

COMING OF AGE: THE PROPOSED ABOLITION OF AGE DISCRIMINATION

As of 1 October 2006, it is the government's intention to make discrimination on the grounds of age, unlawful, by the introduction of the Employment Equality (Age) Regulations ("the Regulations").

What is age discrimination?

Direct age discrimination: A person is discriminated against on the grounds of their age if their actual or perceived age is used as a reason for less favourable treatment and there is no objective justification for doing so.

Indirect age discrimination: A person is also discriminated against on the grounds of their age where a blanket policy or practice disadvantages a certain category of person because of their age, even if this effect is inadvertent, and there is no objective justification for doing so.

Harassment: Again a person is discriminated on the grounds of age if they are subjected to age related harassment, i.e. their dignity is violated or they are subjected to an intimidating, hostile, degrading, humiliating or offensive environment.

Within the employer/employee relationship in particular, there are 2 further types of age discrimination that the employer ought to be aware of:

Victimisation: Victimisation occurs when a person makes a complaint or takes some sort of action under the Regulations e.g. by giving evidence at a

hearing where a colleague is claiming age discrimination, and as a result, that person receives less favourable treatment. As long as the original action or complaint against discrimination was made in good faith, the individual will have the right to a legal remedy for victimisation, even if the original allegation was ill-founded. However, a person who knowingly makes false allegations or gives false information is not protected.

Post employment discrimination:

A former employer may, under the Regulations, be found liable for age discrimination after the employment relationship has ended, where a close connection still exists. Post employment discrimination is usually connected with references.

When will age discrimination be considered permissible?

1. Objective justification

It will be a defence to direct or indirect discrimination if the employer can show that the discrimination is a proportionate means of achieving a legitimate aim. A wide variety of aims may be considered legitimate but they must reflect a real need on the part of the employer. Purely economic aims are rarely sufficient to meet the requirement of objective justification. Objective justification will not be an easy defence to maintain. Employers will have to be able to produce supporting evidence if challenged: assertions that an age based approach was necessary will not be enough.

further information

If you would like more information about any of Goodman Derrick's Employment Law services please telephone and ask for Helen Wyatt or Clare Gilroy-Scott.

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November 2005

2. Genuine occupational requirement

Employers will be entitled to use an age requirement where (having regard to the nature of the employment or the context in which it is carried out) (a) this is a genuine and determining occupational requirement; and (b) it is proportionate for the employer to apply the requirement. The "genuine occupational requirement" defence can be applied in respect of recruitment, promotion, transfer, training and dismissal, but not to the terms of employment. It is unlikely that this defence will be widely applicable. An example where it may be relevant would be for acting jobs.

Other exceptions

1. Service related pay and benefits

Many employers require staff to have completed a certain length of service before a benefit is given or increased. This could amount to indirect discrimination because some age groups are more likely to have completed the required length of service than others, i.e. it discriminates generally against younger workers. However, because the government did not want employers to have to justify the provision of benefits individually, as this might cause them to withdraw them, some age discrimination in connection with such benefits is likely to be permissible provided specific criteria are met.

2. Occupational pensions

The government expects that occupational pension schemes will continue to operate as they do now. A Schedule to the Regulations sets out a full list of age-related rules or practices which may be discriminatory in occupational pension schemes which are specifically exempted from the effect of the Regulations.

What are the main measures that the government proposes to take to prevent age discrimination?

The government's aim is not to force individuals to continue to work beyond the currently accepted retirement ages or otherwise to make individuals work if they do not want to. However, individuals should have the choice to work beyond the currently recognised retirement age. The government believes that age discrimination prevents people of all ages from realising their full potential in the workplace, as focussing on age in this way makes talent and skill secondary considerations. This in turn prevents employers from getting the best performance out of their business. The methods by which the government hopes to prevent age discrimination and promote workplace diversity include the following:

1. Questionnaire procedure

If an employee believes they may have been discriminated against on

the grounds of their age, they can submit a questionnaire to the employer stating the events they believe could be discriminatory and asking for an explanation. If the employer fails (without reasonable excuse) to reply within 8 weeks or provides evasive or equivocal replies, then in any future tribunal proceedings, the tribunal can infer that discrimination has occurred as a result.

2. Complaints of age discrimination to the employment tribunals

An employee who believes they have been discriminated on grounds of age can lodge a complaint with the employment tribunal within 3 months of the discriminatory act. If they are successful in their claim, an employee can benefit from a variety of different remedies, including (but not limited to) compensation which, broadly speaking, can comprise of (a) an award for injury to feelings of between £0 and £25,000, where the average is about £3000 to £5000; and (b) compensation based mainly on net loss of earnings resulting from the discriminatory act.

3. Arrangements relating to retirement

The Regulations will introduce a new default retirement age of 65 (which will be reviewed by the government in 2011). It will be acceptable for an employer and employee to agree an earlier retirement age, but

compulsory retirement before the age of 65 will amount to direct discrimination. Therefore, it will only be lawful if it can be objectively justified.

The Regulations will introduce a new statutory procedure for fairly implementing a retirement at any age which is becoming known as the "duty to consider" procedure. Where an employer intends to dismiss an employee where the reason for the termination is retirement, the employer must notify the employee of:

(a) the date on which they intend the employee to retire. This notification must be given in writing, not more than a year and not less than 6 months before the intended retirement date; and

(b) right to make a request to consider working beyond retirement.

If the employer fails to notify in accordance with the above paragraphs, he has a continuing duty to do so up to the 14th day before the intended retirement date.

An employee, once notified of his employer's wish that he retire, can make a request not to retire on the intended date, provided that request is in writing and is made not more than a year before and not less than 6 weeks before the retirement date.

The employer, if he does not immediately agree to the request to continue to work, may then arrange a meeting to discuss the request with the employee in good faith. Both parties must take reasonable steps to attend and the employer should notify the employee of the decision within 14

days of any such meeting. Alternatively, the employer can consider the employee's representations in writing and notify the employee of his decision in writing as soon as is reasonably practicable.

If the employer refuses the request to continue working, then the employee is entitled to appeal against the decision. The Regulations set out a procedure for dealing with an appeal.

If the employer fails to notify the employee of the intended retirement date within the proper timescale and/or his right to request continuation of work, then the employee can make a claim in the employment tribunals and can receive an award of up to 8 weeks pay, capped at the statutory maximum which is currently £280 per week, making a maximum available award of £2240 at present.

If the employer fails to follow the proper procedure for effecting the retirement, the dismissal of the employee concerned is likely to be classed as automatically unfair.

4. Extended right to claim unfair dismissal

Currently, employees who are dismissed when they have exceeded the "normal retirement age" of their employer or when they are over the age of 65 if there is no such "normal retirement age", are excluded from the general right to claim unfair dismissal. When the Regulations come into force, the upper age limit on the right to claim unfair dismissal will be abolished.

However, a retirement which takes place at or over the default retirement age of 65 will be a fair dismissal provided that the retirement is genuine (i.e. there is not some other reason for the dismissal such as capability) and the employer has followed the "duty to consider" procedure.

If an employer uses the "duty to consider" procedure to dismiss an employee but the employee feels that the dismissal was in fact for other reasons (e.g. capability or conduct etc) the employee can attempt a claim of unfair dismissal. For the purposes of such claims, the Regulations distinguish between a planned retirement and other retirement situations.

In the case of a planned retirement, i.e. one that takes effect either (a) on a date on which the employee reaches the default age of 65; or (b) at the employer's "normal retirement age" (which must be objectively justified if under the age of 65); or (c) on a date which has been confirmed as the retirement date by the employer to the employee at least 6 months in advance, it will be assumed that the reason for the dismissal is retirement and therefore the dismissal will be fair.

In the case of other "unplanned" retirement situations it will be for the employer to show that the reason for the dismissal was retirement and not some other, unfair reason which would allow a finding of unfair dismissal.

5. Redundancy payments and unfair dismissal basic awards

The method by which redundancy payments and unfair dismissal basic awards are calculated will change since part of the current calculation is based on age. However, the specifics of the new method have not yet been determined.

What can employers do to prepare themselves for the new laws?

In summary, employers need to examine age diversity in their workplace to ascertain whether they are discriminating and how.

Methods for combating discrimination include equal opportunities training and updating policies on equal opportunities, recruitment and retirement.

In respect of retirements which are intended to take effect on or after 1 October 2006, in order to ensure these are fair and to avoid claims for unfair dismissal, employers should be following the new "duty to consider" procedure now.

This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.