

Age Discrimination Update



This Update focuses on the Employment Equality (Age) Regulations 2006 which come into force on 1 October. These Regulations represent the final step in the UK's implementation of an EC Directive that establishes a general framework for equal treatment in employment and occupation.

The Government first commenced consultation regarding this significant change to the law in 2003. The final version of the Regulations was published in late March 2006 and has been approved by both Houses of Parliament.

In our view, it is no exaggeration to state that the new Age Discrimination legislation is likely to represent the biggest single change to employment law for many decades. There are huge cultural and legal adjustments that need to be made if age discrimination is to be eliminated in the workplace.

ACAS have published guidance on the Regulations which it is recommended that all employers review. The standards set out in that guidance will be taken account of by Tribunals in the event of there being any disputes. It is notable that in countries where age discrimination has been in place eg the US and Ireland, the number of litigations have been considerable and awards high. It is strongly recommended that employers in the UK should be taking steps now to familiarise themselves with the legislation and to review policies and procedures in preparation for its coming into force and to provide training to all managers and supervisors who are involved in making employment related decisions.

The following represents a basic summary of the new legislation. Because of the importance and complexity of the subject matter, we are holding seminars to review in detail the impact of the legislation for businesses. Details of these are referenced in the attached covering email.

Overview of the Legislation

The legislation protects people of any age from young to old and is therefore much wider than eg the position in the US where protection is only given to those over a particular age. The Regulations also cover the entirety of the employment relationship from recruitment and selection, to training, pay/benefits, promotion and termination.

The Regulations introduce concepts similar to those in other forms of discrimination and they cover four types being direct discrimination, indirect discrimination, harassment and victimisation. These concepts are all well established in existing discrimination legislation eg sex and race.

Direct discrimination occurs when a person is treated less favourably than another on grounds of their age eg a decision not to employ somebody or to dismiss on the basis of age, will be unlawful, subject to the defence of objective justification. In this regard, it is important to note that if challenged, the burden of proof will, in most cases, rest on the employer.

Indirect discrimination occurs when an employer applies a policy or practice that results in a disadvantage to people of a particular age or age group. This is the aspect of the legislation which widens its scope considerably. For example, an employer who advertises for a senior manager who must have 10 years experience will in all probability, be committing indirect discrimination against younger workers because of the imposition of a criterion which a considerably larger number of younger workers as compared to older workers will be unable to comply with. Another example would be the provision of benefits that are linked to service eg a holiday scheme which provides for incremental days after a certain period of service. Such a scheme again is likely to disadvantage younger workers who will be less able to comply with the years of service criterion.

Defences and Exceptions

Because of the breadth of the legislation, there are certain defences and exceptions open to employers. The principal defence is "objective justification" which will be difficult to establish before the Employment Tribunal. Experience from a similar defence in sex discrimination has been interpreted by the Tribunal and Appeal Courts to require a high standard involving the employer satisfying the Tribunal themselves that discrimination was justified in the circumstances as opposed to a more subjective test eg that of a "reasonable" employer. Both direct and indirect age discrimination will be lawful if the employer can show that the discriminatory treatment was a "proportionate means of achieving a legitimate aim". The legislation is non-specific regarding what are legitimate aims and when something may be said to be proportionate. In practice, the Employment Tribunal will ask whether any less discriminatory means could have been used to achieve the same aim. An example would be the imposition of a health test as a condition of employment. That would, in most cases, amount to indirect age discrimination as people of older age groups are less likely to pass the test than younger ones. The employer may be able to justify the requirement for the medical on the grounds of a pursuit of a legitimate aim being health, welfare and safety. However, in relation to proportionality, the issue is whether the medical is set at a level necessary to indicate whether someone is capable of carrying out their particular job and not at a level that is in excess of the requirements of the post.

A further question which remains unclear is the extent to which the saving of costs may be said to be a legitimate aim. The Government's consultation paper would seem to indicate that the saving of cost alone would not amount to a legitimate aim.

There are in addition a number of specific exceptions in the legislation which are easier to establish than the defence of objective justification. Certain

service related pay and benefits are exempt. Any length of service requirement of five years or less will be deemed to be lawful. Over five years, there is a further exemption available which still requires the employer to demonstrate the fulfilling of a business need eg encouraging loyalty or motivation or rewarding experience but at a level of proof which is lower than objective justification. Other exemptions are available in respect of occupational pension schemes, certain types of positive action and redundancy payments.

Recruitment

Employers will need to carry out a full audit of their entire recruitment processes from advertising, through to job application forms, shortlisting and interview practices in order to minimise the risk of claims. This is the area which has led to the highest proportion of claims in Ireland where age discrimination has been in place for over five years.

For example, in relation to advertisements, employers should avoid wording which may suggest that they are seeking candidates of a certain age. Examples would be the use of adjectives such as "dynamic" "fun" "energetic" or "enthusiastic" which may suggest that the employer is seeking a younger employee. Equally, use of words such as "mature" or "requiring boardroom presence" may suggest that the employer is looking for an older employee. When it comes to application forms, questions relating to applicant's age or date of birth should be removed. Dates of education or qualification may also indicate an applicant's age and should be avoided. Employers should seriously consider the use of competency based application forms which focus on the applicant's skills and abilities to meet the job specification in question.

Monitoring and Statistics

The ACAS guidance strongly suggests that employers monitor all aspects of their employment processes to ensure that their procedures are working in practice. For example, in respect of recruitment, this would include monitoring of the age profile of all job applicants as well as those who are shortlisted, interviewed and appointed. The same would apply in respect of the provision of training and promotions. Monitoring should be carried out by persons who are independent from those making decisions.

Pay and Benefits

An audit should be carried out of all pay and benefits particularly those that are service related. Particular difficulties can arise in respect of insured health benefits eg private medical or permanent health insurance. Typically, these cease to be available to employees over a particular age, eg 65. Under the new legislation, the exclusion of such employees who remain in employment will need to be objectively justified which will not be easy as in most cases the issue will be one of cost. Employers who make enhanced redundancy payments equally must check whether their schemes comply with the exception available, which in summary should mirror the existing statutory redundancy payment scheme.

Termination and Retirement

Another major change brought about by the legislation is the way in which employers must now deal with retirements. Going forward, this is no longer an event which simply happens resulting in the termination of employment but rather a process for which the employer must plan. After 1 October 2006, all retirements will amount to a dismissal in law, resulting in significant changes to the Employment Rights Act 1996.

A key issue which the Government required to resolve was whether an employer could fix a retirement age at all. Requiring an employee to stop work because he or she has reached a particular age is one of the most obvious examples of action that would amount to direct age discrimination. The Government responded to concerns raised by employers' organisations and has allowed for a default retirement age of 65. In essence, a retirement that takes place on or after the age of 65 will be lawful and will not amount to age discrimination. It will still amount to a dismissal in law. However, so long as the employer satisfies the procedural requirements introduced by the legislation, it will not amount to an unfair dismissal. On the other hand, employers will require to justify retirement ages under 65 and the Government has indicated that this will be difficult to do in practice.

Employers must comply with new procedural requirements when it comes to retirement dismissals. These involve firstly the issuing of notice of retirement to the employee which must be given not less than 6 or more than 12 months

prior to the proposed date. The employer must advise the employee of the intended retirement date and secondly of their right to make a request to continue working after retirement on their same terms and conditions of employment. The employee must make any such request more than 3 but less than 6 months before the intended retirement date. Where the duty to consider request is taken up by the employee, the employer is required to engage in a formal process, in terms of which the employee is to attend a meeting at which he can be accompanied and be given the opportunity to put forward reasons as to why they should not be retired on the intended date. The employer must give consideration to the request but is not required to provide any reasons or objective justification for refusal. The employee then has a right of appeal which, depending upon the employer's initial response, may be somewhat artificial and again there is no requirement to provide reasons for refusing the appeal. So long as the employer goes through the process required by the legislation, retirement will be the deemed reason for dismissal and will also be fair. On the other hand, a failure to comply with the process can result in the dismissal being unfair.

Summary

As stated at the beginning of this update, the new legislation is a major change to UK employment law and all employers should consider their positions now in advance of 1 October 2006. If you require any assistance in reviewing your current policies, procedures or practices please do not hesitate to contact any member of our Employment Law Division whose details are:-

Sean Saluja SASaluja@paul-williamsons.co.uk
Margaret Gibson MMGibson@paul-williamsons.co.uk
Geoff Clark GXClark@paul-williamsons.co.uk
Gavin Mitchell GMitchell@paul-williamsons.co.uk
Caroline Law CGLaw@paul-williamsons.co.uk