such action.

The use of an age requirement to facilitate employment planning may be easier to justify if a business has a number of people approaching retirement – an example given by the government in the *Age matters* consultation paper – or for succession-planning purposes. For example, if a senior executive is close to retirement the employer may be able to justify requiring the executive’s successor to be

younger than the executive. However, deciding how much younger the successor must be will be difficult.

Employers also often adopt age limits in recruitment for health and safety reasons, to maintain a particular image or to ensure that members of staff “fit in” with the organisation.

For example, a removal company might limit the recruitment of removal staff to those under the age of 40 since it believes that those over this age lack the physical strength to carry out the job. Unless the removal company has strong medical evidence to support this assertion, the requirement will be unlawful. Recruitment based on stereotypical assumptions about age will not be justified. Further, the removal company will have to show why a less discriminatory requirement – such as requiring all staff to undergo health and safety checks prior to and during employment – could not have been used.

A wine bar that attracts customers in their early 30s might wish its bar staff to be between the ages of 25 and 35. If this requirement is used because the wine bar wants its staff to project a certain image or to reflect the demographics of its clientele, it is extremely unlikely that it will be able to justify the requirement, because it is tainted with age discrimination. Similarly, organisations may struggle to justify age restrictions based on a desire for their staff to match their client base or the target audience for their products.

It is less clear what the position would be if the wine bar’s reason for using the age limit was that it was losing profits and had evidence to show that bar staff in its preferred age group attracted more clientele to the wine bar. Both the *Age matters* and the *Coming of age* consultation papers make it clear that the government does not consider that cost itself will be enough to justify discrimination.

However, the *Coming of age* consultation paper also says that economic factors such as business needs and considerations of efficiency may be legitimate aims. In practice, it may be that tribunals are reluctant to allow a requirement to be justified for this reason.

An advertising agency might reject an application from a 45-year-old on the basis that its existing employees are in their 20s and early 30s and it believes that somebody who is 45 will not “fit in”. This age requirement would have been adopted for a reason based on ageist assumptions, and it is highly unlikely that the advertising agency would be able to justify it.

Experience requirements

Employers frequently require applicants to have a minimum number of years’ experience. Such requirements are, however, indirectly discriminatory. For example, a requirement that applicants have at least five years’ experience will disproportionately disadvantage younger workers, as they will be less likely than older workers to be able to comply with it.

In practice, where comparatively little experience is required it may be easier to justify the requirement than where a relatively large amount of experience is required, as fewer candidates will be excluded. In addition, as a great deal of experience is gained during the first few years of employment, it may be proportionate to recruit by reference to years of experience. However, after the first few years, judging competencies by reference to years of experience is much less reliable.

Employers sometimes require applicants to have a maximum amount of experience, stipulating, for example, that they must have between seven and 10 years’ experience. Such a requirement is likely to be indirectly discriminatory, as older workers are more likely than younger workers to have more than 10 years’ experience. Objective justification of the requirement on the basis that the employer does not want to recruit a person who is “overqualified” will be subject to close scrutiny, since “overqualified” is liable to be used as a proxy for “too old”. Evidence will be required to support assumptions that those with more experience will not be able to take instructions from those with less experience, will want more pay, or will seek promotion or a new job within a short period. A tribunal may expect employers to put such concerns to applicants with more experience than required, rather than excluding them from the recruitment process entirely.

To avoid claims of age discrimination, employers are advised to avoid whenever possible the use of minimum or maximum years of experience requirements. Instead, experience should be specified by reference to the kind and level needed.

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8 Exception for genuine occupational requirement etc

(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of age) –

- (a) regulation 7(1)(a) or (c) does not apply to any employment;
- (b) regulation 7(2)(b) or (c) does not apply to promotion or transfer to, or training for, any employment; and
- (c) 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 –

- (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.

Graduate recruitment

Requiring applicants to be graduates may be indirectly discriminatory. Older workers are less likely to have attended university than younger workers and are, therefore, less likely to meet this requirement. Employers will need to consider whether being a graduate is really a necessary requirement for a position and, if so, why. For some positions, holding a diploma, perhaps in addition to having experience, may be sufficient to demonstrate the skills and abilities required. It may be preferable for the employer to state that the position requires “a graduate or equivalent”.

Of particular concern to some employers will be the operation of graduate recruitment schemes. Employers should consider whether there is a genuine requirement for applicants for the jobs available under such schemes to be graduates. In many cases, graduate recruitment schemes are used to recruit for positions requiring a certain amount of technical and/or analytical skill, which can be gained through higher education qualifications. In such cases, employers may be able to justify the operation of their scheme once the age discrimination Regulations are in force.

However, it will be more difficult for employers to justify such schemes if they include discriminatory requirements that go beyond simply the need to be a graduate. For example, requiring applicants to have graduated within the past five years, to be under a certain age, or not to have had any previous work experience may make an otherwise justified scheme unlawful. Such requirements would exclude older graduates and would have to be objectively justified.

Employers should also avoid focusing their recruitment exclusively on the “milk round” – targeted recruitment days at universities. This practice could, in itself, be an unlawful recruitment arrangement, or be used as evidence by an unsuccessful older candidate that the employer was, in fact, seeking to employ younger graduates. It would be preferable for employers to use the milk round as just one component of a recruitment strategy.

Inferences of age discrimination may also be drawn from graduate recruitment scheme brochures and web pages. These should be reviewed, and discriminatory imagery or wording removed.

The recruitment process

Discriminatory recruitment arrangements such as advertisements or selection criteria may, in themselves, be unlawful. For example, a person could bring a claim of age discrimination against an employer where, as a result of an age restriction stated in a job advertisement, he or she did not apply for the advertised position. In such circumstances, damages are likely to be limited to

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- (1) It is unlawful for an employment agency to discriminate against a person –
- (a) in the terms on which the agency offers to provide any of its services;
 - (b) by refusing or deliberately not providing any of its services; or
 - (c) in the way it provides any of its services.
- (2) It is unlawful for an employment agency, in relation to a person to whom it provides its services, or who has requested it to provide its services, to subject that person to harassment.
- (3) Paragraph (1) does not apply to discrimination if it only concerns employment which, by virtue of regulation 8 (exemption for genuine occupational requirement etc), the employer could lawfully refuse to offer the person in question.
- (4) An employment agency shall not be subject to any liability under this regulation if it proves that –
- (a) it acted in reliance on a statement made to it by the employer to the effect that, by reason of the operation of paragraph (3), its action would not be unlawful; and
 - (b) it was reasonable for it to rely on the statement.
- (5) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (4)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (6) For the purposes of this regulation –
- (a) “employment agency” means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers, but it does not include –
 - (i) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations; or
 - (ii) a proprietor of a school; and
 - (b) references to the services of an employment agency include guidance on careers and any other services related to employment.

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an injury to feelings award, unless the individual can persuade the tribunal that he or she would have been offered the position, if it had not been for the age restriction.

It is, however, more likely in practice that unsuccessful applicants will point to the employer’s recruitment arrangements in order to support a claim of age discrimination. For example, an unsuccessful older applicant who brings a claim of age discrimination because the job is offered to a younger, less qualified applicant, may refer to wording in the job advertisement that suggested that younger applicants were preferred – along with the poor age profile of the employer – to support his or her claim. Together these factors may persuade a tribunal that age discrimination occurred. The Regulations specifically reverse the burden of proof so that where the tribunal could conclude, in the absence of an adequate explanation, that discrimination took place, it will shift to the employer to show that it did not discriminate.

To avoid – and defend – claims of age discrimination, it is therefore vital that employers review their recruitment practices, from advertising through to the offering of employment. Guidance for employers on recruitment can be

found in both the Acas guide to the Regulations, *Age and the workplace: putting the Employment Equality (Age) Regulations 2006 into practice*¹, and the 2002 version of the government's voluntary code of practice, *Age discrimination at work – a practical guide for business*².

Monitoring and statistics

Both the Acas guidance and the code advise employers to monitor their recruitment programmes. This should include monitoring of the age profile of all job applicants as well as those who are shortlisted, interviewed and appointed. In addition, employers that have not done so may wish to survey their current workforce for diversity and consider ways of improving it, which might include taking positive action.

Data collated through monitoring will be available to individuals bringing age discrimination claims through the use of the questionnaire procedure, and/or by way of disclosure. Inferences of age discrimination may be drawn if the data is unfavourable. However, if transparent, consistent, well-documented and non-discriminatory recruitment practices are adopted, an employer will be in a much stronger position to rebut any presumption of discrimination from unfavourable data,

particularly if it can show that it is taking steps to improve diversity.

Job advertisements

Under UK sex and race discrimination legislation, discriminatory advertising is unlawful, breaches being actionable by the Equal Opportunities Commission and the Commission for Racial Equality respectively. There is no equivalent provision in the age Regulations, so no cause of action against an employer that, without justification, publishes an age discriminatory advertisement.

However, as demonstrated in the examples above, an individual who is affected by a discriminatory advertisement may claim that it is a discriminatory arrangement or rely on it to infer discriminatory practices.

As a result, employers should take care not to include discriminatory requirements such as age limits in job advertisements, unless they are confident that they can be objectively justified. In addition, employers should avoid wording in advertisements that may suggest that they are seeking candidates of a certain age. For example, use of adjectives such as “dynamic”, “fun”, “energetic”, “vibrant” or “enthusiastic” may suggest that the employer is seeking a younger employee. Conversely, use of words and phrases such as “mature”, “accomplished” or “requiring gravitas/boardroom presence” may suggest that the employer is looking for an older employee.

Application forms

Use of application forms that are designed so that those who sift them for interview selection are unable to see unnecessary personal details will help reduce the risk of discrimination based on irrelevant grounds.

Questions relating to applicants' age or date of birth should be removed from application forms and instead included in a diversity form to be retained by the HR department. Dates of education or qualifications may also indicate an applicant's age, so should be treated in the same way. Where such information is necessary – for example, for administrative or monitoring reasons – it can be obtained at a later stage or stored separately.

Requesting dates of employment may also indicate an applicant's age. Depending on the nature of the vacant position, an employer may be able to defend requesting this kind of information because it demonstrates how much experience the applicant has, whether there have been any gaps in employment and whether the applicant has frequently moved jobs.

Shortlisting, interviewing and selection

Employers should identify the skills and abilities necessary for any vacant position and record these in writing through the use of, for example,

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25 Liability of employers and principals

(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of these Regulations as done by that other person as well as by him.

(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

26 Aiding unlawful acts

(1) A person who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purpose of these Regulations as himself doing an unlawful act of the like description.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under regulation 25 (or would be so liable but for regulation 25(3)) shall be deemed to aid the doing of the act by the employer or principal.

(3) A person does not under this regulation knowingly aid another to do an unlawful act if –

(a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of these Regulations, the act which he aids would not be unlawful; and

(b) it is reasonable for him to rely on the statement.

(4) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (3)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

non-discriminatory job descriptions and person specifications. Written guidance of this kind will help those shortlisting, interviewing and selecting to avoid discrimination – as well as helping to rebut any presumptions of discrimination.

The Acas guidance advises that, after shortlisting, but before the interview and selection stage, employers should check that no bias – deliberate or unintentional – has influenced their decision. The advice is that this should be done by someone who has not been involved in the shortlisting process.

It is best practice for employers to interview using a panel of interviewers. Ideally the panel will be of a diverse age background. The Acas guidance suggests that questions related to age, such as “how would you feel about managing someone older?”, and throwaway comments, such as “don’t you think someone like you should be looking for something with more responsibility?”, should be avoided.

Selection should be based on transparent, written, non-discriminatory and objective selection criteria, which should be fairly and consistently applied. Those shortlisting and interviewing should be given equal opportunities and interviewing training. They should also have read and understood the employer’s equal opportunities policy, which should have been updated to include reference to age.

Notes from interviews, as well as written evidence of the reasons for selection – and non-selection – of candidates, should be kept for at least 12 months after completion of the recruitment exercise.

Training and promotion

It is unlawful for an employer to discriminate against an employee in relation to the opportunities that it affords him or her for training or promotion. However, reg. 29 does allow employers to take positive action in relation to training by giving employees of a particular age or age group access to facilities for training that would help fit them for particular work. For the positive action exception to apply, it must reasonably appear to the employer that it prevents or compensates for disadvantages linked to age suffered by persons of that age or age group doing that work.

Individuals making decisions about training and promotion should be appropriately trained in order to avoid discrimination and ageist assumptions – for example, that older workers will gain no benefit from training or that younger workers will have no requirement for training in information technology. Adopting policies in relation to promotion or training may be desirable as this will provide written guidance for staff and managers.

To avoid claims of age discrimination, employers should ensure that promotion

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29 Exceptions for positive action

(1) Nothing in Part 2 or 3 shall render unlawful any act done in or in connection with –

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

(b) 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.

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opportunities are advertised in a way that ensures equal access for all employees. Similar principles to those outlined above in relation to recruitment apply in relation to selection for promotion. For example, written, transparent, non-discriminatory and objective selection criteria should be used, and the individuals carrying out the selection procedure should have received appropriate training.

In most cases, selection for promotion will include assessment of the employee’s performance to date. Such assessment should be carried out objectively and should ideally be based on written evaluations into which the employee has had input, for example appraisals. Where appraisals include discriminatory elements – such as a requirement to demonstrate “future potential” – these elements should be removed.

Summary

As the new age discrimination laws will outlaw discrimination in the spheres of recruitment and selection and training and promotion, employers will be obliged to identify age discriminatory requirements used in these areas and – unless they are confident that the requirements could be objectively justified if challenged – eliminate them. Where claims are brought, tribunals may draw inferences of age discrimination from the arrangements adopted by the employers. To avoid this – and the resultant reversal of the burden of proof – employers should review their arrangements and, if necessary, improve them. Most importantly, they should ensure that they provide training to those involved in the decision-making process, and that their selection criteria are transparent, well documented, non-discriminatory, and fairly and consistently applied.

Our next guidance note in this series will focus on age discrimination in the sphere of pay and benefits.

1. www.acas.org.uk/media/pdf/d/t/6683_Age_and_the_Workplace_AWK.pdf.
2. www.agepositive.gov.uk/complogos/AgeDiversityAtWork.pdf.