

Age Discrimination and Redundancy

Protection for all ages in redundancy



Overview

It is unlawful to treat a person differently in the workplace because of their age, unless such treatment can be objectively justified or is covered by an exemption or genuine occupational requirement. The age discrimination provisions of the Equality Act 2010 apply to the selection processes employers are entitled to adopt when deciding who should be made redundant. There are no longer any upper and lower age limits for entitlement to a redundancy payment.

What is prohibited?

Various forms of age discrimination are prohibited by the Equality Act 2010.

Direct Discrimination - Where a person is treated less favourably because of their age. For example, an upper or lower age limit is set for a particular job and you fall outside that age bracket.

Indirect Discrimination - Where a provision, criterion or practice applied to all has a greater impact on workers in one age group than those in another. For example, a redundancy selection process which is based solely on 'last in, first out' is likely to discriminate against younger employees who may not have worked in a company for as long as older colleagues. However, length of service as one of a number of selection criteria in redundancy situations has been held to be objectively justified, despite indirectly discriminating against younger workers.

Victimisation - This is less likely to be relevant in the redundancy context. It may occur if, for example, you make a complaint/bring a claim of age discrimination because you have been overlooked for promotion, and then you are selected for redundancy as a result.

Harassment - This is also prohibited but it is unlikely to be relevant to the issue of redundancy.

However, a practice or procedure that treats employees differently because of their age may not fall foul of the law if an employer can show that it can be objectively justified as a proportionate means of achieving a legitimate aim. In the case of age discrimination this applies to both direct and indirect discrimination.

What actually amounts to an 'objective justification' is determined by the Courts and Employment Tribunals on a case-by-case basis, but includes issues such as the health and safety of employees and members of the public and business needs such as providing career development opportunities and succession planning.

Selection criteria for redundancy

Redundancy selection should not be based directly or indirectly on age, and some examples of criteria that are based on age or length of service

have been given above. However, your employer may be able to objectively justify such selection criteria, so it will not be enough for you to simply point to an age-based or age-related criterion or reason for selection in order to succeed in a discrimination claim. You may also have to show either that the employer did not have any good reason to impose this criterion, or that the criterion went further than it needed to in order to achieve any legitimate aim your employer was pursuing. Recent case law indicates that factors such as length of service may be included as part of a number of selection criteria in a redundancy situation without falling foul of age discrimination law.

Statutory redundancy payments

There are no upper and lower age limits for a redundancy payment. This means that all employees, including those over 65, are entitled to statutory redundancy pay if the reason for their dismissal was redundancy and they have two years' service. However, age and length of service will still be used as a factor in calculating statutory redundancy pay.

Without the qualifying two years service, you will not be entitled to a redundancy payment regardless of your age and the reason for your dismissal.

"Redundancy selection should not be based directly or indirectly on age"



How are statutory redundancy payments calculated?

Redundancy payment calculations take both age and length of service into account.

Your redundancy payment is based on a weeks pay, subject to a statutory cap which is currently £400 - as of 1st February 2011 x length of service x a multiplier based on age.

The multipliers based on age are calculated by reference to age bands: you receive half a weeks pay for your years of service until you were 21 years old; you receive one weeks pay for each year's service when you were 22-40 years old; and you receive one and a half weeks pay for your years of service for any time when you were over 41 years old.

These are unaffected by the age discrimination provisions in the Equality Act even though the rate of payment is determined by age as there is a specific exemption.

Enhanced redundancy payments - 'The Act' contains a specific exemption for enhanced redundancy payments. Your employer will still be able to make such enhanced payments, without risk of challenge, where their scheme is merely an enhanced version of the statutory scheme, for example, where the enhanced payments are calculated in accordance with the age bands used to calculate statutory redundancy payments (set out above).

However, if the scheme that you are a part of is different from the statutory scheme, then it will not be automatically exempt from challenge. For example, if the scheme you are a part of does not use the age bands used to calculate statutory redundancy payments, or does not use any age bands at all but does take length of service into consideration, then such schemes may be capable of challenge if there is less favourable treatment because of age or it gives rise to indirect discrimination (subject to it being objectively justified). Recent cases have indicated that linking payments to length of service may be justified where the aims are to encourage turnover of staff and create opportunities for junior staff, and also to reflect the fact that older workers are vulnerable in the job market.

Bringing a claim for age discrimination

Compensation for age discrimination is potentially unlimited and will reflect the loss actually suffered as a result of the discrimination.

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.

You may also need to follow the ACAS Code of Practice on Disciplinary 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. It still needs to be brought within three months less one day of the treatment you are complaining about.

Further information

This factsheet is intended to deal only with the age discrimination provisions of the Equality Act that relate to redundancy.

A comprehensive overview of the law on age discrimination can be found in the factsheet entitled '*Age Concerns*' which is available on the RJW website. There are also a number of other factsheets available on the website dealing with specific aspects of the law on age discrimination.

Contact Us

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



0800 916 9015



Email: enquiries@rjw.co.uk



Web: www.rjw.co.uk



Our offices:

Birmingham, Bristol, Cardiff, Edinburgh (Associated Office), London, Manchester, Milton Keynes, Newcastle, Sheffield, Wakefield

Regulated by the Solicitors Regulation Authority. (SRA No. 54695)
Prepared by Russell Jones & Walker Solicitors 2011.

This factsheet is for general guidance only and should not be treated as a definitive guide or be regarded as legal advice. If you need more details or information about the matters referred to in this factsheet please seek formal legal advice. This information was correct at time of going to press August 2011.