

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.

9 : Comparators in discrimination cases

Bringing a case under discrimination law depends on demonstrating that a person has been treated less favourably than another person or group of people in comparable circumstances.

Basic position

Discrimination law requires demonstrating that a person has been treated less favourably than another person or group of people: women compared to men, minority ethnic groups compared to white people, disabled people compared to those without a disability, etc. To demonstrate that employment and training decisions have been based on your age rather than competencies and suitability raises the question: older or younger than whom?

This is a highly technical legal issue. The aim of this brief is to raise awareness of the issue. Professional advice should be sought.

Direct discrimination

In direct discrimination cases the relevant comparator will be an individual or a few individuals in comparable circumstances with identifiable ages, for example applicants for a job or a pool of people being made redundant or retired.

A comparator can be an actual person or a hypothetical person or people whom the claimant can show would have been treated differently but for their age. It is likely that case law is going to determine how much of

an age gap is needed to convince a Tribunal it is indeed age that has played a crucial role in the decision. Other circumstantial evidence on the attitudes of those involved in making the decision and the culture of the organisation itself will also play a role in this.

Indirect discrimination

In indirect discrimination cases the relevant comparator is more likely to be a more generalised age group. The comparator pool may be defined by an age group who, because of the circumstances, are ruled out of gaining an equal opportunity. Examples would include 20- to 24-year-olds for jobs that required five years' professional experience or all those over 30 for a job that specified a qualification that had only been introduced 10 years ago, when accumulated prior experience might have been an alternative.

The Regulations use the term 'age group' but they contain no guidance about how to define age groups. Is the relevant comparison with people who are 2, 10 or 20 years older or younger?

In practice, the significance of comparative age groups will depend on the case. There is a wider range of possible situations than

in other strands of discrimination law because the Age Regulations contain more exemptions for Government policy.

Data

Statistics can be relevant to proving discrimination. The Acas guidance advises employers to keep monitoring data on the workforce in 10-year age groups (annex 4). TAEN's view is that five-year bands are more appropriate and that it is possible that comparisons of five-year age groups (as in the Labour Force Survey data) may become widespread.

Age groups determined by public policy

A further substantial group of cases will revolve around use of a specific age as a ceiling or threshold for different treatment. These relate mainly to public policy rather than employers' policies. Examples include:

- Being above or below the age range of minimum wages, statutory redundancy payments or retirement/pension rules;
- Being above or below the age limits on Government funding of training.

In these instances the comparator age group is all those on the other side of a given age threshold and the age differential can be as little as one year.

In existing cases the courts have accepted that where there is legitimate use of a certain age to define a public policy, then a difference of a year or two between two people either side of the dividing line does not constitute discrimination. The legal issue in age cases may therefore be the legitimacy of using an age threshold or floor for a public policy and its compatibility with The EU *Equal Treatment Directive 2000* which the Age Regulations implement.

Thus a comparison between:

- a 38- and 42-year-old on redundancy pay
- a 24- and 26-year-old on the funding of a Government-sponsored training programme
- the pay of a 21- and a 23-year-old, or
- the right of a 56-year-old compared to a 53-year-old to draw down an occupational or personal pension

is not so much about an appropriate comparator pool. It is a challenge to the use of age groups in Government policy.

Comparator pools in indirect discrimination

In indirect discrimination cases, the comparator pool may automatically be defined by an age group who, because of the circumstances, are ruled out of gaining an equal opportunity. Examples would include 20-24 year-olds for jobs that required five years' professional experience or all those over 30 for a job that specified a qualification that had only been introduced 10 years ago, when accumulated prior experience might have been an alternative.

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