

### Termination of Employment

The Draft Regulations provide for an exemption allowing employers to retire employees at or above 65 and also to set retirement ages within their organisations at or above 65. Employers will also be able to justify retirement and retirement ages below the national default retirement age if they can satisfy the general test of objective justification.

The Draft Regulations will remove the upper age limits on the right to claim unfair dismissal. "Retirement" will become a potentially fair reason for dismissal along with the existing reasons such as "conduct" and "capability".

A retirement dismissal will be fair when:

- it is genuinely a dismissal on grounds of retirement
- when it takes place in accordance with the new procedural requirements for compulsory retirement (the "duty to consider" procedure).

The Draft Regulations introduce the concept of a "planned retirement date". A retirement will be "planned" if:

- it takes effect at the national default retirement age of 65
- it takes effect at the employer's normal retirement age (which must be objectively justified if less than 65), or
- the employer has informed the employee of the retirement age date in writing at least six months in advance.

In the case of a "planned" retirement an employee will be able to bring a tribunal claim arguing that the retirement was a sham to conceal a dismissal for another reason. Where retirement is not planned the employer will have to satisfy a tribunal that the reason for dismissal was retirement and the burden of proof will rest on the employer.

### Fairness of a retirement dismissal

The Draft Regulations provide that a retirement dismissal will be unfair, if

- the employee has made a request to work beyond retirement but the procedure has not been completed due to a default on the employers part, or
- if the employer has failed to inform the employee in writing, by two weeks before retirement, of the "right to request" to work beyond retirement and the employee was unaware of the right to make a request or of the intended retirement date.

In all other circumstances a retirement dismissal will be fair.

### What is the "right to request" procedure

All employees have the right to request to work beyond the default retirement age of 65 or the retirement age set by their employer. All employers will have a duty to consider requests from employees to work beyond 65.

### Automatically unfair retirement dismissals

Any retirement dismissal will automatically be unfair if:

- prior to retiring the employee, the employer has not informed the employee at all of the right to request to continue working and of the intended retirement date or the employer had informed the employee less than two weeks before the retirement date
- once a duty to consider procedure has started, the employer fails to comply with it properly.

The existing statutory dismissal procedure will not apply to retirement dismissals. Only the "duty to consider" procedure will apply. However if a tribunal decides that retirement was not the true reason for dismissal, then the employer will almost always be in breach of the statutory dismissal procedure and will therefore be liable for an automatically unfair dismissal.

### Next steps

The new legislation is not finalised at the time of writing and you should take legal advice if this newsletter has raised issues for you.

The effects of the new rules are potentially very widespread. It is vital that employers review existing recruitment, pay, benefits and retirement policies and amend them accordingly.



The newsletter from Tobins Solicitors LLP

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# employmentbriefing

## age discrimination special

### Age discrimination: the new regulations

Recent research by the Chartered Institute for Personnel and Development indicates that age discrimination and stereotyping are widespread in UK organisations.

Age is the major gap in UK discrimination law. The government is due to publish the final version of the Employment Equality (Age) Regulations 2006 in March 2006. The Regulations are due to come in to force on 1st October 2006.

#### Who is covered?

The following are protected under the draft Regulations:

- Employees (including police officers and servants of the crown)
- Contract workers
- Office holders such as company directors
- Members of trade organisations
- Those in vocational training or receiving or holding a professional or trade qualification
- Job applicants and applicants for places on vocational training courses

Unpaid volunteers and members of the military are excluded

#### What is age discrimination?

For the purposes of the draft Regulations a person ("A") discriminates against another person ("B").

- On grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
- A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but
  - which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons
  - which puts B at that disadvantage
  - and A cannot show the treatment, or as the case may be, provision criterion or practice to be a proportionate means of achieving a legitimate aim.

Thus the draft Regulations provide protection from both direct and indirect discrimination.

#### Can age discrimination be lawful?

The answer to this is yes but in specific circumstances. The discrimination will be lawful if it can be justified, that is, it pursues a legitimate claim and it is an appropriate and necessary means of achieving that aim. Specific exemptions from the Draft Regulations include the following areas, unless objectively justified

- Pay and other employment benefits
- Pay related to the national minimum wage
- Retirement

## About us

Tobins Solicitors LLP is a law firm specialising exclusively in discrimination and employment law.

Our experienced team provide clear, concise and cost effective advice across the full range

of issues dealt with by human resource professionals. We also act on behalf of senior employees. Our aim is to provide a high quality service whilst still being friendly and approachable.

If you would like to receive further updates from us, please email us.

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- Occupational pension schemes
- Invalidity benefit schemes
- Benefits for no more than five years service
- Benefits based on length of service
- Statutory benefits - there is also an exception where an employer can show that there is a genuine occupational requirement

#### Recruitment and selection

Under the Draft Regulations it is unlawful for an employer to discriminate against a person.

- (a) in the arrangements he makes for the purpose of determining to whom he

should offer employment

- (b) in the terms that he offers that person employment, or

- (c) by refusing to offer, or deliberately not offering, him employment.

(a) and (c) do not apply in relation to a person who has attained the age of 65 and who, if recruited, would be an employee or in crown employment.

Thus if someone who is 65 or over is refused employment then that person would have no right to submit a claim to a tribunal. However if that person is then employed they will be

entitled to be employed on the same terms as a younger employee in the same circumstances.

The Draft Regulations allow for positive action in encouraging persons of a particular age to apply for a job. This is different from positive discrimination where someone is recruited because they are in an under represented age group and which will only be justified through the general test of objective justification.

This is likely to be a difficult area for employers and we have provided a check list on recruitment and selection as a guide.

#### CHECKLIST ON ADVERTISING

- Age, age related criteria or age ranges should not be used in advertisements other than to encourage applications from age groups which do not usually apply.
- Ensure that age neutral images and language are used in advertisement.
- Place job advertisements in ways most likely to attract a mixed age response. For example, bear in mind that young people are much more likely to use career services and the internet.

#### CHECKLIST ON INTERVIEWING AND SELECTION

- It is vital that staff responsible for selecting and interviewing are trained in age discrimination and equal opportunities generally.
- Never use information on equal opportunities as part of the selection process. This is supplied by candidates for monitoring purposes only.
- Ensure that interviewers are aware of all job specifications and only focus on these, applying them objectively and consistently across all candidates, recording their decisions and the reasons behind them.
- Assess candidates objectively on their ability to do their job, relevant knowledge and experience and personal qualities, not their age or physical characteristics. Keep records of the assessment.
- Try to use a mixed age interview panel.
- At interview ask questions related to the job and not about personal circumstances.
- Use age profiling to monitor the selection process at short listing, interview and appointment to ensure that you have been fair.
- If a judgement on a candidate's health or fitness is required, consult a medical practitioner or occupational health practitioner and do not make assumptions based on age.



#### Terms and conditions of employment

The Draft Regulations make it unlawful for an employer to discriminate against a person.

- (a) in the terms of employment on which he affords him
- (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit
- (c) by refusing to afford him or deliberately not affording him any such opportunity, or
- (d) by dismissing him, or subjecting him to any other detriment

This is relatively straight forward. However problems are likely to arise because of the exemptions that are associated with it.

Under the Draft Regulations any service related benefits which are based up to (but not more than) five years service are permitted and will be able to continue. It may of course still be possible to use service longer than five years as a criterion for an employment benefit but this will have to be justified.

Any length of service requirement that mirrors a similar requirement in as statutory benefit and will be able to continue. For example it will not be indirectly discriminatory for an employer to pay redundancy payments to workers with less than two years service.

#### CHECKLIST ON TERMS AND CONDITIONS

- Review all pay and benefits policies and check whether any are based on age related criteria. Make sure they relate to experience and other non-age related criteria.

#### CHECKLIST ON PROMOTION

- Advertise opportunities through open competition and inform all staff
- Consider a promotion and development policy that emphasises age is not a barrier
- Train managers involved in promotion in equality and diversity. Focus on candidate skills and abilities, not length of service. Monitor your procedures

#### Occupational health issues

Management of the health of all workers is likely to create a challenge under the new regime. It will also be necessary for human resources professionals to reconsider the terms and conditions that employers offer including health and welfare benefits.

Occupational health departments will have a key role under the new regulations given their responsibility for carrying out pre-employment assessments.

The benefits that will need to be considered include life assurance, disability income, free

eye checks and payments towards the cost of health screening for individuals over the age of 55. It is likely that employees dismissed on capability grounds will add on a claim for age discrimination as a matter of course.

The Draft Regulations allow employers and scheme providers to fix ages for admission into sickness benefit schemes including permanent health insurance, contractual sick pay and possibly life insurance and some limited private medical insurance. Similarly, the use of age criteria in actuarial calculations in or in relation to any work related benefit scheme is not unlawful.

#### Harassment

Under the Draft Regulations a person ("A") subjects another person ("B") to harassment where, on the grounds of age, A engages in unwanted conduct which has the purpose or effect of

- (a) violating B's dignity, or
- (b) creating an intimidating hostile, degrading, humiliating or offensive environment for B.

The harassment of an older worker does not necessarily constitute age harassment. The reason for the conduct must be the person's age in order for it to be unlawful.