

Guide

The Equality Act 2010

The TAEN Guides to the age related provisions of the Equality Act 2010 are primarily for employees, jobseekers and learners and aim to give a simple, clear explanation. The relevant provisions were formerly contained in the Employment Equality (Age) Regulations 2006 but since October 2010 they have been found in the Equality Act 2010.

The Workplace: Terms and Conditions, Promotion, Career Management

An important aim of the Equality Act 2010 is that age should not stand in your way in the workplace and in your career.

Promotion and opportunities

It is unlawful to deny candidates promotion or career opportunities simply because of their age.

The legislation may also be relevant in other situations where your age or stage of career may less directly influence the opportunities open to you.

Years of experience requirements

You may also find our Guide on Recruitment and Selection helpful, since the same protection applies in promotion as in recruitment situations. Some might say that in promotion cases there is all the more reason to base decisions on demonstrated experience and competence rather than a formulaic approach based on a number of years.

Qualification requirements

These might indirectly restrict an opportunity to people of a certain age. However, a recent case has held that the requirement to hold a degree to move into the top pay band at work did not indirectly discriminate against employees approaching retirement.

Genuine occupational requirements

No experts have yet identified any significant examples of an age-based, genuine occupational requirement which would exclude a specific age group from opportunities in the workplace, other than actors (see the Guide on Recruitment and Selection).

Pay and conditions

If there is a situation where two people are doing equal work and are paid differently because of their age, this is open to challenge. However, this does not affect the National Minimum Wage bands.

Pay can vary between people for many reasons. In some cases the different rate of pay may be indicative of a mixture of gender and age discrimination. Bringing a case for discrimination in pay level therefore depends on collecting good supporting evidence about comparators, workplace pay patterns and related evidence of employer attitudes based on age stereotypes. It is clear-cut discrimination to offer jobs on less good terms just because of your age. It may be hard to establish relevant comparisons but if you have reason to believe this is the case, it is open to challenge. One example would be where a job offer is made on certain terms and then, upon learning your age, an employer withdraws the offer and replaces it with one less good.

Pay scales that are linked to length of service may be indirectly discriminatory, since younger workers are less likely to have long service, even though they may offer the same skills as older workers.

However, the legislation does specifically allow for service-linked pay scales up

to five years. If the pay scale goes beyond five years, a tribunal would consider whether the employer has a reasonable belief in the business benefit of the pay increase beyond five years.

The same logic also applies to other service-related benefits, such as additional holiday (as set out below).

Benefits to reward long service and loyalty

All incremental benefits based on up to five years' service are lawful. Whether you are too young to have done five years' service is not relevant.

Length of service awards that come into effect after longer periods, for example 10 years' service, can be challenged.

They can be permitted where the employer reasonably believes there is a business advantage in rewarding loyalty, encouraging motivation or recognising the experience of workers. This usually requires some evidence, not just the assertion that it is a good thing.

There is flexibility in how length of service is calculated. It can be based on all service with an employer, or service in a particular role. It should be the same for part-time and full-time work, so a half-time worker does not have to work two years to count one year of service. The length of time can also include periods of absence at the employer's discretion.

Health-related financial benefits

Some employment packages include private health insurance, permanent health cover and death in service benefits. These can become more expensive for older employees or even unavailable from insurers for those over 60 or 65.

Offering poorer benefits to older workers is open to challenge under the legislation. Cost alone is not generally regarded as an adequate justification for discriminatory action. However, in one recent case, it was decided that a flexible benefits package where one element of the package was age-related could be justified.

Also, the termination by employers of group life insurance cover (or a related financial service) for employees at age 65 is specifically allowed under the Equality Act.

Employee share schemes

Most share schemes require an employee to remain in employment between the date of grant of an award and the date from when its benefits can be taken. As with length of service benefits, provided the period is less than five years it will automatically be permitted, but if longer, demonstration of how the practice supports a business need is required.

Some companies have share awards that activate depending on a future event, such as the listing of the company or the sale of a part of the company. The five-year rules do not apply to these schemes, so if you are asked to retire before your award becomes exercisable, your employer will have to demonstrate that this meets a stricter objective test of justification.

Most share schemes contain provisions allowing employees who retire at a specified retirement age or later to receive shares early. On the face of it, this discriminates against employees who retire early as well as those who leave before retirement. This has not yet been tested in the tribunals, but employers would need to prove that the rules are necessary to meet legitimate business aims.

However, it is worth noting that there are special rules under the legislation specifically allowing for retiring employees to receive shares under some SAYE and SIP plans, but not all.

Flexible working

Separate from the age discrimination legislation, the right of request to work flexible hours has been extended more widely beyond parents of children to include carers for children and adult relatives or adults living with the employee. Flexible work patterns are popular with many people, especially in mid and later working life. Although the majority of carers for elderly relatives and others are aged 50+, there are no age criteria built into the flexible working rules and age should not determine this.

Evidence of discrimination

Proving that age has been a significant factor in an employment or training decision is hard, just as it is in the case of race or gender.

In order to pursue a claim you have to put together a reasoned case with the available evidence. If there is limited direct evidence of discriminatory action, related evidence which points to discrimination is especially important. An employment tribunal may be able to make a finding of discrimination

based on such evidence. Useful background evidence, which you may be able to obtain from your employer by use of an Equality Act Discrimination Questionnaire (see the Guide on Redress) could include:

- The age profile of the employer's existing workforce, people recruited, offered training opportunities or made redundant.
- The age profile of the customers and the marketing of the business.
- Evidence (or lack of it) on equality policies in the business.
- The fit of your personal circumstances (eg. capabilities, experience, performance figures) with the stated requirements or targets, or in comparison to other colleagues or candidates.
- Written or oral comments and explanations given to you. These could include the kind of questions put to you in an interview and the behaviour of the interviewers.
- Evidence of other people in a certain age group who have experienced similar difficulties within the organisation.

If you challenge your treatment before an employment tribunal, you are entitled to any obtain documents which would assist you in demonstrating the allegations you have made in your claim.

If you can produce enough evidence to support your allegations of discrimination, then the burden of proving that there was not discrimination falls on the employer.

For further information see the Guides on How to Make a Claim and Redress.

If you are concerned you may have experienced discrimination fill in the online questionnaire (EqualityXpress) at www.rjw.co.uk/equalityxpress. Russell Jones & Walker Solicitors will then contact you with their opinion on your claim. The service is free and 100 per cent confidential.

The information in this guide was prepared by the award winning employment department at Russell Jones & Walker Solicitors

Care has been taken to ensure that the information provided in this Guide is accurate up to the date of publication (6 April 2011). However, we do not accept responsibility for mistakes or omissions. In particular, the information provided is for general educational purposes only and is not intended to be legal advice, taking into account your particular circumstances. Please do not use this information to disregard any legal advice, nor to delay in seeking legal advice or representation because of any material contained in it.

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