

## HOT ISSUES IN EMPLOYMENT LAW 2005

### AGE DISCRIMINATION: THE DRAFT REGULATIONS

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1. After a protracted period of consultation and debate, the DTI on 14 July 2005 published the draft **Employment Equality (Age) Regulations 2006**, together with a final consultation paper seeking comments on the details of the drafting. The Department's policy is now fixed, and the Regulations can be assumed to be in an almost final form. They are expected to come into force by December 2006, in accordance with the UK's obligations under Directive 2000/78/EC establishing a framework for equal treatment in employment ("the Framework Directive").

#### Overview of the Regulations

2. Overall, the structure of the Regulations echoes that of the Employment Equality (Sexual Orientation) and Employment Equality (Religion or Belief) Regulations 2003, which were in turn based on the Sex Discrimination Act 1975 and the Race Relations Act 1976.
3. Direct and indirect discrimination on grounds of age, victimisation and harassment are defined in Part 1. The circumstances in the field of employment and vocational training (including special cases, such as barristers, partnerships, contract workers, qualifications bodies and the police) in which such discrimination is unlawful are set out in Part 2; vicarious liability and aiding and abetting are dealt with in Part 3; general exceptions from Parts 2 and 3 are contained in Part 4; and enforcement is dealt with in Part 5. Many provisions, such as those relating to the burden of proof, echo those in the other discrimination Regulations.
4. One important distinction between age discrimination and other forms of direct discrimination under UK law (apart from disability discrimination) is that employers may lawfully treat employees less favourably on grounds of their age provided that they can show that the treatment is a proportionate means of achieving a legitimate

aim: in other words, direct age discrimination, unlike race or sex discrimination, may be objectively justified.

5. The most controversial policy decision embodied in the Regulations is the decision to introduce a default retirement age of 65. Workers over the age of 65 cannot complain of age discrimination in recruitment, or on dismissal by reason of retirement. Those still in employment who are given notice of retirement may make a “request” to be allowed to continue to work, but their employer is obliged to do no more than to consider the request in good faith.

**(i) the definition of discrimination: justification**

6. Regulation 3(1) provides:

“For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if –

(a) on grounds of B’s age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –

- (i) which puts or would put persons of the same age group<sup>1</sup> as B at a particular disadvantage when compared with other persons, and
- (ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.”

7. This is thus the definition of direct and indirect discrimination, familiar from other discrimination legislation, with the important difference that any less favourable treatment on grounds of age which can be shown by an alleged discriminator to be a proportionate means of achieving a legitimate aim does not constitute discrimination within the meaning of the Regulations. This reflects Article 6 of the Directive, which permits member states to provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are

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<sup>1</sup> “Age group” is defined at Regulation 3(4)(a) as “a group of persons defined by reference to age, whether by reference to a particular age or a range of ages”.

objectively and reasonably justified by a legitimate aim, including “legitimate employment policy, labour market and vocational training objectives”, and if the means of achieving the aim are appropriate and necessary.

8. Regulation 3(2) provides some non-exhaustive examples of treatment which, depending on the circumstances of the case, a court or tribunal may find to be a proportionate means of achieving a legitimate aim. These are:

- a) The setting of requirements as to age in order to ensure the protection or promote the vocational integration of people in a particular age group;
- b) The fixing of a minimum age to qualify for certain advantages linked to employment or occupation in order to recruit or retain older people;
- c) The fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post in question or the need for a reasonable period in post before retirement.

9. These examples closely reflect examples of legitimate aims set out at Article 6 of the Directive. They are not all easy to understand. It is by no means clear, for example, what is meant by the phrase “promote the vocational integration of people in a particular age group”, which has been lifted from the Directive.

10. Regulation 3(2) does not purport to identify all the potential legitimate aims in pursuit of which an employer might lawfully treat persons of a particular age group less favourably. It will be open to employers to demonstrate that any aim they are pursuing is legitimate. This is a significant change from the DTI’s original consultation, which had proposed to restrict the legitimate aims on which employers could rely to those listed in the regulations. The DTI has (correctly, in my view) accepted that such an approach would be too restrictive and prescriptive.

11. In its July 2005 Consultation Paper *Equality and Diversity: Coming of Age*, the DTI has suggested various potential legitimate aims, including:

- a) Health, welfare and safety;

- b) Facilitation of employment planning;
- c) Particular training requirements;
- d) Encouraging and rewarding loyalty;
- e) The need for a reasonable period of employment before retirement;
- f) Recruiting or retaining older people.

12. The Consultation Paper also emphasises (paragraph 4.1.18) that less favourable treatment on grounds of age cannot be justified by an aim which is itself related to age discrimination. The Paper gives an example of a “retailer of trendy fashion items”<sup>2</sup> who wants to recruit young shop assistants in order to target young buyers. The paper states that “trying to attract a young target group will not be a legitimate aim, because this has an age-discriminatory aspect”. This warning should give serious pause for thought to many fashion retailers, and others (bars, restaurants etc) who have sought to recruit young, stylish staff in order to project a particular image.

13. Importantly, it will not be sufficient for an employer defending a complaint of age discrimination merely to show that the complainant was less favourably treated on grounds of age for one of the reasons set out at Regulation 3(2) (or some other aim accepted by a court or tribunal as legitimate). The employer must also show that the treatment in question was appropriate and reasonably necessary in order to achieve that aim. In particular:

- a) The treatment must actually contribute to the pursuit of the legitimate aim. For example, if an employer decides to use an age-related benefit to encourage loyalty, he must be satisfied that it actually does so;
- b) The importance of the aim being pursued should be balanced against the discriminatory effect of the treatment;

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<sup>2</sup> A phrase that must surely have been drafted by a Chancery judge.

- c) If the aim could have been achieved by other means, without treating people in a particular age group less favourably, the treatment will not be justified.
14. We can confidently expect that the questions of the aims to be considered legitimate, and the justification of particular treatment in pursuit of those aims, will generate case law.
15. In addition to the justification provision, the Regulations also make provision for genuine occupational requirements in employment. By Regulation 8, the prohibitions on discrimination in recruitment, promotion and dismissal from employment at Regulation 7 do not apply where, having regard to the nature of the employment or the context in which it is carried out, possessing a “characteristic related to age” is a genuine and determining occupational requirement, and it is proportionate to apply that requirement to the particular case.
16. It is not entirely clear why Regulation 8 has been included as well as Regulation 6. It is very difficult to think of a case falling within Regulation 8 which would not also fall within Regulation 6 (I have tried, but failed). Even odder, Regulation 6 applies to age discrimination in all areas of employment and vocational training (including contract workers, partners, qualifications bodies etc), but Regulation 8 applies only to employees<sup>3</sup>.

## **(ii) Retirement**

17. Regulation 29(1) provides:

“Nothing in Part 2 or 3 shall render unlawful the dismissal of an employee at or over the age of 65 where the reason for dismissal is retirement.”

18. Schedule 6 to the Regulations amends the Employment Rights Act 1996 by the introduction of new sections 98(ba), by which retirement becomes a potentially fair reason for dismissal, and sections 98ZA – 98ZE, which make provisions for determining whether the reason for a dismissal is retirement.

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<sup>3</sup> Under the broad definition of “employment under a contract of service or apprenticeship, or a contract personally to do any work”, familiar from the discrimination legislation generally.

19. By section 98ZA(1), retirement is to be taken to be the only reason for a dismissal which takes effect on a “planned retirement date”. A “planned retirement date” includes the date on which any employee reaches the age of 65 (section 98(ZA)(4), or a date of which an employee has been given at least 6 months’ written notice (section 98(ZA)(6).
20. Similarly, an employee cannot complain of age discrimination in recruitment, including a refusal to employ him, if he has attained the age of 65: Regulation 7(4).
21. Michael Rubenstein in his article *Retirement age: Hewitt’s shameful surrender* EOR January 2005 has eloquently attacked the DTI’s decision to introduce a default retirement age of 65, stating that:

“A mandatory retirement age is incompatible with effective age discrimination legislation. It negates the message of the law that age should not be taken into account in decision-making. It will undermine the potential effectiveness of the law in dealing with age discrimination against workers as they approach retirement age, by providing a ready-made excuse for employers. It is the failure to recognise this in any way, shape or form that makes Patricia Hewitt’s decision to impose a default retirement age so shocking to those who care about equal opportunities.”
22. Michael Rubenstein also raises in his article the interesting question whether the default retirement age is compatible with the Directive.
23. Recital 14 of the Directive states: “This Directive shall be without prejudice to national provisions laying down retirement ages.”
24. However, Recital 14 has no parallel in the substantive provisions of the Directive. Although there is plenty of authority to the effect that recitals can assist in the interpretation of the substantive provisions of a directive, it is a different matter to rely on a recital alone as establishing an important limitation on the scope of a directive. Richards J considered a similar situation in relation to this Directive, and the Sexual Orientation Regulations, in the case of *R (Amicus – MSF section) v Secretary of State for Trade and Industry* [2004] IRLR 430. He concluded that the Recital could be relied on as limiting the scope of the directive, in order to avoid frustrating the legislative intention as it appeared in the recital. The point was appealed by the

unsuccessful claimants, but the appeal was withdrawn. Accordingly, there remains scope for argument on the question whether Recital 14 is sufficient to permit the UK to introduce a blanket exclusion from the right to equal treatment in access to employment or dismissal for people over 65.

25. Interestingly, the Consultation Paper does not purport to rely on Recital 14, but, instead, refers (at paragraph 6.1.3) to the provisions in the Directive (Article 6) permitting age discrimination which is objectively justified. It is argued that “this means that Member States can set a national default retirement age where they can justify doing so”. However, it is by no means certain that Article 6 of the Directive permits a Member State to set a national default retirement age. Article 6 appears to be concerned with individual acts of discrimination by employers which can be objectively justified, and not with a blanket limitation of the scope of protection against discrimination for all individuals over a particular age.
26. It should be noted that employers may require employees under the age of 65 to retire, but only if the dismissal can be objectively justified: otherwise the dismissal will be both discriminatory, and unfair.
27. The DTI states in the Consultation Paper that it will monitor the operation of the default retirement age, and review in 2011 whether it continues to be necessary, taking into account life expectancy, the number of individuals working beyond the age of 65, and the impact of the Regulations on business, including the extent to which businesses still rely on retirement ages for workforce planning. The DTI states that it will abolish the default retirement age if the Regulations have achieved the expected culture change, and it is no longer necessary.

### **Unfair dismissal**

28. The upper age limit of 65 for unfair dismissal claims is to be removed. Employees over the age of 65 who are dismissed for reasons other than retirement will have the same right to claim unfair dismissal as other employees. New sections 98ZA – ZE of ERA inserted by Schedule 6 of the Regulations amend the law of unfair dismissal in relation to retirement. The key provisions are as follows:

- a) Retirement is a potentially fair reason for dismissal;
- b) Retirement is to be taken as the only reason for the dismissal of an employee which takes place on a “planned retirement date”, unless the employee can show that the employer would not have dismissed him on the planned retirement date but for some reason other than retirement, or the dismissal amounts to unlawful discrimination under the Regulations (section 98ZA).
- c) A planned retirement date is defined as the date on which the employee reaches the age of 65; the employer’s normal retirement age (whether above or below 65); or a date of which he has been given at least 6 months’ written notice (sections 98ZA (4) – (6)).
- d) If a dismissal for which retirement is the only potentially fair reason does not take place on a planned retirement date, it will be automatically unfair if it constitutes unlawful discrimination under the Regulations, or if the employer contemplated dismissing the employee at some time within 6 months of the dismissal for a reason other than retirement. The latter condition is to be presumed to be met unless the employer shows it is not (section 98ZB).

**The right to make a request not to retire**

- 29. Where an employer intends to dismiss an employee by reason of retirement, he has a new duty to inform the employee that he has a right to make a request not to retire on the intended retirement date, in writing between 6 months and a year before the intended retirement date.
- 30. Detailed provisions concerning the conditions applicable to the making and consideration of such a request are set out at Schedule 7 to the Regulations. In summary, if the employee makes a written request not to retire, the employer must consider it in good faith, and hold a meeting to discuss it with the employee. An employee has a right to appeal against the refusal of such a request.

31. By section 98ZD of the 1996 Act, an employee whose employer fails to notify him of his right to request not to retire, or to comply with his duties to consider the request in good faith in accordance with the provisions of Schedule 7 has been unfairly dismissed.

### **(iii) Service-related pay and benefits**

32. Length of service is often used as a criterion for pay and other benefits, such as additional holiday entitlement, in order to motivate staff, reward loyalty and recognise experience. Such benefits could be indirectly discriminatory, since employees in older age groups would be more likely to receive them. It is the DTI's policy to permit such benefits to continue. Two specific exemptions in the Regulations permit employers to continue to grant such benefits.

33. By Regulation 32, nothing in the Regulations prevents an employer from awarding a benefit to workers by reference to the criterion of length of service up to a maximum of five years, where the benefit is awarded to all employees in materially similar circumstances who meet the criterion.

34. Regulation 33 contains a similar exemption for service-related benefits where the criterion for receipt of the benefit is length of service *over* five years, if it reasonably appears to the employer that there will be an advantage to him from rewarding the loyalty, encouraging the motivation or recognising the experience of workers by awarding benefits on the basis of length of service.

### **(iv) Practical implications for employers**

#### **Recruitment**

35. Employers should review their recruitment procedures for unjustified age discrimination. Apart from the problems faced by "trendy" fashion retailers, employers recruiting trainees in whom substantial investment is made may face difficult decisions about whether they can legitimately apply a maximum age limit. Assumptions that particular jobs require a fixed number of years minimum

experience should also be carefully scrutinised, since they are likely to be indirectly discriminatory.

### **“Up or out”**

36. Some employers (including many law firms) operate an “up or out” policy, whereby employees who fail to be promoted within a particular period of time (or to make partner, in the case of a law firm) may be dismissed. These policies could be vulnerable to challenge as indirectly discriminatory, unless they can be justified: for example, a law firm’s “up or out” policy is likely to impact particularly on employees in their mid-30s.

### **Redundancy selection**

37. Redundancy selection criteria based on length of service are also potentially indirectly discriminatory.

### **Retirement**

38. Any retirement age under 65 will be unlawful unless objectively justified. Employers will need to put in place the procedures for notifying employees of their right to request not to retire, and for ensuring proper consideration of such requests.