

THE EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006

1. INTRODUCTION

European Council Directive 2000/78 required member states to outlaw discrimination on the grounds of religion or belief, disability, age and sexual orientation. Directives are the main way of harmonising laws throughout the member states of the European Union. The European Union has power to issue directives under Article 249 of the Treaty of Rome. Member states must then pass their own laws to implement the directive within a time limit set by the European Commission. On 1 October this year the Employment Equality (Age) Regulations 2006 will be introduced in the UK to outlaw age discrimination in employment and vocational training.

2. SUMMARY OF THE REGULATIONS

In summary the Regulations will:

2.1 Cover employment and vocational training. This includes access to help and guidance, recruitment, promotion, training, development and perks and pay. They apply to all employees (both fixed and indefinite term), partners in firms and the self-employed. Unpaid volunteers will not be covered, but those doing unpaid work will be covered if it is part of paid employment or vocational training. They will also cover job applicants and, in some instances people who have left work. Discrimination after employment must arise out of or be closely connected to the employment relationship.

2.2 Apply to people of all ages, **both** old and young.

2.3 Apply to all employers, providers of vocational training, trade unions, professional associations, employer organisations and trustees, and managers of occupational pension schemes will have new obligations to consider.

2.4 Remove the current upper age limit of 65 for bringing unfair dismissal and redundancy claims.

2.5 Introduce a national default retirement age of 65 for men and women. This will be reviewed in 2011. Mandatory retirement before 65 will be unlawful unless a lower age can be exceptionally objectively justified. An employer can of course set a retirement age above 65.

2.6 Give all employees the right to be informed of their expected retirement date and the right to request to work beyond the default retirement age of 65 or any other retirement age set by the organisation. This must be done at least six months, but not more than 12 months, in advance of a planned retirement. Employee requests to stay on must be considered using a detailed "duty to consider" procedure laid down in the Regulations. Not following this

procedure could result in compensation of up to eight weeks' pay or an automatically unfair dismissal, depending on the extent of the failure. See paragraph 8 below for a more detailed analysis.

2.7 Include occupational pension schemes. Discrimination or harassment by trustees or managers of such a scheme against a member or prospective member of a scheme would be unlawful. However certain practices are exempted including the fixing of ages for admission, the use of normal retirement age, the use of age criteria in actuarial calculations and setting pension benefit levels by reference to length of service. The government has stated that it "expects pension schemes to be able to operate largely as they do now".

2.8 Not affect state pensions.

2.9 Not cover goods, facilities and services.

3. CATEGORIES OF DISCRIMINATION

Four categories of discrimination will be unlawful. The law is similar to that set out in sex, race and disability discrimination legislation.

3.1 Direct discrimination - this occurs where an employer unjustifiably treats an individual less favourably on the grounds of age. This could include refusing to hire a 45-year old on the grounds that they do not enhance the organisation's youthful image, or refusing to promote a 25-year old because the employer thinks other employees might object to being managed by someone younger.

3.2 Indirect discrimination – this occurs where an employer's policy or procedure unjustifiably puts individuals in a certain age group at a disadvantage. This could include an unjustified insistence on 10 years' experience (which younger job applicants are unlikely to have).

3.3 Harassment – this is unwanted conduct related to age which has the purpose or effect of violating an individual's dignity or which creates an intimidating, hostile, degrading, humiliating or offensive environment. An employee might have a claim if s/he is repeatedly told they are "over the hill" or "out of touch".

3.4 Victimisation – this occurs where an employee is treated less favourably than others because s/he has taken action to assert their rights under age discrimination legislation, or because s/he has assisted another person in asserting their rights.

4. CLAIMS

4.1 A claim can be brought by anyone set out in 2.1 above.

4.2 Claims must generally be brought to the employment tribunal within three months of the alleged discriminatory act.

4.3 There is no minimum length of service required in order to bring a claim.

5. REMEDIES

Compensation can be awarded for financial loss and injury to feelings. A tribunal can also award aggravated damages if it finds a link between an employer's conduct or motive and the employee's injured feelings. Compensatory awards will be uncapped.

6. DEFENCES

6.1 An employer will be liable for the discriminatory acts of its employees unless it takes reasonable steps to prevent them. An employee who commits a discriminatory act may be personally liable.

6.2 An employer may be able to defend both direct and indirect discrimination claims if it can show the discrimination is a "proportionate means of achieving a legitimate aim" (objective justification). A "legitimate aim" must correspond with a real need of an employer, and could include business efficiency. A "proportionate means of achieving" means the importance of pursuing a legitimate aim must be weighed against its discriminatory effect. The Regulations do not give examples of what might be legitimate aims. As with other discrimination legislation, this will be for employers to decide on a case by case basis. However the Acas (Advisory, Conciliation and Arbitration Service) guide on the regulations which can be viewed at http://www.acas.org.uk/media/pdf/d/t/6683_Age_and_the_Workplace_AWK.pdf states that a legitimate aim might include:

- economic factors such as business needs and efficiency;
- the health, welfare and safety of the individual (including protection of young people or older workers); and
- the particular training requirements of the job.

7. KEY ACTION POINTS

Councils should:-

7.1 Remember protection is for all – young, old and middle-aged.

7.2 Avoid stereotypes (e.g. older people are slower, less flexible and no good with IT; younger people are inexperienced, more headstrong and less loyal).

7.3 Review recruitment practices and policies (e.g. equal opportunities policies). It is recommended that all age ranges and limits are removed from job advertisements and application forms. Vacancies should be publicised in a way which aims to promote a mixed-age response. In addition advertisements for an 'office junior', a 'young and dynamic person' or using wording such as 'mature' should be avoided, as they give the impression that applicants from a particular age group will be favoured. Where a post is advertised with a requirement for a minimum period of experience it is important to ensure that requirement can be justified as it will mean that younger people are excluded or less likely to be able to fulfil the requirement.

7.4 Not restrict training to younger members of staff only.

7.5 Give all staff equal consideration for promotion. The regulations provide that a requirement for a certain length of experience for promotion must be objectively justified. If

such a requirement is essential for carrying out the role properly, it should be possible to show objective justification.

7.6 Review any benefits based on age and length of service.

7.7 Introduce procedures to deal with the right to request working after retirement age. This could include establishing a diary system to ensure all employees are given between six and twelve months' written notice of intended retirement, and are informed of their right to request to work beyond their expected retirement date.

7.8 Ensure that all staff are aware of the Regulations. In particular care should be taken on how employees refer to each other or how one individual's actions may be offensive to a colleague.

8. HOW WILL THE NEW RIGHT TO REQUEST WORKING BEYOND RETIREMENT WORK?

8.1 An employer must follow the new 'duty to consider' procedure for a retirement to be a fair dismissal. Failure to follow the procedure will mean that the dismissal is automatically unfair. The employer must firstly inform the employee of his/her right to request to work beyond their normal retirement date. This must be done in writing and not more than 1 year, and not less than 6 months, before the intended retirement. Failure to do this will entitle the employee to an award of up to 8 weeks' pay from an Employment Tribunal. The employer is under a continuing duty to inform the employee of the right to work beyond the intended retirement date up until the 14th day before termination of the contract.

8.2 The employee may make a request to continue working after his/her retirement date but must do so not more than six months and not less than 3 months, before the retirement date (unless the employer has not complied with its obligations to notify the employee as set out above in which case the employee can make a request right up to the intended date of retirement). The employee's request must be in writing and must include a proposal that the employee's employment continue beyond the intended date of retirement (a) indefinitely, or (b) for a stated period, or (c) until a stated date. Unless the employer agrees to the employee's request and gives notice to that effect, the employer must hold a meeting with the employee within a reasonable period of receiving the request. (The Regulations do not define what amounts to a 'reasonable period'). There is a new right for the employee to be accompanied at this meeting (and any subsequent appeal meeting) by a work colleague or trade union representative who is also a work colleague. The employer must give notice of any decision to the employee as soon as reasonably practicable after the meeting and there is no duty to give any reasons for the decision. The notice must state whether employment is to continue and for how long (which will ordinarily accord with the employee's request) or if the decision is to refuse the request then confirmation must be given to that effect. If it is not reasonably practicable to have a meeting, the employer can make a decision without a meeting provided he considers any representations made by the employee.

8.3 An employee can appeal the decision of the employer by giving to the employer written notice of the grounds of appeal as soon as is reasonably practicable after notice of the decision. The employer must then call another meeting with the employee to discuss the appeal within a reasonable period, and must inform the employee of the decision as soon as is reasonably practicable following the appeal meeting. The employer does not need to give a reason why the application has been rejected. Any form of redress on the part of the

employee must be directed to an Employment Tribunal. Again, if it is not reasonably practicable to have a meeting, the employer can consider the appeal without a meeting provided he considers any representations made by the employee. The employee may only make one request and one appeal in respect of any intended retirement date. However, if the request is granted, the same procedure will apply in respect of any future retirement date so that the employee will be entitled to request to stay on further and will have the same employment rights on dismissal as with the initial retirement date.

8.4 If on notification, an employee agrees to retire there is no need to follow the procedure.

9. TRANSITIONAL ARRANGEMENTS

9.1 The Regulations contain complicated transitional arrangements relating to retirement dismissals which are due to take place within the first six months of the Regulations coming into force, i.e. retirements due to take place between 1 October 2006 and 31 March 2007. Unlike the main procedure which requires employers to give at least 6 months' and not more than 1 year's notice of retirement and of the right to make a request to continue working beyond the retirement date, under the transitional arrangements an employer is (generally) required to give the notice required under the contract. Councils who have employees due to retire between the above dates should therefore review those employees' contracts of employment to check the period of notice required. The procedures are complicated, but essentially provide for two situations as set out below.

9.2 Notice given before 1 October 2006

If the employee is given notice before 1 October that they are to be retired after 1 October but before 1 April 2007:

- notice must be at least the period required by the contract of employment; or
- where the employee is already serving a long period of notice required by the contract that exceeds four weeks, the employer must give at least four weeks notice before 1 October 2006 to ensure the employee is aware and given the statutory minimum period of notice for retirement.

On 1 October, or as soon as practicable afterwards, the employer must write to the employee telling them of their right to request working longer. The employee can make such a request after the contract has been terminated but not more than four weeks afterwards. A meeting to discuss the request and any subsequent appeal meeting, must be held within a reasonable period. The employee can ask to be accompanied as explained above.

9.3 Notice given after 1 October 2006

If the employee is given notice after 1 October that they are to be retired before 1 April 2007 the employer must:

- write to the employee notifying them of the intended retirement date – giving the longer of contractual or statutory notice; and
- tell them in writing that they have a right to request working longer.

An employee who wants to exercise this right should make a written request:

- where possible, four weeks before the intended retirement date; or
- as soon as reasonably practicable after being notified of the 'right to request'.

The request can be made after the employee's contract has been terminated but not more than four weeks after termination. A meeting to discuss the request, and any subsequent appeal meeting, must be held within a reasonable period. The employee can ask to be accompanied as explained above.

9.4 Anyone retiring on or after 1 April 2007 will be subject to the full retirement procedure set out in the Regulations.

This briefing was issued by Ian Mark, Senior Legal Executive

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