

## **CLIENT GUIDE 7 : AGE DISCRIMINATION**

The Employment Equality (Age) Regulations came into effect on 1 October 2006 (the Age Regulations) and affect all employers in the UK.

The basic principle behind the Age Regulations is that employers must not discriminate directly or indirectly on grounds of age.

- Direct discrimination occurs where a person is treated less favourably on grounds of their age without objective justification. For example, setting an upper or lower age limit for a particular job may be direct discrimination against a person outside the age band.
- Indirect discrimination occurs where selection criteria, policies, benefits, employment rules or any other practices which, although they are applied to all employees, have the effect of disadvantaging people of a particular age unless the practice can be justified.

### **Recruitment, Promotion and Training**

#### Recruitment

Age should not generally be used in recruitment criteria. You should base your decisions about recruitment on the skills required to do the job. Recruitment procedures (including job advertisements, job descriptions, person specifications, interview questions and company publicity and recruitment materials) should be checked for compliance with the Age Regulations.

For example, advertisements should not set a preferred age range for a job or use language such as 'mature', 'young' or 'energetic'. You should examine whether criteria in advertisements or person specifications are likely to have an impact on certain age groups and consider whether less discriminatory criteria would serve the business's needs. For example, 'experienced' is less likely to fall foul of the Age Regulations than 'mature', although asking for a minimum (or maximum) number of years' experience should generally be avoided unless it can be objectively justified.

You may, however, lawfully refuse to recruit someone who is over the normal retirement age for the job or is within six months of the normal retirement age. If there is no normal retirement age, the law sets a default age of 65.

Consider enhancing any university 'milk round' programmes with a broader recruitment strategy so as not to exclude many older workers.

Age or date of birth should generally be removed from application forms but included in diversity monitoring forms to be retained by HR. Review your application form to ensure that you are not asking for unnecessary information about periods and dates, as asking for age-related information on an application form could allow discrimination to take place.

# **JUDITH M LONG**

*solicitors*

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In general, questions asked on forms or at interview should focus on skills, abilities and potential. Managers may find it helpful to have a checklist of key questions to avoid asking with suggested alternatives.

## **Promotion and training**

The same principles apply to promotion and training opportunities. You should not give preferential treatment to someone on grounds of their age unless the age requirement is a genuine occupational requirement or is objectively justified.

## **Positive action**

Certain age groups may sometimes experience particular difficulties in relation to certain types of work. In these cases you may be able to use positive action to assist in redressing the balance in two ways:

- (1) Encouraging persons from that age group to apply for available positions in that area of work; and/or
- (2) Providing training to employees from that age group to fit them for that type of work.

For example, you may advertise in a magazine that is mainly aimed at the disadvantaged age group or instruct an employment agency to focus their attention on encouraging applicants of that age group to apply. Age, however, should not play a part in short-listing or in making a final recruitment or promotion decision. You must treat all applicants equally and must ensure that any recruitment agency is not excluding or discouraging applicants on grounds of age.

## **Pay scales**

The National Minimum Wage Bands would be directly discriminatory under the Age Regulations but are subject to a special exemption.

You are entitled to pay different rates to workers aged 16-17, 18-21 and 22 and over provided that those under 22 are still getting less than the adult rate (£5.80 per hour from 1 October 2009). If any other pay scales were to be adopted based on age, they would be directly discriminatory and unlikely to be justified. It is better to reward skills and experience rather than age.

## **Service related benefits**

Many employers use service related pay and benefits to motivate staff, reward loyalty and recognise experience. If you use 'length of service' criteria to increase staff pay or benefits, this will be allowed as long as the period of service is not more than 5 years.

If you use a period longer than 5 years, then you must be able to justify your decision with a business need, for example by providing information about recruitment and potential.

## **Redundancy**

You must make sure that any redundancy policies do not directly or indirectly discriminate against older workers. An example of indirect discrimination could be your selecting only part time workers for redundancy, when a large number of these may be older workers. The only exceptions are where an age requirement can be objectively justified.

There is no upper or lower age limit on the entitlement of statutory redundancy pay. Therefore you will have to pay the statutory minimum redundancy payments to employees under 18 or over 65 (or after your normal retirement age if this is lower). If you have an enhanced redundancy pay scheme, it must closely mirror the statutory age bands and multipliers. You can, however, increase the multipliers (provided that you increase them all by the same factor) and you can remove the cap on a week's pay.

## **Retirement**

The High Court handed down its decision in the *Heydey* appeal on 25 September 2009, ruling that it is legal for UK law to allow employers to force employees to retire at 65.

The Judge in the case said, however, that there was a compelling case for the compulsory retirement age to rise.

Employers welcomed the ruling. The court's decision means that a string of compensation cases brought by people who did not want to retire will fail.

As the law stands, a British employer can dismiss an employee without a redundancy payment on that person's 65<sup>th</sup> birthday as long as they follow the correct procedure. Employees have the right to request to continue to work beyond the date when the employer wants them to retire but the employer can refuse the request without giving a reason but you are obliged to hold a meeting with your employee to consider their request.

There is no longer an upper age limit on unfair dismissal claims.

## **Action points for employers**

The Acas guidance advises employers to monitor the effect of the Age Regulations to help identify any problems and to collect evidence that might be needed by the courts for objective justification of any age discrimination. Any data collected should normally be made anonymous. If it identifies individuals, it must be processed in accordance with the Data Protection Act 1998 and any existing Data Protection Policy you have.

You should also audit your existing documentation including recruitment literature, employment contracts and policies and procedures to make sure that they comply with the law and best practice and seek to change them if necessary.

Changes to policies and procedures which are not contractual can usually be done without the employees' consent, although employees may sometimes be able to argue that existing policies have been incorporated into their contracts either expressly or by custom and

# **JUDITH M LONG**

*solicitors*

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practice. It is good practice to consult with the workforce over any changes and you may be required to do so if you have a collective agreement with a union. All employees should be notified in writing of any changes once they have been made.

If it is necessary to make changes to existing employees' contracts, this may need careful handling as, in general, you will have to level up rather than level down any discriminatory benefits. If it is necessary to remove a particular benefit, this will have to be done by consultation and possibly negotiation with the workforce and any recognised trade union.

Employers should train all employees of all levels on the relevant parts of the legislation particularly the types of behaviour that could be considered to be harassment, direct and indirect discrimination and victimisation. Managers should be given training on avoiding age discrimination in decision-making particularly in relation to recruitment, promotion and access to other benefits.

If you require further information or advice or more detailed information on the steps to follow to include advice on share options or retirement benefits on termination of employment, retirement procedures and a retirement policy for your organisation, review of employment contracts, policies and procedures, advice on changing terms and conditions of employment, or generally please contact **Judith Long**.

## **JUDITH M LONG**

*solicitors*

76 Empire Square East  
Long Lane  
London  
SE1 4NB

Tel: 020 7403 3337

Fax: 020 7407 1982

E-mail: [judithmlong@msn.com](mailto:judithmlong@msn.com)

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