

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.

5 : Training

In addition to employment, the Age Regulations cover all ‘vocational training’, advice and guidance about it, and qualifications related to it.

Basic position

Providers of training and guidance (including employers, training agencies, qualifications bodies and all institutions of Further and Higher Education) may not discriminate on the basis of age in the provision of training, the terms on which the training is provided or the treatment of learners during training. Any statement that the availability of a training opportunity is influenced by your age is open to challenge.

The Government’s guidelines on interpretation of the Regulations do not draw a distinction between ‘vocational’ and ‘non-vocational’ learning. Informally, the understanding is that all Government supported programmes come within the scope of the Age Regulations.

However, there may be issues around what is ‘vocational’. If learners meet examples of age-based restrictions on access to training because the learning activity is regarded as ‘non-vocational’ they should seek advice.

Definition of training

The definition of ‘vocational training’ in the Age Regulations is broad: “All types of all levels of training which would help fit a person for any employment, vocational guidance, facilities for training, practical work experience and assessment related to the award of any professional or trade qualification” (para 61 of the Government Legal Notes accompanying the Age Regulations).

There may be legal cases to test the interpretation of vocational as there could be different treatment of similar individuals studying on similar courses in different places and institutions.

The most likely area of uncertainty is Personal and Community Development Learning (PCDL, formerly known as Adult and Community Learning). This is funded by Government through the Learning and Skills Council and delivered by both Local Authorities and Colleges.

This includes vocational guidance (Connexions and nextsteps partnerships, Learndirect, etc) and work experience (Jobcentre Plus, New Deals, etc).

It may be suggested that some of this adult learning is exempt from the Age Regulations, both because it is delivered by Local Authorities and because it can be

seen as less 'vocational'. However it has the highest levels of participation of older age groups and is currently subject to reduced public funding when it does not relate to vocational skills and qualifications. There could be challenges to the impact of this on older age groups of learners.

Public policy and employer exemptions on training

Unlike most discrimination law, the Age Regulations allow for different treatment on grounds of age if there is a justifiable legitimate aim including "employment policy, labour market and vocational training objectives". This means that employers and vocational training providers (in relation to their specific business circumstances) and Government (in relation to public policy) can advance a case for exemptions.

The Government has done this in the Regulations, for example in respect of different age bands for redundancy pay and minimum wages and the introduction of the new default retirement age, set at age 65 (see *Introduction to TAEN's Guides and Guide 2 Exemptions*).

The items on which the Government set out exemptions in the Age Regulations did not include the funding of training (see below).

Potential areas of exemptions for training

There are two potential areas of exemptions which relate to training and vocational guidance:

- **Where training is too close to a fixed retirement age to allow for a pay-back on the investment.**

Denying a recruitment opportunity on grounds of cost of training should be relatively rare because in practice few major training programmes for anyone over age 40 are financed by employers. People who want to do a higher level NVQ – National Vocational Qualification including a first degree or postgraduate

qualification) 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 its cost or repay a loan.

There are some occupations which require substantial training - such as air traffic controllers and medical professionals - which currently have recruitment limits in the 30s and 40s. These limits will be open to challenge as being substantially too low. And 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.

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.

- **Training targeted at (but not exclusively for) under-represented age groups, known as 'positive action'.**

An IT course targeted at, or with financial incentives to attract, older workers could be justified on the grounds that older workers in general have lower levels of IT skills and qualifications than younger ones, or are under-represented in such programmes generally.

The Age Regulations could lead to cases about unequal opportunities and outcomes in training. In practice, most employer-funded training is delivered to those under 30 and/or concentrated on those at more senior levels. Training funded by Government, including Further Education courses, apprenticeships, Basic Skills (Skills for Life) qualifications and what are known as Level 2/3 qualifications, is also heavily weighted towards younger adults (i.e. those under age 25). The level of qualifications achieved is also heavily weighted towards younger adults. Under gender or race law, this degree of imbalance would be, and is,

challenged as discriminatory and is a strong basis for positive action (see, for example, the recommendations of the Women and Work Commission's report to the Prime Minister 2006). There may be test cases on age.

Funding of training

Since the passing of the Age Regulations in March 2006, Government has issued guidance that the public funding regime for adult learning is outside the scope of the EU Directive and therefore of the Age Regulations. This decision is based on Article 3.3 of the EU Directive of 2000 which says: "The Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes."

A briefing on this topic is on the Department of Trade and Industry website at: www.dti.gov.uk/employment/discrimination

Article 3.3 of the EU Directive was envisaged in 2000 as relating essentially to social security schemes, though the wording is obviously broad. The Age Regulations say that the 'terms' on which training is provided should not be based on age. Government draws a distinction between denying 'access' to a course (unlawful) and denying funding (lawful).

It may be disputed whether 'terms' of access can be equal while the funding available is different, depending on age. Recent European Court of Justice case law has said that Member States should take account of the spirit as well as the letter of the law.

While Government sets policy it is other bodies including training providers and employers who implement it. These other bodies are required to follow the Age Regulations.

The Acas Guidance places considerable emphasis on the need for evidence to justify differentials in funding based on labour market and training participation data. It poses (pps 16-17) the questions:

- "What evidence have you in support of restricting financial help to a particular age group?"
- "Have you clear evidence that demonstrates particular age groups would be excluded from your learning provision if they had to pay the full fees?"

Some of the age floors and ceilings for Government funding of training are:

- The general Government policy to give priority to under-19s versus age 19+.
- The cut off of age 25 in funding for Level 3 courses and apprenticeships.
- The ceiling of age 60 on Higher Education student loans.

In relation to these funding floors and ceilings there are three kinds of organisation open to challenge:

- The funding agencies such as the Learning and Skills Council, the Higher Education Funding Council and Sector Skills Council;
- Training providers contracted to deliver courses;
- Employers sending employees on funded programmes such as apprenticeships on which, for example, one employee over 25 would have to pay while another under 25 does not.

Government uses age criteria in a range of policy matters (pensions, criminal justice, social security, etc) in a way that is rather different from ethnicity or gender. The transition from youth to adulthood for the purposes of education and learning would appear to be a case where distinctions based on age groupings are necessary.

What may be in contention is what age (and is it a single age?) constitutes the transition from young people to adults and whether a distinction between younger and older adults is reasonable and can be objectively justified.

Next steps and advice

What makes the topic of training different from the other public policy exemptions from the age law (and from the other Guides in the TAEN series) is that it has not been the subject of consultation, public debate and scrutiny prior to the passing of the Age Regulations. Therefore there is greater uncertainty surrounding it.

Developments will depend on individuals challenging the practical limitation of opportunity resulting from age-based funding criteria. Where the challenge comes from an employee it will go to an Employment Tribunal; and where it is made by a learner against a learning provider or funder, it will go to a County Court.

The challenge will turn on the grounds for an exemption under Article 3.3 of the EU Directive. Because there is no case law in the UK yet, it is not possible to say what weight the courts would give to the various arguments.

In the meantime, public agencies, employers and training providers will have to proceed on the basis of the age criteria built into the adult skills funding regime and await challenges from those who have been treated less fairly because of being on the wrong side of one of the age ceilings or thresholds. If there is a challenge then cases will revolve around the UK Government's interpretation of the EU Directive and whether their interpretation is in conflict with what is actually in the Age Regulations themselves.

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.

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