

Notes from the Bolt Burdon Seminar on Age Discrimination

24 and 31 October 2006

Age equality legislation came into force in the UK on 1 October 2006 by the introduction of the Employment Equality (Age) Regulations 2006. It was introduced by the Equal Treatment Framework Directive, the same legislation that gave us sexual orientation, religion & belief equality legislation a few years ago.

The new Age equality Regulations cover access to employment and training; working conditions; dismissal; pay and benefits and membership of any employment related organisation.

It is important to remember that the Regulations apply to all ages. Although the attention of the media has been focused on older employees, the Regulations apply to all employees, young, old and those somewhere in the middle.

However, unlike the UK's other equality legislation the Age Regulations don't apply to the provision of goods and services. So Saga can still give preferential insurance to the over 50's and cinemas and theatres can still give reduced price tickets to students and OAPs.

Because the Age Regulations cover a wide area the focus of our seminar will be on 3 main areas: the types of discrimination to look out for and the wide-ranging effects the Regulations will have on recruitment and termination.

Types of Discrimination:

As per other discrimination legislation in the UK there are 4 types of possible discrimination on the grounds of age: direct, indirect, harassment and victimisation.

Direct Discrimination:

This is where A treats B less favourably than others on the grounds of B's age.

For example if A overlooks B for promotion because A considers B is 'past it' or overlooks C for promotion because they think C is too young to command respect they would be examples of unlawful direct discrimination on the grounds of age.

Its worth noting that the discrimination must be on the grounds of B's age or perceived age, not just on the grounds of age generally.

It is very important to bear in mind that you can subconsciously discriminate so it is a good idea to consider whether you, or those responsible for recruiting or managing staff in your business, have any attitudes or beliefs which are contrary to the principles of age equality.

Indirect:

This is where A applies a policy or practice which applies to everyone but which puts those in the same age group as B at a disadvantage compared with those who aren't in B's age group.

For example if a business places an advertisement requiring 10 years post graduate experience as a prerequisite for the job this would put those in the 21 – 31 age group at a particular disadvantage compared with those of 32 or over.

In practice it seems likely that there will be some considerable difficulties in defining the comparator age groups. Age is not definitive in the same way as someone's sex, race or sexual orientation. Firstly, the Tribunal will need to decide who falls into the Claimant's age group i.e. the range of ages that the policy or practice disadvantages. Secondly, they will need to decide who to compare them with i.e. what range of ages the policy or practice gives a particular advantage to. This is likely to be a tricky job for the Tribunal.

The Justification Defence:

For the first time in UK equality legislation it is possible to justify and therefore escape liability for both direct and indirect discrimination. Whilst other types of indirect discrimination can be justified in some limited circumstances, other types of direct discrimination cannot.

By way of example, if you were to require an employee to have an annual medical because they are Asian this would be unlawful race discrimination but if you were to require an employee to have an annual medical because they are over 50 this may be justifiable and therefore not unlawful age discrimination in some circumstances.

However, the crucial point is that the difference in treatment can only be justified if the employer can show that it was a proportionate means of achieving a legitimate aim.

What is a legitimate aim?

This begs the question what is a legitimate aim? The Regulations do not give us a clear definition of this so we will have to wait for the Tribunals to decide and provide us with guidance via case law.

However, in the consultation paper "Equality & Diversity: Age Matters" the DTI have given us some useful guidance. They suggest that the following could be legitimate aims able to justify a difference in treatment on the grounds of age:

- Health, welfare & safety
- Facilitation of employment planning
- Particular training requirements
- Encouraging and rewarding loyalty
- The need for a reasonable period of employment before retirement – like particular training requirements
- Recruitment or retaining older workers

Most of these seem reasonable business requirements and aims which could potentially be used to justify a difference in treatment.

Taking the case of 'health, welfare and safety' we can find some useful guidance in the Canadian case of **McDonald v Regional Administrative School Unit**. In this case the School imposed an age limit of 65 on bus drivers and were able to justify this on health & safety grounds as they also produced statistical evidence that over 65s were more likely to have road accidents.

'Facilitation of employment planning' could come into play where a business finds that older workers staying in employment longer had effectively led to promotion blocking for younger workers since there are no senior vacancies for them to move into. Alternatively, some employers may see a significant imbalance in the age of their workforce and take action to seek to build a more age diverse workplace.

`Particular training requirements' could apply in a case where substantial training is required before the employee is qualified to undertake the position for which they are being paid, for example, air traffic controllers have to undertake several years of training prior to commencing work.

The burning issue for most employers will be whether a difference in treatment can be justified on the grounds of cost. Cost is of course quite rightly a primary consideration for many business decisions made by employers. We will have to wait and see whether the Tribunals consider costs alone to be a legitimate reason to justify a difference in treatment on the grounds of age. However, it seems possible that this could be the case. We can draw a useful analogy from the recent sex discrimination case of **Cross v BA 2005**. In this case British Airways sought to rely upon cost as a legitimate reason to justify a difference in retirement ages which indirectly discriminated against female employees. When considering the case, the Employment Appeal Tribunal stated that "economic (which includes cost) grounds can properly be a factor justifying indirect discrimination, if combined with other reasons."

The EAT therefore decided that employers cannot justify discriminatory practices on the grounds of cost alone, at least in the context of sex discrimination. However, cost taken together with other factors can potentially justify a difference in treatment. There is likely to be early case law on this area in the context of age discrimination.

What is a proportionate means?

If you they are satisfied that they have identified a legitimate aim to justify the difference in treatment on the grounds of age, the next question the employer needs to consider is what would be a proportionate means of achieving that legitimate aim.

Again, the Regulations do not give us any clear definition of what `proportionate means' are and this will therefore be determined by case law. However, if the following are considered the employer should go some way to building a case whereby they can satisfy the Tribunal that they have used proportionate means:

- The employer should make sure that they have evidence to show that the policy actually contributes to the pursuit of the legitimate aim they are trying to achieve. Relying on theory is unlikely to be sufficient
- The employer must be able to show that they have weighed up the importance of the legitimate aim they are trying to achieve against the discriminatory effects the policy may have, i.e. the employer needs to be able to show that they have checked it is proportionate
- If the employer can identify two alternative means of achieving the same legitimate aim they should always pick the least onerous

Genuine Occupational Requirement

There is one final reason to justify a difference in treatment on the grounds of age – the genuine occupational requirement defence. This can potentially apply to recruitment, promotion, transfer, training and dismissal as a defence to direct or indirect discrimination. However, due to the fact that direct age discrimination can potentially be justified, the genuine occupational requirement defence is likely to have very limited scope in the context of age discrimination. The government has only suggested two possible industries where it could apply – the airline industry where it may be a genuine occupational requirement for pilots to be aged 50 or under on the basis that those over 50 cannot (under current rules) fly over French airspace and actors (discussed further below).

Victimisation

The third type of unlawful discrimination on the grounds of age is victimisation. This is where B has brought, or stated that he intends to bring, proceedings for age discrimination, or gives, or intends to give, evidence on behalf of another employee bringing such a claim, or has suggested that A is guilty of age discrimination and because of this, A treats B less favourably

For example if an employee is called as a witness to give evidence on behalf of another employee bringing a claim for age discrimination and then a couple of months later the employee applies for promotion but his application is rejected, despite the fact that he is well qualified for the job, because his manager says he is a trouble maker this would be an example of unlawful victimisation.

Harassment

Finally, employers need to ensure that they take measures to protect against harassment on the grounds of age in their workplace.

Harassment occurs where, on the grounds of age, A engages in unwanted conduct which either has the purpose or effect of violating B's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for B.

So for example if one employee, A, ridicules another employee, B, for being 'wet behind the ears' and belittles his opinions due to his youth and B finds this humiliating and distressing this would be unlawful harassment.

Until society's attitudes change and age discrimination is considered the same way that discrimination on the grounds of race and sex are considered these days, it seems likely that there will be differences between the types of harassment claims brought on the grounds of age as opposed to other types of harassment

The difference is likely to be between what Age Concern calls 'benevolent prejudice' as opposed to 'hostile prejudice'. Age discriminatory comments are more likely to be made without the intention to offend and it may also be more difficult for an employee to show that the comment did offend in the same way that a derogatory comment on the grounds of their race or sex might.

However, it is very likely that our culture and what we consider acceptable will change in time, in the same way it did after the race and sex discrimination legislation was introduced in the 1970's. However, currently popular culture suggests that it is acceptable to make derogatory comments on the grounds of age – a look around the range of birthday cards for the over 40's confirms this.

Until society's attitudes change it is likely that there will not be so many stand alone harassment claims and we are perhaps more likely to find that derogatory comments made in the work place are used as supporting evidence of a discriminatory culture within an employer's business to support other types of age discrimination claims.

It is however important to remember that harassment cannot be justified and it is therefore very important for all employers to make sure that everyone in their workplace takes care to consider whether any comments they make might unintentionally offend.

AGE DISCRIMINATION & RECRUITMENT

The Employment Equality (Age) Regulations 2006 (the "Regulations") are expected to have a significant impact on the ways in which employers recruit. It is therefore very important that all employers ensure that they understand and comply with the Regulations. Failure to do so could mean that employers fall foul of them and in doing so discriminate against applicants and/or employees.

The General Rule

The general rule is that you cannot advertise for someone on the basis of their age unless you can objectively justify the need to recruit someone of a particular age or age group or it is a genuine occupational requirement that the person you employ to do a particular job is of a particular age or age group.

The defence of objective justification is expected to have limited scope in practice and especially in respect of recruitment where decisions to recruit should now be made on the basis of someone's skills and competencies rather than their age.

Also, there will be very few examples of where it is a genuine occupational requirement that the person employed to do a particular job is of a particular age. One example would be where an actor employed to play a particular role is required to be of a particular age. So, for example, you could refuse to employ a forty year old actor to play the role of Harry Potter by arguing that it is a genuine occupational requirement that you employ someone twenty or younger to play the role.

Exception to the General Rule

There is only one exception to the general rule that you cannot discriminate against somebody on the grounds of their age and that exception can be found in Regulation 7(4) of the Regulations.

The exception in Regulation 7(4) is an important one. Its effect is that if someone sixty five or over (or someone who will be sixty five within six months of making an application for a role) is refused employment, they will not have the right to complain to an Employment Tribunal. However, if that person is then employed, they are entitled to be employed on the same terms as a younger employee in the same circumstances.

The rationale behind this exception is that the cost to employers of employing someone within that age group (in particular the trainings costs) could easily outweigh the benefits of employing them for six months or less.

The Irish Experience

Ireland has had age equality legislation since October 1999 and is therefore a good place to look to try and understand what impact the Regulations will have in Great Britain.

Reportedly twenty percent of all employment claims in Ireland are age discrimination claims. That percentage is higher than for disability discrimination claims which prior to the introduction of age discrimination legislation in Ireland made up the largest percentage of claims.

Equality Authority v Ryanair

One case of particular interest is the case of *Equality Authority v Ryanair (DEC-E/2000/14)*. This was the first successful age discrimination case in Europe. Ryanair

advertised for a Pilot and the advertisement stated that they were looking for a 'young and dynamic professional'. Ryanair attempted to argue that word 'young' was meaningless in an age context and that it did not mean young! They said that the word had been used merely to convey the requirements of the role that the applicant be enthusiastic, passionate, ambitious and dynamic. However, evidence showed that none of the twenty eight candidates that had applied for the role were over forty. It was therefore held that the use of the word 'young' may reasonably have been understood to indicate an intention to discriminate against a person that was not young. Ryanair were also found to have not operated their interview and selection criteria in line with their equal opportunity policy and were fined £8,000.

Byrne v FAS

Another case is that of *Byrne v FAS (DEC-E-2002/045)*. Ms Byrne was an older lady who applied for a technical course in interior design with FAS. At the interview the interviewer said that older students tended to have difficulties with the course. Ms Byrne was subsequently not offered a place on the course. It was held that discriminatory assumptions had been made at the interview and that the interview itself was therefore discriminatory.

Lessons from the Equality Tribunal

The following led the Equality Tribunal in Ireland to conclude that an inference of discrimination was appropriate in the circumstances:

- Lack of focus on the applicant's competencies and skills at interview
- Lack of transparency or unexplained procedural unfairness
- Mismatch between the formal selection criteria and those actually applied in practice
- A noticeable statistical difference in success rates for applicants from different age groups in apparently similar circumstances
- Evidence of a policy to prefer a particular age group

Advertisements

As has hopefully been illustrated above, it is very important that employees think very carefully about both the form and content of advertisements as well as the type of medium used to advertise. Employers should consider whether the words and pictures used in advertisements and recruitment brochures could directly discriminate against a particular age or age group as well as whether the target audience of the medium being used to advertise is of a particular age or age group. If it is, employers might want to consider advertising somewhere else as well to ensure they are not indirectly discriminating against a particular age or age group.

Graduate Recruitment

Research shows that only thirteen percent of people that graduated in 2003 were forty years or over. It is therefore easy to see that requiring an applicant to hold a degree could indirectly discriminate against older applicants. In addition, think carefully before asking a graduate whether they studied full time rather than part time as this could indirectly discriminate against older applicants who are arguably more likely to study part time rather than full time.

Whilst employers can still operate graduate recruitment schemes, it is now vital that they also have other routes of entry into their business as solely recruiting by way of graduate recruitment schemes could indirectly discriminate against older applicants who are less likely to be university students and/or to have recently graduated.

Also, always consider carefully whether qualifications that are relatively new are really necessary (for example media studies). If they are, the defence of objective justification

may be available to justify the need for a particular qualification, provided there is a clear focus on the requirements and needs of a particular role.

Preventative Action

Finally, what can an employer do to ensure they comply with the Regulations? All managers involved in the recruitment process should be fully up to speed on the Regulations. Age profiling at all stages of the recruitment process could uncover any unconscious biases towards a particular age or age group and thereby identify what needs to be done to ensure that an employer does not discriminate. Employers should now consider using competency and skills based application forms as well as moving age related questions in an application form to the equal opportunities monitoring form which those taking recruitment decisions do not get to see. Interviewer's notes of an interview should not make any reference to the age of interviewee or contain any comments that could be perceived as ageist. Maybe most importantly an employer should always consider very carefully when recruiting whether any requirement for a particular qualification or level of experience has a discriminatory effect and if so whether it can be justified.

AGE DISCRIMINATION & TERMINATION OF EMPLOYMENT

Dismissing employees is one of the areas in which the new laws will have a major impact.

The Government is encouraging all of us to work longer as the UK has an increasingly ageing population. The Government also wants employers to get away from companies blanket-retiring employees in their 50's just because they are considered "past their best". Of course, companies will still be able to do this but, since 1 October 2006, they need to ensure that they agree terms with any such employees and ideally ensure that the employee signs a compromise agreement. Otherwise, the company could find themselves subject to an expensive claim for age discrimination.

Direct discrimination

In Ireland, a female secretary in her 50's successfully claimed age discrimination. The Human Resources Manager said that they were making her redundant in order to take on a young girl to train to do her job. The secretary complained that this was direct discrimination, as she had been treated less favourably than younger employees. Unsurprisingly, the employer was found to be liable for age discrimination and had to pay a fairly hefty award of compensation.

This is a classic example of age discrimination and, since 1 October 2006, any employer in the UK who selects employees for redundancy on grounds of age is liable to be subject to a claim for direct discrimination. Similarly, dismissing an older employee for being a "danger to himself" can leave an employer open to a claim for both unfair dismissal and age discrimination.

Indirect discrimination

Indirect discrimination is sometimes more difficult to spot but even well-accepted practices are likely to come into question.

For example, one of the most frequently used criteria or factors in selecting employees for redundancy is Last In First Out. Last In First Out is of course indirectly discriminatory, as it tends to favour older workers over younger workers, because those employed at a company for longer periods of time are often older rather than younger employees.

The ACAS guidance suggests that using Last In First Out in any selection criteria for redundancy is likely to be age discrimination. Employers will have to proceed with caution if they still decide to use Last In First Out as selection criteria, at least until the courts give their view as to whether Last In First Out can be objectively justified.

Remedies

If an employee is not happy with his dismissal, he or she can bring a claim to the Employment Tribunals. As with all types of discrimination cases, compensation for age discrimination is potentially unlimited.

Retirements

What about employees who have reached the age of 65? The new legislation currently allows the retirement of employees on or over the age of 65.

Retirement is potentially age discrimination, because employees are dismissed as they have reached, normally, the age of 65. Age is the sole reason for dismissal.

Prior to 1 October 2006, employees could not generally bring a claim for unfair dismissal if they were over the age of 65. That has now changed and the upper age limit for redundancy payments to employees who are over the age of 65 has also been removed. Compulsory retirement now becomes a “dismissal” for the purposes of claiming unfair dismissal, as well as being potentially unlawful age discrimination.

National Default Retirement Age

Currently, it is still possible to retire employees on or over the age of 65 as the Government have introduced a new National Default Retirement Age of 65.

There was, and still is, much debate about whether the UK should have a Retirement Age. The Government’s compromise solution has been to introduce a temporary new concept of a default retirement age of 65, pending a review of the new regulations in 2011. Ireland initially had a default retirement age but abolished it in 2004. The Government hopes to do the same in the UK from 2011, so that employees continue working past the age of 65 if they wish.

An organization set up by Age Concern, Heyday, has taken the Government to court to challenge the legality of the National Default Retirement Age. They say that employees should be able to continue on working until they either choose to stop or they are dismissed for one of the other potentially fair reasons for dismissal – you may know that these are capability, conduct, redundancy, illegality and some other substantial reason. We are awaiting the outcome of the challenge but this is unlikely to be known for one or two years. The law as currently drafted is therefore liable to change depending on the outcome of Heyday’s challenge.

There are advantages and disadvantages to employees working beyond 65. Often, employees want to stay in their jobs past that age, fearing that they will get bored. Equally some companies want to keep good, experienced and loyal workers. If you have set up a company, you may not wish to relinquish control at 65 and many successful companies are run by Chairmen in their late 60s, 70s or even 80s.

On the other hand, some employees look forward to retirement, to putting their feet up with a glass of wine, travelling, doing voluntary work and so on. Heyday recently surveyed over 60,000 people in their 50’s, and of these 60,000, 80% do not want compulsory retirement at any age. Perhaps surprisingly, 65% of those surveyed actually plan to work past 65 whereas today only 30% of people remain in employment past the age of 65.

Age Concern aren’t happy that there is a National Default Retirement Age at all, saying that this is effectively “forced retirement”. For the time being, the new regulations allow employers to retire employees on or after the age of 65, so long as they follow the correct procedure.

If an employer wishes to have a retirement age of less than 65, this has to be objectively justified. It will be difficult to justify having a retirement age of less than 65, so if your company has a retirement age or normally retire employees below the age of 65, this will need to be changed unless you are able to objectively justify it.

Currently, employers are potentially able to retire employees at the age of 65, so long as:

- i) the reason for dismissal is retirement; and
- ii) they follow the correct procedure.

Reason for dismissal

Retirement is now a sixth potentially fair reason for dismissal. In order for an employer to be able to retire an employee at or over the age of 65, the Tribunal have to accept that the reason for dismissal is retirement.

This means that an employer must satisfy the following three requirements:

1. Give the employee six to twelve months notice before the Intended Date of Retirement, telling the employee the date on which it is intended that they will retire and notifying them of their right to make a request to work past 65. This must be in writing and must be dated;
2. Tell the employee of the Intended Date of Retirement in that letter; and
3. Ensure that dismissal takes place on the Intended Date of Retirement.

If the employer complies with all three of the above requirements, then sections 98AZ – 98ZE of the Employment Rights Act 1996 state that the reason for dismissal will be retirement. The individual sections are as follows:

- If there is no Normal Retirement Age and termination falls before 65, retirement is not the reason for dismissal (section 98ZA of the ERA)
- If there is no Normal Retirement Age and termination falls on or after 65 and the contract is terminated on the Intended Date of Retirement and six-twelve months notice of the IDR is given, retirement will be taken as the reason for dismissal (section 98ZB)
- If there is a normal retirement age and termination is before this age, retirement will not be the reason for dismissal (section 98ZC of the ERA)
- Where there is a Normal Retirement Age of 65 or higher and termination is on or after this age, retirement will be the reason for dismissal so long as the employee retires on the IDR and six to twelve months notice is given (section 98ZD of the ERA)
- Where there is a Normal Retirement Age below 65, retirement can only be the reason for dismissal if it is “objectively justified” to have a Normal Retirement Age below 65 (which is likely to be difficult to do) (section 98ZE of the ERA)

If the reason for dismissal is not retirement, any dismissal alleged to be on grounds of retirement could be an unfair dismissal. In addition, it may well be contrary to the 3-step Statutory Dismissal Procedure (letter, meeting, right to appeal) so may be automatically unfair. The reason for dismissal is therefore important and employers must ensure that they comply with the three requirements set out above.

Notice

If the employer doesn't serve the notice in time, the Tribunal can make an award of up to 8 weeks pay (currently limited to £290 per week). There is also a continuing duty to notify of the employee's “right to request working past retirement”.

If the employer notifies less than 6 months but more than 14 days before the Intended Date of Retirement, the Tribunal will decide whether it is fair and can award up to 8 weeks pay. If there has been no notification within 14 days of the Intended Retirement Date, any dismissal within those 14 days will be automatically unfair and may attract an award of up to 8 weeks pay.

Right to Request Working Past Retirement

When notified of the Intended Date of Retirement, an employee can request not to retire on the Intended Date of Retirement. This request can be for an indefinite period, for a stated period or until a stated date.

The request must be in writing and can only be made once in relation to any one Intended Date of Retirement. It must be made more than three months but less than six months before the Intended Date of Retirement if the employer has properly notified the employee as set out above.

If the employer did not serve notice in time, the request must be made at any time before the Intended Date of Retirement.

There is a duty to consider an employee's request not to be retired on the Intended Date of Retirement and the employer must invite the employee to a meeting to discuss the request. The decision should be given "as soon as reasonably practicable" and allow the employee the right to appeal against the decision.

Transitional Provisions

The regulations will take full effect from 1 April 2007. In the meantime, there will not be sufficient time for an employer to give six to twelve months notice so there are transitional provisions. Please contact us if you would like some information on the transitional provisions or if you would like any assistance on the new regulations or generally.