

Age Discrimination

Age Discrimination in Employment



Since the mid 1970's, UK law has prohibited discrimination on the grounds of race and sex (gender) in the workplace. Currently however, there is no specific legislation that prohibits discrimination in the workplace on the basis of age. Contrast this with the position in the US where age discrimination legislation is well established.

The European Commission's Equal Treatment Framework Directive (No 2000/78) required all member states to introduce new laws to prohibit discrimination on the grounds of religious belief and sexual orientation by 2 December 2003, and on the ground of age by 2 December 2006. A Government consultation on age discrimination continues and regulations prohibiting age discrimination will come into effect on 1 October 2006.

Proposals to outlaw Age Discrimination

It is proposed that if an employer makes a decision that is based upon an individual employee's actual or perceived age, this will amount to direct age discrimination. In addition to this, an employer may be guilty of indirect age discrimination in circumstances where a particular employment policy or practice serves to place a certain category of employee at a disadvantage simply because of their age.

Like the existing anti-discrimination laws, there will also be provisions outlawing harassment on the ground of age and the victimisation of those employees who raise complaints of age discrimination or assist colleagues in doing so.

How will the new regulations change things?

At the present time, a selection for redundancy purely on the basis of age may well amount to unfair dismissal and if the employee is still a number of years away from retirement, damages for future loss could be substantial, although subject to the prevailing statutory cap for unfair dismissal.

Once the new regulations come into effect, selection for redundancy on the basis of age will amount to direct age discrimination. A finding of

age discrimination can result in an award of unlimited damages, including an award in respect of injury to feelings.

The practice of selecting older employees for redundancy over their younger colleagues will amount to direct discrimination. Conversely, the practice of selecting employees for redundancy on a "last in, first out" basis may well amount to indirect discrimination under the new regulations on the basis that younger employees are more likely to be selected under a policy that is based on length of service.

Another area where the regulations may have an impact is in respect of policies that provide for increases in benefits as length of service increases. For example, many employers have a policy whereby pay scales increase automatically according to length of service. Such policies do not necessarily reward good performance and so it could be argued that they are not justified unless employers can show that long serving staff merit higher pay levels for performance related reasons and not simply because they are long serving.

In terms of employment availability, once the regulations are effective, employers will no longer be able to advertise for potential employees within a certain age group, as this will amount to direct discrimination.

Similarly, screening a particular applicant out of a recruitment process on the basis of their age will also amount to discriminatory treatment. It is likely, however, that the new regulations will set out a limited number of exceptions where employers will be able to select employees of a particular age in circumstances where there is a genuine occupational requirement (GOR) for a worker to be of a particular age.

Obvious examples of a GOR include where it would be illegal to employ an individual who is below a certain age. It is probable, however, that there will be fewer legitimate GORs in the area of age discrimination than there would be for some other areas of discrimination such as sex or race.

Where are we now?

Although we don't as yet have any specific legislation prohibiting discrimination on the basis of age, there are still some areas of employment law where age is a relevant factor.

There has recently been new case law on the issue of what should be the "Normal Retirement Age" (NRA) within a particular company. An employee who has reached the age of 65 at the effect date of his or her dismissal is currently barred from bringing a claim for unfair dismissal, unless, within the particular employer, the normal retirement age is over 65. In order to establish what the NRA is for a particular company it is necessary to see if there is a contractual retirement age or, if not, what evidence exists as to at what age employees are regularly retired. Once the new anti age discrimination laws come into effect it is possible that any mandatory retirement age will constitute direct discrimination and so employers will have to use other criteria such as performance issues to justify a dismissal.

The bar on employees over 65 claiming unfair dismissal and receiving redundancy payments has given rise to claims of sex discrimination. These claims were lodged by men aged over 65 who argued that the age barrier had a disproportionate effect on men and could not

be justified. At the present time, these claims have been unsuccessful, although permission has been granted to take the cases on appeal to the House of Lords. The appeal is likely to be of great interest to a number of cases that have been stayed in the Employment Tribunal pending a final decision as to whether older workers can bring complaints of unfair dismissal and claim redundancy payments. It should be noted however that the situation is likely to be remedied by the new age discrimination regulations.

THE UK government has recently clarified the impact the forthcoming age discrimination legislation will have on mandatory retirement ages. Trade unions although supportive of measures designed to prevent age discrimination had expressed reservations about any move to increase the retirement age.

The UK does not currently have a mandatory state retirement age. However, 65 is commonly taken to be the national retirement age as this is the age from which the state pension becomes payable. The statutory right to claim unfair dismissal is also confined to those below an employer's normal retiring age or, in the absence of such, 65. At present many employers have mandatory retirement ages below 65 and are able to enforce these because there is no anti-age discrimination protection in force in the UK.

The government recently announced that age discrimination legislation will:

- set a default retirement age of 65, but also create a right for employees to request to work beyond 65 or the employer's own justified retirement age, that employers will have a duty to consider;
- allow employers to objectively justify earlier retirement ages if they can show it is appropriate and necessary;
- provide for a review of the retirement age in five years to see if the it should be changed.

In the absence of objective justification, employers will be unable to force early retirement on employees before they reach 65.

Whilst such employees may have claims for unfair dismissal after 1 October 2006, they will also have the right to claim that they have suffered age discrimination. Only in limited industries will employers be able to successfully argue that the default age should be less than 65 and these exceptions are likely to be rare.

To find out more

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[Email enquiries@rjw.co.uk](mailto:Email.enquiries@rjw.co.uk)
www.rjw.co.uk

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