

Summary of the law on AGE DISCRIMINATION



This booklet sets out the basic employment rights to which workers are entitled under the age discrimination provisions of the Equality Act 2010. These apply in England, Scotland and Wales only.

- PROTECTION AND LIABILITY
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What does the Act cover?

The Act covers all forms of discrimination in the workplace, including recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of age.

Who is protected?

It covers all employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to their employment.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable for example if they have subjected a colleague to harassment related to age.



When can age discrimination arise?

Age discrimination can arise in relation to:

- the arrangements made for deciding who should be offered employment such as shortlisting and interviews (unless the person is within six months of the employer's normal retirement age, or 65 if there is no normal retirement age¹).
- the terms upon which employment is offered (although there are exceptions relating to some service-related benefits of five years or less).
- refusing or deliberately omitting to offer employment.
- the ways in which access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.

¹ Note that after the default retirement age is abolished with effect from 1 October 2011 it will be an act of discrimination if a person is treated less favourably in the recruitment process because of their age.



What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day to day decisions both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- advance equality of opportunity between people from different groups.
- foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. Broadly these require specified public bodies to publish information on how the general duty is being met, set equality objectives and engage with others such as employees and unions when setting the objectives.



What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the process of recruitment and promotion.

If they "reasonably" think the person with a protected characteristic was disadvantaged because of that characteristic (or there are fewer people with a particular protected characteristic employed), they can choose that person over someone who does not have the characteristic provided that:

- The person is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the underrepresented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



What does the Act outlaw?

Direct discrimination

This means treating a person less favourably than someone else because of age.

Under the Act a person claiming discrimination because of the particular characteristic of age means a particular age group. In other words, someone bringing a claim on this ground can define the particular age group to which they belong as "21-year-olds" or "the under-50s".

In order to determine whether someone is directly discriminated against a comparison has to be made with someone not of that particular age group and whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular age group or because they are associated with someone of a particular age group.

Examples of direct discrimination include:

- Someone who is not promoted because they are under 25.
- Someone who is refused flexible working to look after their mother who is over 70 when other workers who do not have an elderly parent have been allowed flexible working.
- Someone who is prevented from attending a training session because they are thought to be over 50.

Unlike other forms of direct discrimination, employers can justify direct age discrimination if they can show it was "a proportionate means of achieving a legitimate aim".



Indirect discrimination

This arises if an employer applies a provision, criterion or practice (whether formal or informal) which applies or would apply to everyone equally, but which puts or would put those of a particular age group at a disadvantage and the employer cannot justify it.

Like direct discrimination, employers can justify indirect age discrimination if they can show it was "a proportionate means of achieving a legitimate aim".

Harassment

This occurs when one person subjects someone else to unwanted conduct related to age that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subject to unwanted conduct because of another person's age. So, for example, an employee who is subject to offensive comments about their elderly parent will be protected under the Act.

Unwanted conduct covers overtly ageist behaviour such as verbal put downs or expressions or assumptions about the employee as a person, as well as bullying behaviour with no direct ageist content but which is only directed at that person because of their age. For instance, if an employer shouts at a younger employee when they would not have shouted at an older colleague.



In determining whether the conduct amounts to harassment, the Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Employers may also be liable for harassment by third parties such as clients or customers, provided the employer knows the worker has been subject to harassment on two previous occasions and has not taken any reasonably practicable steps to prevent the harassment.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- bringing proceedings under the Act, or previous discrimination legislation.
- making allegations of a breach of the Act or previous discrimination legislation.
- giving evidence or information in connection with proceedings that someone else has brought.
- doing anything else such as raising a grievance or giving evidence in someone else's grievance.

The person complaining of victimisation does not need to show they are of a particular age group in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.



Are there any exceptions?

Recruitment over normal retirement age

The provisions of the Act do not apply when a candidate for a job is over the employer's normal retirement age or, if none, over 65 (or is within six months of these ages when they apply).

However, once the person is appointed the Act applies to ensure that they are not treated any less favourably in their terms and conditions or treatment at work².

Occupational requirement (OR)

The Act does not apply when the employer can show that there is an occupational requirement to do with the nature of the job, which means they need to recruit someone of a certain age, as long as they can show it is a proportionate means of achieving a legitimate aim.

The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext.

There are very few circumstances where age can be a valid occupational requirement for a job. An example would be where an acting part requires an actor of a particular age.

² Note that after the default retirement age is abolished with effect from 1 October 2011 it will be an act of discrimination if a person is treated less favourably in the recruitment process because of their age.



Statutory redundancy pay

The Act does not apply when calculating statutory redundancy pay or contractual redundancy pay which is calculated on the same basis as statutory redundancy pay.

The minimum wage

The Act does not apply to the national minimum wage provisions.

Service-related benefits

Any benefits (such as holiday entitlement or pay linked to length of service) that depend on less than five years' service are specifically exempted from the Act. If the benefit requires more than five years' service, employers have to show that providing it fulfils a business need, such as encouraging loyalty and motivation or rewarding experience.



Is there an age limit for claiming unfair dismissal and redundancy?

No, employees who have reached the age of 65, or the normal retirement age for their job, can claim unfair dismissal and/or a statutory redundancy payment if they have been unfairly dismissed or dismissed by reason of redundancy.

Default retirement age

At the moment employers can fairly retire an employee who is aged 65 or over if the retirement is genuine and they have complied with the “duty to consider” an employee’s request to work beyond retirement.

However, the government has announced that this “default” retirement age will be abolished as of 1 October 2011. Transitional provisions will apply from 6 April 2011. This means that when an employee has been issued with a notice to retire and has not made a request to work beyond their retirement date, then provided it is on or before 30 September 2011 and the duty to consider procedure has been complied with, they can be retired. If, however, an employee has been issued with a notice to retire before, on or after 6 April but with a retirement date after 1 October 2011 they cannot be retired for simply being 65. Those employees can bring a claim of unfair dismissal and age discrimination.



"Duty to consider" procedure

Employers will still be required to follow the “duty to consider” procedure if they issued a notice to retire before 6 April 2011 to an employee who reaches the DRA of 65 on or before 1 October 2010 (or the normal age of retirement for that organisation). This involves the following steps:

Duty to inform

No more than 12 and no less than six months before the intended retirement date, employers must notify the employee in writing of the date on which they intend the employee to retire and of the employee’s right to request to continue working beyond the retirement date.

Making the request

If the employee wishes to make a request to continue working they must do so between three and six months before the intended retirement date.

Hold a meeting

The employer must hold a meeting with the employee to discuss the request within a reasonable period of receiving the request. The employer must then inform the employee of their decision as soon as is reasonably practicable after the meeting.



The right to appeal

If the employee wishes to appeal against their employer's decision to refuse their request they must give notice of appeal as soon as is reasonably practicable.

If they lodge an appeal the employer must hold a meeting within a reasonable period and again notify the employee of the outcome of the appeal as soon as is reasonably practicable after the meeting.

Complaints to an employment Tribunal

If the employer fails to comply with the procedure and the employee lodges a complaint with an employment Tribunal, the dismissal will be automatically unfair.

Where an employer issues a late notification to retire between 30 March 2011 and 5 April 2011, an employee can bring a claim for compensation as a result of the employer's failure to provide a notice of intention to retire at least six months before the retirement date.



Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them because of their age.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination then the burden shifts to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.

How do claimants gather information from their employer?

Workers can request information from their employer about their complaint. There are standard forms for asking and answering questions (the questionnaire procedure), as well as guidance which explains how the procedure works.

A questionnaire can be sent to the employer any time before a claim is lodged at the Tribunal or within 28 days of a Tribunal claim being lodged.

If the employer fails to answer the questions within eight weeks, a Tribunal may use this fact to draw an inference of unlawful discrimination.



What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

Where the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.



What remedies are available?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit to the amount of compensation which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages can also be awarded if the employer has behaved in a high-handed malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.



Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant or any other person even though they were not a party to the claim.

Examples of recommendations Tribunals can make include requiring an employer to:

- introduce an equal opportunities policy.
- ensure their harassment policy is more effectively implemented.
- set up a review panel to deal with equal opportunities and harassment/grievance procedures.
- re-train staff, or
- make public the selection criteria used for the transfer or promotion of staff.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example.

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.







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