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The Employment Equality (Age) Regulations 2006

1 Summary

- From 1 October 2006, the Employment Equality (Age) Regulations 2006 will make it unlawful to discriminate against a worker or employee on the grounds of his/her age. Until now, there has been no legislation in the UK prohibiting age discrimination in employment.
- The Regulations will make it unlawful to discriminate against a worker or employee for being too young as well as being too old. Age includes *apparent* age, so a worker will be protected by the Regulations if he/she is discriminated against on the grounds of his/her perceived age, even if this is not his/ her actual age.
- The Regulations will apply to employment and to those involved in adult education and training. They will **not** apply to discrimination on the grounds of age in the provision of goods and services.
- The Regulations will **not** apply to **unpaid volunteers**.
- The Regulations prohibit **direct and indirect discrimination, harassment and victimisation**.
- The upper age limit for claiming **unfair dismissal** and **statutory redundancy pay (65)** will be removed
- A “default “retirement age of 65 will be introduced. This will make compulsory retirement before the age of 65 unlawful in most cases. (Note: employers who currently have a normal retiring age over 65 should not assume they can reduce it to 65 without their employees’ agreement. Legal advice should be sought).
- An employee will have the right to request to work beyond the age of 65 or the employer’s normal retiring age, and his/her employer will have a duty to ‘consider’ such a request.

NB as with the other discrimination legislation, employment under these regulations is defined as ‘*employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour*’. In other words, someone one might think of as self employed (because they are not on the payroll) could be covered under this and other discrimination legislation if they were

contracted to carry out work personally, and they did not have the right to get someone else to do it.

2 What is discrimination in the context of employment?

Unlawful discrimination may take one of four forms: direct discrimination, indirect discrimination, harassment and victimisation.

Direct Age Discrimination

From 1 October it will be unlawful on the grounds of age to:

- refuse to employ someone
- dismiss them
- refuse to provide them with training
- deny them promotion
- give them adverse terms and conditions
- subject them to any other detriment
- retire them before the employer's normal retirement age (if there is one), or before the 'default' retirement age of 65.

N.B. Unlike any other form of direct discrimination covered by existing legislation, employers will be able to defend themselves against claims where they can show that their actions constitute a **proportionate means of achieving a legitimate aim.**

Indirect Discrimination

Indirect discrimination will take place where an employer uses selection criteria, employment policies/ benefits, employment rules or any other practices or procedures, which, although applied to all employees or job applicants equally, have the effect of disadvantaging those of a particular age group (unless, as with direct discrimination, the particular policy/practice/procedure can be objectively justified).

Harassment

As with the other anti-discriminatory legislation, harassment includes behaviour that is offensive, frightening or in any way distressing. It may be intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not necessarily of malicious intent but which is upsetting. It may be that the organisation has a culture of telling ageist jokes. It can involve matters such as telling young people that they are "wet behind the ears" or describing someone as a "grumpy old man". It will be important for employers to be alert to the dangers of ageist attitudes within the workforce, as employers will be vicariously liable for inappropriate behaviour/remarks, which they fail to take adequate steps to prevent.

Victimisation

Victimisation is where an individual is treated “detrimentally” because they have made or intend to make a complaint about age discrimination. Alternatively they may be labelled a “trouble maker” by colleagues or even “sent to Coventry” by colleagues. The employer, again, who does not take steps to prevent this sort of behaviour will be as liable as the employees directly involved.

3 Lawful Discrimination

There are limited circumstances when it will be lawful to treat people differently because of their age. It will not be unlawful, for example, to discriminate on the grounds of age where:

- there is an **objective justification** for treating people differently. For example, it might be necessary to fix a maximum age for the recruitment or promotion of employees in order to reflect the training requirements of the post or the need for a reasonable period of employment before retirement; or
- a job applicant is older than, or within six months of, the employer’s normal retirement age, or 65 if the employer does not have a normal retirement age; or
- the discrimination in question is covered by one of the limited exceptions given in the Regulations (e.g. minimum age needed for holding a licence required for a job); or
- there is a **genuine occupational requirement** that a person must be of a certain age (for example, where a play is being produced requiring an actor of a certain age, or where, say, an organization promoting/representing the rights of elderly people feels that it is not appropriate to have someone heading the organization who is of an age that is significantly distant from the people being represented).

The Regulations also outline particular circumstances where action that is on the face of it discriminatory will be permitted. These are:

Positive action - An employer may be able to justify aiming recruitment activity at a specific age band in order to address disadvantages suffered by an age group or an imbalance in the profile of the workforce that indicates that persons of a certain age group are being disadvantaged in terms of access to particular work.

National Minimum Wage- the differentials in respect of age set out in the NMW regulations are exempted from the Regulations

Redundancy pay calculations- the age ‘bands’ for calculating statutory redundancy pay will remain and are exempted (although the upper age limit for making a claim will be removed, and service under the age of 18 will be included). It will also be lawful to pay

enhanced redundancy (i.e. more than the statutory entitlement) for persons of different age groups.

Occupational Pension Schemes: certain terms of occupational pension schemes will be exempted from the provisions of the regulations. This is a very complex area and expert interpretation would be required before acting in respect of exemptions in this area. External pension scheme providers should be able to provide necessary guidance.

Employment Benefits based on length of service - benefits related to service of 5 years or less are exempt from the provisions. Benefits related to service over 5 years will also be permitted where there is objective justification for them – where, for example, the additional benefits can be shown to reflect a higher level of experience of the employee, or to reward loyalty, or to increase or maintain the motivation of the employee.

4 **Burden of Proof of Discrimination**

All the discrimination laws and regulations recognise that it is difficult for employees to produce direct evidence of discrimination, so if a claimant can show facts from which an inference of discrimination can be drawn, it is then for the employer to prove on the balance of probabilities that they were not guilty of discrimination as alleged. This will often be difficult to do.

5 **Objective Justification**

Objective justification means that **in exceptional circumstances only**, an employer may treat people differently on the grounds of their age if the employer can produce real evidence that such action will be justifiable as

- a proportionate means (of)
- achieving a legitimate aim

What is proportionate?

- What the employer is doing must actually contribute to a legitimate aim
- The discriminatory effect should be significantly outweighed by the importance and benefits of the legitimate aim
- The employer must have no reasonable alternative to the action he/she is taking. If the legitimate aim can be achieved by less or non-discriminatory means then these must be taken

What is a legitimate aim?

A legitimate aim might include:

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

The test of 'objective justification' is not an easy one to pass and will require evidence, not just assertions.

6 Recruitment

Decisions about recruitment must be made on the skills of the applicants to do the job. Age can no longer be a consideration. Be aware of:

Application Forms

- Remove age/date of birth from main application form (not unlawful to ask for dates of birth but dangerous as can be seen as providing opportunity for an allegation that age is a relevant aspect of selection process).

Job Descriptions/Person Specifications

- avoid references, however obliquely, to age in either document. For example, avoid asking for 'so many years' experience'
- make sure the skills/ qualifications you are asking for are not disadvantaging people at different ages

Advertising

- advertise in a way that will be accessible to a large audience of all ages
- avoid using 'niche' publications. They may have the effect of preventing people in differing age groups applying for the job
- avoid using words that might imply you are looking for people in a certain, albeit broad age group, e.g. "energetic", "mature", "enthusiastic".

Interviewing

- don't ask questions related to age e.g. "how would you feel managing someone older than yourself?"
- don't congratulate a candidate on achieving a senior position at "your age"

7 Training/Promotion/Career Development

From 1 October 2006, it will be unlawful to make decisions about training and career development on the grounds of age (except where very close proximity to retirement makes it impractical because of the time it will take for the employee to acquire the necessary skills to do the job), so,

- be very careful that you do not make decisions as to who should be trained/promoted on the basis of age
- check that your appraisal scheme is not discriminatory

8 Regulations concerning retirement

Employers need to consider the age at which they retire employees (and whether they can justify it if necessary) and the procedures they must follow to retire people fairly (including the new right for

employees to request to work beyond the intended retirement date and their duty to consider such requests). This is important in view of the removal of the upper age limit for unfair dismissal claims. The Regulations set a 'default' retirement age of 65. This means that an employer can retire employees or set retirement ages within an organisation at or above 65. Retirement or retirement ages set by the employer below 65 will have to meet the test of "objective justification". This will not be an easy test to pass. (See "Objective justification" above).

Employers do not have to have a fixed retirement age at all. If an employer elects not to have a fixed retirement age, it is free to determine retirement ages for employees on an individual basis, providing the age is 65 or over (Note: in these circumstances, employers should be careful not to expose themselves to the risk of discrimination claims where they treat individual employees differently and it could be argued that this is on the grounds of, for example, disability or sex).

Retirement procedures

So far as retirement procedures are concerned, the date on which an employee is to be retired will be relevant.

Transitional arrangements will apply to retirements that are to take place between 1 October 2006 and 31 March 2007. Retirements from 1 April 2007 will be subject to the full 'fair retirement' procedure laid down in the Regulations

A. Retirement–Transitional arrangements applicable up to 31 March 2007

Where an employee is due to retire soon after 1 October 2006, the procedures for ensuring a retirement dismissal is fair are as follows:

Notice given before 1 October 2006

If the employee is given notice before 1 October that they are to be retired after 1 October 2006 but before 1 April 2007

- notice must be at least the period for termination of employment required by the employment contract

or

- where the employee is already serving a longer 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 that 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 him/her of the right to request to work longer.

The employee can make such a request after their 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 by a colleague.

Notice given after 1 October 2006

If the employee is given notice after 1 October that he/she is to be retired before 1 April 2007 the employer must:

- write to the employee notifying him/her of the intended retirement date – giving the longer of contractual or statutory notice, **and**
- tell him/her in writing that they have the right to request to work longer.

An employee who wishes to exercise this right must 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 make the request

The request can be made after the employee's contract has been terminated but not more than four weeks after the 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 by a colleague

B Fair Retirement – retirements after 1 April 2007.

A fair retirement will be one that

- takes effect on or after the default retirement age - 65 (or on or after the employer's normal retirement age – if there is one), **and**
- the employer has given the employee at least 6 months' (but no more than 12 months') notice of the intended retirement date in writing, **and** has told the employee of his/her right to request to work beyond the retirement age, and has considered any such request following the procedure set out below.

Requests to extend employment beyond notified retirement date.

If the employee requests in writing, **at least three months but not more than 6 months before the intended retirement date**, the employer must consider the request before the employee is retired. Failure to do so will render the dismissal automatically unfair. If a request is received, the employer must:

- meet the employee to discuss the request within a reasonable period following receipt of the written request (unless agreeing to the request and a meeting is not practicable). The employee may be accompanied by a worker or a trade union

representative employed by the same employer as the employee

- inform the employee of the decision as soon as reasonably practicable
- the employee must be told of the right to appeal the decision not to allow him/her to work after the notified retirement date or if the decision is to allow the employee to work to a date that is not satisfactory to the employee. If the employee does appeal, the hearing should be held as soon as reasonably practicable after the appeal is lodged. However, the appeal hearing can take place after the retirement has taken place.

- NB** a) The employee's employment continues until the employer has informed the employee of the decision.
- b) The employer is **not** required to give its reasons for refusing a request. In the event of a refusal, the dismissal will be fair, by reason of retirement, providing the above procedure is followed.
- c) If the Appeal is successful, then the employee should be notified in writing of the new date of retirement. In this event, the process for notifying the employee of the date of retirement as set out above must be followed before the new retirement date, **unless the new retirement date is** less than 6 months after the original date.

The "fair retirement" procedure above **does not apply** to people who are not employees but are protected by the Regulations (see section 1 above).

9 Other Employment Policies/Benefits

- Check that selection for redundancy policy is not age discriminatory. (Probably 'Last in' first out' in deciding who should be made redundant will no longer be acceptable)
- Check that contractual rights of employees and benefits are not age related unless you can 'objectively justify' such discrimination

10 Statutory Rights & Benefits

There are some significant changes to employees' statutory rights. From 1 October 2006 there will be

- No upper age limit for claims to employment tribunal
- No upper age limit for entitlement to statutory redundancy pay
- No 'tapering down' of entitlement to redundancy pay in the year before an employee reaches 65
- No upper and lower age limits for statutory sick pay