

# Age Concerns

## How the new Age Regulations affect individual rights in the workplace



### Overview

Discrimination in employment on the grounds of a person's age is unlawful. The Regulations which came into effect in 2006 have far-reaching effects, giving protection to not just older workers, but those of all ages, in all areas of employment.

### The protection given

The Regulations protect workers from age discrimination in recruitment, employment terms and conditions, promotions, transfers, dismissals and vocational training. They do not apply to the provision of goods and services although legislation in this field has been proposed by the government.

### The behaviour prohibited

The Regulations outlaw a number of different types of behaviour: direct and indirect discrimination, victimisation and harassment. In certain circumstances they also prohibit discrimination after the employment or working relationship has come to an end. Employers may also be responsible for the acts of their agents, as well as the acts of other employees.

### Direct discrimination

This occurs when a person is treated less favourably than another is or would be treated because of their age, unless this treatment can be 'objectively justified' (as explained further in this factsheet).

### Indirect discrimination

This is where what the law describes as a 'practice, provision or criterion' (i. e an arrangement or feature relating to the employment) is applied or would be applied equally to all persons. If this puts or would put people of a particular age group at a disadvantage compared to persons of another age group, it may be indirect discrimination. However this would not be the case if the 'practice, provision or criterion' can be 'objectively justified' (as explained further in this factsheet).

### Victimisation

This is where a person is treated less favourably because he or she has made a complaint or allegation of age discrimination, or is assisting someone else who has taken action in relation to age discrimination.

### Harassment

Harassment is defined as conduct that violates a person's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment for them. It takes account of all circumstances, including the perception of the victim. Typical examples of harassment include derogatory comments about a person's age, or excluding/ignoring a person on the basis of their age. Harassment may not necessarily be targeted at an individual or individuals; for example an office culture of telling and tolerating 'ageist' jokes may qualify as harassment.

### Objective justification

Direct and indirect discrimination on grounds of age may be justified in certain circumstances. The law recognises that differences in treatment on grounds of age are sometimes necessary. If this is the case, an employer will have to show that any such difference in treatment is a 'proportionate means of achieving a legitimate aim'. This is intended to be a tough test, and employers will have to produce solid evidence of their justification. Recent case law indicates that the test for objective justification in direct discrimination cases will be harder to meet than in cases of indirect discrimination.

### Exceptions and exemptions

**Retirement** - The Regulations set a default retirement age of 65. Normal retirement ages can be set at or above 65, but normal retirement ages below 65 will need to be objectively justified. Employees have the right to request to continue working beyond their normal retirement age, and employers have a duty to consider such requests.

The UK's default retirement age of 65 has been the subject of a challenge in the case of *Heyday*. Following a ruling by the European Court of Justice, the High Court decided these provisions are lawful for now. This was influenced by the Government's decision to bring forward its review of the default retirement age from 2011 to 2010 and the expectation that it may be abolished at such time.

*For more information on the impact of the Regulations on retirement, see our factsheet 'Age Discrimination at Retirement' part of our Employment Law series.*

**Service-related benefits** - Employers often require a certain length of service before awarding a benefit such as private medical expenses insurance, increased pay or holiday entitlement. This could constitute indirect age discrimination because the younger a person is, the less likely he or she is to have the required length of service.

An exception for this type of benefit has been made as length of service benefits are clearly important for motivating staff in certain circumstances, rewarding loyalty and recognising experience.

Any benefit earned by five year's service or less will be exempt. If the benefit is based on more than five year's service, an employer must show that it reasonably believes that they are using the benefit to reflect the higher level of experience of the employee, to reward loyalty, to increase or maintain motivation or that it otherwise fulfils the employers legitimate business needs. The extent of evidence required by a tribunal in this case remains to be seen.

**Statutory Redundancy Pay** - This is currently calculated using age-related criteria. Although the lower and upper age limits will change slightly with the Regulations, the calculation basis will remain the same. Enhanced redundancy payments following the statutory scheme will also be exempt.

If an enhanced redundancy scheme is different from the statutory scheme, it will not be exempt, and the employer will have to justify the scheme objectively.

**National Minimum Wage** - The National Minimum Wage continues to be applied by reference to age bands and the Regulations do not change this.

**Genuine Occupational Requirement** - In limited circumstances, an employer may legally discriminate on grounds of age if being a particular age is a genuine occupational requirement. For example, an actor in a particular role may need to be in or around the age of the character he or she is playing.

There are other exemptions in relation to life assurance, age-related statutory requirements and occupational pension systems.

## Pursuing a complaint

Please note that strict time limits apply in respect of bringing a claim. Most claims will need to be brought in the employment tribunal within three months less one day of the treatment you are complaining about. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this power should not be relied on. Please note that in most cases, this time limit will no longer be extended where an internal grievance is lodged first as the rules relating to this have recently changed.

You may also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures (which can be downloaded from the ACAS website). This is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful but the tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. (There are also penalties on the employer if they do not comply with the Code). Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. If your claim relates to matters that happened before 6th April 2009, or if it relates to matters that occurred ongoing through 6th April 2009 and you have lodged a grievance or tribunal claim about it, then different rules may apply in relation to grievance procedures and time limits. These issues can be complicated and, again, you should take prompt legal advice if you think you may have a claim.

You are entitled to request your employer to complete a questionnaire to obtain information relating to your complaint. This can be served at

any time prior to commencing legal proceedings, or within 21 days of lodging your claim. Once you have convinced the tribunal that an act of discrimination has occurred, and the employer is responsible, it is up to the employer to justify their behaviour.

If a claim is upheld, a tribunal can make a declaration that there has been unlawful discrimination and award compensation. There is no upper limit to the amount that can be awarded.

If you think you are a victim of age discrimination, you may bring a complaint to an Employment Tribunal. There is no minimum service requirement for bringing a claim. It is important to take legal advice at the outset.

Please request a copy of our separate factsheet, '*Age Discrimination at Retirement*' for details of the procedure to be followed for requests to continue working beyond normal retirement age.



*"An employer may legally discriminate on grounds of age if being a particular age is a genuine occupational requirement"*

## Contact Us

*Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:*



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