

A summary of the law on:
Age Discrimination



THOMPSONS NI

The Employment Equality (Age) Regulations (Northern Ireland) 2006 outlaw discrimination on the grounds of age in employment situations; in relation to vocational training; and in relation to students of institutions of further and higher education.

This information sheet is solely concerned with the employment aspects of the Age Discrimination Regulations.

Who do the Age Discrimination Regulations apply to and when?

The Age Discrimination Regulations apply to all employees and workers (including job applicants), apprentices, contract and agency workers, office holders, the police, and self-employed workers.

There is no qualifying period of service required under the Age Discrimination Regulations, so a worker is protected from the time they apply for a job. Ex-employees can also make a claim against a former employer, if they are complaining about something that was closely connected to that period of employment such as something detrimental that was said in a reference. It applies to all discrimination in the workplace such as selection for a job, promotion or transfer; training, employment benefits and dismissal or any other disadvantage such as harassment.

Who is Liable?

Responsibility for age discrimination usually lies with the employer, but if another employee or worker is found to have discriminated, then the employer will normally be “vicariously” liable for them as well. This covers not only incidents of discrimination occurring in the actual workplace, but may also extend to out of work activities such as Christmas parties and drinks in the pub after work. If the alleged discrimination relates to the conduct of another employee, it is advisable to name them as well as the employer in the any application to the Tribunal.

Employers can defend a complaint of discrimination if they can show that they took all reasonably practicable steps to prevent the discrimination occurring. It is rare for employers to succeed with this defence. But even if they do, claimants can still pursue their claim against the individual employee who discriminated against them.

Types of Discrimination

There are four types of unlawful age discrimination in relation to employment – direct discrimination; indirect discrimination; harassment; and victimisation.

Direct Age Discrimination

Direct age discrimination is when, without legal justification, an employer treats an individual less favourably because of their age. The employee bringing the claim has to make a comparison between how he or she was treated and how another individual (either actual or hypothetical) of a different age would have been treated.

Direct age discrimination is different to all the other forms of unlawful direct discrimination. Direct age discrimination is the only type of direct discrimination where the employer has a defence if they can show legal justification for the alleged direct age discrimination. So even if an employee establishes that they have suffered less favourable treatment on the grounds of age, the claim will not be successful if the employer can establish legal justification for their actions (i.e. if they can show that their actions were a proportionate means of achieving a legitimate aim).

The following situations could give rise to a claim for direct discrimination:

- In a job interview an employer tells an older employee that they are looking for a candidate who has “youth on their side”.
- An older candidate is appointed to a job at the expense of a younger candidate with better qualifications because the employer believes that its clients will expect the role to be carried out by someone who is more “mature”.

Indirect Age Discrimination

Indirect discrimination applies to policies and practices which, in reality, disadvantage one age group considerably more than another although on the face of it, they seem to apply to all ages equally.

To prove indirect discrimination, Tribunals have to consider four questions:

- Has the employer imposed a provision, criterion or practice?
- Does it put one age group at a particular disadvantage when compared to another age group?
- Does it disadvantage the individual in question?
- Can the employer show that the provision, criterion or practice is proportionate to the aim they are trying to achieve?

Employers can defend indirect discrimination, but they have to show that the provision, criterion or practice:

- Can be objectively justified on grounds other than age
- Corresponds to a real need on the part of the employer
- Is appropriate to meeting that need
- Is necessary to meet that need

This is a particularly complex area of discrimination law and anyone considering bringing a claim will need specialist advice.

Examples of potential indirect age discrimination 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 among younger workers than older workers.
- Flexible hours or shifts, which may impact on people in their 30s and 40s who have childcare commitments.

Age Harassment

Age harassment occurs where, on the grounds of age, a person is subjected to unwanted conduct which has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Even if that individual is not the butt of the unwanted conduct, they can still be protected by the legislation if their dignity has been violated or an offensive environment has been created.

Conduct is only regarded as harassment when all the circumstances are taken into account (including the perception of the individual at the receiving end of it) and if it is reasonable to conclude that it could have had that effect.

Examples of age harassment include the following:

- Physical harassment.
- Unwanted personal comments about an individual's age.
- Non verbal harassment such as unwanted gestures or displays of inappropriate age related pictures or jokes.
- Isolation or exclusion from workplace related activities, including social activities.

The victim does not have to demonstrate any financial or other specific loss, such as a threat of dismissal. It is enough that the individual's working environment has become intimidating, hostile or offensive.

An example of age harassment would be if younger colleagues habitually tease an older member of staff about being an "old fogie" or a "Granda", even in front of customers. Whilst the younger colleagues might take the view that this is a bit of "banter", if the older colleague is offended then their actions could well amount to harassment.

Single incidents can constitute harassment, though generally speaking, a one off incident would have to be more serious.

Victimisation

Some individuals may be deterred from exercising their rights under the Age Discrimination Regulations or from supporting others who wish to exercise their rights in case they are victimised by their employer. The Regulations guard against this by making it unlawful for an employer to victimise an individual because he or she has brought a discrimination claim, given evidence in a discrimination case or made an allegation of age discrimination (whether it has been upheld or not).

To succeed in a victimisation case, the person has to show that they were treated less favourably than someone who had not taken any of these steps, and that the treatment was because they had pursued a discrimination case, had given evidence or had made allegations of discrimination.

Retirement

Prior to 6 April 2011, the default retirement age was 65 and employers were able to lawfully retire staff at this age regardless of their circumstances (provided they followed a specific statutory procedure).

Since 6 April 2011, employers have not been able to compulsorily retire employees at age 65.

The current position is that a retirement dismissal at any age will potentially constitute an act of age discrimination unless the decision can be legally justified (by showing that the decision was a proportionate means of achieving a legitimate aim).

Whether an employer will be able to legally justify a decision to retire an employee will depend on the facts and circumstances of the individual case but there may be cases when a retirement decision is legal justified. For example, employers might argue that posts in emergency services require a significant level of physical fitness or that other occupations, such as air traffic controllers, require exceptional mental and/or physical fitness.

Exceptions

The Age Discrimination Regulations provide a number of exemptions to the protection against discrimination, including the following:

- Service-related benefits
- The genuine occupational requirement (GOR)
- Positive action

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 Regulations. 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.

Genuine Occupational Requirement (GOR)

Employers are allowed to discriminate under the Age Discrimination Regulations when a person's age is a "genuine occupational requirement" (GOR) for the job. For instance, if the job needs either a younger or older individual for reasons of authenticity, perhaps for a job as an actor or a model.

Positive Action

Positive action means giving preferential treatment to an individual or group of people to prevent, or compensate for, past disadvantages suffered by that individual or group. It is not the same as positive discrimination, which involves treating people more favourably on grounds of age and is unlawful.

The Age Discrimination Regulations state that employers can:

- provide training to people of a particular age (or age group) which would fit them for particular work, or
- take steps to encourage persons of a particular age or age group to take advantage of opportunities for doing particular work (e.g. by running a recruitment campaign to encourage people of a particular age group to apply for certain kinds of work).

Proving Discrimination

Proving age discrimination is not straightforward. An individual complaining of discrimination has to prove, on the balance of probabilities, that the employer discriminated against him or her on the grounds of age. This means that the Tribunal does not have to be certain, but they have to think it more likely than not that the treatment was on the grounds of age.

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 the individual or that any alleged discrimination was legally justified.

Not surprisingly, it is rare to find overt evidence of direct discrimination. Few employers are prepared to admit that they have discriminated against someone and those who are aware of the law may have taken steps to appear to have acted lawfully. Whether or not discrimination can be proved will often depend on what inferences a Tribunal can draw from the primary facts. However, there usually will need to be some factual basis upon which the Tribunal can make its finding. It therefore helps if the claimant can produce any relevant letters or documents. In cases of age harassment, it is useful if the claimant makes a note of the key incidents and the dates on which they took place.

Serving a Questionnaire

Given the difficulty of proving discrimination, claimants are allowed to serve a Questionnaire on their employer to obtain information to ascertain the strength of their claim and to establish, as far as possible, what the facts are and the reason for their treatment. This information can be used as evidence at any Tribunal hearing. If the employer fails to answer the questions within eight weeks, or does so in an evasive or equivocal manner, a Tribunal may use such facts to draw an inference of unlawful discrimination. Questionnaires have to be served within three months of the act of discrimination, or within 21 days of lodging a Tribunal application (although an extension of time can be sought from the Tribunal if this is missed). Serving a Questionnaire does not count as raising a formal grievance.

Tribunal Claims and Time Limits

The time limit for lodging a claim with the Tribunal is three months from the act complained of (or the last act complained of if a series of acts can be considered as a single continuing act of discrimination e.g. ongoing age harassment). No extensions are available unless the Tribunal considers it just and equitable in the circumstances of the case. This is relatively rare.

Lodging a Grievance

While it is not a legal requirement that a person lodges an internal grievance prior to bringing a claim for age discrimination, it is strongly advisable to do so. This creates the possibility that the matter might be successfully resolved in the workplace. In the first instance a worker should try to resolve the matter informally with their employer. If it is not possible to resolve the matter informally, the worker should, without unreasonable delay, raise the matter formally, in writing, setting out the nature of the grievance and how it might be resolved. Even if any such workplace resolution is unlikely, it is still advisable to lodge a grievance with the employer as any failure to do so may result in any compensation awarded being reduced by up to 50% (assuming the claim is ultimately successful).

It should be noted that lodging a grievance does not result in the time limit being extended - the time limit remains three months from the act complained of even if the grievance proceedings are not completed when the three month deadline expires.

Guidance

The Equality Commission has produced a best practice guide for employers in relation to age discrimination. While it does not impose formal legal obligations, evidence of any departure by the employer from the guide could be put in evidence before Tribunals and would almost certainly be taken into account. Copies of the guide can be obtained from the Equality Commission for Northern Ireland: www.equalityni.org.

What Remedies are Available?

There are three remedies available to a Tribunal:

- Declaration
- Compensation
- Recommendations

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on 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. 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. Compensation may be reduced by up to 50% if the claimant failed to use the internal grievance procedure.

Recommendations

The Tribunal's powers to make recommendations are limited to actions that will benefit the individual employee and lessen the effect of the discrimination on him or her. They must be practical, have a time limit and avoid or reduce the effect of the discrimination that the individual has complained about. For instance, they might include a requirement for all members of management to be trained in equal opportunities, or for the employee who has been discriminated against to be provided with additional training or mentoring, or to be invited to interview in relation to future job applications. If the employer fails to comply with a recommendation, then the Tribunal may order the compensation to be increased.

Age Equality Duty

In addition to obligations under the Age Discrimination Regulations, Section 75 of the Northern Ireland Act 1998, places public authorities under a duty to have due regard to the need to promote equality between various groups including between different age groups.

This means that service providers and public sector employers have to design employment and services with the varying needs of different age groups in mind.

This information sheet provides a summary of the rights of employees in relation to Age Discrimination. This information should not be taken as a comprehensive statement of the law in this area. You are advised to take advice from your union representative before taking any action based on this information.

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