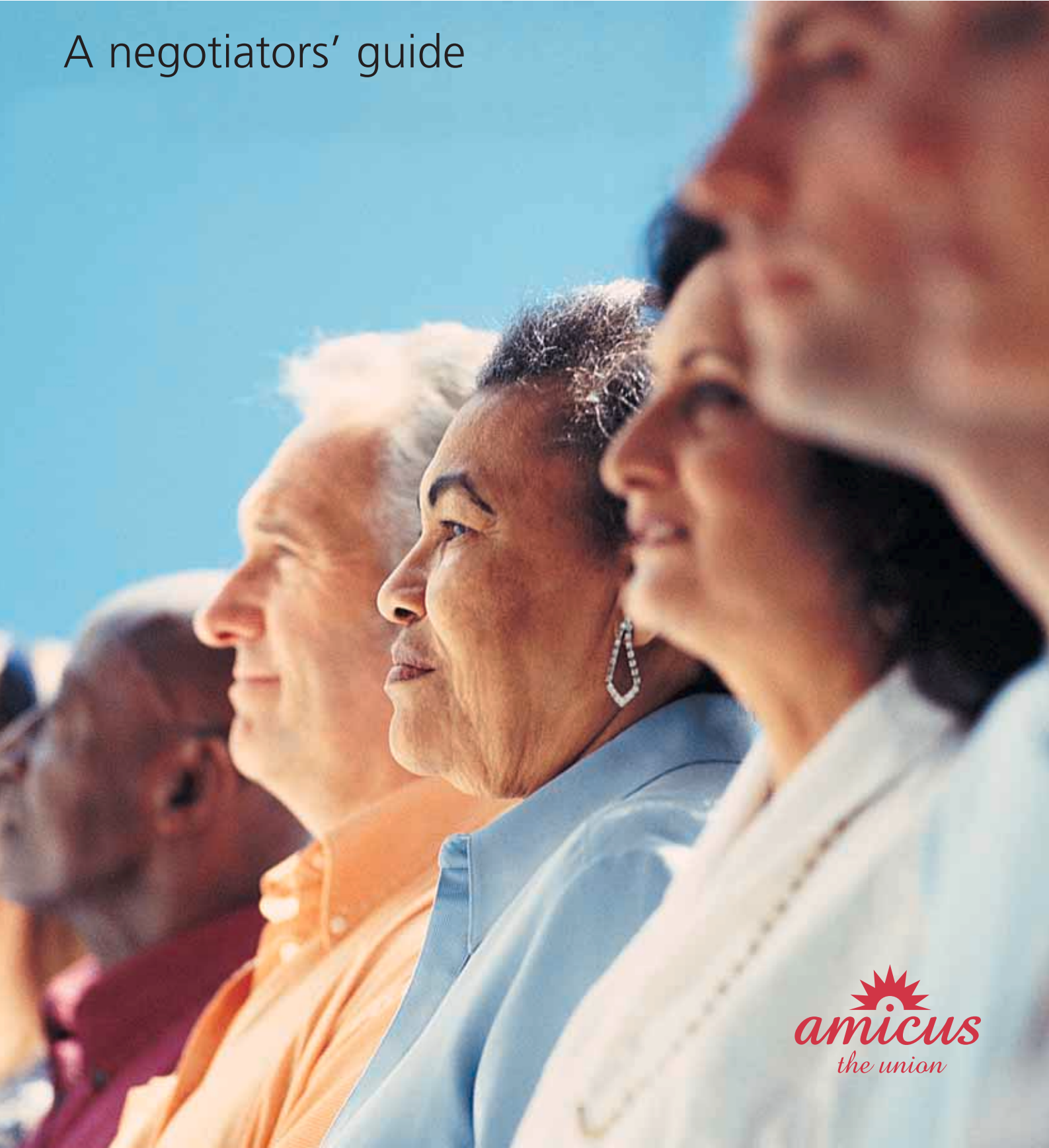


COMBATING AGE DISCRIMINATION

AND ACHIEVING AGE DIVERSITY AT WORK

A negotiators' guide



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Introduction

Amicus is committed to supporting our activists and workplace reps with the resources, information and training to update equal opportunities policies in the workplace. With new legislation on equality, there is an opportunity for Amicus to develop proactive negotiations on equality and this guide is designed to support these negotiations.



Amicus members can be confident that they will be treated with dignity and respect at work, and that where Amicus is organised, we can deliver better terms and conditions for all members.

Derek Simpson Amicus General Secretary

Age discrimination at work is regarded by many as a major social problem in the UK and impacts on all age groups. The age discrimination regulations have now brought the issue to the fore and are an opportunity for Amicus negotiators to ensure that employers are taking action to eradicate age discrimination in both policy and practice.



Organisations should be employing a diverse workforce, not only because it is best practice, but because it is a business benefit, giving the employer a wider pool of skills with the ability to deliver high quality service and increased productivity.

Skills, competence and experience should be the determining factors in employment decisions not age.

A number of organisations are reviewing their policies, procedures, and employee pay and benefits in relation to the introduction of the age discrimination regulations. These include pay schemes, redundancy schemes, early retirement, increasing retirement ages, holidays, long service awards and sickness absence policies. Amicus is currently obtaining legal guidance on these issues and will be publishing guidance which will be universally applied throughout Amicus. In the meantime, you should contact your Amicus Officer for advice if there is any attempt by employers to reduce any employee benefits because of the age discrimination regulations.

Amicus representatives and shop stewards have an important role in tackling age discrimination in the workplace, through negotiating policies and practices with employers and ensuring that employers are complying with the law. I would urge you to make use of this guide in your negotiations with employers on age discrimination and diversity issues.

Siobhan Endean Head of Equalities

■ Age: the facts

- The UK is an ageing population, the proportion of the population aged 65 and over has increased, but the proportion below the age of 16 has decreased over the last 30 years. As a result of this the working age population is contracting.¹
- Age discrimination at work occurs across the age range, although it is more common at the younger and older age ranges, particularly under 25 and over 50.²
- 45-59 year olds form the largest group in the labour force.
- The number of workers aged less than 35 is falling, with the fastest decreases amongst those aged 18-24.³
- Some define older workers as women over 35 and men over 42.
- 95% of 55-65 year old men were working in 1975, by the end of 20th century this had reduced to 60%.⁴
- One in five women aged 60-64 are working compared with one in eight men in the same age group.⁵

■ Age at work: the issues

Age discrimination at work is complex issue occurring across all age groups. It is caused by stereotyping and the widespread practice of classifying people by age in the UK. It affects many elements at work including recruitment, promotion, training, assessment of performance and redundancy.

Research has revealed the following:-

- Older workers' experience of age discrimination is linked to stereotypical assumptions about retirement, health, vitality and both physical and mental competence.
- Younger workers also suffer from stereotyping and can be viewed as irresponsible, unreliable, lacking skills and knowledge.⁶
- 39% of people feel that retirement has been forced upon by their employer due to health reasons or redundancy.⁷
- 8 out of 10 young people believe that age discrimination is widespread.

¹ *National Statistics Online, Ageing Briefing, 2006*

² *Survey of employers' policies, practice and preferences relating to age, DWP, Metcalf and Meadows, 2006*

³ *Facts and misunderstandings about demography and the workforce, DWP, Warnes and John, 2005*

⁴ *Age: The Facts. Employers Forum on Age, 2006*

⁵ *Factors affecting the labour market position of older workers, DWP, Humphrey, Costigan, Pickering, Stratford and Barnes, 2003*

⁶ *Survey of employers' policies, practice and preferences relating to age, DWP, Metcalf and Meadows, 2006*

⁷ *Factors affecting the labour market position of older workers, DWP, Humphrey, Costigan, Pickering, Stratford and Barnes, 2003*

- Young workers reported that most of the incidences of age discrimination in the workplace related to management practices and inappropriate behaviour in the form of bullying, being asked to do all the menial tasks and being overlooked for promotional opportunities.⁸
- Equal pay audits in the finance sector have revealed that men start to gain promotion in their late 20s and early 30s which is when many women are starting families. Many women in this age group do not gain promotion and although this is predominately due to sex discrimination and lack of flexible working, there is a link to age.

What research also reveals is that the attitudes of employers are totally unfounded. A number of studies have shown that in most jobs there is little or no relationship between age and job performance. There are changes that occur due to ageing, but most occur well after normal working age and are totally irrelevant to the workplace.⁹ Amicus shop stewards and representatives have an important role in dispelling the myths surrounding age.



■ The business case for age diversity

There are clear business benefits for age diversity, particularly as the UK workforce is growing older and the working age population is reducing. This is set against a background of skills shortages where employers are finding it difficult to recruit staff in some areas. The business benefits include:

- Reduced costs as a result of improved employee retention
- Lower recruitment and training costs
- Increased productivity
- Being viewed as an employer of best practice, thereby attracting the best workers
- A more talented workforce
- Retained corporate knowledge.¹⁰

⁸ *Ageism: Attitudes and experiences of young people, 2001*

⁹ *Facts and misunderstandings about demography and the workforce, DWP, Warnes and John, 2005*

¹⁰ *Age: The Facts, Business Case, Employers Forum on Age 2006*

■ Flexible working

Flexible retirement can be a useful way for workers to deal with the change between full-time work and retirement. This is likely to become more prevalent because of the age discrimination legislation and changes to occupational pension rules which allow an employee to draw a pension from their employer, but continue to work in the same organisation.

Research shows that over three-quarters of organisations allow flexibility in the lead up to retirement and the figures are similar for allowing flexible working for eldercare. Flexibility can include part-time working, staged retirement and continuing on a fixed term contract. However, only 56% of organisations have formal flexible retirement policies.¹¹

The Government will be introducing the right to request flexible working for employees caring for adults in April 2007, in addition to the existing right for parents with young children. Alongside the age discrimination regulations and changes to pension legislation there is an opportunity for Amicus **to negotiate flexible working policies for all workers** where policies are not in place at present.

We do not support that the right to flexible working should be confined to certain groups of workers. If we are to achieve a culture change in the workplace then all employees should be able to work in a flexible manner without it affecting their career prospects or the jobs that they do. More information on the flexible working is available in the Negotiators' Guidelines on Work-Life Balance which is available at the Amicus Equal Rights Website or your Amicus Regional Office.

<http://www.amicustheunion.org/Default.aspx?page=39>

■ Negotiating in the workplace

The following should be considered in any negotiations on age diversity in the workplace:

1. The organisation should carry out an equal pay audit covering age, gender, disability and race in partnership with Amicus. Advice on how to carry out an equal pay audit can be found in the Amicus Guide to Equal Pay www.amicustheunion.org/PDF/equal-pay.pdf or you can contact your Regional Office for a hard copy.
2. Equal opportunities and harassment policies should be introduced if the organisation does not have these already. Representatives and shop
3. An action plan should be set, including confidential monitoring on age, with targets, towards achieving a more age diverse workforce if this is necessary. The plan should be reviewed on a regular basis for effectiveness.

stewards can refer to the Amicus guide to negotiating for equality for guidance on equal opportunities policies which is available on the Amicus Equal Rights website or from your Regional Office. If the organisation has already introduced these policies they should be reviewed to check if they are being implemented in practice.

¹¹ *Survey of employers' policies, practice and preferences relating to age, DWP, Metcalf and Meadows, 2006*

4. Employers should provide training for all staff on equality to include age discrimination. The training should ensure that employees have an understanding of the employers' policy on age and their obligations under the Age Discrimination Regulations. It should make clear that the discrimination and harassment of workers of any age is unacceptable and will not be tolerated. Extra training should be provided for managers and those staff who recruit, select and train employees
5. Recruitment and selection procedures should be reviewed to ensure that they do not discriminate on the grounds of age. For example, employers will not be allowed to recruit young workers to an organisation, simply because their target audience for customers is young and vice-versa. Employers should avoid specifying a minimum length of experience, as this disadvantages younger workers. The quality and relevance of experience to a job is important, not the number of years of experience. Although, certain qualifications are relevant for many jobs, organisations should avoid phrases like "only people with GCSEs should apply" as this excludes many older people who left school before GCSEs were introduced.
6. Job descriptions and criteria for applications should be reviewed to check that there is no bias on the grounds of age. Employers will not be allowed to use age restrictions on applications for jobs.
7. Employers should ensure that advertisements for jobs are in a form that will encourage a diverse range of applicants. Employers will no longer be able to use age restrictions in job advertisements. Subtle use of language may also lead a tribunal to draw an inference of age discrimination, e.g. asking for "mature candidates" or references to a "young, dynamic company". Advertisements should use language and pictures that appeal to a wide range of age groups. Job advertisements and applications should include information on an organisation's equal opportunities policy, including welcoming applications from all age groups. If employers use a recruitment agency they will need to check that the agency is not discriminating on the grounds of age.
8. Job advertisements should not be confined to one method or one publication to ensure that a diverse range of people have the opportunity to apply. For instance, many organisations have graduate recruitment schemes. Although, it will still be acceptable to target universities in recruiting employees for the scheme, employers will also need to ensure that they are using other mediums for advertising so that they can attract a wider range of applicants of all ages.
9. Training should be available to all workers – it is not appropriate to overlook someone for training because of their age, e.g. because of stereotypical attitudes of capability. Employers should consider offering pre-employment training, where appropriate, to prepare potential job applicants for interviews and selection tests.
10. An employer should review its image. Does it encourage under-represented groups to apply for jobs and promotion? Is it viewed as an organisation that is committed to equality and diversity? Do publications use language and pictures that appeal to a wide age group?



■ The employment equality (age) regulations

The Employment Equality (Age) Regulations 2006 come into force on 1 October 2006. They apply in England, Wales and Scotland. Similar provisions contained in the Employment Equality (Age) Regulations (Northern Ireland) 2006 will apply in Northern Ireland.

The Regulations apply to all employment and vocational training. They do not extend to education (apart from vocational training) nor to the provision of goods and services.

A number of organisations are reviewing their policies, procedures, and employee pay and benefits in relation to the introduction of the age discrimination regulations. These include pay schemes, redundancy schemes, early retirement, increasing retirement ages, holidays, long service awards and sickness absence policies. Amicus is currently obtaining legal guidance on these issues and will be publishing guidance which will be universally applied throughout Amicus. In the meantime, you should contact your Amicus Officer for advice if there is any attempt by employers to reduce any employee benefits because of the age discrimination regulations.

1 Who the regulations apply to

(a) Workers

The Regulations apply to all employment, which is widely defined as meaning employment under a contract of service or apprenticeship, or any contract to do work. This definition includes contract workers, temporary workers, casual staff, even self-employed workers where they are personally engaged to do the work.

The Regulations apply to anyone who is in employment and also those applying for jobs and those whose employment has terminated.

There is no service requirement in discrimination cases, so a worker is protected from their first day at work, or indeed prior to their employment if they are discriminated against in their application for employment.

(b) Vocational training and further and higher education

Vocational training is covered by the Regulations, defined in terms of all types and levels of training "which would help fit a person for any employment". Other types of vocational training, such as practical work experience, are also covered.

Higher and further education institutions are covered in relation to the terms on which students are admitted and their access to benefits.

(c) Trade unions

As with other discrimination legislation, the activities of trade unions fall within the Regulations. A union is subject to the requirements of the Regulations both in relation to its own staff and also in relation to its members: their application for membership, the benefits they receive and any other service or aspect of membership.

(d) Office holders and the armed forces

Unpaid office holders, such as members of boards, MPs, councillors and serving members of the armed forces are excluded.

(e) Geographical application

The Regulations apply to employment or work "at an establishment in Great Britain". This includes situations where the work is carried out entirely or partly in Great Britain, and also situations where the work is entirely outside but where:-

- the employer has a place of work in Great Britain
- the work is for the purpose of the business carried on at that establishment, and
- the employee is ordinarily resident in Great Britain when they apply for or are offered the employment, or at any time during their employment.

As with other equality legislation, this is likely to be interpreted by employment tribunals as covering people only working in Great Britain for limited periods of time.

2 Discrimination

The Regulations make it unlawful to discriminate directly or indirectly, on the grounds of age, and also to harass or victimise a person.

(a) Direct discrimination

Direct discrimination occurs when a person is treated less favourably than another on grounds of age. This involves a comparison between how the claimant has been treated, and how a person of a different age (“the comparator”) has been or would have been treated.

The Regulations cover treatment based on a perception of someone’s age, even if their actual age is not known, or an assumption made about a person’s age is incorrect.

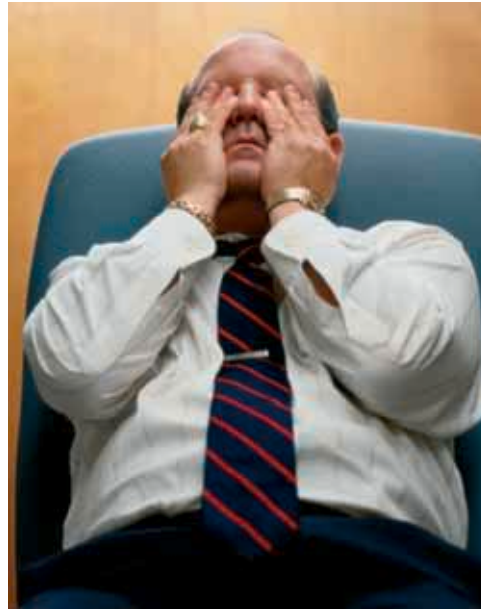
Proving that a person has been treated less favourably than another on the grounds of age may be difficult.

Of course, recruitment processes that state or imply that people of a certain age are more welcome than others are relatively straightforward to challenge. In a recent Irish case, Ryanair lost an age discrimination claim when they advertised for “a young and dynamic professional”. Their defence that the word “young” was intended to refer to energy and dynamism rather than age, was unsuccessful.¹²

But discrimination is rarely so obvious. It often arises as a consequence of stereotypical assumptions about characteristics associated with age: that an older person will be unsuitable for a dynamic role or is likely to take increased sick leave; that a younger person is not reliable.

As with the other discrimination laws, the Age Regulations acknowledge that the only way to prove that discrimination has occurred is to draw inferences. A Tribunal may therefore infer that unlawful discrimination has taken place where the acts could potentially point to a finding of discrimination and the employer is unable to provide a legitimate non age related explanation.

One of the key distinctions between



direct discrimination on grounds of age and direct discrimination on the grounds of for example gender or race, is that an employer can lawfully justify direct age discrimination. To do this the employer must show that the treatment was necessary to achieve “a legitimate aim” and that it was “proportionate”. A legitimate aim must be shown to correspond with a real need on the part of the organisation, and is appropriate and necessary for achieving that aim.

It is likely that the justification defence could include economic and budgetary factors but discrimination will not be justified simply because it is more expensive not to discriminate. Also, the justification cannot itself be tainted by age discrimination. So, the Government’s 2005 Consultation document “Coming of Age” provides by way of illustration the example of a retailer who wants to attract customers of a certain age group, and states that the retailer cannot lawfully justify only employing sales people in that age group. This is because the justification is in effect age discriminatory, and so cannot amount to a legitimate aim on which a justification defence can be based.

Proportionality means that the larger the discriminatory impact, the weightier the justification must be. Conversely, the more marginal the impact, so the slighter the justification may be. Proportionality also requires an organisation not to discriminate more than necessary: if a legitimate aim could be achieved by a less discriminatory method, then that less discriminatory method should be adopted.

¹² *Equality Authority-v-Ryanair (DEC-E2000/14)*

(b) Indirect discrimination

Indirect discrimination applies to a policy or practice, which on the face of it has nothing to do with age but which in its practice operates to the detriment of people of a particular age group.

Examples of working practice which may impact on groups of one age rather than another include:-

- service related benefits, such as service related holiday or notice entitlement, which generally will favour older workers at the expense of younger workers
- a requirement for IT qualifications which are likely to be more common in younger workers than older
- flexible hours or shifts, which may impact on people in their 30s and 40s who have child care commitments.

However as with other equality strands, proving that one age group is at more of a disadvantage than another may be complex.

Defining the age group is the first step. The Regulations say this means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages.

The Government's Consultation document uses the example of a business requiring applicants for a courier job to have held a driving licence for five years. This, the document says, could be



discriminatory because more people aged for example 40 will fulfil this requirement than those aged for example 25.

The key issue with this example, as with indirect age discrimination generally, will be whether or not the policy can be justified. It is likely that employment tribunals will interpret justification similarly for both direct and indirect discrimination, given that the structure of the Regulations uses the same definition for both.

(c) Harassment

The Regulations define harassment as occurring where on grounds of age a person subjects another to unwanted conduct which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

This definition covers a broader range of conduct than might commonly be associated with harassment. The sorts of stereotypical conduct, comments or banter that associate older people with incompetence, ill-health, or inability to cope with technology, may well be regarded as humiliating or contributing to an offensive environment. Likewise, conduct or comments that associate younger workers with unreliability or irresponsibility may fall foul of this definition.

Assessing whether or not unlawful harassment has taken place involves an objective test. This means that it would be for a tribunal to assess whether or not the conduct fell within the description of harassment in the Regulations, through particular regard has to be paid to the views of the victim.

(d) Victimisation

Victimisation applies where someone is treated less favourably because they have brought age discrimination proceedings against their employer, given evidence at proceedings or simply alleged age discrimination.

The individual is protected even if the allegations of age discrimination turn out to be untrue. This is unless the allegations that are made are not only untrue but were not made in good faith.



3 Exemptions

Extensive exemptions apply to the Age Regulations which significantly limit their application.

(a) Recruitment over normal retirement age

The exemption in relation to recruitment over normal retirement age applies where a candidate for a job is over the employer's lawful normal retirement age, or if none over 65 (or who is within 6 months of these ages as at the date of their application for the job). In these circumstances, a person is not protected by the Regulations if they are refused a job on grounds of their age.

This exemption only applies to employees, so does not apply to the broader concept of worker.

[It is hard to imagine a more discriminatory rule than one which expressly allows an employer to operate a blanket ban on employment over a certain age. The underpinning European Directive says such a rule must be justified, but there is no explanation in the Government's Consultation Document of what the justification for a blanket recruitment ban might be, other than a reference to the exemption applying where a person is dismissed over the normal retirement age.

At the time of writing, Heydey, a membership organisation for people in or nearing retirement, has been notified by the High Court, that their application for a judicial review of the Regulations will be held in December 2006. The High Court will be scrutinising the legality of

the Regulations which Heydey believe contravene the European Equal Treatment Directive by leaving people over 65 without the right or choice to work.

The exemption only applies to the recruitment process itself. Once a person over the normal retirement age is appointed, then the Regulations apply to ensure that they are not treated any less favourably in their terms and conditions or treatment at work on grounds of their age.

(b) Genuine occupational requirement

The Regulations will not apply where the employer can show that there is a genuine reason to do with the nature of the job which requires the recruitment of a person of a certain age.

There will be very few circumstances where age can be a valid occupational requirement for a job. The example that is usually used is where an acting part requires an actor of a particular age.

(c) The minimum wage

Differential wage rates for younger people, reflecting the national minimum wage provisions, are exempted from the Regulations.

(d) Service related benefits

Service related benefits, such as holiday entitlement or pay linked to length of service, are potentially indirectly discriminatory on grounds of age in that younger workers are less likely to be able to benefit from them than older workers.

But because service related benefits are very common, and in addition are generally regarded by both employers and employees alike as a useful way of rewarding service, the Regulations set out an overarching justification for these benefits.

Any benefits that depend on less than 5 years' service are specifically exempted from the Regulations. But where the benefit is dependent on more than 5 years' service then the employer has to show that it reasonably appears to them that the provision of the benefit fulfils a business need, for example by encouraging loyalty and motivation or rewarding experience.

This exemption relates to service and not age related benefits. So if for example an employer offers a benefit for workers over a certain age, that is a directly discriminatory benefit (which may or may not be justified) and not an indirect service related benefit. This exemption will not therefore apply to it.

4 Vicarious liability: responsibility of employers and principals

The Regulations follow the pattern of the other discrimination laws, so that an employer will generally be liable for any discriminatory acts of their staff.

This is though subject to the defence where the employer can show that they "took such steps as were reasonably practicable" to prevent the discrimination from taking place. In these circumstances, the employer may succeed in establishing the defence, although a claimant may still have a case against the individual member of staff.

5 Positive action

Positive action is lawful. Positive discrimination is not.

The Age Regulations allow for an employer, training provider, or trade union to grant a certain age group or groups access to training or encouragement to take advantage of opportunities to do work, where people of that age

group are disadvantaged in relation to work because of their age.

So, by way of example, where older people within an organisation have less experience of IT, an employer would be allowed to target training at them. If there is no evidence of disadvantage, such targeted training cannot be done.

These provisions only extend to providing access to facilities for training and encouragement to take advantage of opportunities for doing work. An employer cannot appoint someone to a job, or positively discriminate in any other way, simply by virtue of a particular age group being under represented.

A trade union can lawfully take steps to encourage people of a particular age group to join the union where that group is disadvantaged for reasons linked to age. A union can also encourage members of a particular age group to undertake training to help fit them for a post within the union, or encourage them to take advantage of opportunities for holding such posts, where they have been disadvantaged by reason of age.

6 The duty to consider working beyond retirement

The Regulations create a new right. When an employee is approaching normal retirement age they have the right to request that their employer allow them to continue working beyond retirement age.

The right is only one of request and the employer is under no obligation to grant the request, or even to provide reasons why it has been refused. The right is also only available to employees, not the broader category of workers. The process that has to be followed is set out below.

(a) The employer's duty to notify

- (i) An employer who intends to retire an employee must notify them in writing between 6 and 12 months before the intended date of retirement of:-
 - (a) their right to make a request to continue working beyond retirement,



and

- (b) the date on which it is intended that the retirement take place.

This duty to notify applies whether or not similar notification already exists in the employee's contract of employment or elsewhere.

- (ii) If an employer fails to notify the employee within 6 months of the retirement date, there is still an ongoing obligation to notify, in writing, no later than 14 days before the retirement date.
- (iii) Where the employer has notified of the right to request, and the request is made and granted and a different retirement date no more than 6 months after the original date is agreed, the employer does not have to re-notify about the new date.
- (iv) If an employer fails to notify but the employee has reasonable grounds for believing that they are in fact going to be retired, then they have the right to make a request anyway.

(b) The employee's request

- (i) The employee's request must be in writing, and state:-
 - (a) That they want a different retirement date (usually later);
 - (b) That they are exercising their statutory right to request under by the Age Regulations, and

- (c) The date they want the employment to continue until, which can be a date or period, or simply indefinitely.
- (ii) An employee can only make one request in relation to each intended date of retirement.
- (iii) The request must be made between 6 and 3 months before the intended retirement date where the employer has given between 12 and 6 months' notice. Where the employer has failed to give notice, the employee simply has to make the request before the intended date of retirement.

(c) The meeting

- (i) Unless the employer and employee reach agreement about a revised retirement date, the employer must arrange a meeting to discuss the request within a reasonable time of receiving it.
- (ii) Both employer and employee must take reasonable steps to attend the meeting.
- (iii) If it is not reasonably practicable to hold a meeting within a reasonable time period, the employer may consider the request without a meeting, providing that they consider all representations made by the employee.
- (iv) The employer must notify the employee in writing of their decision as soon as is reasonably practicable.
- (v) If the employer rejects the request, or grants it but for a shorter period of time than requested, then they must notify the employee of the intended retirement date, and of their right to appeal.

(d) The appeal

Where a request is rejected or a shorter period of continued working is allowed than was asked for, the employee may appeal. The appeal must be submitted as soon as possible after notification of the decision. The process to be followed by both employer and employee is similar to the process that has to be followed in relation to the original right to request.

(e) The right to be accompanied

The employee has the right to be accompanied by a colleague of their choice, (who must be employed by the same employer) to the request meeting and the appeal. The companion can address the meeting and confer with the employee, but cannot answer questions on behalf of the employee.

If the companion is unable to attend the meeting on the date that has been fixed, then the employer must postpone the meeting providing that the alternative time proposed is convenient to all parties and is within 7 days of the first meeting date.

The companion has the right to paid time off in accordance with the usual provisions for time off for union activities.

(f) Dismissal before request

Where an employer dismisses the employee prior to notifying them of their decision following a request, the employment will be deemed to continue until the day after the notice has been given.

(g) Remedies for an employer's failure

If an employer fails to notify the employee of their right to request within 12 to 6 months prior to the intended date of retirement, the employee has the right to pursue a tribunal claim. This must be done within three months of the employer's failure. If the employment tribunal upholds their claim, they are entitled to a maximum of 8 week's pay (with the week's pay capped at the standard statutory limit, currently £290).

Where the employer has failed to allow a companion to attend a meeting, a tribunal may award up to 2 weeks' pay, again capped at the statutory limit.

(h) Age Discrimination Questionnaire

If you believe that a member may be being discriminated against on grounds of age but you need further information from your employer in order to check or prove this, then you can ask for that information in a discrimination

questionnaire. In the questionnaire you need to state what leads you to believe discrimination has occurred, and then ask questions. This procedure can only be used once in a case, so make the best of it. Ask your officer for assistance in drafting the questions if you are uncertain. You may also wish to discuss a tactical consideration of whether to do the questionnaire before, or after, any grievance. (Note that the questionnaire does not count as a grievance for the purposes of the Statutory Grievance and Disciplinary Procedures).

A copy of the Questionnaire can be found on the DTI web site at:

<http://www.dti.gov.uk/files/file32724.pdf>

7 Dismissal: age discrimination and unfair dismissal

The Age Regulations impact on dismissals in two ways. Firstly a dismissal for an age related reason may amount to a breach of the Age Regulations themselves. Secondly, it may amount to an unfair dismissal.

(a) Age discrimination

Dismissal, by reason of an employee reaching retirement age, potentially amounts to direct age discrimination requiring justification. However, there is a significant exemption that excludes the operation of the Regulations where the termination is due to "retirement" at or over the age of 65 ("the default retirement age").

"Retirement" is defined in the Regulations as follows :

- Where there is no normal retirement age, and the dismissal occurs when the employee is aged over 65. Here the dismissal will be by way of retirement providing the employer had provided notification to the employee of their right to request working beyond 65 between 12 and 6 months before that date; or
- Where there is a normal retirement age and the dismissal takes place when the employee is aged over that normal

retirement age. Again, in these circumstances the dismissal will be by reason of retirement providing due notification is given of the right to request.

This default retirement age amounts to a broad exemption that operates more or less regardless of the circumstances, providing the employer shows that the employee is aged 65 or over, a "retirement" has taken place and due notice of the right to request is given. On the other hand, where a dismissal is due to retirement under the age of 65, or where the employer cannot show that they have given due notice of the right to request, then the dismissal may be directly discriminatory requiring justification if it is not to be unlawful.

(b) Unfair dismissal

The bar on bringing unfair dismissal (or redundancy) tribunal claims by people who have reached normal retirement age (or 65 if none), is removed. This means that any employee who is dismissed over the age of 65 can now bring an unfair dismissal or redundancy claim.

However, the circumstances in which a person aged over retirement age (or 65 if none) are limited.

If the employer can show :

- that the reason for dismissal is retirement; and
- they have complied with their duty to notify

then the dismissal will be automatically fair.

Retirement is defined as above, though for unfair dismissal there is the possibility of a fair retirement age of under 65 providing it can be justified.

The rules are strict and specific, and unlike our existing unfair dismissal rules they exclude any general assessment of overall fairness.

If however the employer cannot show that the dismissal is a retirement, then the dismissal is likely to be unfair. And where the employer has failed to notify the employee of their right to request to work 14 days prior to the termination date (as opposed to within the 12 and 6

months timescale), or has failed to consider the request at a meeting as required or failed to consider an appeal, then the dismissal will be automatically unfair.

If the employer has failed to notify within the 12 and 6 month timescale, but has notified within 14 days of retirement, the dismissal is not automatically unfair but the employee will still have the separate tribunal remedy for the failure to notify in time, so attracting compensation of up to 8 weeks' pay.

What is remarkable by its absence is any right to claim unfair dismissal where the employer capriciously or unreasonably dismisses an employee or rejects a request to continue working. Where the employer can establish that retirement is the reason, and complies with the basic duty to notify procedure, there is no sanction at all in the Regulations in relation to the dismissal or the refusal of the request.

Overall, the impact of these Regulations (no doubt intended by the Government) is to encourage employers to allow employees to continue working until 65, but then at that point to allow them to terminate employment lawfully.

8 Unfair dismissal and redundancy compensation

The tapering reduction for calculating the basic award for unfair dismissal and redundancy payments, depending on proximity to retirement age, is removed by the Regulations. But the age related factors for calculating the statutory basic award and redundancy calculation remain : ½ a week, 1 week and 1½ weeks depending on age. Likewise the service related factor (up to a maximum of 20 years) remain.

Providing the same structure is used to calculate contractual redundancy terms as for statutory redundancy terms (even though the amounts may be higher) then these contractual terms will be lawful without the need for employers to justify them.

■ Age discrimination and pensions

NOTE: AT THE TIME OF GOING TO PRESS THE GOVERNMENT WAS CONSIDERING AMENDMENTS TO THE PENSION PROVISIONS CONTAINED IN THE REGULATIONS. FURTHER INFORMATION WILL BE CIRCULATED WHEN THE POSITION IS KNOWN.

Introduction

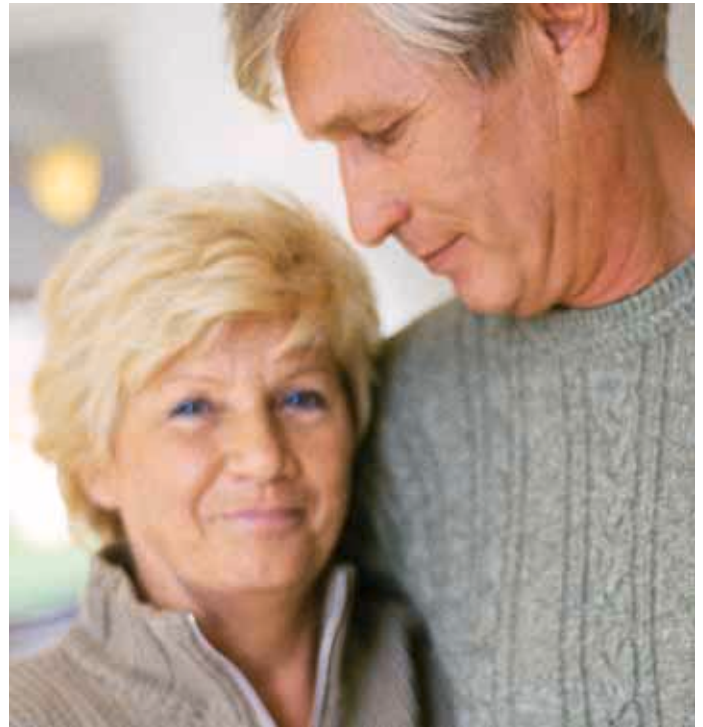
Unlike the rest of the Age Discrimination Regulations, the Regulations relating to pensions do not come in to force until 1st December 2006. This is because the government changed their minds about this section of the Regulations, so if you are looking at guidance on the web on pensions and age discrimination, do not rely on any guidance dated before September 2006 as it may be out of date.

Strictly (though, as you will see below, not necessarily legally) speaking pension provision is inherently discriminatory on age grounds. The intention behind any pension scheme is that, leaving ill health to one side, workers should have a replacement income at the end of their working life. That replacement income should reflect their last pay, and older workers in general are paid more than younger ones. It should also reflect the length of service of the worker, because in one working lifetime comparable workers should have the opportunity to build up comparable pension entitlements from a number of employments.

It is also a matter of mathematical fact that it costs more to provide an equivalent benefit for an older worker than for a younger one, and equality of contribution would therefore lead to inequality of benefit. It is a matter of mathematics and actuarial science that the amount of cash that will be generated by surrendering a proportion of pension for a lump sum, and the value of a pension if it is taken early depend on life expectancy and therefore age.

The Framework Directive recognises that and allows broad exemptions from the prohibition against age-based discrimination. Member states may

"...provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those



schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex." (Art. 6(2))

The Regulations have pursued this exemption by adopting a broad policy of exempting all usual age-based pension practices from the prohibition against direct or indirect discrimination. They are not all excluded however. Moreover, the regulations have the effect of outlawing some previously controversial practices that members will be glad to see the back of.

The starting point is regulation 11 which prohibits the trustees of occupational pensions, and the managers of contract-based personal pension schemes, from exercising any power or function in a manner that discriminates on age grounds. If the rules require them to do so then they have a unilateral right to amend the rules. Discrimination refers back to regulation 3, and so the general

defence of justification is available to the trustees or managers if an allegation of unlawful discrimination is made. Regulation 32 also provides a defence where the criterion for discriminatory treatment is length of service.

Neither defence is as wide-ranging as it might appear, because of the way in which the rights of early leavers are dealt with in the Pension schemes Act 1993. If a member has at least three months' scheme membership, he or she must be allowed to keep a deferred pension in the scheme or to transfer the value of that pension to another occupational or personal pension¹³. The value of the deferred pension or transfer value reflects, in some cases, the member's potential service as well as the actual scheme membership.

In some pension schemes, for instance, a member accrues pension at one rate (e.g. 1/60th of pensionable pay) for the first 20 years membership and at a second higher rate (e.g. 2/60ths) for the next 10 years. That is discriminatory and a defence based on the argument that the higher accrual rate is a service-based benefit will not work. That is because a member who leaves after say two years does not get a deferred pension based on 2/60ths: the benefit of the higher accrual in the last 10 years is spread out and his or her pension is based on 2/45ths. The higher accrual rate depends on the fact that the member could have had the benefit of the higher accrual rate¹⁴.

Transitional arrangements

Pensions which are based on length of service will relate to service before and after the entry into force of the regula-

tions and so special provision is made for benefits already earned by service in order to prevent benefits already earned being lost. Any benefits already accrued on the 1st October will be protected.

That extends expressly to pension benefits payable in the event of redundancy: they are not accrued benefits unless and until the member concerned is made redundant. Employees who are members of a scheme providing such benefits, or who could become members on application, will not lose the right to favourable redundancy terms. The position of members who join the employment after 1st October is much more difficult (see below).

Express exemptions

The main defences are to be found in schedule 2 to the regulations. They exempt in whole or in part most pension scheme practices that would otherwise be discriminatory.

1. Joining

Fixing minimum and maximum ages for joining the scheme will remain lawful. So will fixing a maximum age for making a transfer of benefits into or out of the scheme (typically schemes will not make or take a transfer within a year of retirement).

Fixing a minimum level of pensionable pay for membership will also remain lawful: this is the "clawback" provision found in many schemes. But note that the amount clawed back must not exceed the lower earnings limit: some scheme (such as the Railways Pension Scheme) claw back a greater amount and that will become unlawful.

¹³ *If the member has less than two years' membership, the scheme can specify that the member can take a transfer but not a deferred pension.*

¹⁴ *The so-called "rule of 85" in the Local Government Pension Scheme falls foul of the same principle.*

2. Actuarial Factors

Using age-based actuarial factors will remain lawful, but there is a strong argument that factors based on something else as well as age will be unlawful. Using a standard actuarial factor (such as £12 lump sum for each £1 of pension surrendered) is not age based: an age-based factor differentiates between age ranges and younger members would get a bigger lump sum than older members.

3. Contributions

Some schemes have a sliding scale of contributions according to pay. Older members pay a higher percentage of pay, older members are likely to be better paid, and so the practice discriminates. The regulations exempt it from the prohibition against discrimination.

Defined contribution (money purchase) schemes commonly have a different employer's contribution rate, and required employee contribution rate, depending on age. Provided the intention is to provide equal benefits for all ages (it costs more to provide the same benefit for an older member) the practice will remain lawful. The DTI guidance suggests (correctly) that it will be more difficult to demonstrate this intention however if the number of contribution bands is too few, but there is no need for a sliding scale with an infinite number of contribution bands according to age.

In similar vein, an identical rate discriminates against older workers. That too will remain lawful.

There is an implicit higher contribution rate for older members in a defined benefit scheme, which again discriminates against younger workers. That will be exempt too.

4. Age limits for retiring with a pension

The concept of a normal retirement age will be replaced by the scheme's "early retirement pivot age": that is the age at which a member is entitled to draw his

or her pension without requiring employer consent and without actuarial reduction. It will remain lawful to operate an early retirement pivot age and also a "later retirement pivot age": that is the age at which actuarial enhancements are paid if a member remains in service. It will also be possible to have different pivot ages for different groups of members, which potentially justifies rules such as the Local government Pension Scheme's Rule of 85: it operates as an age at which some (but not all) members are allowed to retire early without actuarial reduction.

There is almost invariably an option to allow members to draw a reduced pension below the early retirement pivot age. Pension schemes must, as a condition for tax approval, prevent a member, other than on ill-health grounds, receiving benefits below age 50 (rising to 55 in 2010). That will remain the case. Members retiring between that age and the scheme's early retirement pivot age must be subjected to an actuarial reduction. It will not be possible to avoid this requirement by granting a service credit to make up for the reduction.

Where this bites is in the case of schemes which have special provisions for redundancy pensions. There are two common practices: the first is to allow the member to draw an immediate but unreduced pension and the second is to enhance the pension by granting a service credit.

It is clearly the intention of the regulations not to exempt these practices. Parallel provisions in ill-health retirements were considered and exempted. Redundancy cases were not: the early pension, if there is to be one, must be reduced and unenhanced to qualify for exemption.

There is a way round this, which depends on ensuring that the practice is not discriminatory in the first place. Arrangements that allow older members to go with a pension and provide lump sum payments to younger members are significantly more generous to the older age group. If the value of the benefits for both groups is brought into line, so

that the difference in value can be shown to be service based and not age based, then the only reason for the difference in treatment becomes the fact that older members (over age 50) can draw an early pension whereas younger members may not as a matter of law. Older members must be given the alternative of a lump sum payment and the younger age group must be allowed to draw their deferred pension benefits at age 50. An actuarial analysis would be required, but this is bound to show that the value of an early pension is equivalent to a very large lump sum.

5. Drawing a pension and remaining in service

Until the tax changes introduced in April, it was not possible to remain in employment and simultaneously draw a pension from the employer's pension scheme¹⁵. That is no longer the case. Preventing a member from drawing their pension if they remain in employment is discriminatory (indirectly) against members who are over the scheme early retirement pivot age. More than that, if a member stays on after that age and draws his or her pension whilst simultaneously working, then it is discriminatory to prevent him or her from continuing to accrue further pension entitlements in their continued employment as well. In either event, if an employer wants to prevent such a member from (i) carrying on at work, and (ii) drawing a pension and (iii) building up further pension rights then the trustees or manager will have to show that the practice can be justified in the strict sense that it is a proportionate means of achieving a legitimate business aim.

6. Amount of benefits

It will remain lawful to base pension

benefits on final pay (even though older people are likely to be better paid) or career average pay. It will also remain lawful to limit the number of years of service that count for pension purposes¹⁶, and to require a member has at least two years' membership in order to qualify for a deferred pension.

It will also remain lawful to calculate pension entitlements according to length of service, but only if the benefits accrued for each year's service is the same for all age groups. A rule which says that a member accrues benefits at a higher rate after say 20 years' service will have to be justified as a proportionate means of achieving a legitimate business objective. The fact that early leavers get a proportionate share of the higher accrual rate does not save the rule: the amount of the proportionate share depends on the length of potential service that the member could have had and that is a function of their age at joining.

Setting a maximum level of pay that counts for pension purposes will remain lawful (even though the former earnings cap imposed as a condition of tax approval has gone). Setting a level of minimum earnings is also going to remain lawful provided that minimum is no higher than the lower earnings limit.

7. Ill-health and death benefits

As noted above, it will remain lawful to pay early and enhanced benefits to members who retire early on the grounds of ill-health. To meet the requirements of the new tax regime, trustees or managers will have to receive evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment, and the member

¹⁵ *In rare cases, members were allowed to draw their pension lump sum.*

¹⁶ *Even though the old tax rule, that a member could not build up a pension of more than 2/3rds of final pay has now gone.*

must have in fact ceased to carry on in that employment. It will also remain lawful to terminate their life assurance cover but only when they reach what would have been their normal retirement age.

Many schemes reduce the amount of a spouse's or civil partner's pension if there is a significant age gap between the members and the spouse or civil partner. That will remain lawful. Some schemes terminate the spouse's or partner's pension if he or she remarries or forms a new civil partnership; that will become unlawful because younger widow/ers or partners are more likely to remarry or form a civil partnership.

8. Pension increases

Many schemes do not apply pension increases to pensions in payment until the member reaches age 55, when increases are applied for RPI increases in the future and also for RPI increases between the ages of actual retirement and age 55. That is invariably the case in the public sector, and will remain lawful.

Schemes have only been required to increase pensions in payment since 1997 and often trustees or managers pay higher discretionary increases to older pensioners as a result. This will remain lawful where the intention is to catch up

on previous years when no increase was paid. So will other discretionary increase practices if the intention is to provide more equal benefits for different age categories.

9. Miscellaneous

Bridging pensions: some schemes are integrated with the state pension scheme so that the scheme pension payable to different groups is different to the extent that their basic state pension is different. Most obviously, men currently have to wait five years longer to receive their basic state pension and schemes therefore pay a higher pension to male pensioners between ages 60 and 65. The regulations will not prevent that, but this will become less important as male and female state pension ages are equalised.

Scheme closure: many employers are closing generous defined benefit schemes to new employees and offering them less generous defined contribution schemes. The regulations will permit that to continue.

Tax requirements: some of the interrelationships between tax law and age discrimination have been mentioned above. As a final catch-all, discriminatory practices or procedures which are required as a condition of registration for tax purposes are preserved.



Appendix A

Sample letter to request extension of employment beyond retirement

Dear Sirs,

REQUEST TO EXTEND EMPLOYMENT IN ACCORDANCE WITH PARAGRAPH 5 OF SCHEDULE 6 TO THE EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006 ('THE REGULATIONS')

[You have notified me in a letter dated [] that you intend to retire me on [].]/ [I have reasonable grounds to believe that you intend to retire me on [], namely that [you have told me verbally/that my contract stipulates that retirement age is 65].]*.

I hereby request in accordance with the statutory procedure set out at schedule 6 to the Regulations, and in particular, paragraph 5 of schedule 6, that my employment continue following [DATE] [indefinitely]/[until [EXTENDED DATE]]/[for [SPECIFIED PERIOD OF TIME]].*

I look forward to receiving your comments and would appreciate a response within 14 days. Please note that if a meeting is arranged, I intend to be accompanied at any such meeting and that the following dates would not be convenient for a meeting: [DATES].

Yours faithfully

* delete as appropriate

Sample letter to appeal against refusal to extend employment

Dear Sirs,

APPEAL AGAINST REFUSAL TO EXTEND EMPLOYMENT IN ACCORDANCE WITH MY REQUEST

I received notification of your decision dated [] to refuse my request to extend my employment [until [DATE]]/ [for [LENGTH OF TIME]]/ [indefinitely]*.

I wish to appeal against this decision. The grounds of my appeal are [that you failed to properly consider my request]/ [that you failed to properly consider the information that I provided in support of my request]/ [that you have treated me inconsistently compared with other individuals who have made such a request]/etc*.

I look forward to hearing from you in writing within 14 days. Please note that if a meeting is arranged, I intend to be accompanied at any such meeting. My and my companion's unavailable dates for a meeting are [].

Yours faithfully

* delete as appropriate

Appendix B - Frequently asked questions

Can Last in First Out (LIFO) still be used to select for redundancy?

When faced with a potential redundancy situation or an employer wishing to renegotiate an existing redundancy policy, the workplace representative should make clear that the method of selection is ultimately the responsibility of the employer. The union policy in such matters is to oppose redundancies wherever possible and particularly any attempt to introduce compulsion. Previous advice to representatives has been that if compulsion was introduced by the employer then the only criteria which could meet the test of objectivity was one based on service, normally last in first out. Under the new Age Regulations such an approach is likely to be unlawful unless a business reason can be established to justify this method of selection. Where the union's members have given an unambiguous mandate, (ideally by workplace ballot of which a written record has been kept), for the LIFO criteria to be pursued, the workplace representative may seek to have the criteria used. If, as is likely, the employer resists such a criterion, the workplace representative should endeavour to secure other objective criteria (i.e. criteria which are capable of being measured by existing evidence), but make clear that the final selection criteria is the employer's decision and reserve the right to challenge it through an appeal process both internally and externally, (i.e. Employment Tribunal, subject to legal advice).

Are sickness and holiday benefits based on length of service now unlawful?

The Regulations provide that benefits based on length of service only need a low standard of justification to be lawful. There is also an exemption which means that service related benefits for up to 5 years are automatically allowed.

An employer giving service related benefits would only need to be able to say that it 'reasonably appeared to it' that the way in which it used the criterion of length of service fulfilled a business need on the part of the undertaking. That business need would include encouraging loyalty or motivation, or rewarding experience, which would certainly appear to have been precisely the reasons why the provisions were introduced in the first place.

My employer wants to change our redundancy terms because it says they are unlawful as they treat people differently according to their age group. Is this right?

If your employer's grouping of payments by age mirrors the government's statutory redundancy scheme then it will be lawful.

If the grouping is something that is not as above, and is not on a simple multiplier by years of service basis then the scheme is not automatically lawful, but may well be lawful through being 'justified'. This is to a higher level of justification than that needed for service related benefits, so there may be a genuine difficulty. In negotiating changes we would aim to 'level up'. It is advisable to get legal help via your officer if you are having to negotiate such changes as the differing interests of members of different ages is a difficult new challenge for reps under these Regulations.

The Age Regulations confirm that the existing statutory redundancy payment calculation mechanism is lawful and also provide for permitted departures from the statutory calculation mechanism as follows;

- (i) the employer may treat a week's pay as not being subject to the statutory cap;
- (ii) it may multiply the amount for each year of employment by a figure of more than one
- (iii) having calculated the core redundancy payment, it may multiply the figure by a factor of more than one.

Colleagues often give each other birthday cards joking about physical decay when getting older. Could they get in trouble for age discrimination?

Birthday cards like this, and jokes which are age related (and may often be sex related too) are potentially unlawful harassment, depending on how they are experienced by the butt of the jokes. You might wish to gently suggest to colleagues that they take a different approach. You should also bear in mind that anyone who feels harassed by such humour would be entitled to support under the Dignity at Work principles, and may wish to have an informal approach made to the 'harasser' before wishing to go in to any formal procedure.

Useful websites

The Amicus Equal Rights Website

<http://www.amicustheunion.org/Default.aspx?page=39>

Age Positive – Government Website on Age

Age Positive is an organisation set up to provide materials and information to help combat age discrimination and properly implement the new Regulations. You can obtain a free ring binder and extensive information by visiting this site.
www.agepositive.gov.uk

ACAS

The ACAS Guide on Age Discrimination gives useful charts and other information.
http://www.acas.org.uk/media/pdf/d/t/6683_Age_and_the_Workplace_AWK.pdf

DTI Fact sheets on Age

For a summary of the Government's interpretation of the legislation see the DTI fact sheets

<http://www.dti.gov.uk/employment/discrimination/age-discrimination/age-legislation/page29258.html>

TUC Equality Website

www.tuc.org.uk/equality/index.cfm

The Employers Forum on Age

www.efa.org.uk

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