

AGE REGULATIONS

NEW LAWS MAY
MAKE SCHEMES
REDUNDANT

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Employers operating
enhanced redundancy pay
schemes may find themselves
in treacherous waters when
the age laws come into force

Perhaps surprisingly, the effect of the new Employment Equality (Age) Regulations 2006 on redundancy seems to be prompting more queries from employers than any other aspect.

When the regulations come into force in October, employers will need to vet their selection criteria for redundancy to ensure they are not age discriminatory. They should also review any arrangements for enhanced retirement pensions, at least for new joiners, to check they will be lawful.

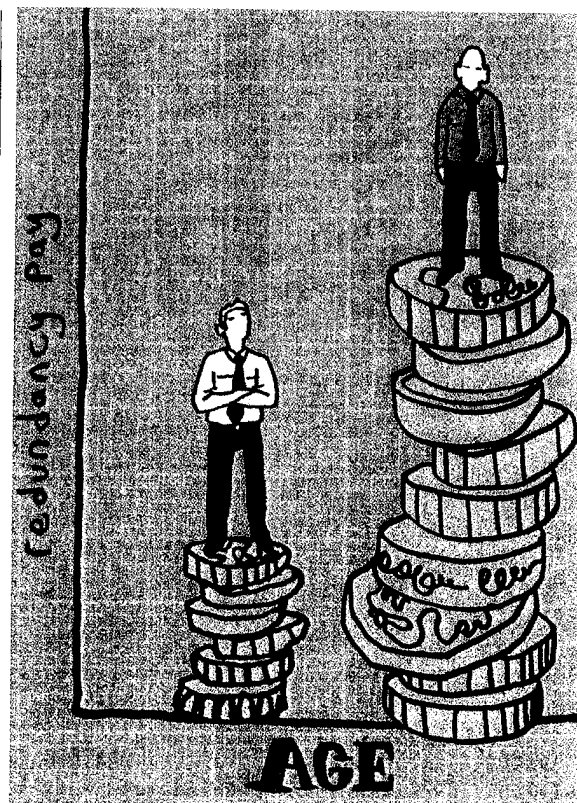
Some of the most acute problems will arise over redundancy pay. The regulations make several changes to the statutory redundancy pay scheme, including removing:

- any upper age limit;
- the lower age limit for calculating length of service;
- "capping" payments after an employee's 64th birthday;
- rules excluding employees from redundancy payments if they are entitled to a pension.

As expected, using length of service to calculate redundancy pay – along with the cap of 20 years' service – remains unaffected, even though this indirectly discriminates against younger workers.

Controversially, the government has also maintained the age multiple for calculating statutory redundancy pay. There were rumours it had been considering a standard multiple of 1.2 for each year of service, irrespective of age – but this may have proved unpalatable as it would have reduced already small redundancy payments for some older employees.

The age multiples could be challenged in the European Court of Justice and it remains to be seen if the government's confidence they can be justified is well founded. In *Mangold v*

MULTIPLE
OUTCOMES

The impact of the age regulations on employers' enhanced redundancy schemes will be significant, as companies have set up a wide variety of such schemes over the years, often after negotiation with unions. If the government loses in the ECJ over the legality of the state's use of age multiples, service multiples would need to be levelled up to 1.5 for all employees.

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Helm (2006 IRLR 143; ECJ), the court adopted a strict approach to EU states seeking to justify age discriminatory laws. This suggests the multiples are probably not compliant with the EU directive the regulations implement.

The regulations allow employers to continue enhanced redundancy payments, but to do this employers must use the age multiples from the statutory scheme in their own. Many do not. Enhanced payments are usually based on a week's pay (uncapped) or a month's pay for each year of service. This provides a redundant employee with more financial security than the statutory scheme. Such schemes will not be covered by the exception or benefit from a separate exception permitting certain benefits based on length of service, because this does not cover payments for ceasing to work for an employer.

The upshot is that many employers wishing to preserve enhanced schemes will have to fall back on the general rules for justifying indirect age discrimination – namely, that it was a proportionate means of achieving a legitimate aim.

Some enhanced schemes are based on age multiples, but not usually the ones used in the statutory scheme. These schemes would

have to be justified too, as they discriminate directly on grounds of age. This is likely to be even tougher than justifying the indirectly discriminatory impact of schemes based on service without an age multiple.

Employers are left between a rock and a hard place. What should an employer do with, say, a scheme that pays a month for each year of service? Retaining it will risk challenges from younger employees contending their payment should be calculated on the maximum service entitlement. The employer could adapt its scheme to incorporate the state's age multiples, which would either increase payments for older employees or reduce payments for younger ones. It may also entail difficult negotiations with staff or unions. The final option would be to remove the enhanced scheme altogether. But this may present its own problems as many schemes form part of employees' contractual rights.

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