

Employment Equality (Age) Regulations 2006

The TAEN Guides to the Age Regulations are primarily for individual employees, jobseekers and learners and aim to give a simple, clear explanation. They are neither a legal opinion nor a statement of Government views.

4 : The workplace - terms and conditions, promotion, career management

The objective of the Age Regulations is that age should not be a factor in the way you are treated within your workplace and in the management of your career.

Promotion and opportunities

It will be unlawful for decisions about promotion to be based on the age of the candidates.

However, there are many situations in which, directly or indirectly, your age or stage of career could influence the opportunities open to you.

Years of experience requirements

For requirements for a number of years experience for promotion the same issues arise as in recruitment (see Guide 3 *Recruitment*). It can be argued that when it comes to promotion there is all the more reason to base decisions on demonstrated experience and competence rather than a formulaic approach based on a number of years.

Qualification requirements

These can indirectly restrict an opportunity to people of a certain age. These could also be influenced by the different levels of

funding of Government training schemes to gain qualifications available to younger employees compared to older employees (see Guide 3 *Recruitment* and Guide 5 *Training*).

Workforce planning

Opportunities for individuals may be restricted by an overall Human Resources objective of filling gaps or re-balancing the age profile of parts of the workforce (for example, a lot of people approaching retirement, so special efforts are needed to recruit younger people).

This could be presented as 'Positive Action' to correct an imbalance in the composition of the workforce. Such policies are frequently based on assumptions about age and stage in working life - as well as the age at which people will retire (see Guide 3 *Recruitment* and Guide 7 *Retirement*).

These kinds of policies are open to challenge and case law will determine in what circumstances employers may be able to justify a legitimate objective of workforce planning.

Succession planning

As discussed in Guide 3 *Recruitment*, age may be a sensitive dimension of succession planning. In the case of the incumbent in a job, it is relevant to distinguish length of time in a job or 'need for a change' from their actual age. The need for a change after ten years in a job may apply just as much to a 40 year-old as to a 60 year-old.

However, length of time in a job does tend to increase with age and it is likely that cases around 'job blocking' situations will arise. Where there are several candidates for the post, age should not be an important factor in the decision. There is no reason why a successor need be younger than a predecessor.

Working time left before retirement

This consideration exercises substantial influence on people management in the workplace. The sentiment that people have reached a 'winding down' time is common. This can last for at least the last ten years of working life. In practice it should, in most cases, not be an issue until six months prior to a fixed retirement age.

Health and safety considerations.

There is no need to judge a whole age group by a standard assumption on health and safety. There is more variation in health and physical capacity within an age group than between age groups (see Guide 2 *Exemptions*).

Extra costs

Extra costs can be associated with an older or younger person occupying a job (see Guide 3 *Recruitment*).

Genuine occupational requirements

No experts have yet identified any significant examples of an age-based, genuine occupational requirement which would exclude a specific age group from opportunities in the workplace, other than actors (see Guide 3 on *Recruitment*).

'Fit' in the workplace

Some work teams can have a strong culture associated with a specific age group and there is a need for a 'fit with the age group'. There are often well established views within workplaces which equate levels in a management hierarchy to age. There can be sensitivity about an older person working for a younger manager or, on the part of a manager, having someone older working for you.

None of these preconceived notions or preferences are likely to constitute a valid ground for using age in decisions on promotion or other opportunities in the workplace. They do however illustrate workplace situations which may need to be managed carefully in order to avoid action which is contrary to the Age Regulations.

Appraisal systems

Appraisal interviews, as well as more informal line management contacts, represent opportunities for examining individual options and career development. These may include options within and outside the current workplace. At older ages they could include discussion of possible retirement plans as well as training needs and opportunities.

Putting to one side the notorious challenges of crafting and running effective appraisal systems (especially when they combine remuneration decisions with discussion of career options), assumptions about age and stage of career are often implicit in the appraisal process.

Ideally, appraisal and career development discussions should take place without preconceptions about age and stage of career. What people want from their working life will be determined more by their personal circumstances and motivation than by what age group they belong to.

Even if there are perceptions that some age groups are more likely to exhibit certain attitudes to working life than others, they may well not apply to you.

There has been concern that employers could be challenged for even raising the subject of retirement in the context of an appraisal interview or in career planning. The context will depend on whether the company has a fixed retirement age (see Guide 7 *Retirement*).

There is nothing in the Age Regulations which makes it unlawful for retirement to be discussed, but clearly much will depend on the circumstances. A sensitively handled discussion about options, including retirement, is one thing. Periodic harassment to retire in a context of ageist attitudes running through the workplace generally is another.

Pay and conditions

If there is a situation where two people are doing equal work and are paid differently because of their age, this is open to challenge.

Pay can vary between people for many reasons. In some cases the different rate of pay may be indicative of a mixture of gender and age discrimination. Bringing a case for discrimination in pay level therefore depends on collecting good supporting evidence about comparators, workplace pay patterns and related evidence of employer attitudes based on age stereotypes

Average pay does vary with age. Average pay for women rises until their mid-30s and then falls. For men it rises to their mid-40s and then falls. Those in their 50s are paid on average 15-25% less than those in their 40s. People in their 20s may feel that their pay does not reflect their input and is discounted on account of their youth.

Research shows that many people returning to the labour market in mid or later career have to accept large drops in pay compared to what they were earning before and compared to what existing employees are earning.

It will be discriminatory to offer jobs on less good terms just because of your age. It may

be hard to establish relevant comparisons but if this appears to be the case it is open to challenge. One example would be where a job offer is made on certain terms and then, upon learning your age, an employer withdraws the offer and replaces it with one on less good terms.

Health-related benefits

Some employment packages include private health insurance, permanent health cover and death in service benefits. These can become more expensive for older employees or even unavailable from insurers for those over 60 or 65.

If a less good employment package is made available on the basis of age this is open to challenge under the Age Regulations. Cost alone is not regarded as an adequate justification for discriminatory action. If a competitive package is not available from other insurers this is likely to lead to some difficult cases under the Regulations.

However, the termination by employers of life insurance cover for employees at age 65 is specifically allowed as an exemption in the Age Regulations.

One-off adjustments

One-off adjustments (which may be better or worse) applied in the remuneration package only from a given date can create a position where all joiners after the given date (and who may on average be younger than existing employees) have less good terms and conditions.

An example would be a change from a defined benefit pension scheme to a defined contribution pension scheme for new entrants.

Such a situation can be the cause of age differentiation of pay and conditions. However, this is unlikely to constitute grounds for claiming indirect age discrimination.

Benefits to reward long service and loyalty

Improvements to pay and benefits based on length of service are by definition not available to younger people who have not been employed for sufficient years. They were extensively discussed in the preparation of the legislation.

There is an important gender dimension: because, on average, women have been in jobs less long than men, long service awards contribute to the gender pay gap. The Age Regulations represent a compromise, recognising that long service awards are an accepted and popular part of remuneration, but tend to discriminate on grounds of age and gender.

Under the Age Regulations, all incremental benefits based on **up to five years' service** will automatically be regarded as lawful. They will not be open to challenge because you are too young to have done five years' service.

Length of services awards that come into effect after **longer periods**, for example ten years' service, will be open to challenge and would then need to be justified. That includes pay scales that have annual increments over a period of more than five years.

If these longer timescales are challenged, then an employer will have to demonstrate that there is a business advantage in rewarding loyalty, encouraging motivation or recognising the experience of workers. This will require some evidence to that effect, not just the assertion that it is a good thing.

However the test is less rigorous than the test for a legitimate and justifiable exemption. If the business benefits cannot be demonstrated, then an employer would have to change to be within the five-year time horizon for length of service awards.

There is flexibility in how length of service is calculated. It can be based on all service with an employer, or service in a particular role. It will be the same for part-time and

full-time work, so a half-time worker does not have to work two years to count one year of service. The length of time can include periods of absence at the employer's discretion.

Flexible working

Separate from the Age Regulations, the right of request to work flexible hours has been extended more widely beyond parents of children under six years old, to include carers. Flexible work patterns are popular with many people, especially in mid and later working life. Although the majority of carers for elderly relatives and others are aged 50+, there are no age criteria built into the flexible working rules and age should not determine this.

Evidence of discrimination

Proving that age has been a significant factor in an employment or training decision is hard, just as it is in the case of race or gender.

In order to advance a case you have to put together a reasoned case with the available evidence. If there is limited direct evidence of discriminatory action, related evidence which points to a discriminatory approach may be important. An Employment Tribunal may 'infer' from this that discrimination has taken place. Some of the relevant evidence could be:

- The age profile of the employer's existing workforce and evidence or lack of it on equality policies in the business.
- The age profile of the customers and the marketing of the business.
- The fit of your capabilities and experience with the job description of a new opportunity, as compared to the short listed/selected candidates. You can request the interview notes of the selection panel to see how the job description and required competencies have been applied.

- Written or oral comments and explanations given to you. These could include the kind of questions put to you in an interview and the behaviour of the interviewers.
- Evidence of other people in a certain age group applying for jobs within the organisation.
- The choice of media, etc, to advertise a job vacancy.

If you can produce evidence of discrimination to the satisfaction of Acas, then the burden of proving that there was not discrimination falls on the employer.

A case on discrimination can be strengthened by the provision of relevant statistics about the treatment of different age groups, for example on the age profile of the workforce, people recruited, offered training opportunities or made redundant. This data can be requested from an employer in an Age Discrimination Questionnaire (see Guide 10 *Redress*).

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