

Age Discrimination Legislation - how it affects Employers in relation to work and employment.

1. Introduction

Since 1st October 2006, it has been unlawful for employers, and others, to discriminate against a person on the basis of his/her age – unlike in the US, where regulations give protection only to ‘older’ workers, the UK rules apply to all age groups. The UK rules were originally implemented by The Employment Equality (Age) Regulations 2006, but have been incorporated, with some changes, into the Equality Act 2010.

In conjunction with our partners at D3 Employee Solutions, we have produced this guide, to help you understand the implications of the legislation. We recommend that you read the guide and then contact john@d3.org.uk if you require any further help.

The Equality Act 2010 is a complex, lengthy piece of legislation and this Guide is a summary only. It is based on our understanding of the Act and Laterlife and D3 Employee Solutions cannot be held liable for any omissions or errors, both as to content and interpretation. How to apply the Guide to specific instances may need specialist advice.

This Guide is focussed on Age Discrimination and is focussed primarily on the work/employment context. There are some differences between employment and non-employment environments and not all these are covered in this Guide. The whole area of discrimination in relation to service provision is not covered at all. There are some differences between how the law applies to some of the protected characteristics, much of what follows would also apply to the other ‘protected characteristics’ of race, sex, sexual orientation, disability, religion/belief, gender reassignment, marriage/civil partnerships and pregnancy/maternity.

2. Age as a ‘Protected Characteristic’

Under the Equality Act 2010, age is one of nine protected characteristics. The Act applies to any person of any particular age (e.g. age 50) or who falls within any particular age group (e.g. over 65). ‘Age group’ can be a very broad concept and will apply, for example to people in the age range 60-65, to the ‘under 60s’ and to the ‘over 60s’. So, a person age 21 might be thought to have few common characteristics with people in their 50s, but they could all be considered as being in the same age group by virtue of belong to the age group ‘under 60’.

According to the [Employment Code of Practice](#) issued by the Equality and Human Rights Commission (EHRC), age group can also be relative, so it might be defined as, for example ‘relative to people who are older than me’ or ‘relative to people who are younger than me’.

The concept of ‘age group’ also incorporates ‘elastic’ concepts such as ‘youthful’, ‘middle aged’, ‘elderly’, ‘young’, ‘old’. These are relative terms which might be defined by the context. The EHRC points to the difference between a ‘youthful bartender’ and a ‘youthful corporate CEO’ – these conjure up different images.

So a person who is, say, 51, could be described as belonging to many different age groups, including:

- ‘51-year olds’
- ‘People born in a particular year’
- ‘Middle-aged’
- ‘Under-55’, ‘under 60’, ‘under 65’ etc.

- 'Over 50', 'over 45', 'over 21' etc.
- '50 to 55', '50 to 60' etc.

3. Who is protected and who has liability/obligations under the Equality Act?

a) Employers, Employees and Workers

Part 5 of the Act prohibits discrimination in relation to 'work' in its broadest sense.

'**Employees**/'**Workers**' are protected if they are in 'employment', or are an applicant for 'employment', which covers

- Employment under a 'contract of employment' (employee)
- Employment under a 'contract of apprenticeship' (apprentice)
- Employment under a 'contract personally to do work' (technically self-employed or casual worker)
- Crown employment
- Employment as a relevant member of the house of Commons or House of Lords staff
- Service as a Police officer or police cadet
- Contract work i.e. those employed by one party (e.g. an agency) but who do work for a third party/'principal' (e.g. a business). In this case the Principal has the same liability as if (s)he was the employer
- Service in the armed forces
- Service as a partner in a Partnership
- 'employment' as a pupil or a tenant to a barrister
- Service as an 'office holder' (e.g. Tribunal member)

Therefore, there is a wide range of people/bodies who would be regarded as '**employers**' and who would have specific liability under the Act. These would include:

- Large Corporations in respect of employees, contract workers, casual employees and apprentices
- Small and medium sized enterprises (private and public) in respect of employees, contract workers, casual employees and apprentices
- Charitable organisations in their capacity as 'employer'
- Private clubs in their capacity as 'employer'
- Individuals or couples who 'employ' others e.g. a nanny or a carer as a direct employee or as a contract/agency worker
- Barristers and the Clerks in respect of pupils and tenants as well as their employees/workers
- Chief Police Officers in respect of police offices and as well as their civilian employees/workers Partners in a firm or members of a Limited liability Partnership (LLP) in respect of partners as well as their employees/workers
- The branches of the armed services in respect of service personnel as well as their civilian employees/workers
- Various public bodies in respect of office holders and crown employees as well as employees/workers

The liability that 'employers' have is not to discriminate or victimise 'employees/workers' in relation to:

- The terms of their employment
- Their access to opportunities for promotion, transfer or training
- The receipt of benefits, facilities or service
- Termination of employment (dismissal, express or constructive)
- Subjecting them to any other detriment

And, in respect of applicants for 'employment', not to discriminate or victimise in relation to:

- The arrangements for deciding to whom to offer employment (i.e. in the whole recruitment and selection process)
- The terms of employment offered
- Not offering employment

And 'employers' must not harass either 'employees/workers' or applicants for 'employment'

b) Qualification bodies

Authorities which award qualifications specifically for a particular trade or profession (i.e. **not** schools, colleges and universities in respect of their 'academic qualifications') have a duty not to discriminate or victimise on the basis of age.

The protection applies to:

- The arrangements the body makes for deciding upon whom to confer a relevant qualification
- The terms on which a relevant qualification is conferred or the basis on which it may vary those terms
- The basis on which a qualification is not conferred
- The basis on which the body might withdraw a qualification or not renew it
- the body not subjecting an individual to some other detriment

c) Employment Services Providers (ESRs)

ESRs may not discriminate against or victimise an individual when providing an employment service. ESRs include:

- providers of vocational training or vocational/career guidance
- providers of services to help others find work e.g. recruitment agencies, head-hunters and Job Centres
- providers of people to undertake work e.g. employment agencies, gangmasters

The protection applies to:

- the arrangements the ESR makes for selecting individuals to whom to provide the employment service
- the terms under which the service provision is made
- the basis upon which the service will not be offered
- the basis upon which the service is terminated or not renewed
- the ESR not subjecting an individual to some other detriment
- the ESR not harassing a person who has asked for the service provision or who is in receipt of the service.

d) Trade Unions, Employers' Organisations, Trade Associations and Professional Bodies

These bodies do, of course, normally have obligations/liabilities as employers; but they also have them with regard to members and applicants for membership which mirror

those of qualification bodies and ESRs. That is, they must not discriminate or victimise applicants with regard to:

- the arrangements made for deciding who should be offered membership
- the terms upon which membership is offered
- not accepting an application for membership

And with regard to existing members, not discriminating or victimising with regard to:

- access (or non-access) to benefits, facilities or service
- ending or not renewing membership
- varying the terms of membership
- subjecting a member to any other detriment

These bodies must also not harass members or applicants

e) Local Authorities

Local authorities have liabilities/obligations with regard to their employees, but they also must not discriminate against or victimise their Members (councillors) in relation to them carrying out their official business. This applies to the way in which members are afforded access to (or not afforded access to) opportunities for training or for receiving any other facility. They must also not be subject to other detriment on the grounds of age, although not being appointed/elected to a particular office or committee is not necessarily to be regarded as a detriment.

f) Individuals

Individuals can also be held liable. So, whether it be in connection with employment, qualification bodies, ESRs or the various member organisation, a person who feels they have been discriminated against, victimised or harassed can take action against the organisation and/or against an individual(s).

g) Secondary Liability

This applies in three forms:

- although individuals can be held accountable, employers are generally held liable for acts of discrimination, victimisation or harassment by their employees if those acts are done in the course of their employment. And the Act expressly says that it does not matter whether the employer actually knew about the discriminatory acts, victimisation or harassment. There is only one defence: if the employer can show that it took 'all reasonable steps' to prevent or stop such acts occurring, either generally or in a specific instance. Previous legislation expressed the defence in relation to an employer having taken 'such steps as are reasonably practicable'; the change to put the employer to the test of showing that it took '*all* reasonable steps' might not seem significant but a Claimant may be able to point to one or more practicable steps that were omitted so the employer could then fail the test.
- 'Principals' can also be held liable (or jointly liable) for acts or omissions by an agent acting with the Principal's authority, again whether or not it knows and/or approves of the acts/omissions. Examples of agents used by 'Principals' are recruitment agents or occupational health advisers.

- Employers can also be held liable for harassment in relation to any of the protected categories (including age) by third parties (e.g. customers or suppliers), although in this case no liability exists unless the employer knows about it; and the harassment must have happened on at least three occasions (although not necessarily by the same 'harasser'). Liability can be avoided if the employer has taken reasonable steps to prevent the harassment.

4. Where do the Regulations apply?

The Regulations apply only to employment and contract work 'at an establishment in Great Britain' (i.e. England, Wales and Scotland). Northern Ireland continues to have its own, separate equality legislation. So this would include a person working wholly or partly in GB. However, it will also cover workers who work wholly outside GB if three criteria are met:

- The employer has a place of business in GB, and
- The worker is ordinarily resident in GB, and
- The work they do or have applied for, although carried out abroad, is for the purposes of that GB business

5. What is discrimination?

The Equality Act defines two types of discrimination as regards age and four types of 'Other Prohibited Conduct'

Direct Discrimination

Where, because of age, a person is treated less favourably than others are or would be treated. So a refusal to interview anyone over the age of 50 would almost certainly represent direct discrimination of an applicant over 50 who was not interviewed. There is a possible defence in that it is possible to treat someone less favourably than others if the treatment is a 'proportionate means of achieving a legitimate aim' – this is the so-called 'objective justification test' which does not apply with regard to the other protected categories. 'Less favourable treatment' is a comparative term – the question arises as to 'less favourable' compared to who? That comparator can be a real one (e.g. a previous job holder or a successful candidate) or a hypothetical one.

The new definition of direct discrimination (less favourable treatment 'because of age') makes no reference to the actual age of a particular person. So it is possible to treat someone less favourably because of someone else's age – e.g. the age of a family member (so-called 'associative discrimination'); and/or because of a perception of someone's age (so-called perceptive discrimination). Watch out for case law to see how this pans out.

Indirect Discrimination

This applies where 'provision, criteria or practice' (which cannot be 'objectively justified') puts people of a particular age or age group at a disadvantage. For a person to successfully claim, they personally must have actually been put to a disadvantage.

So a requirement for, say, "10 years' sales experience" would place those below the age of around 28 at a disadvantage. So unless that length of experience can be objectively justified, indirect discrimination will have occurred.

Provision, criteria or practice' (PCP) has been interpreted by Tribunals and courts very broadly

Harassment

This is defined as unwanted conduct, related to age, by one or more persons which has the purpose or effect of violating someone's dignity and/or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Such conduct might be name-calling, unwanted offensive jokes, verbal abuse and/or ignoring. There can be no 'objective justification' of harassment and it is essentially the perception of the 'victim' that counts. The only possible defence is that the 'victim' is being oversensitive and the conduct complained of was inadvertent and could not reasonably be taken as offensive. Note that 'bullying', as such, is not a category of discrimination, but bullying behaviour, if based on age (or indeed on the basis of the other protected characteristics), could certainly be regarded as harassment.

The legal definition of harassment is that it only needs to be 'related to age' not necessarily to complainant's age or age group. Therefore in principle, a relatively young person could be offended by persistent 'banter' aimed at older people.

Whether a one-off act can be classed as harassment or whether it needs to be a series of acts will be case and fact-sensitive. Different individuals have different levels of tolerance; what one person sees as offensive others will regard as a joke; and some act as just more serious than others in some objective sense.

Victimisation

This is subjecting someone to a detriment, not specifically due to their age, but because they have done one or more of four so-called 'protected acts', or because it is believed that they have done, or may have done one or more of those protected acts:

- brought proceedings under the Equality Act or its predecessor regulations
- given evidence or information in connection with proceedings brought by someone else
- made allegations that the Equality Act has or may have been contravened; or
- done anything else under or by reference to the Act or its predecessor regulations.

Previous regulation defined victimisation as 'less favourable treatment by reason of having done a protected act' which involved comparisons with others; the Equality Act only refers to 'detriment because of' having done a protected act. Detriment is not defined but it is a concept the courts are used to dealing with.

Instructing, causing or inducing contravention of the Act

A person must not instruct or cause another person(s) to discriminate, victimise or harass another or directly or indirectly induce them to.

Being 'caused to' could arise from a discriminatory policy that everyone is required to follow. Being induced could arise from an indication that a particular course of action would be frowned upon – for example, if a manager who was planning to recruit a 64 year old is told that this would reflect badly on him/her and affect his/her next performance review.

Whether or not the instruction or inducement is acted upon either or both the recipient of the instruction/inducement or the intended 'victim' could have a claim if they suffer a detriment because of what they did or did not do in relation to the Instruction/inducement. Such a claim might be in addition to a victimisation claim from the recipient and or a discrimination claim from the victim if the instruction/inducement is acted upon.

Policies which cause discrimination by others do of open an organisation to claims from 'victims; but they lay the organisation open to claims by those who object to and/or refuse to follow the policy and who then suffer a detriment because of that refusal or objection .

The Act also allows the EHRC to enforce this part of the Act – this is most likely in the case of discriminatory policies.

Aiding Discrimination

A person may not knowingly help another to contravene the basic provisions of the Equality Act and commits an offence if they do so. An example is where a manager asks an HR Officer to tell him/her of the age of all applicants for a job, even though that information is separated out from the application forms and confined to a confidential monitoring form. The HR Officer will be committing an offence if this information is provided and then used to discriminate and they will be jointly liable with the manager.

To be held liable the 'helper' need not intend that discrimination, victimisation or harassment take place or know that it will definitely take place. They must just know that this is a probable outcome.

Of course if someone is asked to help (directly or indirectly), but refuse they would have a claim if they are then subject to detriment for refusing.

Combined (or 'Dual') discrimination

The Act has a provision that covers so-called dual discrimination so that a person could allege that they have been discriminated against because they are, say, an older, black man i.e. suffered less favourable treatment relative to say younger, white men. However, when the Act was passed it was left to the Government to specifically bring the various parts into force. The Coalition Government decide **not** to enact the dual discrimination provisions.

6. What are the Exceptions?

Occupational Requirement (OR) – direct and indirect discrimination in relation to hiring, dismissal, and access to training and promotion can be justified if there is an occupational requirement which can be justified as proportionate means of achieving a legitimate aim (objective justification). In relation to age, the obvious example is in the employment of actors, but even here employers will need to be careful not to draw the requirement too narrowly. In relation to age, OR may be seen to be a bit superfluous since direct and indirect discrimination are capable of being objectively justified in any event.

Positive Action – although positive discrimination is not be lawful (e.g. employing someone because of their age), it will be open to employers and training providers to take 'positive action' which aims to prevent or compensate for disadvantages suffered by people of a particular age or age group. For example, if an employer has an ageing workforce, it may be

legitimate to place vacancy adverts in a magazine more likely to be read by younger people. It would perhaps be unwise to only advertise here, but provided appointments were made on merit, then seeking a greater number of applications from younger people could be a legitimate aim.

National Minimum Wage – the age bands for younger workers are specifically permitted. They are held to be objectively justified in making it easier for younger workers to find work.

Service-related benefits – where benefits increase with service, this would inevitably amount to indirect discrimination since younger workers would have had less opportunity to meet the service criteria. However, the Equality Act specifically permits pay and benefits (e.g. holidays and sick leave/pay entitlements) to be service related (up to 5 years), without them being regarded as indirectly discriminatory, and without them having to be justified i.e. they cannot be challenged. However, any service criterion (of greater than 5 years) can be defended if the employer reasonably believes that a business need is fulfilled. Again, this may be superfluous since indirect discrimination is capable of being objectively justified in any event. Interestingly, the entitlements to statutory minimum notice continue to benefit those with up to 12 years' service. However, where employers provide contractual notice periods greater than the statutory minima those notice periods may well be found to be indirectly discriminatory if they are based on length of service. Similarly, contractual rights to pay in lieu of notice may well be deemed to benefit older employees and so be discriminatory. In both these instances it would be down to the employer to objectively justify the practice, presumably using similar arguments that the Government used to justify giving exemption to service-related benefits and retaining age/service-based calculations for redundancy and unfair dismissal awards.

Redundancy payments – the formula for calculating statutory minimum redundancy payments (which are age and service related) remain and it will be open for employers to continue to enhance such payments where their enhancement formula closely mirrors the statutory formula

Default Retirement Age – this exception, which permitted 'compulsory' retirement at an age no earlier than 65, was dropped with effect from 1st October 2011. A general policy of having a 'normal retirement age' for a group of workers will be directly discriminatory. However, as with all forms of direct discrimination relating to age, it is possible to 'objectively justify' a specific retirement age. Commentators have given various 'legitimate aims that may be put forward as justification for discriminating in this way e.g. to allow opportunities for promotion of younger people, to permit manpower planning, to counter against the effect of an age imbalance in the workforce or to address deteriorating physical condition related to aging. However, aside from whether these are 'legitimate' aims, the courts will look very carefully at the second leg of the justification test i.e. is a fixed retirement age a proportionate means of achieving that aim or are there more appropriate, less discriminatory ways to achieve the same aims.

Job applicants over or nearing 'normal retirement age'. Under the original regulations it was lawful not to consider applicants or not to appoint someone who was either above the employer's normal retirement age (65 or over) or who, within 6 months, will reach that age. As from 1st October 2011 this exception also disappears so any policy or action not to consider or appoint will need to be 'objectively justified'

Pensions – the Government has allowed employers and trustees to retain most age-based rules in their pension schemes on the basis that to unravel them would take considerable time and expense and might discourage employers from providing decent pension benefits.

This is a complex area and those wishing to learn more should see the DWP's guide entitled ['The Impact of Age Regulation on Pension Schemes'](#)

Life Assurance – for employers *not* to provide life cover on the basis of age is likely to be discriminatory. However, it will be lawful to continue to provide life assurance to a person who has retired due to ill-health but discontinue that cover when they reach normal retirement age (if such can be justified) or age 65.

.Acts under statutory authority – any act done because it is required under any statutory provision will not be unlawful. If a statutory provision gives discretion or permission, then this exception will not protect the exercise of that discretion in a discriminatory way.

National security – any act done 'for the purpose of safeguarding national security' will not be unlawful under the Regulations

7. Unfair dismissal rules

Dismissal where the reason or principal is the person's age will be an act of direct discrimination, but the 2006 regulations added 'Retirement' to the list of potentially fair reasons for dismissal of employees. However this potentially fair reason was removed fully with effect from 1st October 2011. Therefore, to be fair a dismissal of an older worker will have to be justified under the normal criteria of conduct, capability, redundancy or 'some other substantial reason'(SOSR). If an employer seeks to objectively justify a retirement age, then any retirement/dismissal at that age would need to use SOSR as the reason for dismissal in defending an unfair dismissal claim.

8. Enforcement

The Equality Act essentially gives individuals rights not to be discriminated against and it is, in the main, individuals who will seek to enforce those rights through the Employment Tribunal system. In the employment context there is no service qualification to the entitlement to make a claim – the rights are conferred from day one of employment and also to applicants before employment. The rights also persist after employment in relation to acts done in connection with the employment e.g. in connection with the provision of references.

A claim must be presented within three months of the alleged act of discrimination, or, where the complaint is of a continuing act (e.g. with harassment) within three months of the last instance. Tribunals have discretion to allow claims after this date where it is 'just and equitable' to do so.

In any claim it is for the Claimant to show a prima facie case of discrimination. It is not enough to simply say "I am age 55, I have been dismissed, and therefore I have been directly discriminated against". In this instance the Claimant would have to show facts which point to the fact that dismissal *could* have been because of his/her age, by pointing to situations where younger people have not been dismissed in similar situations or where there may have been other examples where the employers 'took' against the employee in relation to age. Once the Claimant has shown that a prima facie case exists, then it is for the employer then to seek to show that, in this example, the dismissal was for a reason other than age e.g. conduct or capability.

Remedies available following a successful claim are:

- a declaration as to the rights of the Claimant (and the Respondent) in relation to the matters claimed

- compensation for 'economic loss' sustained as a result of the discrimination e.g. loss of earning in the case of a dismissal found to have been discrimination
- compensation for damages. In age cases this is likely to be compensation for 'Injury to Feelings', but in principle could also include 'personal injury', if, for example, the discrimination leads to depression
- unlike in unfair dismissal cases, the monetary compensation available to Claimants is not capped

Tribunals can now also issue Respondents with recommendations in a more general sense and not just confined to a successful Claimant's personal rights and circumstances. For example they may recommend that an employer make specific changes to a particular policy. Unreasonable refusal to follow any such recommendation may lead to the Tribunal increasing the compensation to the original Claimant, and, in serious cases, could be the trigger for an EHRC investigation.

Although it is individuals who will seek to enforce their personal rights, the equality & human Rights commission (EHRC) has powers to investigate employers and other bodies where they believe the Act to have been contravened and to issue 'unlawful act notices' where applicable. Such powers are only used when there is prima facie evidence of systematic and consistent contravention of the law e.g. in relation to unlawful job advertising which seems to reveal an overt policy of discrimination or in relation to systematic unlawful instructions to discriminate. The EHRC may also active support an individual in the pursuit of their individual rights.

Conclusion

All employers must make ensure that their working practices comply with the legislation. Since 2006 there have been a significant number of age discrimination claims – there were 6,800 in 2010/11. Employers will want to minimise the time and expense of defending claims by ensuring that they comply.

With older workers, employers can take positive steps in order to ensure that employees do not feel discriminated against. One such step is to allow them to attend a Pre-retirement course, which will help them to prepare sensibly for retirement, whenever they choose to retire.