

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.

3 : Recruitment

The Age Regulations make it make it unlawful to base recruitment procedures and decisions on age. The various possible grounds for exemptions are however significant in recruitment cases.

Evidence of discrimination

Proving that age has been a significant factor in a recruitment decision is hard, just as it is in the case of race or gender. It is easy to hide behind the line: "There was someone else whose qualifications better fitted our job requirement."

It is likely that the obvious signs of age barriers to recruitment such as the wording of job advertisements will diminish with the legislation in place. The discrimination will become more subtle.

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

Some of the relevant evidence could be:

- The wording of an advertisement, the job and person description and description of the business itself, including the implications of the language used in them (e.g, young, dynamic business).

- The age profile of the existing workforce and evidence, or lack of it, on equality policies in the business.
- The age profile of the customers and marketing of the business.
- The fit of your competencies and experience with the job description, 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 competences have been applied.
- The use of selection procedures including psychometric testing without adequate explanation which may indirectly disadvantage some age groups.
- Written or oral comments and explanations given to you. This could include the kind of questions put to you in interview and the behaviour of the interviewers.
- Assumptions about pay levels and age, relating level of remuneration with your last job.

- Evidence of people in other age groups applying to the business.
- 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 the Age Discrimination Questionnaire (see Guide 10 *Redress*).

Application forms and CVs: dates

An employer or recruitment agency can continue to ask for date of birth or dates of career on an application form. However, an employer who had not done so might be considered to be demonstrating good practice in showing that age was no more relevant than gender in the application process.

Those who request date of birth, etc, may be more open to the inference that they are using age criteria. Best practice is for application forms to be structured around your skills, abilities and experience to fit the required job competencies, rather than a chronological listing of qualifications and previous jobs.

Graduate recruitment

If you are a mature graduate and there is an upper age limit on a graduate recruitment programme this may be unlawful.

Employers will still be able to do graduate 'milk rounds' with a focus on the majority of graduates being at the start of their working life, but not to the exclusion of older graduates. Businesses which state they do

not have an upper age limit on graduate recruitment and take steps to advertise their vacancies outside the milk round will be in a stronger position. Those who do not may be more exposed.

Years of experience for a job

A job which requires five years' previous experience could rule you out because you are too young. This may indicate indirect age discrimination. What matters is

- why the experience is being measured in years rather than the skills and competencies required to do the job,
- how many years' experience are being asked for, and how reasonable that is in relation to the job specification, and
- the length of time that people typically stay in that kind of job.

If you can demonstrate that you have the competencies required for the job even though you do not have the number of years, then you may well have a good case.

Over-qualified for a job

In contrast, you may meet the argument that you are over-qualified for the job. This is not a strong explanation for not being selected when you meet the job requirements. It is sometimes another way of saying that you are too old. Often employers are saying at the same time that they are experiencing skills shortages. This explanation for being refused a job should therefore be probed and challenged if necessary. Behind it lies a lack of recognition that individuals may choose to downshift as well as be ambitious for advancement at various stages of their careers.

Qualifications required for a job

You may be applying for a job which requires certain qualifications. In some cases a qualification may be a statutory requirement. In other cases the qualification

may not have existed when you started on your career or you may have acquired the same skills in your work without getting a formal qualification.

Qualifications are not the only guide to skills and experience, especially if you gained your formal qualifications 25 or more years ago. The job specification may therefore may indirectly discriminate against anyone old enough not to have been able to obtain the qualification earlier in their career.

If you are excluded and can demonstrate you have the same skills as the qualification specification, it could represent a case of indirect discrimination.

The effect of workforce and succession planning on recruitment

A recruiter may indicate that the age profile of the workforce is such that there is a one-off need to fill a shortfall of people in a certain age group and give priority to them.

This could be presented as a justifiable and legitimate business aim or as an example of 'positive action'. Positive action is allowed to offset imbalances (for example, specific efforts to increase the numbers of disabled people in a workforce) but not to the exclusion of others.

If other groups are deliberately excluded then it is a case of positive discrimination. Positive discrimination is unlawful under the Regulations (see Guide 5 *Training*).

Much thinking about workforce planning is based on stereotypes about ages and career stages in the workforce, including assumptions about the age at which people will leave the business to retire. Therefore, job opportunities may be constrained by the requirements of succession planning. This relates mainly to jobs at senior levels in a business.

For example, an enterprise has a chief executive with an agreed retirement date three years ahead when reaching age 65. There is no in-house successor and a

person is to be recruited to a subordinate post for the next three years in preparation for the top job. It is clearly possible that an applicant could be older than the current chief executive and have a declared intention of working to 70 or beyond.

But a widespread assumption would be that the candidates will be some years younger than the present incumbent. If such an older candidate, well suited to the post, was refused on grounds of age would this be justified? Cases of this kind are likely to be presented to Employment Tribunals.

Recruitment and training costs of a new recruit

One barrier to being recruited could be that there is not enough time prior to a fixed retirement age to pay back the cost of recruitment or training the applicant (see Guide 7 *Retirement*). The law allows a window of six months prior a fixed retirement age. Thus, if the fixed retirement age is 65, the ceiling on recruitment age is 64 and a half.

Using the argument of approaching retirement over a longer prior period to justify limiting opportunities can be challenged and would have to be justified. In many businesses the average rate of staff turnover means that a gap of much more than two years would be hard to justify if recruits of all ages only stay for that period before moving on. Costs of recruitment are related to level of pay so the argument may prove to be stronger for more senior posts.

Denying a recruitment opportunity on grounds of the cost of training (see *Training*) should be relatively rare because in practice few major training programmes of anyone over age 40 are financed by employers.

As a rule, individuals who want to do a higher level NVQ (National Vocational Qualification), such as a university degree, post graduate or professional qualification in mid-career, normally have to pay for it themselves and take the financial risk in relation to future earnings to recoup the cost or repay a loan. There are some exceptions

to this rule - such as air traffic controllers and medical consultants who currently have recruitment age limits in the 30s and 40s – but these will be open to challenge as being substantially too low.

It is relevant that expensive training is given to younger adults by both Government and employers with no guarantee that they will pursue the activity long enough to deliver a pay-back on the cost.

A one-week induction course, typical in many jobs, is not going to take years to pay back. Case law to determine what is a reasonable pay-back on recruitment and training costs is likely.

Health and safety

You may be declined job opportunities on health and safety grounds, whether related to youth or age. These will need to be rigorously justified to be upheld. A case would have to be made for a blanket restriction on an age group on health and safety grounds.

Generalisations about the probability of any given health condition in any given age group (for example 'incidence of heart disease increases over 50') are open to challenge. In most situations there are systems of medical tests to verify required levels of health and safety competence for each individual employee.

See also Health and Safety in Guide 2 *Exemptions*.

Cost barriers to recruitment

You could be rejected for a job on grounds of extra costs associated with your age. Examples could be the extra cost of more frequent medical tests for drivers or higher insurance costs for over-60s or under-25s.

Cost in itself is not a justification for an employer to discriminate against an age group, just as the cost of maternity leave is no reason to discriminate against certain age groups of women. Nevertheless, it is likely that extra costs associated with older

or young workers will be a contentious issue. If the argument is used to deny a job opportunity you should seek advice.

'Genuine occupational requirements'

This is a well recognised concept in discrimination law. It means that there is a genuine need to have people of a certain age to do a certain job. An example in the case of gender would be caring jobs done by females dealing with the personal hygiene of female patients.

So far no good examples of age as a genuine occupational requirement have been identified, apart from the specialist case of an actor for a young or old part on the stage or screen.

There are, however, many situations in which it is widely perceived that some age groups are better suited to certain jobs. Examples would be retailers or telephone advice services targeting young or older age groups, care services, etc. Very few of these are likely to be upheld as a situation where a genuine occupational requirement exists.

The fact that a workplace tends to be staffed predominantly by younger or older people does not mean that there should be blanket exclusion on other age groups. There can always be candidates of other ages who fit in to the older or younger scene just as well, even if they are in the minority.

Overtime, mobility and other job requirements

Some jobs may by their nature demand a large amount of 'anti-social' hours or willingness to travel frequently at short notice. In some situations it is possible that such requirements could be used to exclude applicants from a particular age group, especially older candidates with a high level of family commitments. This could lead to cases of indirect discrimination in recruitment.

Instructions to a recruitment or employment agency

You may be told by an employment agency that they are acting on instruction from an employer on the age range of candidates they are seeking to recruit. If this happens you should ask to see written evidence and an explanation of the employer's reasoning. The law does allow employers to give instruction, but if it contains an age restriction it would have to be justified – if challenged.

TAEN's Guides

Along with other non-governmental organisations, TAEN participated in over five years of discussions and preparations with the UK Government and others on the transposition of the EU's *Equal Treatment Directive 2000* (on which the Age Regulations are based) into UK law.

TAEN's Guides to the Regulations divide them into a series of manageable, separate chunks. There is overlap between the topics. In some cases this is dealt with by repetition in more than one guide. In other cases there is cross reference from one guide to another.

TAEN
September 2006

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2006

This Guide has been produced by The Age and Employment Network with funding from the Department of Trade and Industry.

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