

How to recognise cases of  
**age discrimination**

*a guide for  
workers*

by Tamara Lewis

# Contents

Chapter	Content	Page
	Acknowledgments	i
	Introduction	iii
	Self-diagnosis checklist and collecting evidence	vii
	<b>part 1: the law</b>	
1	The legal framework ACAS Guidance; Who is covered; Contract workers; Vicarious Liability; When may discrimination occur; What form may discrimination take?	2
2	Direct discrimination	8
3	Indirect discrimination Indirect discrimination; Flexible working	16
4	Defence to direct and indirect discrimination	21
5	Victimisation	27
6	Harassment	32
7	Exceptions	35
	<b>part 2: different employment situations</b>	
8	Recruitment	40
9	Promotion	54
10	Training	59
11	Pay, benefits and other conditions	63

12	Redundancy	69
13	Other dismissals	77
14	Retirement dismissals Discrimination and retirement; unfair dismissal; the duty to notify and consider requests for continued working	80
<b>part 3: tribunal procedures</b>		
15	Statutory dispute resolution procedures	94
16	Bringing a grievance	98
17	Tribunals and questionnaires	102
18	Tribunal time-limits	106
<b>appendices</b>		
19	Age and disability	110
20	Older workers – looking for work?	113
21	Myths and stereotypes	116
22	Sources of advice and representation	122
23	Bibliography	124

*“Age discrimination blights employment opportunities for young and old alike. We want employers to draw on the full range of skills and talents available to them from the whole of the working population. It is good for business, good for individuals and good for society.”*

DTI (2003)

# Acknowledgements

**This guide was written for Help the Aged by Tamara Lewis, Central London Law Centre. The law is based on the final Regulations and case law as known at 1st August 2006.**

The guide has been developed in partnership between Tamara Lewis and Help the Aged, supported by the Access to Justice/Age and Advice network. Network members include: ACAS, AdviceUK, Advice Services Alliance, AdviceNow, Age Concern England, Citizens Advice, the Disability Rights Commission, the Equal Opportunities Commission, the Law Centre's Federation, The Age and Employment Network (TAEN) and the National Institute of Adult and Continuing Education (NIACE). The author particularly thanks Cleon Hutton and Patrick Grattan for their support and helpful suggestions.

The development of this guide and first print run has been funded by the EU Commission. Reprints have been supported by the Department of Trade and Industry.

The guide is available as a pdf file on Help the Aged's website at [www.helptheaged.org.uk](http://www.helptheaged.org.uk) For hard copies, e-mail at [Cleon.Hutton@helptheaged.org.uk](mailto:Cleon.Hutton@helptheaged.org.uk)

## European Community Action Programme

This publication is supported by the European Community Action Program to combat discrimination (2001-2006). This programme was established to support effective implementation of new EU anti-discrimination legislation. The six-year Programme targets all stakeholders who can help shape the development of appropriate and effective anti-discrimination legislation and policies, across the EU-25, EFTA and EU candidate countries.

The Action Programme has three main objectives. These are:

- (1) To improve the understanding of issues related to discrimination
- (2) To develop the capacity to tackle discrimination effectively
- (3) To promote the values underlying the fight against discrimination

For more information see:

[http://ec.europa.eu/employment\\_social/fundamental\\_rights/index\\_en.htm](http://ec.europa.eu/employment_social/fundamental_rights/index_en.htm)

The contents of this publication do not necessarily reflect the opinion or position of the European Commission Directorate-General Employment and Social Affairs. Neither the European Commission nor any person acting on its behalf is responsible for the use which might be made of the information in this publication.



[www.stop-discrimination.info](http://www.stop-discrimination.info)

## **Disclaimer**

This guide provides a general introduction to age discrimination law and how to recognise potential cases. Whilst every effort has been made to ensure that the information provided is accurate, it does not constitute legal or other professional advice.

© Tamara Lewis and Help the Aged. 1st August 2006

# Introduction

*“Age discrimination is the last bastion of lawful unfair discrimination in the workplace and we are committed to tackling it.”*

Patricia Hewitt, Secretary of State for Trade and Industry. (2004)

**Twenty or more years of research shows that age discrimination in employment is firmly embedded. Age discrimination can and does affect those of any age, but apart from lower pay for younger workers, and promotion – where younger and older workers seem equally disadvantaged – most age discrimination is aimed at older workers.**

The population of the UK is ageing, with most people enjoying longer and healthier lives. It is estimated that by 2025, half of the adult population will be 50 or over. At the same time, due to a very low birth rate (less than replacement level) and increases in college-based training, the number of workers under 35 is falling, particularly in the 18-25 age band. Therefore, unless attitudes towards older workers change, there will be a reduction in the size of the labour force.

Age discrimination against older workers occurs across all employment practices and has a reinforcing effect. Failure to offer training means older workers become deskilled, more vulnerable to redundancy and less able to compete for new employment. Large numbers of workers are forced or encouraged to leave their jobs 5-15 years before the state pension age [13] (Numbers in square brackets refer to listing in bibliography, Chapter 23.). For workers over 50, losing a job tends to mean the end of their working life, as it is hard to get a new job at that age. All too often this leads to poverty, disillusion and depression.

All the evidence indicates that age discrimination is seen as more socially acceptable than other forms of discrimination and as part of the natural order.

*“Age related issues are based on ingrained attitudes and will be difficult to shift.” [6]*

Workers of all ages as well as employers are likely to apply stereotypes. A survey of 800 employers and 500 older people in 2001 found that “nearly all those surveyed ... with the exception of those who have personally experienced age discrimination, tend to think of both older and younger workers in a way that reinforces stereotypes” [6]. Many of the common myths and stereotypes are set out in Chapter 21.

Unfortunately it seems that although employers have positive as well as negative stereotypes about the qualities of older workers, they tend to act upon the negative ones.

If stereotypes are so prevalent, this is a challenge for workers, when considering whether to bring a case. Workers should not feel it is “unfair” for them to challenge discriminatory policies.

*“I was only talking to a lady the other day who wasn’t putting herself forward for promotion because at 47 she thought she was too old: she was brilliant, and all it took was a few words of encouragement to make her apply.”*

Large retail organisation. [24]

*“Raising the expectations of older people and their sense of their own worth and value ... should be a major objective...Age discrimination is not simply a matter of barriers put up by others; many older people themselves develop reduced expectations with regard to their rights and abilities.”* [15]

## The new law

In 1999, the government introduced a voluntary Code of Practice on Age Diversity in Employment. In 2001, NOP carried out a large-scale evaluation of its effectiveness for the DWP, published as: Evaluation of the Code of Practice on Age Diversity in Employment. A second edition of the Code was published in December 2002.

Voluntary Codes are rarely effective in changing behaviour on a large-scale. It has taken a European Directive to secure legislative change. The Employment Equality (Age) Regulations 2006 were introduced to implement the European Framework Employment Directive. Unfortunately, the government has taken full advantage of the discretion allowed in the Directive to restrict the scope of the new law. Most significantly, after considerable debate, a default retirement age of 65 has been retained. (See Chapter 14 for more comments.) The Regulations also allow a general defence to direct age discrimination – something which does not exist in the other discrimination strands. The effect of these two factors together risks undermining the effectiveness of the entire age discrimination law.

*“We want to establish a real change of culture in the workplace, where people are judged on their skills and talents rather than their age. We want to move towards a world where employers no longer assume that when workers reach a certain age they have nothing to offer.”*

Alan Johnson. Secretary of State for Work and Pensions. (2004)

## Finding your way around this guide

The content of this guide is set out on the first pages. You may find it useful to follow the sequence set out in the self-diagnosis checklist on pvii.

Part 1 of this guide provides a legal overview, with an explanation of the definitions of discrimination (direct, indirect, victimisation and harassment), the general defence and exceptions. The chapters first set out the law and then provide practical examples of how the definitions and defence apply. At the end of each chapter is a box with key points.

It is recommended that you read these chapters concerning the general principles, before moving on to any specialist chapter relevant to your complaint, eg concerning recruitment, pay or redundancy.

This guide does not provide procedural details regarding how to run a tribunal case. For guidance on that aspect, see suggestions in the bibliography (Chapter 23). The guide’s main focus is on the evidence necessary to recognise a potential case and assess whether it is likely to succeed.

Two key considerations will arise in most age discrimination cases:

- (1) Where the employer denies a decision was based on age, it will be necessary to find the evidence to persuade a tribunal that this was in fact the case.
- (2) In direct and indirect discrimination cases, it will be necessary to identify the employer’s defence and assess whether the tribunal is likely to find it acceptable.

You may have been discriminated against under other discrimination legislation. The guide gives some suggestions in the text where other strands may apply. The Disability Discrimination Act 1995 may be particularly helpful if you have a disability, since the Disability Discrimination Act requires employers to take more positive supportive steps than the Age Regulations.

There has been extensive research over many years into the level and reasons for age discrimination and patterns of stereotyping. Government departments have been particularly active in commissioning reports in the last few years. Some of these reports contain original research, others summarise earlier research. Some of the most useful reports are listed in the bibliography (Chapter 23) and numbers in square brackets (denoted [00]) throughout the guide refer to this listing.

## Terminology

Discrimination law does not only protect employees. The term “worker” has been used throughout this text to cover anyone protected by the legislation.

Research reports refer to “older” and “younger” workers. Inevitably these are loose terms and tend to be relative to the industry, type of job and gender. There is evidence that female workers are seen as “older” at a far younger age than male workers.<sup>[23]</sup> Most commonly, workers over 50 are seen as “older”, but in some jobs the threshold may be lower, and 40 is not unusual. When this guide refers to discrimination against older workers, it tends to mean those over 50, but this is very approximate and used only as a convenient short-hand for discussing the concepts.

Where the guide refers to a “Regulation”, it is referring to a Regulation under the Age Regulations, which came into force in October 2006.

## Collecting evidence

Many of the chapters provide checklists regarding the kind of evidence necessary to prove discrimination and considerations relevant to the employer’s likely defence. Information to explore any of these factors can be obtained in a number of ways, eg by speaking to witnesses; writing informally to the employer; using the grievance procedure; obtaining documents; or by sending a questionnaire (see p103).

Research reports are useful to show either that the employer is likely to be acting on a common stereotype rather than an individualised assessment, or that the employer’s defence is invalid because, again, it is based on a myth or stereotype. For a list of reports see bibliography, Chapter 23 and the Myths and Stereotypes, Chapter 21. Where the reports are referred to in the text, they are indicated like this: [00].

## Self-diagnosis checklist

- 1 | Check you are covered by the Age Regulations (see p3).
- 2 | Identify those actions your employer (or potential employer) has taken which you think are discriminatory, eg failure to offer you a job or making you redundant.
- 3 | Do you think you would have been treated differently if you were younger (or older)? If so, this may be direct discrimination. You should read Chapter 2, so that you understand the meaning of direct discrimination and the type of evidence which you will need to prove it.
- 4 | You should then consider whether the employer will be able to justify the discrimination. You should read Chapter 4 regarding what an employer needs to prove to defend a case.
- 5 | If your situation falls within one of the specialist chapters in Part 2, eg Recruitment or Redundancy, you should go on to read that chapter.
- 6 | You should also check that none of the exceptions apply when discrimination is allowed under the Regulations. See Chapter 7 for an overview.
- 7 | What reason has the employer given you, or is s/he likely to give you, for the way you have been treated? Is the reason why you did not get the job or have been made redundant etc an apparently neutral reason on its face, but one which would tend to disadvantage those of your age group? For example, insufficient experience or qualifications? If so, this may be indirect discrimination. You should read Chapter 3 for the legal definition and for further examples.
- 8 | You should then follow the steps at 4-6 above.
- 9 | Have you ever complained about age discrimination in the past? If so, do you think this may be why you have now been discriminated against? If this is a possibility, you should read Chapter 5. You should then follow the steps at 5-6 above.
- 10 | If you have been harassed, you should read Chapter 6.
- 11 | If you feel you have a possible case, it is usually a good idea to take advice. Chapter 22 discusses where you can get advice. You should not be put off taking further steps because people tell you age discrimination is "natural" or because you feel that yourself. You may find it interesting to read Chapter 21 regarding common myths and stereotypes.
- 12 | Before starting any tribunal case, you will want advice regarding what is involved, your chances of winning and the likely compensation. For an introduction to these aspects, see Chapter 17.
- 13 | It is essential that you do not miss any tribunal time-limits. You will need specialist advice, but an introduction is in Chapter 18.
- 14 | If you do decide to go ahead, you should make sure that you send a questionnaire. You will probably need help with this. See Chapter 17.
- 15 | Consider whether you need to write a grievance letter before you start your case because the statutory dispute resolution procedures apply. You may need specialist advice on this. See Chapters 15 and 16 regarding grievances.

part 1

the law

## Chapter 1: The legal framework

### **Age discrimination in employment was made unlawful from 1st October 2006.**

The law against age discrimination is set out in the Employment Equality (Age) Regulations 2006. These are referred to in this guide as the “Age Regulations” or the “Regulations”.

The Age Regulations were brought in to implement the age part of the European Framework Employment Directive, also known as the General Framework Directive. There may be some legal challenges where the Regulations do not fully implement the Directive. Indeed, some parts of the Regulations are already under challenge and you should look out for any reported outcomes. However, this is a complex area and beyond the scope of this Guide. It is very important that test cases are correctly identified and handled. Otherwise they could set bad law.

The following types of discrimination are also unlawful in Great Britain:

- Race
- Religion or similar belief
- Sex, marital or civil partnership status, pregnancy and maternity
- Sexual orientation
- Disability.

The legal framework is similar for these different discrimination strands, but there are some important differences.

Individuals who believe they have suffered age discrimination can bring their case in an employment tribunal. The same tribunals hear all cases of employment law including discrimination in employment. For more detail about employment tribunals, see Chapter 17.

### **The ACAS Guidance**

ACAS has issued guidance to the Regulations: *Age and the Workplace: Putting the Employment Equality (Age) Regulations 2006 into practice*. This is mainly an employers’ guide, but it is still useful for workers and their advisers to look at. It is available on its website at [http://www.acas.org.uk/media/pdf/s/3/Age\\_and\\_the\\_Workplace.pdf](http://www.acas.org.uk/media/pdf/s/3/Age_and_the_Workplace.pdf)

The ACAS guidance does not have the same status as a legal Code of Practice, which must be taken into account by employment tribunals if relevant to any case. Nevertheless it is likely that tribunals will take note of the interpretation of certain difficult areas set out in the guidance. It may also be helpful to show employers, if you are trying to persuade them to act differently.

## Are you covered by the Age Regulations?

The Age Regulations cover discrimination in employment or vocational training. Unlike most of the other discrimination strands, they do not cover discrimination in goods and services.

The Regulations do not only forbid discrimination against older workers (unlike the position in the USA). You are protected against age discrimination whatever your age, subject to the special rules concerning retirement.

There is no exemption for small employers.

You can claim age discrimination:

- Whatever your age (subject to the rules on retirement).
- Whether you are a full-time or part-time worker.
- Regardless of how long you have been working for your employer.
- Whether or not you are an employee – as long as you are doing work personally for the employer.

The following workers can claim age discrimination:

- Job applicants.
- Employees.
- Ex-employees.
- The self-employed working on a contract personally to work for the employer.
- Apprentices.
- Contract workers (see below).
- Office holders, eg judges.
- Crown servants and parliamentary staff.
- The police or those seconded to work for the Serious Organised Crime Agency.
- Partners in firms, eg solicitors.

The Regulations prohibit discrimination by:

- Employers.
- Trustees and managers of occupational pension schemes.
- Barristers or advocates against tenants or pupils.
- Trade organisations, eg trade unions and employers' associations.
- Qualifications bodies.
- Providers of vocational training.
- Employment agencies.

The Regulations also prohibit discrimination by institutions of further and higher education. It is uncertain whether local government training provision is covered. These cases are not dealt with by employment tribunals and are not within the scope of this Guide. For more detail on age discrimination law and training, see *Age Legislation and Funding of Training*. [34]

## Who are contract workers?

Under Regulation 9, you are protected from discrimination if you are a contract worker.

A “contract worker” under discrimination law has a special meaning. It covers the situation where you are employed by one organisation, but you do work for another organisation (“the principal”), under a contract (whether written or verbal) between your employer and the principal. If the principal discriminates against you, you can bring a claim against the principal, even though the principal is not your employer.

This may cover you if:

- You are sent by an agency to work for a particular firm. You could make a claim against the firm if it discriminates against you.
- You work for a concession based in a department store. If the store benefits from your work and exercises some control over you, it may be a ‘principal’. If so, you can claim against the store if it discriminates against you.
- You work for a private company which supplies services, eg cleaning or catering, to a local authority, NHS trust or similar organisation. You could make a claim against the local authority etc if it discriminates against you.

**For example:** a local council contracts out its catering services to Hot Foods Ltd. Under the contract, Hot Foods Ltd will supply cooks and kitchen assistants to work in the council’s canteen. Freddie is one of these cooks. One of the council’s managers, who uses the canteen, starts abusing and harassing Freddie, telling him he is too old and slow. Freddie can bring a case against the council for harassment due to his age.

In these situations, you may or may not want to bring a claim against your employer too. That depends on a number of factors, eg

- Whether your employer has also discriminated against you, or was powerless in the situation.
- Whether there is evidence to prove this.
- Whether you prefer not to upset your own employer, in case other work is available.

In the above example, Freddie has no reason to bring a claim against Hot Foods Ltd, because it has not done anything wrong.

It is often hard to be sure whether someone is a ‘contract worker’ and you may need to take specialist advice.

## Vicarious liability: who is responsible when discrimination occurs

Your employer is automatically responsible for any discrimination carried out by one worker or manager against another. This is so even if the top people in the organisation did not know what their junior managers were doing.

The discrimination must happen in the course of employment. This simply means on the work premises or during work time or connected with work, eg an after-work leaving drink.

Your employer cannot escape responsibility for what has happened by taking prompt remedial action once s/he finds out. However, this may prevent him/her being responsible for any further discrimination.

The employer's only defence is if s/he can show s/he took all reasonably practicable steps to prevent such discrimination ever occurring. In practice, this is an extremely difficult defence for employers to prove and very rarely succeeds. It would not be enough to have an Equal Opportunities Policy on paper. The organisation would have to show it operated the Policy very actively indeed.

An employer is also responsible for discrimination carried out by an authorised agent.

**For example**, if a recruitment agency acting on an employer's behalf unjustifiably rejects you because you are considered too old, you can probably claim against the employer as well as against the agency.

If an employment agency acts on an employer's unlawful instructions, it may be legally responsible itself for discrimination, unless it reasonably relied on a statement by the employer that its actions would not be unlawful.

## When may discrimination occur?

Discrimination may occur at any stage in the employment relationship, including before employment starts or after it has ended. The employer must not discriminate:

- In the arrangements made for deciding who should be offered a job.
- In the terms on which you are offered a job.
- By refusing to offer you a job.
- In the terms and conditions on which you are employed.
- In promotion, transfer, training or other benefits.
- By dismissing you or making you redundant.
- By subjecting you to any other detriment, eg giving you a disciplinary warning or writing a poor reference.
- By taking action against you after you have left the job, provided it relates to a matter connected with your job, eg by writing a discriminatory reference or ignoring your appeal against dismissal.

## What form may discrimination take?

There are five types of unlawful age discrimination:

- Direct discrimination – Regulation 3(1)(a).
- Indirect discrimination – Regulation 3(1)(b).
- Victimisation – Regulation 4.

- ❑ Victimisation relating to instructions to discriminate – Regulation 5.
- ❑ Harassment – Regulation 6.

A summary of the definitions is as follows. The definitions are dealt with in more detail in Chapters 2 – 6 below.

### Direct discrimination

This is where you are treated less favourably by your employer due to your age or perceived age.

**For example:** you are not offered a job because the employer considers you are too old at 50. Or the employer does not know your age but thinks you look about 50 and considers that it too old.

Direct discrimination is allowed if the employer can objectively justify it. The employer must convince the tribunal that the discrimination is a proportionate means of achieving a legitimate aim.

The position is different in other discrimination strands. For example, it is not permitted to justify direct race or sex discrimination.

### Indirect discrimination

This is where the employer treats you the same way as s/he treats or would treat everyone else, but nevertheless, you are at a disadvantage due to your age, and others of your age group would also be at a particular disadvantage.

**For example:** the employer requires 10 years' experience for a particular job. You do not get the job because you are aged 23 and have not had the chance to build up 10 years' experience. This requirement would disadvantage most younger workers, who would not yet have had the chance to acquire 10 years' experience.

There is the same defence as for direct age discrimination, ie if the employer can show the provision, criterion or practice was a proportionate means of achieving a legitimate aim.

**For example:** the job was so complex, that sufficient experience could only be acquired over a 10-year period. But it is hard to think of many jobs which would require such lengthy experience.

## **Victimisation**

This is where you are treated badly or punished because you have complained about age discrimination in some way. As long as your complaint was made in good faith, you should not be victimised.

There is similar protection under Regulation 5, where you are victimised because you fail to carry out an instruction to discriminate against someone else.

## **Harassment**

This is where, on grounds of age, you are subjected to conduct which has the purpose or effect of violating your dignity or creating a humiliating or offensive environment.

## Chapter 2: Direct discrimination

### The legal definition

**Regulation 3(1)(a) states:**

*A person (“A”) discriminates against another person (“B”) if on grounds of B’s age, A treats B less favourably than he treats or would treat other persons*

Direct discrimination is the most obvious form of age discrimination. It occurs where your employer treats you less favourably on grounds of your age.

**For example:** Denise (aged 55) is not promoted because she is considered too old for promotion. If she had been younger, her employer would have promoted her.

**For example:** Theo (aged 30) is not offered a job as head teacher because the employer thinks he is too young and would not gain parents’ confidence. If he had been older, the employer would have offered him the job.

### Different treatment, not just unfair treatment

It is not enough to prove that the employer has treated you unfairly. You need to show you have been treated *differently* because of your age.

It is useful to ask yourself the “but for” question. In the above example, “but for Denise’s age, would the employer have promoted her?”

In your own case, ask yourself – if you were younger (or older) would the employer have treated you differently? For example, would the employer have:

- Offered you a job?
- Promoted you?
- Paid you more?
- Put you on a training course?
- Pressed you to accept redundancy?

## Comparators

The definition of direct discrimination invites comparisons to be made. It is helpful if you can show the employer has recruited, promoted, trained, retained etc another worker of a different age, but who has similar qualifications and experience or is in a similar relevant situation to you. This person would be an “actual comparator”.

**For example:** using the first illustration above, Robyn (aged 34) is promoted. She has very similar (or slightly fewer) skills, experience and qualifications to Denise. The employer will need to explain why he preferred Robyn to Denise.

It is not essential that you can find an actual comparator. In the previous example, it may be that no one is promoted. But Denise may still be able to prove that if she had been younger, she would have been promoted. This would require the tribunal to make a “hypothetical” comparison.

The “hypothetical” comparator would be a fictional worker with very similar skills, experience and qualifications to Denise but who is younger. The tribunal will look at all the evidence and decide whether such a hypothetical comparator would have been promoted. If the employer admits s/he has treated you less favourably on grounds of your age, you should not need a comparator.

For more detail on comparators and the evidence needed to prove different treatment, see p11 below.

## Direct discrimination due to apparent age

The employer may not know your age, or may think that you look older or younger than in fact you are. It is equally unlawful to discriminate against you because of your ‘apparent age’.

**For example:** Abi (aged 25) goes into a shop to speak to the manager about a job vacancy advertised in the window. She is very young looking and the manager mistakenly thinks she is 18 or 19. The manager does not want to employ a teenager, because she believes young workers are irresponsible, and she tells Abi the job has gone.

It may also be unlawful where an employer discriminates against a worker because, although the employer knows the worker’s true age, the employer is concerned that customers may think the worker is of a different (and “unacceptable”) age.

**For example:** an employer rejects Terry’s application for the position of mortgage adviser. Although Terry is in fact aged 35, he looks about 10 years’ younger. The employer is concerned that customers will not feel confident to take advice from a mortgage adviser who appears young and therefore inexperienced.

## Motives for direct age discrimination

Direct discrimination may arise from different motives, eg

- ❑ It arises from hostility towards people of a certain age.
- ❑ It arises from stereotyped ideas as to the capabilities and qualities of people of a certain age. These stereotypes may or may not be generally accurate and, even if they are generally accurate, they may or may not apply to you as an individual.
- ❑ It arises due to concern about customer reaction or how you will fit in within the workforce.
- ❑ Unconscious discrimination. The employer does not realise his/her decisions have been influenced by your age.

All these reasons for treating you differently on grounds of age are potentially unlawful. However, much will depend on whether the employer can make out a defence (see below).

## The defence to direct age discrimination

It is a defence to direct age discrimination if the employer can prove the less favourable treatment is justified because it is a proportionate means of achieving a legitimate aim. This defence is worded the same way as the defence to indirect age discrimination. For more detail, see Chapter 4.

## Specific exceptions to direct age discrimination

As well as the general defence to direct discrimination, there are a number of specific exceptions, where discrimination is permitted. These are set out in Chapter 7.

## How do you prove direct age discrimination?

An employer may admit s/he has treated you less favourably on grounds of your age, but maintain that this was justified. If this happens, you need to challenge the employer's use of the defence (see below).

Alternatively, an employer may deny that how s/he has treated you has anything to do with your age. If you take your case to an employment tribunal, you will then need to prove hidden age discrimination.

## Evidence checklist

Always remember that it is not enough to prove that you have been treated unfairly. Maybe the employer treats everyone unfairly. You must prove the employer has treated you *differently*. The different treatment must be less favourable.

Consider everything the employer has said and done. Would the employer have said or done those things if you had been younger or older?

The following types of evidence can help prove you have been directly discriminated against:

- Actual comparators.
- Less exact comparisons.
- Statistics.
- Ageist remarks.
- Departure from normal practices or policies.
- The history of your treatment in the workplace.
- The employer's inability to explain the treatment.

### Does the employer know your age?

It may also be necessary to prove the employer knew your age – or at least thought you were of a particular age.

This may not be an issue, eg if it is obvious from your appearance or if you have been with the organisation for a long while. But discrimination can occur when someone does not look their age, and their true age has been revealed suddenly and accidentally.

**For example:** Gerry is 58 but he looks much younger. He needs to ask HR to approve a bank loan application, which states his age. After this, he notices a difference in the way he is treated at work.

The most obvious context in which age may be unknown is short-listing for a job, where the employer does not know you. However, information on your job application may reveal your age. See p43 for comments on this.

Remember also that it can be unlawful to discriminate on the basis of your apparent age. An employer may reach the wrong conclusions about your age, eg by looking at your career history on your application form, but it will still be unlawful to refuse you a job on the basis of that wrong assumption.

In theory, you need not disclose your age when bringing a tribunal claim that the employer has discriminated on the basis of your apparent age. However, it will be necessary to prove that the employer perceived you to be of a certain age. It is possible to imagine some cases where it is not necessary to reveal the your true age or even a tactical advantage not to do so. But in most cases, it will be simpler if you are open about your true age.

### Actual comparators

The best evidence to prove hidden direct age discrimination is usually to identify an actual comparator. This means another person of a different age from you who, in similar circumstances, has been treated more favourably. The comparator should be as similar as possible to you apart from the difference of age.

**For example:** Sol, a well-qualified engineer with good experience applies for a job and is not even short-listed. His application shows he is aged 52. Philip, a younger engineer with equal or less experience and qualifications is short-listed. Philip is an actual comparator.

Employers usually try to explain away their different treatment of comparators by saying that the comparator's situation was not in fact comparable with yours.

**For example:** where two workers appear to have committed the same offence and one is dismissed but the other is not, the employer may say the dismissed worker had a worse disciplinary record or had only been with the organisation for a short while or was in fact more blameworthy in respect of the offence.

This is why it is best that the comparator's circumstances are as similar as possible to your own. The age of the comparator is a difficult issue. In order to prove that the better treatment of the comparator is probably due to the age difference, the comparator must obviously be of a different age to you.

**For example:** if Gilbert (aged 53) does not get promoted, a good comparator would be a much younger worker with lesser qualifications and experience, who does get promoted, eg Patrick (aged 38).

But what if Tony (aged 49) gets promoted? This is not much younger than 53. Therefore it does not suggest the reason Gilbert did not get promoted was anything to do with Gilbert's age. Unless there is evidence to suggest that the employer is applying a cut-off on promotion at the age of 50, it will be harder for Gilbert to prove his case.

There is no simple answer as to how much age difference there must be between you and your comparator. The age difference needs to be looked at in the context of all the facts for its significance.

**For example:** an employer refuses to appoint Pascal (aged 63), but does appoint Ralph (aged 61). Although there is only a 2-year age difference, this does not disprove Pascal's age discrimination claim. The employer may be more concerned about Pascal's proximity to retirement age than Ralph's, because workers often stay no longer than 4 years anyway.

You need not only refer to one comparator. If there are more than one, this makes it even harder for the employer to explain away the different treatment.

There may be comparators of which you are unaware. One way to find out is by using the questionnaire procedure (see p103).

It is not essential to find an actual comparator to prove direct discrimination. It is just very helpful.

If the employer admits s/he has treated you less favourably on grounds of your age (but relies on the justification defence), you should not need to find a comparator.

**For example:** an employer tells Freda that she has not been promoted because she is too old at the age of 48. Freda does not need to find a comparator, and it does not matter at what age the employer *would* have promoted her, eg whether the employer would have promoted her if she was 47 or if, on the other hand, the employer would not promote anyone over 40. It is enough that the employer admittedly based the decision on the fact that Freda is 48.

## Similar comparisons

It is often impossible to find an actual comparator whose circumstances exactly match yours apart from the age difference. Nevertheless, loosely similar comparisons can also help to prove the employer has a tendency to discriminate.

**For example:** Jenny (aged 42) fails her 3-week probation in her new job as call centre operator because she came in 20 minutes late on two mornings due to tube strikes. Mandy (aged 24) passes her probation, even though she was off-sick with 'flu for 1 week out of the 3. Also, Pippa (aged 20) had her probation extended rather than terminated, when there were several customer complaints regarding her handling of matters. Mandy and Pippa's circumstances are not identical to Jenny's but their "offences" seem at a similar or worse level, yet they were given the benefit of the doubt.

Of course it is easier for employers to explain away their different treatment of these looser comparators by non-age factors. It is necessary to be sensible about making this kind of comparison and not to choose silly and obviously non-comparable examples which will really irritate the tribunal.

## Statistics

It can be revealing to look at how the employer generally treats workers of different age groups. For example, statistics may reveal:

- ❑ Few workers over or under a certain age are recruited or promoted generally, or to certain posts.
- ❑ The department where you applied to work entirely consisted of workers younger (or older) than you.

A good way to find out statistics is through the questionnaire procedure (see p103).

## Ageist remarks

You can prove direct age discrimination, even though there have been no ageist remarks. However, remarks which indicate a hostile or stereotyped view of workers of a certain age can reveal the employer's true state of mind.

The most significant remarks are any made by the manager who has decided not to promote you or make you redundant etc, or remarks made during a recruitment, promotion or redundancy process. For examples, see the specialist chapters in part 2 of this guide.

Employers often deny that they have made unacceptable remarks and these can be hard to prove. It is therefore essential that you mention the remark from the beginning, and do not bring it up for the first time during a tribunal hearing. You need to refer to it in any grievance letter you write and in the tribunal claim form.

You must also be consistent regarding what was actually said. If you give different versions of the remark at different times, it may be suggested that you are not telling the truth. If you cannot remember the exact words, you should say so and not guess.

## Departures from normal practices and policies

As already mentioned, it is not enough to prove you have been treated unfairly. The employer may just be a bad employer who treats everyone badly. It is more useful to prove that the employer has failed to follow a written procedure – unless the employer can show s/he routinely ignores his/her own procedures. Most useful of all is to show the employer normally does things in a different way in practice.

## The history of your treatment in the workplace

Of course your age increases over time and this may affect how you have been treated at different stages of your working life. Your treatment may deteriorate gradually as you get older, or suddenly as you reach a “threshold” age, usually 40, 50 or 60.

**For example:** you may have received appraisal markings as “suitable for promotion” for many years, but this may suddenly change to “unsuitable for promotion”, when nothing has changed except your age.

## The employer’s inability to explain the treatment

The employer’s explanation for not recruiting or promoting you or for selecting you for redundancy etc is crucial. The first thing to do is to find out and pin down the explanation. This can be done in various ways, eg:

- Asking the employer verbally. This is not so useful because there may be a dispute later about the answer you are given.
- Asking in an informal letter or e-mail. An e-mail in particular may draw the employer into providing a quick and honest written reply.
- Asking in a formal letter. The difficulty with this is that employers often provide verbal answers to letters, when they do not want to get pinned down. Also, a letter is likely to make the employer more cautious, and possibly less truthful, in the reply.
- Taking out a grievance. This option does not apply to external recruitment. The disadvantage with taking out a grievance is that it may antagonise the employer and also lead to a cautious and possibly untruthful reply. It is a step which could be used after more informal approaches. It may be necessary anyway before going to a tribunal (see Chapter 15).
- By sending a questionnaire (see Chapter 17). Again, this is not a first option and is suitable only when you are very likely to bring a tribunal case.

If the employer is unable to provide a convincing explanation for the way you have been treated, if other factors could suggest age discrimination, the tribunal must decide age discrimination has taken place.

Once the employer has given an explanation, you need to consider whether this explanation is genuine or can be revealed to be a sham.

## The employer's defence to direct age discrimination

If the employer wishes to defend direct discrimination, s/he must prove the different treatment is objectively justified. Although it is for the employer to prove this defence and not for you to disprove it, it is still useful to consider whether it will succeed and how it can be challenged.

If the employer denies s/he took a decision based on age in the first place, it is unlikely s/he will try to use the defence or that a defence would succeed. However, an employer may try to argue that, on the one hand, s/he did not treat you less favourably on age grounds, but on the other hand, if s/he did, s/he can justify doing so.

It is strongly arguable that, except perhaps where you are very near retirement age, decisions should be based on your individual qualities rather than stereotyped generalisations. The defence should therefore be difficult to prove in direct discrimination cases. For more details of the defence, see Chapter 4.

### Direct discrimination: key points

- Direct discrimination occurs where the employer treats you less favourably on grounds of your age. It is also unlawful to discriminate because of your apparent age.
- When looking for evidence, focus on different treatment rather than purely unfair treatment.
- The best evidence is where you can find a comparator who has been treated better than you in similar circumstances. If you cannot find an exact comparator, a loosely similar comparison may be useful.
- It is still possible to prove age discrimination where there is no comparator.
- It is important to find out and discredit the employer's explanation for the different treatment.
- There is a general defence to direct discrimination which is the same as that for indirect discrimination, ie if the employer can show the discrimination is justified as a proportionate means of meeting a legitimate aim. The general defence should rarely succeed in direct discrimination cases. (See Chapter 4 for more detail.)
- There are also a number of specific exceptions. (See Chapter 7.)

## Chapter 3: Indirect discrimination

### The legal definition

**Regulation 3(1)(b) says:**

*a person (“A”) discriminates against another person (“B”) if – 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 as B at a particular disadvantage when compared with other persons, and*
- (ii) which puts B at that disadvantage, and A cannot show the ... provision, criterion or practice to be a proportionate means of achieving a legitimate aim.*

Direct discrimination is where you are treated differently due to your age.

Indirect discrimination is where you are treated in the same way as other workers are treated (or would be treated). But the employer has adopted a practice or applied a provision or criterion, which disadvantages you and would also tend to disadvantage others of your age group.

**For example:** the employer selects for redundancy on the basis of Last In, First Out. This means that workers with the shortest service, whatever their age, will be made redundant. However, although it is a neutral criterion, it is one which will tend to target younger workers, who are less likely to have acquired long service.

### The stages of the definition

It is simplest to apply the definition in these stages:

- (1) Find out why you have been refused a job or promotion, or have been made redundant etc.  
**For example:** you do not have the required qualifications or experience.
- (2) Would those requirements put others of your age or age group at a particular disadvantage compared with those of other age groups?  
**For example:** young workers are generally less likely to have lengthy experience.
- (3) What justification is the employer likely to give for applying the particular requirements or practices? Is the tribunal likely to accept it is a proportionate means of achieving a legitimate aim?

**For example:** does the job in question really require those qualifications or experience?

Indirect discrimination law is difficult and it is recommended that you take specialist advice.

## (Identifying) Discriminatory provisions, criteria and practices

There are many provisions, criteria or practices which may have an adverse impact on people of a certain age. For example:

- **Qualifications.** A requirement to have certain qualifications for a job or promotion could particularly disadvantage older workers, if such qualifications have only come into fashion or existence more recently (eg a degree in media studies or GCSEs). For more detail of indirect discrimination in recruitment and promotion, see pages 46 and 56 respectively.
- **IT knowledge.** Although some older workers are very comfortable with IT technology, research suggests that older workers are generally far less likely than younger workers to be confident or skilled in this area. The use of IT is pervasive and it can come up in various contexts, some of which are more necessary than others. For example, the job itself may require use of IT systems. Alternatively, a job which hardly uses IT at all, may nevertheless require job applications to be made via e-mail or provide training through interactive IT.
- **Length of service.** Length of service requirements can take various forms, eg selection for redundancy based on Last In, First Out or greater pay and benefits for those with longer service. This is likely to disadvantage younger workers. For more detail on indirect discrimination in redundancy, see p71, and in pay and benefits, see p65-66. See also comments below regarding experience.
- **Experience.** Requirements for lengthy experience of any kind may disadvantage younger workers who have had less time in the job market. Such requirements may also disadvantage others who have had disrupted job experience, eg due to discrimination or childcare, and can therefore also be indirect race or sex discrimination.
- **Health and fitness tests.** Depending on what such tests are assessing, they may have adverse impact on older workers.
- **Long or inflexible hours; full-time working; mobility; relocation.** Research shows that the over 50s often take on caring responsibilities for a range of dependants including older relatives and grandchildren. This can be a strong age-related barrier to employment, particularly for older women. It can lead to an inability to take on a job or a promoted position or to adverse appraisals and vulnerability to redundancy because of unwillingness to work overtime. Requirements to travel or for relocation may also be harder for older workers, who are more likely to have settled lives, family commitments and support systems.

Many of the issues and concerns overlap with those concerning women with childcare requirements, who are covered by indirect sex discrimination law.

## Flexible working: don't be afraid to ask

*“For those with health issues or caring responsibilities, which have interrupted their working life or threaten to do so, flexible employment can be a highly effective option.” [33]*

**Many organisations are moving towards flexible working. There are four different needs for flexible working which are indirectly linked to age:**

- A desire for gradual retirement, reducing hours in the lead up to retirement (whether at age 65 or beyond).
- The need to care for elderly adult dependants. This is concentrated among workers in their 50s and 60s. For example, it is estimated that more than one in five people aged 50-59 have caring responsibilities.
- The need to care for children. This is concentrated among workers in their 20s-40s.
- Because of health reasons, which may amount to a disability under the Disability Discrimination Act (see Chapter 19).

Many workers would be able to remain in work longer if they could work part-time or make other flexible arrangements, including flexible hours or home-working. In addition, older workers who have been out of employment for some while, eg due to caring commitments, usually find it easier to return on flexible arrangements.

Although employers are most likely to respond to requests for flexible working in respect of childcare, research shows they also accept reasons related to adult caring or gradual retirement more than other reasons. In a DWP research report in Spring 2006 [36], 78% of establishments said they were likely to allow flexible working in the run up to retirement.

From April 2007, the government is to introduce a statutory right for eligible workers to request flexible working in order to care for adult dependants. The exact details of this entitlement are not available at the time of writing. This entitlement is similar to the right to request flexible working for care of children under 6. Although it is simply a right to make a request and have it considered – not a right in itself to have the request agreed – it does at least ensure your employer considers the matter properly. If an employer refuses, older workers may be able to claim indirect age discrimination, depending in particular on whether the refusal is objectively justified. Specialist advice is highly recommended to formulate this kind of case.

You can request flexible working at any time without the need to use the statutory right. The advantage of the statutory right is simply that it forces your employer to hold a meeting with you and give you written reasons for any refusal. It also helps to create a culture whereby employers are less surprised by such requests and may be more responsive.

It increases the chances of your employer agreeing to your request if you think through what difficulties it may cause and suggest solutions. It is even better if you can suggest any positive benefits from the proposed arrangement.

Of course there is always a risk of a negative response and that your employer will treat you less seriously afterwards. The new right will make it unlawful to victimise you for requesting the change, but victimisation is still unpleasant if it occurs and can be hard to prove. Nevertheless, if you have persuasive reasons for wanting to work flexibly, consider asking. Remember also that if you need flexible or reduced hours for any health reasons, you may be able to request a reasonable adjustment under the Disability Discrimination Act (see Chapter 19).

*“With an ageing population, the issue of how older workers, and especially women, can combine employment with caring responsibilities is set to become an increasingly important issue.” [33]*

## The employer’s defence to indirect age discrimination

Whether these kinds of provisions, criteria and practices are unlawful depends mainly on whether the employer can justify their application, by proving they are a proportional means of achieving a legitimate aim.

The defence to indirect age discrimination is worded in the same way as that for direct age discrimination, although it is more likely to succeed in indirect than direct age discrimination cases. For details of the defence, see Chapter 4.

### Indirect discrimination: key points

---

- The definition of indirect discrimination is essentially the same as in other discrimination legislation.
- Indirect discrimination occurs if you are disadvantaged because of the application of a provision, criterion or practice, which is of a kind which would disadvantage those of your age group generally when compared with others.
- Examples of discriminatory provisions, criteria or practices affecting older workers are requirements for recent qualifications; maximum experience; IT knowledge; inflexible hours.
- Examples of discriminatory provisions, criteria or practices affecting younger workers are requirements for long service or minimum experience.
- The employer can defend indirect discrimination if s/he can prove s/he is using a proportionate means to achieve a legitimate aim. (See Chapter 4 for more detail.)
- The need to work flexibly is of increasing importance to older workers. There is to be a new right to request flexible working for adult carers.

## Chapter 4: The defence to direct and indirect discrimination

### The legal definition

**Under Regulation 3, it is a defence to direct or indirect age discrimination where the employer can objectively justify the discriminatory treatment by showing that it is a proportionate means of achieving a legitimate aim.**

The Framework Employment Directive spells this out a little more. Under Article 6 of the Directive, it is a defence only where the treatment is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The employer must therefore prove:

- S/he has a legitimate aim. This must amount to a real need.
- The means of achieving that aim are appropriate and necessary, bearing in mind the overriding principle of non-discrimination. The employer needs to prove there is no reasonable alternative.
- The means are proportionate, ie the greater the impact of the discrimination on you personally or on those of your age group generally, the stronger the justification the employer needs.
- The aim cannot be achieved in an alternative non- or less discriminatory way.
- The discrimination is justified on an objective test, ie as judged by a tribunal, not purely the employer's subjective opinion.

The definition is the same as for the defence to indirect discrimination under the other strands, eg indirect sex discrimination. The unusual aspect of age discrimination law is that this general defence also applies to direct discrimination.

As well as this general defence, there are specific exceptions to unlawful discrimination. These are set out in Chapter 7.

### Applying the defence

The scope of the defence is crucial. It affects to what extent age discrimination is unlawful.

Unfortunately, no one knows how strictly the defence will be applied by the tribunals. This makes it very difficult for everyone concerned to know what is unlawful. Employers are unhappy about this as well as

workers. It will take one or two years before any test cases reach the higher courts. Meanwhile, if you are thinking of bringing a case, you must be prepared for some level of uncertainty as to the result.

The government has said:

*“The test of objective justification will not be an easy one to satisfy. The principle remains that different treatment on grounds of age will be unlawful: treating people differently on grounds of age will be possible but only exceptionally and only for good reasons”.*

It is strongly arguable that the defence should rarely succeed in direct discrimination cases, where employers’ actions are so often based on assumptions and stereotypes about age, rather than assessing individual capabilities. In the first decision at European level (*Mangold v Helm*), the ECJ found an age-based policy unlawful precisely because it did not give consideration to factors relevant to individual workers.

**Mangold v Helm** [2006] IRLR 143, ECJ

The German government had a blanket rule that fixed-term contracts, which were restricted for younger workers, had no restrictions for workers aged 52 and above. The reason was to encourage the employment of older workers. The ECJ said that although this was a legitimate aim, the means adopted were not proportionate. This was because of the exclusion of a significant body of workers based purely on their age, without consideration of other factors such as the structure of the labour market in question or the personal situation of the person concerned. The rule applied to all 52 year old workers without distinction, whether or not they were unemployed before being offered the fixed-term contract or for how long.

## Who needs to prove the defence?

The onus is on the employer to prove the defence. The government says:

*“In order to objectively justify different treatment on grounds of age, it will be necessary to provide evidence when challenged. Assertions will not be enough.”*

You do not have to prove there is no defence. Nevertheless, it is useful to challenge the employer by:

- ❑ Showing that a large number of people are or would be adversely affected by the employer's actions. This is often obvious if the employer uses sweeping age bars.

- ❑ Showing that the impact on you has been very serious.

**For example:** it will be harder for the employer to justify discrimination if you have lost your job than if you have been excluded from a single business trip with no ongoing consequences. Having said that, even the latter example requires strong justification.

- ❑ Suggesting alternative less discriminatory ways of achieving the employer's aims.

**For example:** the employer wants to measure competence for a job by requiring certain qualifications. For many jobs, knowledge and competence could be assessed by job-related tests.

- ❑ Pressing the employer to provide evidence to back up his/her assertions that s/he has a legitimate aim, that his/her actions actually contribute to achieving that aim and that there is no less discriminatory way of achieving the aim.

## Typical defences – will they stand up?

Set out below are some common defences to age discrimination. For a discussion of defences in specific contexts, see also the chapters on recruitment, promotion, training, pay and other benefits, redundancy and dismissal.

In assessing the strength of any defence, it is worth bearing in mind that fair practices improve staff retention. Staff retention is of high value to employers, as most of them will acknowledge.

### Customer or client preference/corporate image

These are similar factors, although there are subtle differences between them. An employer may feel a worker is too old or too young to fit the image of the business or the job in question, and that customers may be put off.

At this stage, it is difficult to know whether customer preference or corporate image will be found by the tribunals to be an acceptable defence. Arguably it is not justifiable in any circumstances to use as a defence a factor which panders to the prejudices and stereotypes of customers.

Quite apart from these arguments of principle, it is important to challenge whether customers really would be deterred by a worker of a different age, if such a worker had an appropriate manner and approach, and in the context of a mixed-age workforce. It is the qualities of the individual worker which should count. Bearing in mind that any discrimination must be "proportionate", an absolute bar on workers of a certain age on grounds of supposed customer preference would seem to be excessive.

**Barchester Healthcare PLC**, when recruiting for staff for an elderly nursing home, considers candidates' "maturity". This is not a codeword for recruiting older workers. The principal concern is that staff can work with elderly clients, requiring a degree of maturity in their outlook and approach. Managers carrying out recruitment are trained to identify people who can demonstrate patience, understanding and a caring attitude to residents. These skills are not age specific. [14]

### Saving costs

In all areas of discrimination law, it is uncertain to what extent costs savings can be a justification for discrimination. Certainly an employer cannot casually say that it is justifiable to discriminate because it is cheaper. Test cases on indirect sex discrimination law under the Sex Discrimination Act suggest that an employer may use cost savings as one of several reasons justifying discrimination, but it will not be acceptable if it is the sole reason. In respect of any discrimination by the government in setting policies, cost savings may not be taken into account at all.

Where employers do put forward costs savings, these should be looked at in context. For example, Nationwide Building Society says that although there are additional costs for employers in providing benefits such as life or medical insurance for older workers, these are more than offset by the financial benefits of retaining older workers, eg saving recruitment costs, retaining and passing on business knowledge, and increased commitment. [30]

The idea that insurance premiums, eg for employer's liability, public liability, professional indemnity or commercial motor insurance are higher for older workers is not necessarily true and should be checked. Even group medical insurance may only be minimally affected, depending on the proportion of older workers in the scheme. [31] Nevertheless, there is unfortunately a large amount of age discrimination in insurance premiums which employers may try to use as justification for refusing to employ older workers or offering them less favourable terms and conditions. If this happens, remember that cost alone probably cannot justify discrimination by an employer.

### Proximity to retirement age

This defence is based on the assumption that it is not worth training, recruiting or promoting a worker because s/he will not remain in work for long enough for the employer to benefit. This defence should only be successful when the worker is extremely close to retirement age, arguably in the final year. Otherwise it fails to recognise that skills need updating every few years anyway and that younger workers change jobs more frequently than older workers. (See Myths and Stereotypes, Chapter 21). It is also useful for an employer to have motivated and competent workers right up to their retirement date.

## Health, welfare and safety

Making an assumption that all workers of a certain age have health risks can be direct discrimination. There are many stereotypes about the health and fitness of older workers (see Chapter 21). Although it is clearly a legitimate aim to safeguard health and safety, this should be done by actual measurement of the health of individuals rather than by generalised assumptions related to age. A good example is the recognition by many airlines that pilots' fitness can be individually assessed rather than imposing a global retirement age of 55.

Rather than imposing blanket age limits, it is fairer to require individuals (regardless of age) to pass certain medical or stamina tests. This may be indirect discrimination against older workers, but it is more likely to be justifiable, provided the test does not require a higher level of health or fitness than the job genuinely requires.

If you are unable to pass a health or fitness test due to a disability, you may be protected by the Disability Discrimination Act (see Chapter 19).

## Generalisations – myths and stereotypes

Many defences to direct discrimination are based on false assumptions about the capabilities of workers of a certain age. It is important to be aware of these stereotypes (see Chapter 21).

*“We have felt very disrespected after being described as too old. We are not old, but experienced.”*

Zinedine Zidane (aged 34), Captain of the French football team, which unexpectedly reached the final of the 2006 World Cup.

## Exceptions

In addition to the general defence, there are some specific exceptions, where it is not unlawful to discriminate on grounds of age (see Chapter 7).

### **Defences to direct and indirect discrimination: key points**

---

- It is a defence if an employer can objectively justify the treatment by showing it is a proportionate means of achieving a legitimate aim.
- In other discrimination strands, this defence only applies to indirect discrimination.
- It should be particularly hard for employers to prove the defence to direct age discrimination as it will usually entail relying on generalisations about workers of a certain age.
- Until there are test cases, it is uncertain whether factors such as customer preference or saving costs will be a good defence.
- In all cases, the reasons for the defence must be powerful, given the overriding aim of promoting equality. The greater the discriminatory effect, the stronger the defence needs to be.
- There are also specific exceptions under the Regulations (see Chapter 7).

## Chapter 5: Victimisation

### The legal definition

#### Regulation 4 states:

*A person (“A”) discriminates against another person (“B”) if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –*

- (a) brought proceedings against A or any other person under these Regulations;*
- (b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;*
- (c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or*
- (d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations, or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.*

It is important that you feel able to raise issues of discrimination at work without fearing that you will be punished as a result. The law against victimisation says that you must not be treated less favourably because you have raised an issue of age discrimination in any way.

**For example:** you have brought an internal grievance complaining that you were not promoted because of your age. Your employer decides you are a trouble-maker and finds a reason to dismiss you. This is victimisation.

Your employer must not victimise anyone who is willing to be a witness on your behalf or who complains that you have been discriminated against.

**For example:** Fabrice (aged 28) gives evidence at a grievance in support of his older colleague, Dennis (aged 56), who complains of lack of training opportunities due to his age. As a result, the employer stops inviting Fabrice to business lunches.

Similarly, you must not be victimised because you complain about age discrimination occurring against someone else.

**For example:** you are on a recruitment panel and you are concerned about the attitude of your fellow panel members towards an older candidate. You raise your concerns with HR. As a result, you are taken off the panel and told you will not in future be involved in recruitment decisions.

## The protected act

The important point is that you must not be victimised because you have complained about age discrimination. If you simply complain that your treatment is unfair, without mentioning age discrimination, the victimisation protection does not apply.

You may have raised the issue of age discrimination in a number of ways. The way you make the complaint is called the protected act. For example, you may have raised the issue:

- In an internal grievance.
- In a letter, formally or informally.
- Verbally, in a casual conversation, or in a formal meeting.
- In an employment tribunal.
- Because the employer knows you have taken advice about age discrimination.

## The form of victimisation

The employer may victimise you in any number of ways, for example, by:

- Making you redundant.
- Finding a reason to dismiss you.
- Subjecting you to disciplinary action.
- Denying you promotion.
- Withholding bonuses.
- Withholding overtime opportunities.
- Withholding travel opportunities.
- Allocating a heavier workload.
- Writing a bad appraisal.
- Excluding you from important meetings with colleagues or clients.
- Writing a bad reference.

The employer is responsible for any victimisation by your colleagues (see p4 on vicarious liability). For example, your colleagues may not like you complaining about ageist harassment and may send you to Coventry.

## The employer's defence to victimisation

As long as you believe what you say, you must not be victimised, even if you prove to be wrong in thinking age discrimination has taken place. However, it is not unlawful to victimise a worker who has made false allegations in bad faith.

It is no defence for your employer to say s/he did not intend to victimise you and only did so unconsciously.

## How do you prove victimisation?

Although victimisation law is there to protect you and your witnesses, it would be wrong to be over-confident. You still need to prove that you have in fact been victimised. Few employers will admit that they have victimised anyone, and they will usually find another pretext for their actions.

## Instructions to discriminate

There is similar legal protection if you are put under pressure by your employer to discriminate. Under Regulation 5, it is unlawful to treat you less favourably because:

- You have not carried out an instruction to carry out an act of discrimination under the Age Regulations, or
- You have complained to someone about that instruction.

## How to raise issues of age discrimination

If you are still in the job and have not previously complained about age discrimination but are thinking of doing so, these are matters to take into consideration:

- How is your employer likely to react? Is there a fair chance of a solution or is it just likely to attract victimisation?
- How do you see your future prospects with your employer? Has the working relationship already broken down or are you anxious to maintain good relations? If you lose the job, do you have alternatives? Are you worried about references?
- If raising the matter resolves nothing, will you want to go to a tribunal? Have you taken advice as to whether you would have a good case? Do you know the limitations on a tribunal's powers? Who would represent you?
- If you do decide to raise the issue, it is advisable to maximise your chances of protection by the victimisation law. Therefore you should make any complaint about age discrimination, clearly, unambiguously and in writing. You need not use the exact phrase "age discrimination", but you do clearly need to make reference to the connection between your age and the treatment you are complaining about.

See also Chapter 16 regarding grievances.

## Evidence checklist

The following is a checklist of useful evidence to help you prove victimisation:

- 1 | Remember that the employer's acts of victimisation must take place *after* you have complained of age discrimination. Therefore:
  - Identify the occasion(s) when you raised the issue of age discrimination. Note the date(s).
  - Identify how the employer mistreated you as a result, ie the employer's act(s) of victimisation. Note the date(s).
- 2 | You will need to prove that you did make a complaint about age discrimination. This may be difficult.
  - If you raised the issue in an employment tribunal claim for age discrimination, there will of course be no problem.
  - If you did not bring a tribunal case, did you raise the issue in writing? If so, how (by letter; grievance form; e-mail; age questionnaire etc)? Find a copy. Who was the document shown or sent to? Can you prove it was received?
  - If you only raised the issue verbally, is it likely that your employer will deny what you said? Who did you speak to and when? Were there any witnesses? If it was in a meeting, was it minuted? Was it referred to or followed up in writing afterwards by you or your employer?
  - Whether you raised the issue verbally or in writing, what exactly did you say? Did you very clearly refer to age discrimination rather than just unfairness?
- 3 | You need to prove that the reason your employer has dismissed you or victimised you in some way is *because* you complained about age discrimination.
  - Did this treatment take place *after* you complained of age discrimination? (If not, it cannot be victimisation.)
  - How long after your complaint did the victimisation take place? (There is no maximum time-scale, but the closer in time your employer's treatment takes place, the more it looks like a reaction to your complaint.)
  - If it has been a long time since you originally complained about age discrimination, the reason you are now being dismissed etc may not be connected. Have any other incidents occurred since you first complained of age discrimination?
  - It cannot be victimisation if the manager or other person who is now dismissing you etc did not know about your original complaint of age discrimination. Can you prove that s/he did know?
  - What was your employer's reaction at the time to your complaint of age discrimination? A hostile or dismissive reaction may mean victimisation was more likely.
  - Does your employer admit that the less favourable treatment is due to your complaint of age discrimination? This is unlikely, unless your employer is trying to suggest your complaint was made in bad faith and the protection therefore does not apply. If your employer does suggest this, can you indicate what facts made you genuinely believe you had been discriminated against?

- If your employer insists the treatment is for another genuine reason, eg genuine redundancy or you are genuinely guilty of unrelated misconduct, you need to consider how to disprove this.
- Can your employer's explanation for the less favourable treatment be discredited, eg by showing it was a sham redundancy or there was no valid ground for disciplinary action?
- Have other workers (who have never complained of age discrimination) committed similar offences to you, but not been disciplined or dismissed? Did your employer know the other workers had committed similar offences? If your employer did not know about anyone else, then this provides an 'innocent' explanation for why they were not also disciplined.

**For example:** a worker is disciplined for making personal telephone calls. Her colleagues also make personal telephone calls. Management knows this but takes no action.

- It would be revealing if you had committed similar offences, before you ever complained of age discrimination, but the employer is only taking disciplinary action now, after you have made that complaint. Did your employer know about the previous offences at the time? If not, that is the explanation for no action having been taken previously.

**For example:** Leanne has always arrived 15-20 minutes late, but she makes it up at the end of the day. The employer knew about this but took no action. However, the first time Leanne was late after she complained of age discrimination, the employer instituted disciplinary action.

## Victimisation: key points

---

- Workers must not be punished because they have complained about age discrimination, either on their own behalf, or on behalf of others.
- It is unlawful to treat a worker less favourably because s/he has done a "protected act", ie complained about age discrimination formally or informally, verbally, in writing, in a grievance or in a tribunal case.
- The less favourable treatment may take many forms, eg false redundancy, disciplinary action, dismissal, failure to promote, exclusion, bad references.
- It is necessary to prove that the less favourable treatment is caused by the complaint of discrimination.
- The employer has a defence if the worker made a false allegation in bad faith. If the worker genuinely believes there has been age discrimination, s/he must not be victimised, even if s/he is wrong.
- It is also unlawful to treat a worker less favourably because s/he has complained about or failed to carry out an instruction to discriminate.

## Chapter 6: Harassment

### Introduction

**Bullying and harassment is sadly a growing problem in the workplace generally. In 2003, the majority of cases reported to Bully Online and the UK National Workplace Bullying Advice Line concerned workers over 40. But it is not only older workers. A DWP study in 2001 found significant harassment of younger workers. Less skilled younger workers were particularly susceptible to bullying, teasing and being singled out for menial or unpleasant tasks.**

### The legal definition

It is unlawful if you are harassed on grounds of your age or the age of someone else, eg your partner or friends. There is no justification defence.

Under Regulation 6, harassment takes place where, on grounds of age, the harasser engages in unwanted conduct which has the purpose of:

- (a) violating your dignity, or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for you.

Even if the harasser does not *intend* to violate your dignity or create such an environment, his/her conduct will be unlawful if it has that *effect* in practice. It is not entirely for you to say whether it has had that effect, although your views are the most important. However, it is an objective test, ie in all the circumstances, including in particular the perception of the harassed worker, should it reasonably be considered as having such an effect?

The most important part of this definition is the word “unwanted”.

#### For example:

- You may be quite happy to engage in banter about your age. On the other hand, many workers feel they have to laugh along with constant comments, when in reality these make them feel uncomfortable.
- You may be perfectly happy with mild jokes about your age and even make some self-deprecating remarks yourself. But you draw the line at other forms of harassment.

## Forms of harassment

Harassment can take various forms, eg

- Teasing or offensive jokes.
- Hostile or belittling/patronising remarks.
- Remarks/jokes about physical appearance linked to age.
- Being made to do menial tasks and having to run errands.
- Exclusion from office gossip, social events or team meetings.
- Bullying.
- Making you feel you ought to leave.

*“It is very interesting that you can be very prejudiced about age and get away with it as a joke.”*

Anna Ford.

## How do you prove harassment?

Harassment cases are always hard to prove because the harasser tends to deny that s/he has carried out the harassment. Useful evidence can include:

- Hostile remarks or stereotyped observations based on age. If these are made verbally, you may need witnesses.
- Banter or “jokes” referring to age. These may be in writing, for example birthday cards saying “over the hill at 50”. The relevance of these depends on the context, frequency, who was present, whether they were unwanted, and whether they are suggestive of the type of harassment complained of. It is possible that you are happy to engage in banter, but are not happy about other forms of harassment.
- Direct witnesses, ie those who have seen the harassment first-hand.
- Indirect witnesses, eg anyone you told about the harassment soon after it happened. A GP may be useful in this respect.
- If there are complaints about your conduct or capability, it is helpful to find a younger worker who has committed similar misconduct or demonstrated similar incapability, and has not been disciplined or criticised.

**The following case under similar laws in the Republic of Ireland illustrates the type of conduct which would constitute harassment.**

A young female manager, newly recruited to a small company, was systematically humiliated and belittled in front of other staff by a male manager in his 60s who could not accept her position there. He would say things like she was “only a young fooling girl”. He was consistently hostile and aggressive to her, refused to cooperate and intervened in her responsibilities. Despite her complaint, senior management failed to take any effective action. She resigned and brought a harassment case under age discrimination law in the Republic of Ireland. The Equality Officer found age and gender-based harassment.

## Harassment on other grounds

Unfortunately workers may get harassed for several reasons. For example:

- A worker may get harassed because s/he is deaf. This would be unlawful under the Disability Discrimination Act.
- A worker may be sexually harassed or harassed because of his/her sexual orientation. This would be unlawful under the Sex Discrimination Act or the Employment Equality (Sexual Orientation) Regulations.
- Harassment of a black worker would be unlawful under the Race Relations Act.

### Harassment: key points

- The definition of harassment is basically the same as under the other discrimination strands (apart from sexual harassment).
- Harassment may be unlawful even if it is unintentional, if it would reasonably be considered to violate the worker’s dignity or create an offensive environment.
- Harassment occurs where the harasser’s conduct is unwanted.

## Chapter 7: Exceptions – when age discrimination is allowed

### Overview

There is a general defence to direct and indirect discrimination where the employer can justify the discrimination by proving it is a proportionate means of achieving a legitimate aim. This is dealt with in detail in Chapter 4. There are also the specific exceptions set out below.

### Genuine Occupational Requirements

The concept of a Genuine Occupational Requirement (GOR) exception appears in most discrimination legislation. However, it is rather superfluous under the Age Regulations, where the general justification defence applies to direct as well as to indirect discrimination. It is hard to imagine when this particular exception would need to be used.

Under Regulation 8, it is permitted to discriminate in recruitment, promotion, transfer, training or dismissal against a worker because s/he does not possess a certain characteristic related to age or because the employer is not satisfied, on reasonable grounds, that s/he possesses that characteristic.

**For example:** a TV production company will only employ a young, or young-looking actor to play the part of a teenager in a drama.

It is not entirely clear what “a characteristic related to age” covers. The GOR exception clearly covers discrimination against a worker because s/he is too old or too young or looks too old or young. It is unclear how much further it goes.

The GOR exception applies only 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 in the particular case. For the meaning of ‘proportionate’, see Chapter 4, in the context of the general defence to discrimination.

## **The National Minimum Wage**

The National Minimum Wage sets three different minimum rates of pay according to the worker's age. The Age Regulations retain these pay bands. For details, see Chapter 11.

## **Benefits based on length of service**

Generally speaking, service-related benefits indirectly discriminate against younger workers because they have not had the opportunity to acquire lengthy service. Because service-related benefits are so widespread and well-established, those based on service under 5 years are not unlawful. Moreover, those based on over 5 years' service are easier to justify than other discriminatory provisions, criteria or practices. For details, see p66.

## **Enhanced redundancy pay**

The statutory redundancy pay scheme will continue to be calculated on the basis of length of service and age. An employer can offer enhanced redundancy pay calculated by the same formula but omitting the weekly ceiling or using a higher multiplier for each year of employment. For details, see Chapter 14.

## **Retirement**

It is not unlawful age discrimination to dismiss an employee at or over the age of 65 where the reason for the dismissal is retirement. Whether the reason is in reality retirement is decided according to complicated rules. For details, see Chapter 14.

## **Life assurance cover for retired workers**

Where the employer arranges for workers to be provided with life assurance cover after their early retirement on grounds of ill health, it is lawful to arrange for such cover to cease when the workers reach the age of 65 or, if different, when they reach the organisation's normal retirement age.

## **Pensions**

See p67.

## Recruitment at or near retirement age

Under Regulation 7(4) it is not unlawful to discriminate in recruitment against a job applicant:

- Who is older than 65 or any higher normal retirement age operated by the employer, or
- Who would reach 65 or the employer's normal retirement age within six months from the date of his/her application for the job.

This exception applies only to those who would, if appointed, be an employee or member of House of Lords or House of Commons staff or in Crown employment.

## Statutory authority and national security

Acts done to comply with a requirement of any statute or statutory instrument are not unlawful. For example, the Licensing Act 1964 prohibits the employment of workers under 18 in a bar selling alcohol. There is also an exception for any act justifiably done for the purpose of safeguarding national security.

## Positive action

Where it reasonably appears to prevent or compensate for disadvantages linked to age suffered by those of a particular age or age group, it is not unlawful to:

- Give individuals of a particular age or age group access to training to fit them for particular work.
- Encourage individuals of a particular age or age group to take advantage of opportunities for doing particular work, eg by stating in a job advert that applications from older workers are particularly welcome.

However the employer cannot make the actual decision whether to recruit someone based on age, unless that it is objectively justified in the usual way.

There are similar positive action rules for trade unions and other trade organisations.



part 2

# different employment situations

## Chapter 8: Recruitment

*“No one is interested in employing anyone over 50, they think our brains stop functioning when we get to 50.”* [13]

### Direct age discrimination in recruitment

**Direct age discrimination in recruitment means that the employer has failed to offer you a job, or even an interview, because of your age.**

Recruitment is the largest area of age discrimination reported by older workers. Depending on the industry, workers can find themselves too old to get another job from as young as 40. To a lesser extent, young people may also find themselves discriminated against for certain jobs. Data from the 1998 Workplace Employee Relations Survey suggests that almost 25% of managers take account of age in the recruitment process. [27]

In 1998, a survey of 7000 job ads in the Sunday Times and London free magazines found that approximately 8% contained numerical age limits and up to 10% had ageist words or phrases.[11] In the lead up to the introduction of age discrimination law, the same sort of ads could still easily be found (see p51).

Most recently, in a large research project by Riach and Smith,[29] testing employer responses by matched CVs showed that 21 year olds were three times more likely to be invited for interview to graduate posts than 39 year olds. In another test, 21 year olds were four times more likely than 49 year olds to be invited for interview to waiter jobs in London (twice as likely out of London).

*“I’m willing to take a great salary drop but employment agencies say prospective employers won’t entertain me as they feel I’ll grow bored with menial tasks and leave.”* [13]

This all sounds rather depressing, but maybe matters will improve once age discrimination law becomes established. Meanwhile, some tips for older workers looking for work are in Chapter 20.

### Job applicants at or near age 65

Under Regulation 7(4) and (8), it is not unlawful to discriminate against you in recruitment if you apply for a job (as opposed to a promotion) when you will reach 65 or the employer's normal retirement age (if that is higher) within 6 months of your job application or if you are already over that age. This exception only applies if you are applying for a job as an employee or member of House of Commons or House of Lords staff or in Crown employment.

If an employer does choose to offer you a job when you are aged 65 or above, s/he must not unjustifiably offer less favourable terms and conditions due to your age.

### How do you prove direct age discrimination in recruitment?

In direct discrimination cases, you need to prove that the reason you were not short-listed or selected for the job is your age.

The employer may admit this, but say that it is justified. If so, the employer will need very good reasons for holding your age against you. The employer should not rely on any stereotyped ideas about the qualities of older (or younger) workers. For more detail about what sort of defence may defeat your claim, see p48.

In the past, employers have quite openly told job applicants that they are too old. But now that age discrimination is unlawful, it is likely that many employers will make some other excuse. You will need to prove the true reason for the employer's decision is your age.

### Evidence checklist

To prove direct discrimination when the employer denies it, it is necessary to look for clues and read between the lines. The following evidence could suggest there has been direct age discrimination in the recruitment process, although no single factor in itself necessarily indicates discrimination has occurred. See also the general overview of evidence to prove direct age discrimination in Chapter 2.

- **The advertisement: wording.** The advertisement may explicitly or implicitly require candidates of a certain age. Consider the wording, imagery and where the advertisement is placed. The examples in this checklist, which were taken from real advertisements placed during 2005, may suggest the eventual decision not to recruit you was due to direct discrimination. (See p46 below for indirect discrimination in advertisements.)

**Wording which explicitly discriminates on age grounds:**

- Caretaker, age 35+
- Applicants should be 25-35 years of age. (This could also be indirect sex discrimination, as many women in this age group will be taking a career break for childcare.)

**Wording which seems explicit as to chronological age, but which the employer may try to say is simply descriptive of personal qualities:**

- Young graduate wanted.
- Mature experienced person wanted.

**Wording which suggests the employer has in mind a younger worker:**

- You will work in a young and non stuffy environment.
- You would like to work in the city while raising your family in the countryside.
- This is a perfect opportunity to fast-track your career.
- School leavers are invited to apply.
- Junior property lawyer required.
- Maximum 3 years' post-qualification experience (PQE).

A requirement for "2-3 years PQE (post qualification experience)" usually means this is the maximum (as well as minimum) experience required. This may be more explicit, for example stating "Newly qualified to 2 years PQE". Such requirements can indirectly discriminate against older workers (see p46 below), but may also indicate hidden direct discrimination. The question is why the employer should want someone with so little experience. It may be because the work is simple and will bore anyone of longer experience, or it may be a disguised way of getting a young worker or paying less.

**Wording using adjectives suggestive of age:**

- Candidates should be bright and enthusiastic.

Certain adjectives may be suggestive of age without being explicit. For example, an older worker may believe s/he has been rejected due to age if the advertisement used adjectives such as "energetic, dynamic, progressive, forward-looking or modern". Such adjectives cannot be criticised in themselves and may genuinely be age-neutral. But they may be significant if the rejected older worker appears suitable for the job and to meet those criteria as well as anyone, or if the criteria seem excessive or inappropriate for the type of job advertised.

**Equality Authority v Ryanair**

Ryanair placed an advertisement in The Irish Times seeking a "young and dynamic professional". When challenged by the Irish Equality Authority, it argued that "young" did not refer to age but was intended to convey enthusiasm, passion, ambition and someone who was dynamic. However, out of the 30 applicants who had indicated their age, none were over 40 years old.

The Equality Authority found that, even if it was not Ryanair's intention, the word "young" suggested young of age and was therefore age discrimination.

- **Where the advertisement is placed.** If the advertisements are placed exclusively in a location or publication where it is obvious that only people of a younger or older age would be likely to see them, this may indicate an intention to directly discriminate, when taken together with other evidence. (It may also be indirect discrimination – see p46 below). If an employer placed advertisements in a variety of different places, which may attract different age groups, this would not be suggestive of direct discrimination.
- **The application form.** It is significant if you have not been short-listed for a job where you would expect to be short-listed, comparing your application with the advertisement, job description and person specification.  
Of course this can only be age discrimination if the employer would have been able to guess your age from the application form. Asking for a candidate's age on the form (as opposed to on a separate monitoring sheet) may itself be an indication of intention to discriminate.

*“You just put over 50 on your CV and that's it, it closes the doors. It's very scary. It's terribly depressing.” [13]*

- **The interview.** If you were rejected after an interview, the employer may say that other candidates had a better interview. This is hard to disprove. It helps to show you did a good interview. It is a good idea to write down the questions and your answers while you can still remember them. If you do bring a tribunal case, you will need to see the interview panel's notes of all the interviews.
- It is relevant if any comments or questions were made at the interview indicating hostility or stereotyping because of your age. The problem is that interviewers sometimes later deny they made such remarks. It is therefore important you mention what was said the first time you make any written complaint. Examples of such remarks taken from real situations are:
  - “We are looking for someone older.”
  - “How would you feel about being given orders by someone younger than you?”
  - “How would you feel about working with 50 year olds?”
  - Starting an interview with the words, “We don't give points for life experience”.
  - Responding to a candidate's statement that s/he is 50 with the question “Any ailments?”
- Sometimes the interviewer's manner changes once you reveal your age. For example:
  - You are virtually offered the job on the telephone and given the impression that the interview is a formality. However, at the face-to-face interview, when the employer sees you, s/he immediately becomes more cautious and ultimately the job is not offered.
  - The interview questions turn negative half way through, after you say something which reveals your age.
  - You are offered the job, but the offer is later withdrawn on some pretext, after the employer finds out your age.

- You may feel that you were doing well at the interview until the interviewer made an ageist remark, which disconcerted you and caused you to finish the interview badly. This can be hard to prove. You need to prove that the remark was made (which the interviewer may deny) and that it did badly affect the way you continued the interview.

*“It doesn’t matter how much experience you may have. When you mention your age during a job interview, the lights go out. Nobody wants to know. They say they would like to employ you but feel it’s not worth having to go through the same procedure again in a few years time.” [13]*

- **Subjective recruitment procedures.** Bad procedures do not in themselves prove age discrimination, but they make it more likely. The purpose of objective procedures is to reduce the chances of direct discrimination. Examples of bad procedures are:
  - Decision-making by one individual or one individual with particular influence.
  - No pre-fixed selection criteria.
  - No objective marking or scoring system.
  - Pre-fixed criteria which are not followed by the decision-makers.
  - Breach of the employer’s own recruitment or equal opportunities procedures.
  - Breach of any relevant guidelines in the ACAS guidance (see its section on recruitment).
- **The employer’s explanation.** If the employer cannot explain why s/he failed to short-list or appoint you, this is in itself good evidence when taken together with other factors. You need to ask the employer for reasons and check whether these are unsatisfactory, vague or suggestive of direct discrimination, eg saying you would not “fit in” or that you are “over-qualified”.
- **Feedback.** It is relevant if any stereotyped or discriminatory remarks were made during any verbal (or written) feedback. For example, “Did you get tired during the day?”
- **Workforce patterns.** It may be revealing if the existing workforce, particularly at the relevant level or in the particular job, is dominated by people who are all younger (or older) than you. There is strong evidence that employers favour homogeneous teams.

*“A natural, matching or stereotyping process exists, as part of a preferred company culture, where fitting in to a team or department is believed to be critical for the productivity of staff and company. Although the candidate’s overall suitability for the job is considered, age appears to have a strong influence on final selection.” [6]*

Although in theory employers favour an age diverse workforce, in practice, the need for new staff to integrate with the existing workforce may be a source of subconscious age discrimination. [6]

- **Customer profile; imagined customer preference; corporate image.** Discrimination may be more likely if the job entails serving customers who are younger (or older) than you or if it is commonly thought that clients would like to deal with staff of a certain age. For example:
  - A shop selling jeans for teenagers up to mid-20s, may feel sales staff should be of a similar age.
  - A firm offering legal, accountancy or financial advice may feel that its clients would not be confident in dealing with an adviser under 35.

It is possible that the employer will admit discriminating for such a reason but argue that it is justified. For further comments on the potential defence, see below.

- **Comparators.** The best evidence is if someone else has been short-listed or appointed who is patently less suitable for the job and is of a different age. Usually a very small difference in age between you and such a comparator will not indicate age discrimination, unless there is evidence that the employer might have been applying a certain age as a cut-off. See Chapter 2 for more on comparators.

**This kind of evidence, from a caller to Help the Aged, could prove direct discrimination, unless the employer has a good explanation:**

Tim (aged 58) was turned down for the permanent post of deputy head of a primary school, even though he had served as acting head for the previous three years, was the only applicant for the job and had received praise in a recent OFSTED report.

## Indirect age discrimination in recruitment

In indirect discrimination cases, you must prove the reason you were not short-listed or offered the job was because of a provision, criterion or practice, requirement or condition, which would put those of your age group at a particular disadvantage. For example, you did not have the required experience or qualifications or the job was only advertised in places attracting younger (or older) people.

Many workers are unsuccessful in getting jobs because they do not have certain qualifications, experience or up-to-date skills. Many of these requirements are linked to age. For example, jobs which require lengthy experience will exclude younger workers. On the other hand, requirements for qualifications or certain types of qualifications can exclude many older workers. This is because qualifications are far more common today than in the past, where many people learnt their skills on the job. For example, the proportion of the working population lacking any qualifications was 40% in 1984, but down to 21% by 1995. [13]

Older workers are also disadvantaged in the recruitment process if employers see experience of unemployment or redundancy as an indicator that something is wrong with the worker. Yet those workers may have found themselves selected first for redundancy and unable to get a new job precisely because of age discrimination.

Some workers are disadvantaged on multiple grounds. For example, an older black worker is more likely to have been unemployed due to race as well as age discrimination. A young female worker is less likely to have acquired lengthy experience because she may have been out of the job market for a while for childcare reasons.

It is possible for both direct and indirect discrimination to be present at the same time.

### How do you prove indirect age discrimination in recruitment?

Indirect discrimination occurs where an employer applies apparently neutral provisions, criteria or practices which in fact disadvantage workers of a certain age group. For more detail on the definition of indirect age discrimination, see Chapter 3. In summary, there are three stages to proving indirect age discrimination in recruitment:

- (1) Find out why you were rejected from the job. For example, was this because you did not have particular qualifications or experience?
- (2) You need to show that the reason you were rejected from the job is one which would tend to disadvantage many others of your age group, compared with younger (or older) workers. For example, you did not have the required qualification and older workers generally would be less likely to have that qualification than younger workers.
- (3) The employer needs to justify his/her reasons for rejecting you.

## (Identifying) Discriminatory provisions, criteria or practices in recruitment

Examples of indirectly discriminatory provisions, criteria or practices in recruitment, if unjustified, could be:

- **Qualifications.** For example, vocational, degree level, those only recently introduced such as GCSEs. Depending on the nature of the requested qualifications, this could disadvantage workers of any age, but it is more likely to disadvantage older workers. Requirements for university degrees or specialist vocational qualifications may disadvantage older workers in particular. In the past, there has been more emphasis on learning on the job than on acquiring degrees and specialist training. Many people over 50 lack formal qualifications.[19] Also, certain subjects have only been introduced or become popular relatively recently, eg media studies.
- **Recent qualifications.** For example, “graduates holding a degree obtained during the last 2 years” or “recent graduate”.  
This is likely to disadvantage older workers.  
It could also be indirect sex discrimination because it would disadvantage women who did not take a job immediately after university due to childcare.
- **Minimum experience.** This is usually expressed as a minimum number of years’ experience or minimum experience at a senior level.  
This is likely to disadvantage younger workers.  
This would also disadvantage workers from any group which is discriminated against in finding and retaining employment, eg black and other minority ethnic workers, or women who have taken time out for childcare. This would be indirect race or sex discrimination.
- **Maximum experience.** For example, “Solicitor required. Maximum 2 years PQE (post-qualification experience)”.  
This is likely to disadvantage older workers. It may also suggest an intention to directly discriminate – see p42 above.
- **Requiring no history of unemployment.**  
This is likely to disadvantage older workers, since older workers who lose their jobs are likely to stay unemployed far longer than younger workers for a variety of reasons.  
Such a requirement would also indirectly discriminate against any group which suffers discrimination in recruitment, eg black and other minority ethnic or disabled workers. In addition, it would be indirect sex discrimination against a woman who had taken time out for childcare.
- **Refusing to rehire employees who have previously taken voluntary redundancy.**  
This is most likely to disadvantage older workers, but it is possible in a particular workplace that younger workers were the ones who had accepted voluntary redundancy.
- **Full-time working, overtime, or other hours, which interfere with caring responsibilities.**  
This is likely to disadvantage older workers. See also comments regarding mobility requirements below. This could also be indirect sex discrimination as it would disadvantage women of any age with childcare or other caring responsibilities.

- **Mobility requirements.** These may also interfere with caring responsibilities. Research indicates that having time for caring responsibilities is a big issue for older workers, particularly women, who need to look after elderly relatives or grandchildren. It is also an issue for younger women who have childcare responsibilities. For more detail, see p18 regarding flexible working.
  - **Advertising.** For example, placing advertisements exclusively in locations which will mainly be seen by younger workers (eg Cosmopolitan magazine, certain fitness centres or graduate recruitment schemes) or by older workers (eg SAGA magazine or bingo halls). This is likely to disadvantage older or younger workers respectively. It may also suggest an intention to directly discriminate. See p43 above. Certain locations may also be associated with one sex or racial group, or be used less by disabled workers, and could indirectly discriminate on other grounds.
  - **IT applications.** Requiring applications to be submitted in computerised form when the job does not need IT skills may indirectly discriminate against older workers.
  - **Tests.** Some forms of recruitment testing can disadvantage workers of a particular age.
- For a case-study example of indirect discrimination in recruitment or promotion, see Noonan on p57.

## The employer's defence to direct or indirect age discrimination in recruitment

The following types of defences are likely in recruitment situations. For comments regarding the defence to age discrimination generally and more examples, see Chapter 4. In all cases, the employer must show:

- S/he was trying to achieve a legitimate aim.
- That the particular treatment, provision, criterion or practice (including an explicitly age-based criterion) was a proportionate means of achieving that aim, ie necessary because there was no alternative non-discriminatory way.
- **As a measure of competence (qualifications).** Qualifications are sometimes necessary but they can also be excessive. Although younger people are likely to be better qualified, older workers can balance this by their life-skills and job experience.

*“If you want someone who is numerate, you want someone who is numerate. They don’t necessarily need to have GCSE maths.”*

Large public sector employer. [24]

Where employers require qualifications which were only recently introduced, this can be avoided by stating for example, “GCSE biology or equivalent”.

- **As a measure of competence (experience).** Experience is often needed for a job. But the real question is whether the employer is looking for a higher level of experience than is necessary for the job. For example, is 10 years’ experience really necessary for a job? It could exclude a 28 year old with 8 years’ solid experience who is otherwise excellent for the job. Requiring only a few years’ experience will be easier to justify than requiring many years, partly because fewer candidates will be ruled out, and partly because the most valuable experience tends to be acquired in the first few years of a job.
- **Few remaining years of service.** A frequent reason for not recruiting an older worker is that s/he is unlikely to work for many more years and is therefore not cost-effective. This ignores the fact that young workers change jobs at frequent intervals and older workers, except those very near to retirement age, are likely to stay longer in the particular job than a younger person. It also ignores that skills need updating so often that retraining is necessary every few years anyway. (See Myths and Stereotypes, Chapter 21.)
- **Negative views of productivity, attitude and health of older workers.** Applying sweeping stereotypes rather than judging the individual candidate is unlikely to be justifiable. Many such stereotypes are in any event inaccurate (see Chapter 21).
- **Integration with the existing workforce.**  
 Many employers feel that the extent to which members of a team get on with each other is a key factor in productivity and performance. This is thought to be enhanced by similar ages or personality types in teams. The perceived need for a new recruit to “fit in” with the age group of the existing workforce appears to influence recruitment decisions substantially.  
 It is reported that even where employers believe that age diversity would be a positive influence, this does not translate into practice.[6] Unconscious stereotypes can therefore have a negative effect on recruitment. Yet there is considerable evidence that mixed age teams are beneficial and welcomed by the workers themselves (see Myths and Stereotypes, Chapter 21).

## Victimisation in recruitment

It is victimisation if you were not recruited because you previously alleged discrimination against this employer or the employer finds out you took a case or accused your previous employer of discrimination. For a full checklist on victimisation, see Chapter 5.

## Recruitment: key points

---

- Research shows that age is a factor in a high proportion of recruitment exercises.
- If you are not short-listed or given a job because of your age, it may be direct discrimination.
- Asking age-related questions in the interview may be direct discrimination in the way the interview is conducted.
- If you are an older worker and you are not short-listed or given a job because you do not have sufficient, appropriate or recent qualifications, or because you have too much experience, this may be indirect discrimination.
- If you are a younger worker and you are not short-listed or given a job because you have insufficient experience, this may be indirect discrimination.
- There is a defence to direct or indirect discrimination if the employer can show s/he has used a proportionate means to achieve a legitimate aim.
- It will be very hard for an employer to justify explicit age requirements for a job.
- Failure to offer you a job because you previously complained of age discrimination (against this employer or against your former employer) in good faith is victimisation.
- The employer may deny s/he has discriminated on age grounds. It is important to look for evidence which can prove that age was the real reason your job application was rejected.

## Genuine advertisements

These are real advertisements found in the Guardian, Evening Standard, the Metro and the Law Society Gazette, from June-December 2005.

<p><b>X Security PLC</b></p> <p>are recruiting mature experienced security officers for one of our prestigious contracts. for an application form, contact ...</p>	<p>BASIC SALARY + COMMISSION</p> <p><b>It really can be yours!</b></p> <p>To be part of our growing team of successful young telemarketers, call Roger on ...</p>	<p><b>UPHOLSTERER</b> Upholsterer needed. Min 5 years experience, to join busy company in South London. Please call ...</p>
<p><b>Solicitor</b></p> <p>Highly successful firm requires solicitor 1-3 yrs PQE. This is a great opportunity for a high calibre junior lawyer to join a friendly team and fast-track their career.</p>	<p><b>Part time caretakers</b></p> <p>c £10,000 Suit semi-retired person 50 yrs +. Tel:</p>	<p><b>Audit Manager</b></p> <p>This challenging and varied role is central to the Council's provision of a high quality internal audit service. You must be a qualified auditor or accountant with four years' senior level experience in strategic planning and management.</p>
<p><b>building company...</b></p> <p>...requires a fully experienced buyer. The ideal applicant will possess a minimum of 10 years construction experience. The position offers a highly competitive salary dependent upon experience. Contact:</p>	<p><b>SOLICITOR PLYMOUTH</b></p> <p><b>You:</b></p> <ul style="list-style-type: none"> <li>• are 3-6 yrs qualified</li> <li>• can run your own caseload</li> <li>• would like to work in a city while raising your family in the countryside</li> </ul> <p>Dynamic firm. Best rates of pay.</p>	

## Workplace realities

Help the Aged caller cards before the introduction of the Age Regulations.

Caller emailed describing own experiences, the caller has to lie to his employer about his age to keep his job. His previous experiences with trying to keep work are bad, the caller had rejections ranging from over qualified to working with younger people. The caller only got a job when he lied about his age.

"I was made redundant at the age of 60. I was intending to work until 65, which is the retiring age at the company I worked for. Since that time (exactly 1 year) I have applied for 28 vacant interviews, having 6 interviews. I have got nowhere. I am a very young looking 61. As soon as employers know how old you are, they don't want to know. The jobs I had interviews for, I didn't put my age on the application form. When I told them, I had a letter in the post telling me I was unsuccessful."

The caller was awarded a doctorate in 2000 and has been seeking employment since. The caller can get interview but often feels judged because he is older. In one interview, the interviewer first stated that "we do not give you points for life experience" and was then asked if he got tired throughout the day.

"Age discrimination is alive and well in Bedfordshire. After 30 years as a secretary, computer literate and able to spell, I lost my job at the age of 53. I could not get another job and we moved here from London 1 year ago. 50 job applications and 1 interview, yet when I sent a 'doctored' CV with same qualifications but different age, I was asked for an interview! I am 57 now and work as a volunteer secretary 3 days a week which costs me £24. It's a joke."

The caller's father was made redundant at 45 and since then has not been able to secure permanent work because of his age. When the caller's father left his date of birth off his CV he received interviews – again until they discovered his age. The caller's aunt also experienced this type of age discrimination and had to alter her date of birth to get work.

"I am 51 years of age and a graduate in Applied Social Science. I attended an interview to train as a Social Worker. 60 applicants were split into 4 groups of 14. I was the only applicant in my group with a degree. I was turned down by the (30 something) interviewer because (in her opinion) I did not have enough life experience! Having helped to look after my paralysed father for 11 years, done 6 years of voluntary work and raised 2 children into their 20s, this was ridiculous."

The caller applied for a part-time telephonist job. The caller had a telephone interview and the interview was going very well until the interviewer asked how old the caller is.

"I am 51. I applied to become a drugs counsellor. I was rejected on the basis that 'I was too old and that youngsters would not be able to relate to me'."

"I am aged 60 and out of work for some 4 years. My unemployment has been largely responsible for my current ill-health (severe depression). I am desperate to do any job, paid or unpaid, but find this pretty difficult."

The caller's husband was made redundant at 48 and afterwards could not find a job. He applied, yet companies did not even reply to his letters. He has found work now, but found the process soul destroying.

Made redundant at 42, now 10 years unemployed. Was a computer systems analyst.

"I have tried leaving my age off my CV but everyone knows this means 'over 40' and the candidate is therefore not to be considered."

Caller emailed to say that they are 44 years old and trying to find employment is absolute hell.

## Chapter 9: Promotion

*“There was an acceptance amongst both younger and older employees and employers that it would be unusual for older staff beyond a certain age to be promoted.” [6]*

### Direct age discrimination in promotion

**Direct age discrimination in promotion means that your employer has failed to promote you because of your age.**

Age discrimination in promotion affects both younger and older workers. Research shows there is a general assumption among both employers and employees that workers over 50 do not want or need promotion, and it would be unusual for a worker over a certain age to get promoted.[6] This is partly because of the ingrained idea that older workers will not remain in the workforce for long enough to make the investment in their promotion worthwhile.

*“It was openly said to me when I was 56 or 57 that they would only consider promoting people long-term.” [6]*

On the other hand, many younger workers are not promoted, either because it is felt fairer that workers with longer service should be promoted first, or because of an anxiety that older workers will not accept being managed by someone younger than themselves. In some jobs, it is felt that customers or clients will find it difficult to take a younger worker seriously.

### How do you prove direct age discrimination in promotion?

Your employer may deny that you were refused promotion due to your age and give a different reason. This means you will need to prove hidden age discrimination.

Alternatively, or in addition, your employer may admit s/he did not promote you due to your age, but rely on the defence, ie s/he will say it was justified because s/he was using a proportionate means to achieve a legitimate aim.

## Evidence checklist

The following evidence could suggest there has been direct age discrimination in promotion, although no factor in itself necessarily indicates discrimination has occurred. See also the general overview of evidence to prove direct age discrimination in Chapter 2.

- **The application form.** You have not been short-listed for a job where you would expect to be short-listed, when comparing your application with the advertisement, job description and person specification.
- **The interview.** Comments or questions at interview indicating hostility or stereotyping of you on grounds of age, eg
  - “How will you feel about managing staff who are the same age as your mother?”
  - “Why do you want to take on all that extra hassle at your time of life?”

The interviewers may deny they made these comments. It is therefore important you mention them the first time you make a written complaint, so that you are consistent.

- **Subjective promotion procedures.** Subjective procedures do not in themselves prove age discrimination, but they make it more likely. The purpose of objective procedures is to reduce the chances of direct discrimination. Examples of poor procedures are:
  - Decision making by one individual or one individual with particular influence.
  - No pre-fixed selection criteria.
  - No objective marking or scoring system.
  - Pre-fixed criteria which are departed not followed by the decision-makers.
  - Breach of the employer’s own promotion or equal opportunities procedures.
  - Breach of any relevant guidelines in the ACAS guidance.
- **Your employer’s explanation.** Find out your employer’s reasons for rejecting you. Watch for unsatisfactory or vague reasons.
- **Feedback.** Watch for stereotypes or discriminatory remarks made during any verbal (or written) feedback.
- **Acting-up.** If you have successfully acted up or substituted into the higher position, this helps to prove you were suitable for the post.
- **Appraisals.** In some organisations, appraisals are used as a way of identifying staff suitable for promotion. These can be discriminatory in themselves. Watch for a series of appraisals marking you as suitable for promotion followed by an unexplained “unsuitable” marking after you have reached, for example, 50.

- **Other failed promotion attempts.** It is not necessarily indicative of age discrimination if you have tried and failed to get promotion in the recent past. It may simply mean that you do not have the requisite skills. However, it is harder for an employer to explain several rejections than a single instance, where there may just happen to have been a better candidate. It will only be helpful if the other instances occurred fairly recently, while you were still of an age which your employer might be discriminating against. A long history of failed promotions is more likely to indicate that there is a reason other than age.
- **Other incidents of discrimination.** Other evidence of discriminatory tendencies by the employer or those making the decision, either towards you or towards other workers of the same age.
- **Comparators.** The best evidence is where someone else has been short-listed or promoted who is patently less suitable for the job and is of a different age. Usually a very small difference in age between you and such a comparator will not indicate age discrimination, unless there is evidence that your employer might have been applying a certain age as a cut-off. See Chapter 2 for more on comparators.
- **Workforce patterns.** It may be revealing if there are few workers of your age at the particular level, or if there is a pattern of few promotions of workers of a particular age. (See comments in respect of recruitment, p44.)

## Indirect age discrimination in promotion

The reason you were not promoted may be due to indirect discrimination. It is possible for both direct and indirect discrimination to be present at the same time.

### How do you prove indirect age discrimination in promotion?

For more detail on the definition of indirect age discrimination, see Chapter 3. In summary, there are several stages to proving indirect age discrimination in promotion:

- (1) Find out the reason you have been refused promotion. For example, you had inadequate experience.
- (2) You must show that the reason you were not promoted is one which would tend to put those of your age group at a particular disadvantage compared with other people. For example, younger workers would tend to have less experience than older workers.
- (3) Your employer has a defence if s/he can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

### (Identifying) Discriminatory provisions, criteria or practices in promotion

Examples of indirectly discriminatory provisions, criteria or practices in promotion are similar to those which may be applied on recruitment (see Chapter 8). Other criteria which may apply on promotion are:

- All staff must attend an Outward Bound course in order to assess who is most fit for promotion. This would tend to disadvantage older workers.
- Promotion goes first to those who have had longest service with the company. This would tend to disadvantage younger workers.

## The employer's defence to direct or indirect age discrimination

The types of defence likely to be used in promotion cases are similar to those used in recruitment cases (see Chapter 8).

The following case was investigated by the Equality Officer in the Republic of Ireland under Irish age discrimination law. Although the Equality Officer found indirect discrimination, the facts could also suggest direct discrimination.

### **Noonan v Accountancy Connections**

Mr Noonan, who was in his 50s, had 20 years experience as a qualified accountant. He was rejected from 2 senior accountancy posts on grounds that he was "too senior" and the company wanted people who had been qualified 2-3 years. The company felt overqualified candidates might lack motivation. Also, for one of the posts, Mr Noonan would have been older than the person he reported to and the company felt that would cause problems.

The Equality Officer said this was indirect age discrimination. The condition that candidates should only be 2-3 years' qualified impacted substantially more on those over 30. The company could not justify its requirement and was simply making generalisations unsupported by any objective evidence.

## Victimisation in promotion

If you were not promoted because you previously alleged age discrimination against your employer, this would be victimisation. For a full checklist on victimisation, see Chapter 5.

## Promotion: key points

---

- If you are not promoted because of your age, this may be direct discrimination.
- If promotion opportunities are offered first to those who have been longest in the company, this may be indirect discrimination against younger workers.
- For other examples of indirect discrimination in promotion against workers of any age, see indirect discrimination in recruitment (p47).
- There is a defence to direct or indirect discrimination if your employer can show s/he has used a proportionate means to achieve a legitimate aim.
- Failure to promote you because you previously complained of age discrimination in good faith is victimisation.
- Your employer may deny s/he has discriminated on age grounds. It is important to look for evidence which can prove that age was the real reason you were not promoted.

## Chapter 10: Training

*“Both employers and employees need to be convinced that training people of all ages – and continuous improvement and development of staff – can benefit businesses and individuals.” [13]*

### Introduction

**Discrimination in training is a big issue for older workers. Research consistently shows that workers aged 50+ are less likely to be offered training than younger workers. This is particularly so regarding training for new jobs, as opposed to any on-the-job training that is needed.**

This puts them into a Catch 22 position. A key reason given for not recruiting or promoting older workers is lack of skills, yet often they have been deprived of the opportunity to learn those skills. One research report [18], in reporting that there is no discernible deterioration in performance in the majority of jobs up to the age of 70 at least, states that the factor which impacts most on the level of performance is training.

*“I wanted training for another job within the firm that I knew someone else had had. They would not give me the training, but they trained a younger person.” [6]*

The main reason why employers are reluctant to fund training for older workers is because of their perception of shorter payback time before retirement. This is the same reasoning as used for not recruiting or promoting older workers. It ignores the fact that older workers are likely to remain longer in the particular job than younger workers, who are likely to move on. A worker aged 50 may still have 15 years' service with that employer. Moreover, a National Audit Office Report in 2004 says most skills have a shelf-life of only 3-5 years. [22]

The other reason for employers' reluctance to train older workers is the idea that older workers find it harder to acquire new skills and knowledge and are less likely to retain new knowledge. Research says there

is no evidence for this. The generalisation that older workers have negative attitudes towards and inaptitude for training is simplistic and probably the most damaging of all the stereotypes.[26] Older workers may prefer to learn differently (on-the-job rather than classroom based), but they are equally able to acquire the knowledge and retain it.

It is true that some individuals may lack confidence, but this is usually overcome where the organisation has a strong training ethos. In the area of IT, where older workers can be afraid to reveal their ignorance to younger colleagues or to their bosses, specific courses would be a good idea.

## Direct age discrimination in training

If you are an older worker, you may have been excluded from training opportunities because of your age. This may be a deliberate decision by your employer or it may just be that you have been accidentally overlooked. For example, it may be that:

- You are never allowed to go on any training at all.
- Your younger colleagues are directly offered or put on courses, but you are just told to apply if you see any available courses on the notice board.
- The only courses you are put on are basic and mundane. You are never put on courses which develop your knowledge and skills in new areas.

If your employer denies that you have been offered less training than your younger colleagues, it is useful to find out:

- All courses attended by each of your colleagues (dates/nature/length).
- The reason why you were not offered any of these courses.

It is also unlawful to exclude younger workers from training because they are too young. This happens less often.

Under Regulation 29, in some circumstances employers are permitted to provide courses exclusively for workers of a particular age as a form of positive action (see Chapter 7).

## Indirect age discrimination in training

Your employer may be willing to offer training equally to workers of all ages. However, the training arrangements may disadvantage older (or younger) workers. For example:

- Making advanced training courses available only to workers who have been employed in the organisation for at least 5 years. This would disadvantage those younger workers who are fast learners, but have to wait.

- Delivering training exclusively by an academic classroom method can disadvantage or deter older workers who may not have been involved in classroom based training for many years or who may have learned all their skills on the job.
- Offering IT training courses only at an advanced level, which expects minimum standards of IT competence. Older workers are more likely to want to start at a basic level.

## The employer's defence to direct or indirect age discrimination in training

As discussed above, it is unlikely to be a good defence for excluding an older worker from training that it is not worth the investment due to insufficient payback time. This is only likely to be a persuasive argument if the course is expensive and the worker has only one or two years left prior to retirement. Even so close to retirement, there is a strong argument that the investment in training is balanced by the worker's likely improved morale and performance over the remaining years.

*“Look at the motivation of the individual – they have to feel like a valued employee even if they only have two or three years left to work in the company. So that's a couple of grand spent on training. If they are not motivated, they might end up taking a lot of time off sick. It's not cost effective – you will lose in the end.”*

Large Services Organisation. [24]

Providing alternative training methods and ensuring all employees are made aware of training opportunities is not difficult for employers and you may even want to make some suggestions! For example, see the good practice examples set out in Age Positive Business Case Studies. [24] Tailoring training to individual needs is good practice with workers of all ages. Alternative methods could include on-the-job training, one-to-one training, self-paced training and giving workers their own workbook to work through in their own time.

### Training: key points

---

- It may be direct discrimination to offer better training opportunities to workers of a particular age. Older workers in particular tend to get excluded from training opportunities.
- It may be indirect discrimination if access to training or training arrangements are decided in a way which tends to disadvantage workers of a particular age.
- It is good practice for employers to offer different training methods to suit workers of different ages, backgrounds and personalities.
- In certain circumstances, employers are permitted to target training at particular age groups as a form of positive action to eliminate past disadvantage (see Chapter 7).

## Chapter 11: Pay, benefits and other conditions

*“We are doing salary reviews at the moment and I can think of one person who is retiring in two months’ time, but we will give her a salary increase like anyone else, because if she is doing a good job, she should still be rewarded like anyone else.”*

Employer, large services organisation. [24]

### Pay

#### The National Minimum Wage

**The National Minimum Wage Act 1998 and the National Minimum Wage Regulations 1999 set out minimum rates of pay according to a worker’s age. The rates are increased on an annual basis, but are very low. In the year starting October 2006, the hourly rates were £3.30 for 16-17 year olds, a youth rate of £4.45 for 18-21 year olds, and an adult rate of £5.35 for those aged 22 and over.**

The different rates of pay still apply despite the Age Regulations. The government insists that the differential is justified. However, this is questionable. The Low Pay Commission Report of 2005 clearly rejects the application of the youth rate to 21 year olds. Further, the Commission’s conclusion that there should be a youth rate for 18-20 year olds is not supported by the evidence in its own report. At some stage there is likely to be a test case challenging the lawfulness of the lower rate for 21 year olds (or even 18-20 year olds).

#### Permitted age discrimination: keeping within the minimum wage bands

Regulation 31 of the Age Regulations allows an employer to pay a worker (“A”) a lower hourly rate than another worker (“B”) on grounds of his/her age, where:

- The national minimum wage rate is less for someone of A’s age than for someone of B’s age, and
- A is paid at a rate below the normal adult minimum wage.

**For example:** in the year starting October 2006 A and B are waiters in a fast food restaurant. A (aged 19) falls within the youth rate (£4.45/hour). B (aged 23) is entitled to the full adult rate (£5.35/hour). The employer may choose to pay B anything from £5.35 upwards. If the employer decides to pay A less because he is only 19, s/he can pay him anything from £4.45-£5.34 without breaking the Age Regulations.

So if B is paid £7/hour, the employer may pay A only £5/hour, solely because A is younger. The Regulation 31 exception applies and this cannot be unlawful under the Age Regulations. However, if the employer pays A £6/hour, the Regulation 31 exception does not apply. If A can prove he is paid less because of his age and that it is not justifiable, this will be unlawful discrimination. (See below on direct discrimination in pay.)

Regulation 31 also states that an apprentice who does not qualify for the national minimum wage may be paid less than one who does.

## Direct age discrimination in pay

An employer does not have to pay all workers doing the same job the same amount. But the employer must not pay you less for discriminatory reasons. Direct age discrimination in pay occurs where an employer pays you less on grounds of your age. There is a specific exception where discrimination is permitted across different bands of the national minimum wage (see Regulation 31 above). In other circumstances, the issues are:

- Can you prove the pay differential is because of your age and not for other reasons?
- Can the employer provide a justification for paying less on grounds of age?

The following evidence may help prove you have been paid less because of your age:

- **Advertisement.** You have just been appointed to a job, where the advertisement stated “Salary according to age” and you are at the low end of the salary band.
- **Comparators on the same job.** Comparators are particularly helpful to prove pay discrimination. The best comparator is someone who is paid more than you, even though s/he is doing the same job and has a similar length of service. You should try to foresee your employer’s likely explanation and consider whether it can be disputed, eg the comparator has greater responsibility, is better at the job, has longer service, has more qualifications, was head-hunted, or his/her pay was red-circled for historic reasons. You can also compare your pay with your predecessor in the job.
- **Comparators on jobs of equal value.** If there is no comparator doing the same job, it is useful to find someone doing a job of obviously equal value, but who is paid more. This is not such a good comparator because it gives your employer scope to argue that the jobs are not of equal value – or not in the employer’s eyes anyway.

- ❑ **Workplace pay patterns.** A general pattern showing pay differentials according to age is always better than a single comparator, who may be explained away. However it can be hard to get information regarding the pay of others.
- ❑ **Other indications of age discrimination.** For example, you are generally given less high profile work because of your age, or comments have been made which indicate you are taken less seriously because of your age.
- ❑ **Your employer's explanation.** You need to ask your employer why you are being paid at a low rate or less than a colleague. As always, the credibility of your employer's explanation will be a key factor.

It is possible that you have been paid less for other reasons, eg due to your race or sex. Proving race discrimination in pay is similar to proving age discrimination. However, sex discrimination in pay must follow the complicated scheme of the Equal Pay Act.

### Indirect age discrimination in pay

Indirect pay discrimination occurs where rates of pay are decided by criteria which tend to disadvantage workers of a particular age. The most common example is where there are increments tied to length of service. Generally-speaking, younger workers will tend to have shorter service and will lose out. Black and other minority ethnic workers and women also tend to have shorter than average service and are less likely to benefit from service-related pay.

Service-related pay increases tend to be very popular with both employers and workers. The Age Regulations therefore make an exception and allow service-related pay (and benefits) for the first 5 years of service. Thereafter, the employer must justify using service as a criterion, but the usual objective test for justification does not apply. The rules regarding the specific exception are set out below.

Pay may also be linked to previous experience before joining your employer. This needs objective justification in the usual way.

## Benefits

### Direct age discrimination in benefits

Direct discrimination in benefits is most likely in relation to insurance-based benefits, where premiums may become more expensive as workers get older (though see comments at p24 under "Saving costs"). If this is the reason, it is unlikely that the employer will hide it. It is more a question of whether such discrimination can be justified.

## Indirect age discrimination in benefits

In many workplaces, entitlements to benefits such as number of weeks' holiday, length of sick pay, sabbaticals, and entitlement to free medical insurance are determined by length of service. This disadvantages younger workers who have had less time to acquire long service. However, awarding greater benefits for length of service is a well-entrenched practice, which employers and workers have been reluctant to undermine. In the consultation on the Age Regulations, employers said that if there was any risk of being found guilty of age discrimination, they would remove service-related pay and benefits and level down entitlements to the lowest levels. As a result, it is made particularly easy for an employer to justify this kind of indirect discrimination because of the specific exception under Regulation 32.

## Pay and benefits: the specific exception

Under Regulation 32 of the Age Regulations, you cannot challenge pay or benefits based on length of service in respect of your first 5 years of service.

**For example:** an employer offers free private health insurance to all workers once they reach two years' service. A young worker with only 18 months' service cannot claim this is indirect age discrimination as it is exempt under the Regulations.

However, an employer must still justify applying length of service criteria to pay or benefits after 5 years' service.

**For example:** an employer gives workers one week's full sick pay for every year of service. A young worker with 6 years' service is therefore entitled to 6 weeks' full sick pay, whereas an older worker with 12 years' service is entitled to twice as much. The young worker could claim indirect age discrimination. The employer would not need to justify the arrangement for the first five years, but would need to justify granting an extra week's sick pay for the extra year's service after that.

Although the employer must justify service-related pay and benefits after 5 years' service, the usual objective test of justification does not apply. The employer only needs to show that it reasonably appears to him/her that the service criterion fulfils a business need, for example by encouraging loyalty or motivation or rewarding the experience of some or all of the workforce. This can help maintain workforce stability.

It is possible that this weakening of the defence in respect of service-related benefits, so that it is simply down to what the employer "reasonably" thinks, is unlawful under the Directive. The outcome of the *Cadman* test case in respect of indirect sex discrimination in pay may be relevant to this (see below).

Note that this exception does not apply to pay or benefits awarded to a worker on ceasing employment, eg continuing insurance benefits or enhanced redundancy pay. (But see p74 regarding redundancy pay.)

### Calculation of the 5 years exemption

The 5 years' service can be calculated either as the time you have worked for your employer in total or as the length of time you have been doing work for your employer which the employer reasonably considers to be at or above a particular level. Your employer can discount any period you have been absent from work, whether temporary or permanently, and any period prior to such absence, unless it would not be reasonable to do so. It is unlikely to be reasonable to discount a period when a worker was absent due to maternity leave, and this could also be sex discrimination. Discounting periods absent due to sick leave would probably also be unreasonable and in some cases, may also amount to disability discrimination.

### Pay and benefits: indirect race or sex discrimination

You may have shorter service and therefore lesser entitlement to pay or benefits, not only because you are young, but because you are a woman or black or from other discriminated against groups. Workers who are discriminated against in redundancy, dismissal or recruitment, are likely to acquire shorter service. Also, women tend to have shorter service due to childcare breaks.

If you are in this situation, you may have a claim for indirect sex or race discrimination. The key question is whether your employer can justify the service-related pay or benefits. In the context of indirect sex discrimination, European case-law has been inconsistent as to whether it is necessary for an employer to justify service-related pay or whether it should always be justifiable. At present, until the outcome of the test case heard in 2006, *Cadman v Health and Safety Executive*, it should be assumed that, under the Sex Discrimination Act, an employer must justify rewarding long service in the usual way.

It is uncertain what effect the *Cadman* decision will have on the need to justify indirect age (as opposed to sex) discrimination arising from service-related pay. The government has argued in front of the European Court of Justice in *Cadman* that the position with age discrimination should not be the same as with sex discrimination. If the ECJ accepts this distinction, it means that a worker may find it easier to prove indirect race or sex discrimination than indirect age discrimination in respect of service-related pay or benefits.

### Pensions

Although it is unlawful to discriminate in occupational pensions, there are numerous exceptions. This is a complex area and requires specialist advice. The law is set out in detail in Regulation 11 and Schedule 2 of the Age Regulations. There will also be a DTI Guide, available on its website (bibliography, Chapter 23). See also a useful publication by the National Association of Pension Funds. [35]

## Pay and benefits: key points

---

- You can claim direct discrimination in pay if you are paid less on grounds of your age. It is useful evidence to point to a colleague of a different age who is doing similar work but who is paid more.
- The differential pay rates of the national minimum wage still apply. It is lawful to pay you a lower hourly rate on grounds of your age, if you are on a lower age band of the national minimum wage and are paid at a level below the adult rate.
- Service-related pay or benefits indirectly discriminate against younger workers but the normal justification defence does not apply.
  - Service-related pay or benefits cannot be challenged in respect of your first five years' of service.
  - You can challenge service-related pay or benefits after five years' service, but the test for justification is based on your employer's reasonable opinion rather than the usual objective test for indirect discrimination.
- The *Cadman* test case for indirect sex discrimination may change the position under the Age Regulations too.
- Watch out for direct or indirect pay discrimination on other unlawful grounds, eg sex or race, where the normal justification test applies.

## Chapter 12: Redundancy

*“At the age of 46, I was handed my notice of redundancy by a middle manager who said, ‘We must make room for some of the new young ones’.” [21]*

### Direct age discrimination in redundancy

Most employers take a variety of factors into account when selecting for redundancy. However age can often be a consideration. Research shows that where age is taken into account, it is older workers who are targeted. This can take the form of direct selection for redundancy on age grounds or pressurising a worker to accept voluntary redundancy. Sham redundancies also occur, usually where a single redundancy dismissal is made of an older worker who is then replaced by someone younger doing an identical job.

*“Fear of redundancy is really uppermost in your mind when you get older because they could make you redundant, change your job title, and then bring in a younger person.” [6]*

Discrimination in the redundancy context may also occur in the nature and terms of any voluntary redundancy package on offer.

### How do you prove direct age discrimination in redundancy selection?

Direct discrimination in redundancy selection occurs if you are

- Selected for redundancy because of your age.
- Pressurised to accept voluntary redundancy because of your age.

Your employer may openly admit you were made redundant because of your age. If so, your employer will need to prove this was a justifiable reason (see p72 below regarding the employer’s defence).

Alternatively, your employer may deny that you have been made redundant due to your age and give a different reason. This means you will need to prove age discrimination was the true reason.

## Evidence checklist

To prove hidden age discrimination, it is necessary to look for clues and read between the lines. The following evidence could suggest there has been direct age discrimination in redundancy selection, although no single factor in itself necessarily indicates discrimination has occurred. It also depends on whether you have been made redundant as part of a large-scale redundancy operation in a large company, or you are a single redundancy in a small company. See also the general overview of evidence to prove direct age discrimination in Chapter 2.

- **Vulnerable age.** It is more likely you have been made redundant because of your age if you are an older worker or of an age which your employer is likely to regard as more suitable for redundancy.
- **Illogical selection pool.** With large-scale redundancies, an employer starts by identifying the pool of workers from which it will be decided who should be made redundant. Watch for an illogical or unfair selection pool, which appears to target those of a particular age, or enables your employer to target you or bring you into contention for redundancy.
- **Subjective selection procedures.** Subjective and ill-defined selection criteria or subjective and inconsistent marking make conscious or unconscious bias more likely.
- **Inaccurate assessment of your merits.** You are marked inaccurately against the selection criteria and/or your work is assessed by managers who have no first-hand knowledge of it.
- **Moving the goalposts.** Your employer has departed from his/her own redundancy policy with no clear reason or coherent alternative method.
- **Your employer's explanation.** You need to ask your employer why you were chosen for redundancy. If your employer cannot explain why s/he selected you for redundancy, this is in itself good evidence when taken together with other factors. Therefore watch for unsatisfactory or vague reasons. Also watch for explanations which are suggestive of direct discrimination.
- **Ageist remarks.** Your employer may have made a remark during the redundancy process, when explaining why you were selected, or shortly before redundancies were announced, suggesting that age is a factor.
- **Pattern of redundancies.** There is a pattern in terms of those retained or selected for redundancy according to age.
- **Comparators.** It is particularly useful if you can identify a much younger (or older) worker who has been retained who:
  - On the selection criteria applied by your employer should have scored less successfully than you.
  - For other reasons would seem more obvious to select for redundancy than you, eg s/he has a very poor conduct record or has only just started employment.
- **Workforce patterns.** The workforce as a whole, including management, personnel and those making the redundancy selection, is dominated by younger (or older) workers.
- **Other discrimination against you or others of your age.** There is other evidence of age discrimination against you, or against older (or younger) workers generally in the workplace.
- **Sham redundancy.** If you are the only person who has been made redundant, consider whether there was a genuine redundancy situation. Have you been replaced by a new and younger recruit doing the same job? Is there an advertisement for your job within weeks of your dismissal?

The following Canadian case, heard under that country's own age discrimination law, illustrates evidence which may suggest direct discrimination in redundancy.

**Larente v Canadian Broadcasting Corporation**

Ms Larente (aged 44) worked for the Corporation since 1975, joining the HR department in 1977. In 1997, it was announced that HR services must be reduced by 40%. In August, the Director told her that her employment would be terminated as of 31 December 1997 due to budget cut backs. He said, "We kept those who were likely to meet the challenge of tomorrow".

Ms Larente asked for an explanation as to the evaluation process. She was again told that the decision had been made on the recommendation of the management team and it had been decided to keep on staff most likely to meet the service's needs. Ms Larente felt she could do this because she had been evaluated as satisfactory in her recent evaluation. Several other colleagues of the same age or older and with long service were made redundant at the same time.

The Canadian Human Rights Tribunal reviewed Ms Larente's expertise, knowledge and experience, and decided that the decision to make her redundant was based on her age.

## Indirect age discrimination in redundancy selection

You may not have been made redundant because of your age. But your employer may have applied selection criteria which tend to disadvantage workers of a particular age. If so, this may be indirect discrimination.

It is possible for both direct and indirect discrimination to be present at the same time.

### How do you prove indirect age discrimination in redundancy selection?

For more detail on the definition of indirect age discrimination, see Chapter 3. In summary, there are several stages to proving indirect age discrimination in redundancy:

- (1) Find out the reason you have been made redundant. For example, you were chosen because you had shorter service than others.
- (2) You need to show that the reason for your selection is one which has put or would put those of your age group at a particular disadvantage compared with other people. For example, younger workers generally would tend to have shorter service than older workers.
- (3) Your employer has a defence if s/he can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

## (Identifying) Discriminatory provisions, criteria or practices in redundancy selection

Traditionally the favoured method of redundancy selection has been "Last In, First Out" (LIFO). This method is superficially attractive as it seems to ensure objectivity and feels fair. It has become less popular with employers in recent years as it does not distinguish between the skills and capabilities of workers retained and dismissed. From an equal opportunities point of view, LIFO has been severely discredited because workers with shortest service tend to be those from disadvantaged groups. In the context of age discrimination, LIFO is likely to target younger workers.

The search for other objective criteria to replace LIFO is not easy and many alternative criteria also have hidden discriminatory effects. In any redundancy selection, the following criteria need to be carefully considered for their impact on workers:

- **Removal of senior management tiers.** This is likely to target older workers.
- **Job proficiency (as opposed to potential).** Longer serving workers will have acquired greater job proficiency than newer workers who are still learning and being trained. Those with shortest service are most likely to be younger workers (as well as those from disadvantaged groups, eg black and other minority ethnic workers and women).
- **Merit assessments (past or present).** Assessments, particularly when carried out by one manager, can be very subjective. Older workers in particular are vulnerable to conscious or unconscious discrimination, stereotyping or misunderstanding. Reliance on past appraisals or personal development plans carries similar problems. (Workers from other disadvantaged groups are also vulnerable to merit assessments.)
- **Flexibility with hours and shifts/mobility.** Shift working and flexi-hours can be a particular issue for older workers as well as for women (see p17).
- **Costs savings.** Although it may be more expensive to make older workers redundant in the short-term, because longer service attracts higher redundancy pay, in the long-term it is cheaper if older (longer-serving) workers are on higher salaries.

## The employer's defence to direct or indirect discrimination in redundancy selection

In most situations, you would expect your employer to select on the basis of retaining those workers who have the most relevant skills. Direct discrimination based purely on age should be difficult to justify.

Employers who directly discriminate against older workers in redundancy selection may say they have done so for a number of reasons, eg

- It is cheaper (if they are on higher salaries).
- It is easier to persuade them to volunteer to go.

- It is more socially acceptable. The latter is based on another myth: the Lump of Labour Fallacy (see p121).
- The employer believes older workers are less productive or amenable to change (see Chapter 21 regarding these myths). However, any defence based on a generalisation, rather than an accurate assessment of the individual's capabilities, is likely to fail.

Some of these reasons, whether or not they apparently benefit your employer, are based on an idea that it is "fairer" to select older workers or rely on LIFO as an objective method. It is uncertain whether an employer can rely on a reason which is not beneficial to him/herself, though s/he may claim that a method which is recognised within the company and in society generally as fair is good for morale within the company and its PR outside. This kind of defence is untested.

For a discussion of the general validity of the following defences, see Chapter 4:

- Costs savings.
- Proximity to retirement age.

Remember that in defending age discrimination, the principle of proportionality always applies. The greater the impact on you – and others of your age – of the discrimination, the better the justification needed by your employer. Given the evidence that workers over 50 find it hard ever to get back into the job market, the impact of redundancy selection is enormous. Your employer would therefore need to provide a strong justification.

## **Victimisation in redundancy selection**

It is victimisation to make you redundant because you have complained to your employer about age discrimination in the past. For a full checklist on victimisation, see Chapter 5.

## **Unfair dismissal and notice pay**

If you are an employee with one year's service, you may additionally claim unfair dismissal if you are unfairly selected for redundancy.

You are also entitled to be given notice or pay in lieu. The amount of notice is as set out in your contract, subject to the statutory minimum.

## Discrimination in redundancy pay and severance packages

### Statutory redundancy pay

Statutory redundancy pay is payable to employees with a minimum of two years' service who are dismissed by reason of redundancy. It is calculated according to a formula. There is half a week's pay for each year worked below the age of 22, one week's pay for each year worked between 22 and 40 inclusive, and one and a half week's pay for each year worked at the age of 41 or above. A maximum of 20 years' employment may be counted. A week's pay is gross pay subject to a maximum, which increases each year. In the year starting 1st February 2006, the weekly maximum was £290.

The calculation is the same as before the introduction of the Age Regulations, except that the Regulations removed the lower and upper age limits on service to be included in the calculation. The previous tapering down provisions at age 64 were also removed by the Regulations.

The way redundancy pay is calculated disadvantages younger workers both directly (in its link between age and number of week's counted) and indirectly (by awarding more pay for number of years' worked). The government justifies this by reference to evidence it has gathered which indicates that the older the worker is, the longer s/he is likely to be out of work and the more likely s/he is to experience a substantial fall in pay if s/he ever does find a new job. (See quote from written ministerial statement to Parliament, 2nd March 2006 at p104 below.)

### Exception for some types of enhanced redundancy pay

Under Regulation 33, an employer may discriminate by giving employees enhanced redundancy payments based on the statutory calculation. Provided it applies to the whole redundancy scheme, it will not be unlawful for your employer to increase the payment in one or more of the following ways:

- By removing the maximum on the weekly gross pay.
- By multiplying the weekly amount by a figure of more than one for each year of employment.
- By multiplying the whole calculation by a figure of more than one.

### Contractual redundancy pay

For various reasons, employers may decide to offer greater or lesser contractual redundancy pay or voluntary redundancy packages to older workers. These variations need to be justified unless they take the form of enhanced statutory redundancy pay under Regulation 33 (see above). Examples of discrimination, unless justified, are:

- An employer offers higher redundancy pay to those over 50 as an incentive for older workers to leave.
- An employer offers higher redundancy pay to older workers because they will find it harder to find new employment.
- An employer offers higher voluntary redundancy pay to workers under 50 because they will be giving up more years of future potential salary.
- An employer offers more redundancy pay to younger workers because older workers will have access to their pensions.
- An employer offers a variety of options in a redundancy situation to younger workers but not to older workers.
- Voluntary redundancy is only offered to workers of a particular age.

### The employer's defence to direct or indirect age discrimination in redundancy pay

Regulation 33 allows your employer to increase redundancy pay in a way which is based on the statutory formula (see above). With other variations, whether the employer can justify direct or indirect age discrimination depends on the facts and reasons.

Where the purpose of offering better redundancy pay to older workers is to encourage them to leave, see comments in the context of redundancy selection (see above).

The fact that the government has retained the statutory scheme, which gives larger redundancy pay to older workers and to those of longer service, may mean that any contractual scheme which makes similar distinctions is also justifiable.

As recognised by the government, there is considerable evidence that workers over 50 will find it harder to find new employment (see p104) and therefore it would seem justifiable to pay higher redundancy pay by way of compensation. However, it comes back to whether an employer is entitled to use as justification a reason which considers the welfare of the redundant workers, but not necessarily of the employer (see p73 above). Whereas a government can justify social policy objectives, a private employer probably cannot. Moreover, as there is a specific exception for enhanced redundancy pay based on the calculation of statutory redundancy pay, other types of increased redundancy pay for older workers may be harder to justify.

Regarding whether it is justifiable to offer younger workers higher redundancy pay than older workers, the following case under the Irish legislation is interesting, although it has no legal authority in the UK.

The following case was investigated by the Office of the Director of Equality Investigations in the Republic of Ireland.

**Perry v The Garda Commissioner**

Ms Perry (aged 64), a traffic warden, was offered a less favourable Voluntary Early Retirement package than a younger colleague (aged 59). Three options were offered to Wardens under 60: to remain in the employment of the Garda but at a different location; to transfer to employment with the Dublin Corporation; or to apply for Voluntary Early Retirement (VER). Wardens over 60 were only offered the latter option. Moreover, their VER was calculated on a less favourable basis.

Those over 60 had their VER gratuity calculated on the basis of the number of years remaining before 65. However, applicants for VER who were under 60 had their gratuity calculated on the number of accumulated years of service. The Garda tried to justify this by saying the younger employee would forgo greater wages by retiring earlier.

The Equality Officer posed the scenario of two identical employees, one aged 60 years + 1 day, the other aged 59 years + 364 days. The income foregone by each would only be marginally different yet the VER gratuity received would be hugely different. This undermined the Garda's reasoning and the Equality Officer did not think that the age discrimination would be justifiable. (The case was in fact dismissed on a different technicality.)

## Redundancy: key points

- Discrimination in the redundancy context may take the form of unfair selection for redundancy, pressurising you to take voluntary redundancy, or offering a different redundancy package.
- Selecting you for redundancy on grounds of your age may be direct discrimination. If you are an employee with at least 1 year's service, it may also be unfair dismissal.
- If your employer denies that you have been selected because of your age, various kinds of evidence may help you prove it.
- If you have been selected for redundancy due to a selection criterion which tends particularly to target older or younger workers (eg LIFO), this may be indirect discrimination.
- Direct or indirect discrimination in redundancy may be justified if your employer can show it was a proportionate means of meeting a legitimate aim.
- Selecting you for redundancy because you have previously complained in good faith about age discrimination is victimisation.
- Statutory redundancy pay still differentiates according to length of service and age. Enhanced versions of this are permitted. Other contractual redundancy pay schemes which discriminate need to be justified in the usual way.
- See Chapter 13 for other dismissals.

## Chapter 13: Other dismissals

*“Employers’ stereotypes about age influence decisions about recruiting, training, promoting and releasing workers.” [13]*

### Direct age discrimination in dismissal

**This chapter concerns dismissals for reasons other than redundancy (see Chapter 12) or retirement (see Chapter 14), but which may be age discriminatory.**

If an employer dismisses you because you are too old (or young), this is direct discrimination. Your employer may consciously decide s/he does not want workers beyond a certain age or may unconsciously react more strongly to any signs of incapability or misconduct than had you been younger (or older).

Your employer may deny the dismissal was because of your age and give a different reason, eg it was due to redundancy (see Chapter 12), misconduct or incapability. If this happens, you will need to prove the true reason for the dismissal was your age.

Alternatively, your employer may admit the true reason for your dismissal was your age, but rely on the defence, ie say that s/he was using a proportionate means to achieve a legitimate aim.

### How do you prove direct age discrimination in dismissal?

Where your employer seeks to hide that s/he has dismissed you due to your age by using a pretext, such as misconduct or poor performance, you will need to prove the true reason. The following factors may help prove hidden age discrimination, though no single factor may be sufficient in itself:

- **Vulnerable age.** You are an older worker or of an age that is likely to be discriminated against on age grounds in that workplace.
- **Comparators.** You can identify a younger (or older) worker who has committed the same offence or who has the same level of performance and who has not been dismissed.
- **Previous work record.** A change in your employer’s attitude after you reached a threshold age or after the employer found out your age would be revealing. For example, you had not previously been warned about misconduct or poor performance, yet you had committed the same apparent offence in the past, or your work performance has been consistent.

- **Your employer's explanation.** Your employer's explanation for what is wrong with your conduct or performance is unconvincing.
- **Ageist remarks.** See comments in respect of redundancy at p70.
- **Workforce patterns.** See comments in respect of redundancy at p70.
- **Other age discrimination against you.** See comments in respect of redundancy at p70.
- **Unfair reason for dismissal or unfair procedures.** It is not an indication of discrimination in itself that your employer has acted unfairly, since your employer may act unfairly towards all workers. However, unfairness may be significant:
  - When it is taken together with other factors, or
  - If it can be shown that the employer normally does follow his/her own policies and good procedures and act fairly, or
  - It is a very high level of unfairness, which the employer cannot explain.

## The employer's defence to direct age discrimination in dismissal

Where an employer admits s/he has dismissed you because of your age, the most likely defences to be put forward are:

- Looking to the future, you need to be replaced by someone younger who will offer more service.
- For health and safety reasons, you are too old (or too young) for the particular type of work.
- You have become too old for the image of the company.

**For example:** a manager of a fast food restaurant is thought to have become too old for the restaurant's image when s/he reaches 40.

Any defence which relies on generalisations regarding workers' capacities at a certain age, rather than assessing the individual worker, will be difficult to prove (see Chapter 4 regarding the defence to direct discrimination and Chapter 21 regarding common stereotypes and myths).

For a discussion of the general validity of the following defences, see Chapter 4:

- Health and safety.
- Proximity to retirement age.
- Company image or customer preference.
- Saving costs.

## Indirect age discrimination in dismissal

For the kind of issues which may arise on an indirectly discriminatory dismissal, see indirect discrimination in redundancy selection (p71) and indirect discrimination generally (Chapter 3).

## Victimisation in dismissal

It is victimisation to dismiss you because you have complained to your employer about age discrimination in the past. For a full checklist on victimisation, see Chapter 5.

## Unfair dismissal

An eligible worker can claim unfair dismissal contrary to the Employment Rights Act 1996 if his/her dismissal is unfair. You must have at least one year's service with the employer and must be an employee as defined by the Employment Rights Act 1996. There are special rules if you have reached retirement age (see Chapter 14).

## Notice

Unless you were dismissed for gross misconduct, you are entitled to be given notice or pay in lieu of notice when you are dismissed. Your notice entitlement is set out in your contract of employment, but is subject to the statutory minimum periods.

### Dismissal: key points

---

- It is direct discrimination to dismiss you because you are too old or too young or to treat any offence more seriously because of your age.
- See Chapter 12 regarding redundancy dismissals.
- See Chapter 14 regarding retirement dismissals.
- If you are an employee with at least 1 year's service, you can also claim unfair dismissal. Employees will also be entitled to notice.

## Chapter 14: Retirement dismissals

*“It’s all about choice – not work till you drop but choose when you stop.”*

Trade and Industry Secretary, Alan Johnson (2006)

### Introduction

**In the years leading up to the institution of the Age Regulations, there was a lengthy debate within government and society generally as to the desirability of retaining a national retirement age. Disappointingly, the final decision was to set a default retirement age of 65, although this is to be reviewed in 2011.**

Allowing a retirement age undermines the age legislation in many respects beyond its effect on retirement. It means there is a possible defence to less favourable treatment of older workers because of their proximity to retirement age.

In deciding to allow a default retirement age, the government is relying on the defence to age discrimination under the Directive, ie age discrimination is permitted if it is objectively and reasonably justified. However, the government has not provided any substantial justification and is now, at the time of writing, facing a legal challenge.

The DTI’s partial regulatory impact assessment on retirement ages of July 2005 looked at the effect of retaining or abolishing retirement age. It concluded that the option of no default retirement age showed higher benefits overall to individuals, employees, employers, the Exchequer and GDP, than any other option. Yet in the face of all the evidence in the impact assessment, the government has set a default retirement age.

The primary justification given is that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. The government says that although an increasing number of employers have no set retirement age, some nevertheless still rely on it heavily. There is no analysis of what proportion of businesses use this method, nor whether it is an appropriate or necessary measure in any instance, as opposed to a habitual way of doing things. The very fact that not all businesses use this method indicates that it is not automatically justifiable in every case. For example, research by the Chartered Institute of Personnel and Development and the Chartered Management Institute of over 2600 managers and personnel practitioners in August 2005 showed that 29% of the organisations had no

mandatory retirement age and operated a flexible retirement policy. [23]

In a survey for the DWP of 2087 employment establishments in 2005, 57% had no compulsory retirement age. This was especially true of smaller establishments.[36]

The majority of people do not want to work beyond retirement age. But the important point is that people have the choice. In introducing the final Age Regulations, the Secretary for Trade and Industry gave this rather mixed message:

*“As we are living longer and healthier lives, it is essential that the talents of older workers are not wasted. We must have the opportunity to carry on working where that is what we want. So we will scrap unjustified retirement ages below 65 and introduce a new right to request working beyond 65. In five years we will review all retirement ages to see whether the time is right to abolish them altogether.”*

## Overview of the rules

The rules are complicated and are set out in detail in this chapter. As a very short summary, these are the important points:

- If you are an employee, your employer can force you to retire at the age of 65 provided the correct procedures are followed.
- Although you have the right to ask your employer to carry on working, your employer only needs to consider your request. S/he can refuse and give no reasons.
- If you are not an employee, but are another kind of worker or office-holder covered by the Regulations, it is age discrimination to force you to retire or refuse to recruit you because you have reached the age of 65, unless objectively justified in the usual way.
- The rules are the same for men and women.
- The establishment of a default retirement age and/or the impossibility of challenging the reason for a ‘retirement’ dismissal where the employer has followed correct procedures, may be contrary to the Directive and are currently (at the time of writing) under challenge.
- If your employer does agree to keep you on after the age of 65, you must not be discriminated against on age grounds in your terms and conditions or other treatment at work without objective justification.

## The default retirement age

The default retirement age is 65. This means that if you are an employee, your retirement age is 65 unless your employer operates a different normal retirement age. The normal retirement age (NRA) is the age at which employees who hold or have held the same kind of position as you are normally required to retire.

The age at which you become entitled to the state pension or an occupational pension is a separate matter and should not be confused with the age at which you can be forced to retire from work.

Your employer can choose to employ you beyond the age of 65 if you wish to continue.

Note that the following special rules regarding retirement apply to you if you are an employee or member of House of Commons or House of Lords staff or in Crown employment, but not if you are another worker or office-holder covered by the Age Regulations. See p91 regarding non-employees and retirement.

## The effect of the default retirement age if you are an employee

### Age discrimination and retirement

- Under Regulation 30, it is not age discrimination to dismiss you genuinely for retirement at or over age 65.
- There are rules which help decide whether the dismissal is genuinely for retirement (see p87 below). These rules also apply to unfair dismissal for retirement.
- It is age discrimination to force you to retire before the age of 65 without objective justification. The employer must prove it is a proportionate means of achieving a legitimate aim.

### Unfair dismissal at retirement age

- Unfair dismissal law is covered by section 98 of the Employment Rights Act 1996 (ERA). Under section 98ZG, it is not unfair dismissal to dismiss you genuinely for retirement at age 65 or any earlier objectively justified normal retirement age (NRA), provided the correct procedures are followed.
- It is automatic unfair dismissal to force you to retire before age 65 or any earlier objectively justified NRA.
- Detailed rules regarding unfair dismissal and retirement are set out at p86 below.

### Other discrimination at retirement age

- Even if a dismissal is deemed to be genuinely for retirement (because the employer followed the correct procedures), the decision to dismiss may have been affected by other discrimination. Claims can be made under the other discrimination legislation regardless of your age.

- For example, an employer may refuse to allow a female employee to continue working past 65 but be in the habit of allowing male employees to continue past that age. If so, the female employee could claim sex discrimination under the Sex Discrimination Act.
- It is also possible to imagine situations where an employer may decide to retire an employee because of his/her disability, when s/he would otherwise have been kept on. See Chapter 19 regarding disability.

## Normal retirement age below 65 – can it be justified?

It is direct discrimination to force you to retire below the age of 65 unless it can be objectively justified. It will rarely be justifiable for an employer to impose a normal retirement age below 65. The most common reasons, eg health and safety or performance concerns, can be better tested by individual assessment and appraisal systems.

## The employer's duty to inform

### Notification under Schedule 6, paragraph 2

Under Schedule 6, paragraph 2 of the Age Regulations, if your employer intends to retire you, s/he must give you written notice of:

- The date on which s/he intends you to retire.
- Your right to request not to retire on the intended date.

This notification must be made 6 months – 1 year before the proposed retirement date, even if you already know your retirement date because it is in your written contract of employment or your employer has previously told you.

**For example**, you reach retirement age on 7th May 2007. Your employer must write to you no more than one year before 7th May 2007 and no less than 6 months before 7th May 2007, telling you of your retirement date and your right to request not to retire on that date.

If your employer fails to make this notification, you can claim compensation for breach of the duty. A tribunal can award up to 8 weeks' pay according to what it considers just and equitable. A week's pay is gross pay subject to the weekly maximum in force at the time for calculating statutory redundancy pay (see p74).

Your tribunal claim must be started before the end of 3 months starting from the last day when your employer was permitted to make the notification. If you did not then know the date of intended retirement, the time-limit is counted from the date when you found out or should have known.

### The continuing duty: Schedule 6, paragraph 4

If your employer does not make the notification 6 months – 1 year in advance, you can claim up to 8 weeks' compensation, as explained above. However, your employer has a continuing duty under Schedule 6 paragraph 4 to notify you up to 14 days before your retirement.

The significance of this continuing duty is that if your employer fails to notify you by 14 days before, you can claim automatic unfair dismissal under section 98ZG of the Employment Rights Act 1996. (See below.)

In the above example, your employer may fail to give you a written notification 6 months – 1 year before 7th May 2007. However, your employer does give you the written notification on 1st April 2007. As this is more than 14 days before your intended retirement date of 7th May 2007, the dismissal is not automatically unfair under section 98ZG. However, you can claim up to 8 weeks' compensation because you did not get at least 6 months' notice.

## The statutory right to request not to retire

### The purpose of the procedure

Of course you can informally ask your employer at any time to continue working past retirement age. However, if you make a request under the statutory procedure, your employer is forced to hold a meeting and discuss the matter.

Unfortunately, that is as far as it goes. Your employer can choose whether to say yes or no to continued working. Your employer does not need to have good reasons for refusing. Indeed, your employer does not even need to state why s/he is refusing.

The government has stated that it hopes the procedure will encourage a climate whereby employers increasingly agree to requests to continue working:

### The steps of the procedure

The statutory procedure is set out in Schedule 6, paragraph 5 of the Regulations. The following steps must be followed if you want to request working beyond retirement:

- You must make a written request to continue working. The request must:
  - State that it is made under Schedule 6, paragraph 5.
  - Propose that your employment should continue following retirement for a stated period or until a stated date or indefinitely.
- Identify the date on which you believe your employer intends to retire you, unless your employer has already provided a written notification of that date under Schedule 6 paragraph 2. A sample letter is on p90.

- The request must be made more than 3 months but not more than 6 months before the intended retirement date. If your employer has not given a written notification under Schedule 6 paragraph 2, your request can be made at any time during the 6 months before the intended retirement date.
- Your employer must hold a meeting to discuss your request within a reasonable time of receiving it. There is no definition in the Regulations of how long would be 'reasonable'. Both parties must take all reasonable steps to attend the meeting. However, if it is not practicable to hold a meeting within a reasonable period, your employer can consider the matter without one. The meeting is unnecessary if you reach agreement on continued working and your employer gives you a written notice to that effect.
- Your employer must provide written notification of his/her decision as soon as reasonably practicable after the meeting. Again, there is no guidance in the Regulations as to how long an employer is entitled to take. This is important because, if your employer is guilty of an undue delay, it may mean s/he has not properly followed the procedure.
- If your request is accepted, the notification must state that you can continue working indefinitely or, if not, for how long. If the request is refused, the notification must state this and confirm your retirement date. Your employer need not give reasons for refusal, although the ACAS guidance says it would be good practice to do so.
- You can appeal in writing as soon as reasonably practicable after the decision. You must set out your grounds of appeal. This is a little difficult if you have not been told your employer's reasons for refusing your request. All you can do is repeat your reasons for wanting to continue and address any objections made by your employer. A sample letter is at p91.
- Your employer must hold an appeal meeting. The same rules apply as for holding the initial meeting. A written decision must be given afterwards. Again there is no obligation to give reasons for refusal.
- If your termination date falls before your employer has given his/her initial decision under this procedure, your contract of employment continues in force until the day after the written decision is given. However, the original termination date remains unchanged for the purposes of ascertaining the intended retirement date under the unfair dismissal rules (see "unfair dismissal and retirement" below.) There is no postponement of the termination date while you appeal.

If your employer fails to follow this procedure, your dismissal will be automatically unfair under section 98ZG (see below).

A request under this procedure can only be made once in respect of a single retirement date, although there is nothing to stop you discussing the matter informally with your employer.

**Example of relevant dates:**

Dennis's retirement date is 7th May 2007. His employer writes to him on 1st September 2006 to tell him of the date and his right to request continued working. His employer has complied with Schedule 6 paragraph 2 by making this notification no less than 6 months and no more than 1 year before the intended retirement date.

Dennis wants to continue working. He must make a written request to do so more than 3 months (but not more than 6 months) before 7th May 2007.

## The right to be accompanied

You have the right to be accompanied by a work colleague of your choice. Your companion can address the meeting and confer with you, but cannot answer questions on your behalf. If your companion cannot attend the original meeting date, your employer must postpone the meeting to a time in the next 7 days when your companion can attend. Your companion must be allowed time off to come with you.

If your employer refuses or threatens to refuse to allow you to be accompanied in this way, you can claim compensation of up to two weeks' gross pay, subject to the weekly maximum applicable to statutory redundancy pay. A claim must be brought to a tribunal within 3 months of the refusal or threat.

It is automatic unfair dismissal to dismiss you because you have exercised the right to be accompanied, or to dismiss your companion for accompanying you. No minimum service is required to make this claim. It is also unlawful to subject you or your companion to a detriment short of dismissal for these reasons.

## Unfair dismissal and retirement

The rules regarding unfair dismissal when an employee is dismissed at retirement age or for retirement reasons are set out in the Employment Rights Act 1996 (ERA) at sections 98ZA – 98ZH.

There is no upper age limit on the right to claim unfair dismissal. However, if you are genuinely dismissed for retirement at retirement age, the dismissal will only be unfair if your employer did not follow the Schedule 6 notification and duty to consider procedures set out above. There are therefore three key issues:

- Were you dismissed at retirement age?
- Was the reason for your dismissal genuinely retirement?
- Did your employer give you the correct notifications?

## Were you dismissed at retirement age?

When referring to ‘retirement age’, this section of the Chapter means:

- ❑ The default age of 65, or
- ❑ Any higher normal retirement age (NRA) set by your employer for employees generally, or
- ❑ Any lower NRA set by your employer, which is non-discriminatory and objectively justifiable. In practice, an NRA below 65 will rarely be justifiable.

It is unfair to dismiss you for retirement if you are below retirement age. Unless justified, this will also be age discrimination.

## Was the reason for your dismissal genuinely retirement?

As explained above, provided the correct procedures are followed, it is fair to dismiss you genuinely for reasons of retirement. You cannot win any unfair dismissal claim. However, if the reason for dismissal is not genuinely retirement, you may be able to prove unfair dismissal and age discrimination.

Provided:

- ❑ Your employer gave the statutory notification under Schedule 6 paragraph 2 (see above),
- ❑ Your job ended on the intended retirement date, and
- ❑ Your job ended at your retirement age,

the law presumes the true reason for your dismissal was retirement. You cannot argue that there was any other reason, whatever the evidence (though see p82 regarding sex and other discrimination).

The ‘intended retirement date’ means the date notified to you by your employer under Schedule 6 paragraph 2 or 4, or if your employer made no such notification, a date which you identified when making a request to continue working.

However, if your job ended before you reached retirement age or before the intended retirement date notified to you, the law presumes the reason was not retirement, regardless of what your employer says. The reason will also not be retirement if your employer set a NRA below the age of 65, which cannot be justified and is therefore age discrimination.

In other situations for example, where your employer has not made a Schedule 6 paragraph 2 notification, but your contract of employment nevertheless ends at or after retirement age and on an intended retirement date, the tribunal will look at the evidence and decides what it thinks is the true reason for dismissal. In particular, it must take account of:

- Whether your employer at least gave you a Schedule 6 paragraph 4 notification (ie more than 14 days in advance of the proposed retirement date).
- If so, how far in advance of your retirement the notification was made.
- Whether your employer followed – or tried to follow – the statutory procedure to consider any request you made to continue working.

The tribunal will also consider other evidence about your employer's true reason for dismissing you.

If the tribunal then decides the true reason for your dismissal was not retirement, your employer will have to prove there was another reason and that it was fair to dismiss you for that other reason. This will be extremely difficult if your employer started by asserting that the reason for dismissal was retirement. If your employer cannot prove a different reason for dismissal, the dismissal will be unfair. Note also that for non-retirement dismissals, the statutory dispute resolution procedures apply and it will be automatic unfair dismissal if your employer did not follow the statutory DDP (see Chapter 15).

## **Did your employer follow the correct procedures?**

Once a tribunal decides that you were dismissed at retirement age and for reasons of retirement, whether or not the dismissal is fair is decided by ERA section 98ZG and depends on whether the procedural notifications were followed under Schedule 6.

The rules can be summarised as follows:

- It is fair to dismiss you genuinely for retirement, provided your employer has given you the correct notification under Schedule 6 paragraph 2 or 4 of your retirement date and your right to request continued working, and has considered any request you make to continue working, including any appeal.
- It is automatically unfair to dismiss you for retirement if your employer did not follow the notification and duty to consider procedures.
- In both situations, it is not age discrimination to dismiss you at or over 65 if the reason is genuinely retirement.

## **What happens if you are allowed to continue working beyond retirement and are forced to retire at a later date?**

Your employer may overlook or ignore your retirement date and you may continue working beyond the age of 65 (or NRA). If this happens, your employer may at any stage impose a retirement date by giving 6 months – 1 year's notice in accordance with Schedule 6, paragraph 2. The usual procedure and consequences will then apply.

Alternatively, you and your employer may have followed the procedures when you reached 65 and have agreed that you continue to work for a further period. If this happens, your employer must give you the Schedule 6 paragraph 2 notification again, within 6 months – 1 year before any later retirement date, and must consider any request you make to continue working. However, this is not necessary if the later date is no more than 6 months from the original retirement date.

**For example**, Robert reaches the default retirement age on 10th September 2007. His employer notifies him on 4th January 2007 that the intended retirement date is 10th September 2007, but that Robert can request continued working. Robert does request continued working and it is agreed that he will continue until 31st December 2009. The employer must give a further notification 6 months – 1 year before 31st December 2009. This further notification would not be necessary if it had been agreed that Robert would continue only to 31st December 2007.

## Compensation for unfair dismissal

The main elements of unfair dismissal compensation are usually the basic award and compensation for loss of earnings. The basic award is based on your age and number of year's service and is calculated like statutory redundancy pay (see p74).

There is a minimum basic award of 4 weeks' pay where a dismissal is unfair under section 98ZG, ie because your employer failed to give you a notification under Sched 6 para 4 or to consider your request not to be retired or your appeal.

It is uncertain how much loss of earnings a tribunal will be prepared to award in a case where the unfairness arises purely because your employer failed to notify you of your right to request continued working or failed to consider such a request. After all, your employer was free to refuse your request to continue working in any event. It is possible that the loss of earnings will be confined to the period it would have taken to go through the procedure, but perhaps with an additional amount to reflect the theoretical possibility that your employer may have agreed to a period of further working.

A tribunal can also award reinstatement or compensation if your employer refuses to reinstate. It is uncertain whether tribunals will be willing to order reinstatement of employees after retirement age. In any event, a tribunal cannot force your employer to reinstate you. It can only award additional compensation if your employer refuses.

## The statutory dispute resolution procedures

The statutory dispute resolution procedures (see Chapter 15) do not apply to retirement dismissals. However, if an employment tribunal finds that your dismissal was not genuinely for reasons of retirement, then your employer should normally have followed the statutory DDP and could be responsible for automatic unfair dismissal if s/he has not done so.

## Transitional provisions

There are special transitional provisions under Schedule 7 where your retirement date falls after 1st October 2006 and before 1st April 2007. There are two different time-scales for your employer to notify the intended retirement date and you to request continued working. These depend on whether your employer gave notice of the retirement dismissal before or after 1st October 2006. Details are set out in Annex 12 of the ACAS guidance.

### Sample letter to request continued working

*insert date*

Dear

I would like to make a formal request to continue working beyond my retirement date. My request is made under Schedule 6, paragraph 5 of the Employment Equality (Age) Regulations 2006.

You have given me written notification that my retirement date is [*insert date*].

[*Or, where your employer has not notified you of your retirement date under Schedule 6, para 2: I believe you intend to retire me on insert date.*]

I would like to continue working [indefinitely] [until *insert date*].

I believe I can still do a very good job for you. [*Add any reasons which you think will encourage your employer to continue to employ you, eg saving recruitment costs, retaining experience, mentoring younger employees, completing a particular project, good customer relations, good employee morale.*]

Yours sincerely,

**Sample letter appealing against refusal to allow continued working**

*Insert date*

Dear

I was very disappointed that my request for continued working was refused and I would like to appeal against this refusal.

My reasons for appealing are *[give reasons, eg why you think it is a good idea and will benefit your employer for you to continue working; answer any objections which your employer has made.]*

*[If you have been given no reasons for refusal:]* It would be very helpful if you could give me reasons why you initially refused my request. This would help me answer your concerns. The ACAS guidance does recommend that employers give reasons.

Yours sincerely,

**Non-employees**

The above rules apply only to employees working under a contract of employment (as covered by unfair dismissal law), House of Commons or House of Lords staff and people in Crown employment. They do not apply to other workers and office-holders who are covered by the Age Regulations. Such other workers cannot in any event claim unfair dismissal because they are not eligible to do so. However, age discrimination law still applies. If the employer dismisses or refuses to recruit a worker (other than an employee) because s/he is aged 65 or above, this will be age discrimination unless justified in the usual way. It may be easier to justify such a decision given the general position regarding employees.

## Retirement: key points

---

- A default retirement age of 65 applies. Employers can set a lower normal retirement age only if it is objectively justifiable, which will be rare.
- If you are an employee, your employer must notify you 6 – 12 months in advance, of the proposed retirement date and of your right to request continued working.
- Your employer must consider any request you make to continue working, but s/he can refuse and need not give any reasons.
- Provided your employer follows these procedures, you cannot claim unfair dismissal if you are genuinely dismissed for reasons of retirement at retirement age.
- If you are an employee, it is not age discrimination to dismiss you genuinely for reasons of retirement at or above the age of 65.
- A dismissal at retirement age, and on the intended retirement date notified to you in accordance with the statutory procedure, is generally taken to be genuinely for reasons of retirement if the notification procedures were followed.
- If you are another kind of worker, you cannot claim unfair dismissal, but you can claim age discrimination if you are unjustifiably dismissed for reaching the age of 65 or above.

part three

# tribunal procedures

## Chapter 15:

# Statutory dispute resolution procedures

**If you are an employee, the statutory dispute resolution procedures will usually apply to your situation. You need to take them into account if you intend to bring a tribunal case for age discrimination against your employer. These procedures do not apply to cases brought against institutions of further and higher education or providers of vocational training where the provider is not your own employer.**

The law is set out in the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004.

It is sometimes uncertain whether the statutory dispute resolution procedures apply because:

- You have to be an employee in the sense meant by the unfair dismissal legislation, not by the discrimination legislation. But your status may be unclear.
- There are many other exceptions.

The rules regarding when the procedures apply are complicated and full of uncertainties. Until case law clarifies the true position, the only advice that can be given is to play safe. The following is a basic introduction with regard to how the procedures apply to the Age Regulations. The rules are too detailed to set out in full in this guide. For more detail, see *Employment Law: An Adviser's Handbook* (bibliography, Chapter 23), though there has been more recent case law.

The idea is to encourage employers and employees to follow internal disciplinary, grievance and appeal procedures before taking their dispute to an employment tribunal.

There are two statutory procedures:

- The statutory minimum dismissal and disciplinary procedure (DDP). This generally applies to relevant disciplinary action (not warnings or paid suspension) and to most dismissals. The DDP does not apply to mass redundancies (20 or more employees) or to genuine retirement dismissals (see Chapter 14).
- The statutory grievance procedure. This applies to constructive dismissal (where you resign) and discriminatory actions other than dismissal, eg disciplinary action, lack of training, or denial of promotion. Although job applicants are not explicitly excluded, the procedure only applies to employees, so it would seem not to apply in a recruitment case (although there have been no test cases on this). This means that if you are complaining about discrimination in recruitment, you can go ahead without worrying about following the procedures.

## Dismissal

Your employer should follow the minimum steps of the DDP before dismissing you or taking relevant disciplinary action (eg unpaid suspension or disciplinary demotion).

Essentially the DDP entails these steps:

1. Your employer should send you a letter setting out your alleged conduct or characteristics or other circumstances which lead him/her to contemplate dismissing or taking disciplinary action, and inviting you to a meeting.
2. Before the meeting, your employer should give you more detail of the grounds in the letter. It is important to try to get as much information as possible before the meeting. In a misconduct case, this may mean asking for the evidence against you including any statements taken, and in a redundancy case, the selection criteria and your markings. You must be given a reasonable opportunity (ie sufficient time) to consider your response before the meeting.
3. The meeting is then held. Afterwards, you should be informed of the outcome and your right of appeal.
4. If you do not like the outcome, you should appeal. An appeal meeting will be held and afterwards your employer should notify you of the outcome.

In certain gross misconduct cases, your employer can dismiss first and write to you afterwards. You will still have the right of appeal.

You must cooperate with the steps of the procedure and attend the meetings. Otherwise, if you bring a case alleging that your dismissal was age discrimination or unfair dismissal and win the case, your compensation can be reduced by at least 10% and up to 50%.

If your employer fails to go through the procedure properly, your compensation can be increased by 10 – 50%. Also, if you have at least one year's service, your dismissal will be automatically unfair.

You need not comply with the procedure in a few exceptional circumstances. For example, if the procedure is started but you have been subjected to harassment and have reasonable grounds to believe that continuing with the procedure would result in you being subjected to further harassment. The harassment need not necessarily be on age grounds. Nevertheless, this is hard to prove and it is best for you to go through with the procedure, unless you really cannot face doing so for the above reasons and are prepared to risk a reduction in your compensation.

## The statutory grievance procedure

If you are an employee, you cannot bring a tribunal claim for age discrimination in relation to any action other than actual dismissal unless you have first sent your employer a written grievance under the statutory grievance procedure and waited 28 days. The idea is that your employer has an opportunity to address your concerns before the matter goes further.

It is very important that your written grievance clearly refers to all the matters which will be the subject of your tribunal claim. Your letter should state that it is a grievance, even though this may not be legally essential. It should certainly clarify what kind of discrimination is claimed and the actions concerned. A sample letter is on p100.

These are the key steps of the statutory grievance procedure:

1. You must send your employer a statement setting out the grievance. This is often called the “step 1 grievance letter”.
2. Your employer holds a grievance meeting.
3. Afterwards, your employer notifies you of the decision and your right of appeal.
4. You should appeal if you do not agree with your employer’s decision. An appeal meeting must be held and you must be notified in writing of the outcome.

If you have already left, the modified procedure can apply, but only if both sides agree. Under the modified procedure, your employer simply responds to your grievance in writing. For suggested wording to request the modified procedure, see p101. This is useful if you do not want to attend a grievance meeting and believe there is nothing to be gained from doing so. Unfortunately, your employer may insist on you attending, especially if s/he senses that you do not want to do so.

A big problem with the entire procedure is that many employees who have suffered discrimination do not want to attend meetings with their employer. Try not to let this deter you from bringing a tribunal case. It is only one stage which you need to go through. You should try to obtain help and advice from your trade union, a local advice agency or a solicitor. They should be able to:

- Help you write the grievance letter.
- Discuss with you how to handle the grievance meeting and any awkward questions.
- Fix an appointment soon after the meeting to discuss what happened and the next steps.

See also Chapter 16 regarding writing grievance letters.

If you really cannot face going through a grievance meeting, you should at least send your employer a letter which sets out your grievance in writing. If your employer invites you to a meeting, you should write back and explain why you feel you cannot attend and ask your employer to deal with the matter in writing. If you do this, at least you will not be blocked from bringing your tribunal case for age discrimination. However, you do risk your compensation being reduced by 10 – 50% if you win your age discrimination case.

It is therefore strongly advised that you attend the grievance meeting, even if you do not want to. Remember that:

- You can take a work colleague or trade union representative with you.
- If you want to bring a tribunal case, you will have to face up to a tribunal hearing.
- It is only one or two meetings which you need to attend (the grievance and appeal meetings). Why make it easy for your employer by not attending?

- You can get advice in advance about how to handle the meeting and you can put all your most important points in a letter, if you are afraid you will not be able to express yourself well.

You need not start or follow the procedure if you have been subjected to harassment and have reasonable grounds to believe that starting or continuing with the procedure would result in you being subjected to further harassment. The harassment need not be on grounds of age. However, this exception is hard to prove. It is best if you go through with the procedure anyway. It is not enough that you have been harassed at work in the past. You need to show that it is going through the grievance procedure which would lead to further harassment.

If it is your employer who fails to hold a grievance meeting or follow the procedure properly, and you win your age discrimination case, your compensation can be increased by 10 – 50%.

For more detail on handling the grievance meeting and ideas for negotiation, see Chapter 16.

## Several acts of discrimination including dismissal

In discrimination cases, it is common for many discriminatory actions to have taken place and to be the subject of the claim. Some of these may already be out of time but form background evidence. If you have been dismissed, but you are also complaining about discriminatory actions prior to dismissal, both the DDP and the statutory grievance procedure will apply. This is particularly important to remember for time-limit purposes. For more on time-limits, see Chapter 18.

### Statutory dispute resolution procedures: key points

- Employees, but not other workers, are covered by the statutory dispute resolution procedures. There are some exceptions.
- If you are an employee, your employer should follow the statutory minimum DDP before dismissing you. Otherwise, if you win your tribunal case for age discrimination or unfair dismissal, you will get increased compensation. If you have one year's service, you can also claim automatic unfair dismissal. The procedure does not apply to redundancy dismissals of 20 or more employees or to retirement dismissals.
- If you are an employee, you must write a statutory grievance about any discriminatory action (except dismissal), before bringing a tribunal claim about that matter. Otherwise you will be debarred from bringing the claim. See Chapter 16 regarding handling grievances.
- The procedures affect tribunal time-limits, but only if they apply. It is often unclear whether they do indeed apply, so it is safest to keep to the original time-limits (see Chapter 18).

## Chapter 16:

# Bringing a grievance

**If you are an employee, you must follow the statutory grievance procedure under the statutory dispute resolution procedures before bringing a tribunal case for discrimination (except where it only concerns dismissal). For further detail, see Chapter 15.**

The point of bringing a grievance is that you may be able to agree a solution with your employer without having to go to a tribunal. This is not always possible, but you may choose to bring a grievance even where the statutory dispute resolution procedures do not apply to you, eg because you are a worker and not an employee.

### Writing the grievance letter

It is worth giving some thought as to what to put into your grievance letter and what tone to adopt. If you can, you should get advice from your trade union, a local advice agency or even a solicitor. The way a grievance letter is written depends on its purpose, which may be:

- A genuine attempt to resolve a difficulty with a reasonable chance of receptiveness from the employer.
- To put pressure on your employer or a particular manager to resolve a situation when informal approaches have not succeeded.
- Where your employer is likely to be unresponsive and working relations are deteriorating, to put matters on record for use in a future tribunal case. The purpose may be simply to record your version of facts (including any ageist remarks) which may later be disputed, or to record your unhappiness at a situation and your attempts to reach a sensible resolution.
- To comply with the requirements of the statutory dispute resolution procedures before bringing a tribunal case.

The letter can come from you (even if it is drafted by an adviser) or be sent on your behalf by a solicitor, advice agency or trade union representative. The tone of the letter can be formal or friendly. It should always be firm and not show signs of weakness. It can be useful to make suggestions and to ask for written responses to pertinent questions.

It is usually better for the letter to come from you. Employers can react badly to the involvement of outside advisers, or become more cautious and even go to their own lawyers. Despite what many workers

believe, employers are not often persuaded to treat a worker better just because they have received a solicitor's letter. Letters from advisers tend to be ineffective unless the legal position is very strong and the employer is ignoring the worker's own attempts to solve the situation. In the end, it all depends on what you are realistically trying to achieve by the letter

Sample letters to comply with the requirements of the statutory dispute resolution procedures are set out on pages 100 and 101.

## The grievance meeting

You need to be careful about how you handle grievance meetings, especially where the statutory dispute resolution procedures apply. Employers have become more cautious as a result of the statutory procedures, often involving lawyers in the background, and using the meeting simply to find out what kind of tribunal case they will be facing and to pin you down.

Here are some tips:

- Keep calm and polite.
- Be clear and consistent in what you are saying.
- If any relevant ageist remarks have been made to you in the past, make sure you mention them.
- Take the opportunity to ask your employer to give reasons for his/her decisions.
- Take a careful note of anything important which is said.
- If you are asked to make difficult decisions on the spot, say you will think about it and let your employer have a response in the next few days.

You are entitled to be accompanied by a workplace colleague or, if you are a trade union member, by your trade union representative. Unless your contract says otherwise, you are not entitled to be accompanied by a friend outside the workplace – though you can always ask. The most useful thing your colleague can do is take a good note of anything important.

## Model statutory grievance letters

The statutory dispute resolution procedures are explained in Chapter 15. The following sample letters show how to comply with the minimum requirements of the statutory grievance procedure.

## Sample grievance letter while the employee is still employed

*insert date*

Dear

I wish to take out a grievance regarding your recent decision not to promote me to the post of senior accountant. My manager told me that I was too senior and she felt I would lack motivation. She said that the company wanted people who had been qualified for only a few years.

I feel these reasons are unfair. I was very enthusiastic in my application for the post. I feel that my age is being held against me. If the company only wants someone junior or who has been qualified for only a few years, that will rule out anyone of my age. I can't help feeling that the company wants someone younger, but I feel I still have a lot to offer.

Yours sincerely,

## Notes

The important elements of this letter are:

- It states that it is a grievance letter. Although current case law says this is not necessary, it is much safer to do so.
- It identifies the act of discrimination complained about, ie the refused promotion.
- It makes it clear that the grievance is about age discrimination.
- In effect, the letter identifies both indirect discrimination and direct discrimination, but if this is difficult at this stage, it is probably unnecessary to be so precise. However, if you are alleging victimisation, you should say so, and you should mention the protected act, ie the occasion when you complained about age discrimination.
- It states the reasons given verbally to the employee for the rejection. It is particularly important to record these accurately where, as here, they reveal direct or indirect discrimination.

## Modified grievance procedure

If you are no longer employed by the company and would prefer not to go through the full procedure, you could add this paragraph to the end of your letter:

“As I have now left the job, I am prepared to go through the modified grievance procedure. If you are agreeable to this, please let me have your written response to my grievance.”

If your employer refuses to deal with the matter under the modified procedure and invites you to a grievance meeting, you will have to attend the meeting. Otherwise any compensation you are awarded if you win your discrimination case is likely to be reduced.

## Sample appeal letter

*insert date*

Dear

Thank you for your letter dated (*insert date*), informing me that my grievance has been rejected.

I would like to appeal against the decision to reject my grievance.

*(Optional)* You say in your letter that the job duties of senior accountant are more mundane than they appear and that I have previously indicated that I would not want to do that kind of work. That is not in fact true. I covered the position for 6 weeks last year and I really enjoyed the work.

I would like you also to reconsider all the points which I made at the grievance meeting on (*insert date*).

Yours sincerely,

## Chapter 17: Tribunals and questionnaires

### Running a tribunal case

**If you wish to bring a case concerning age discrimination relating to employment, you must do so in an employment tribunal. Employment tribunals deal with all kinds of employment cases, including those relating to discrimination.**

This guide does not deal with tribunal procedure. For detail on running employment tribunal cases, see *Employment Law: An Adviser's Handbook* (bibliography, Chapter 23).

There are strict time-limits for starting age discrimination cases in the tribunal. These are set out on p106.

Before starting a tribunal case, it may also be necessary to follow the statutory dispute resolution procedures. For details of these and whether they apply, see Chapter 15.

### What is involved in a tribunal case?

To start a tribunal case, you need to fill in the standard Claim form (ET1) and deliver it to the tribunal. You may have several claims at once, eg for age discrimination, unfair dismissal, notice pay and outstanding wages and holiday pay. Your claim will be registered at the tribunal office most local to where you worked.

The tribunal will send your Claim form to the employer. Your employer also fills in a form, called the Response (ET3), setting out the details of his/her defence. The Response is passed on to you. You will usually receive this 4 – 6 weeks after lodging your Claim.

You can either choose to represent yourself or you can try to find a representative. For a list of possible advice agencies to help you, see Chapter 22. If you are a trade union member, you should ask your union to represent you. Your employer also needs to decide whether to get a legal representative. If representatives are involved, they do the case preparation and communicate with each other and the tribunal.

During the next few weeks or months, the case is prepared. You can ask your employer for all relevant documents and for further information to clarify the Response. Your employer can also ask you for documents and information. This is all done by letter. The tribunal will probably hold a case management discussion at some stage to check all the arrangements are in place. If you and/or your employer have a representative, the representatives go to the case management discussion meeting. Otherwise you and any relevant manager attends.

Closer to the hearing date all the witnesses (including you) must put their evidence into written witness statements. These are then exchanged, usually 1 – 2 weeks before the hearing. You also need to agree with your employer or your employer’s representative who will prepare the joint trial bundle of documents for use by everyone at the hearing and what should go into it. In Scotland, you usually prepare your own bundle.

At the hearing itself, all witnesses must give evidence. You will probably be asked to read your own statement out loud. Then your employer’s representative can ask you questions. This is called cross-examination. The tribunal may also ask you questions. The same thing happens in reverse with your employer’s witnesses.

The tribunal consists of a three-person panel – a Chair who is a solicitor or barrister, and two non-legal members, one from each side of industry (employers and trade unions). The hearing is not intimidating as it is in a criminal court. No one wears wigs and gowns and everyone sits down. But the hearing is not completely informal either. Witnesses take an oath to tell the truth and there is a certain formality to the proceedings with rules about giving evidence. Sometimes there are complex legal arguments, especially in discrimination cases.

## Using a questionnaire to gather evidence

The questionnaire procedure is a way for you to find out more information about the facts behind what has happened and your employer’s explanation. The procedure is only available to you and cannot be used by your employer.

Under the procedure, you can send your employer a set of written questions, which your employer should answer. If your employer does not answer, this is likely to be held against him/her at the eventual tribunal hearing.

You can send a questionnaire to your employer before you start any tribunal case. Then if you are satisfied by the answers to your questions, you need not go ahead with your case. Alternatively, you can send your questionnaire shortly after you have started your tribunal case. There are strict time-limits for sending the questionnaire to your employer (see p108).

The questionnaire is usually written on a standard form which can be downloaded from the DTI’s website at [www.dti.gov.uk/files/file32724.pdf](http://www.dti.gov.uk/files/file32724.pdf)

These are the kinds of topic which you can ask about in a questionnaire:

- ❑ Who made the relevant decisions and what were their reasons.
- ❑ In a recruitment case: details about who else applied and the successful candidate (age, qualifications, experience etc).
- ❑ In a training case: what training has everyone else received.
- ❑ In a redundancy case: the selection criteria; who else was made redundant and their age.

The questionnaire procedure is absolutely vital and provides a unique opportunity to gather evidence and pin down the employer. It should not be overlooked. For full detail on how to use the procedure and what questions to ask, there is a series of questionnaire guides for the different discrimination strands, produced by Central London Law Centre (see bibliography, Chapter 23).

## Compensation and remedies

### Financial compensation

There is no upper limit on the compensation which a tribunal can award for age discrimination. Compensation is awarded for unintentional indirect discrimination only if the tribunal believes it is just and equitable to do so. Compensation is awarded in three categories:

- **Actual financial loss.** This may be, for example, loss of earnings following your dismissal or loss of potential earnings if you did not get a job or promotion. If you can convince a tribunal that, because of your age, you are unlikely to get another job for a long time or not before the retirement age of 65, it may be prepared to award several years' future loss of earnings. To have a chance of getting an award for a long period of future loss, you must show you made considerable efforts to find a new job.

For older workers, it is helpful to quote the government's written ministerial statement, Hansard 2nd March 2006, on statutory redundancy payments:

*“Evidence the government has gathered demonstrates that younger, prime age and older workers fall into three distinct economic categories, with older workers facing a particularly difficult position in the employment market. Young workers tend not to be out of work for long, and see only a small fall in pay when switching jobs. Older workers are much more likely to become long-term unemployed, and to experience a substantial fall in pay when finding a new job. Prime age workers fall into the middle.”*

Hansard (HC) 2.3.06 col.40WS

- **Injury to feelings.** This sometimes divides into two awards, one for injury to feelings and one for aggravated damages, where an employer has behaved particularly badly. You must prove that the discrimination has injured your feelings and, if relevant, damaged your health. The total award for injury to feelings is hard to predict. Awards in other discrimination cases tend to range between £1000 and £25,000 or more. Additional sums may be awarded for injury to health. The higher awards tend to be made in cases of particularly nasty harassment or where a worker suffers severe depression as a result of the discrimination. In many cases, tribunals can be disappointing and only award a few thousand pounds. You should not assume you will be awarded a large amount or a sum which properly reflects your true injury.
- **Interest.**

## Recommendations

The tribunal can make recommendations that the employer should take action which would benefit you, eg that you are put onto certain training courses. The tribunal cannot insist on you being reinstated or getting the next promotion vacancy.

If any settlement is negotiated prior to the hearing, then there is of course no restriction on what may be negotiated. For example, you could negotiate the wording of a reference.

## Chapter 18:

# Tribunal time-limits

**Time-limits are very important. The tribunal Claim form must arrive at the tribunal office on or before the time-limit. Time-limits are difficult to apply in practice. The following is a broad summary but you should get specialist advice.**

### Unfair dismissal

- The time-limit is 3 calendar months less one day from the effective date of termination (EDT).  
**For example:** if the EDT was 3rd June, the time-limit would be 2nd September in the same year.
- The tribunal can only allow in a late claim if it was not reasonably practicable for you to have lodged your claim in time. This is very hard to prove.
- If the statutory dispute resolution procedures apply (see Chapter 15), the time-limit may be extended by a further 3 months if, at the date of the expiry of the normal time-limit, you have reasonable grounds for believing a disciplinary procedure is being followed in respect of your complaint.  
**For example:** if the EDT was 3rd June and the normal time-limit was 2nd September, the time-limit would be extended by 3 months if, as at 2nd September, the appeal had been fixed but not yet been heard.
- If you resigned and are claiming constructive dismissal, the position under the statutory dispute resolution procedures is more complex.  
**As it is often uncertain whether the statutory dispute resolution procedures apply, it is safest to stick to the normal 3 month time-limit.**

### Age discrimination

Time limits for age discrimination cases are the same as time-limits under other discrimination legislation. These are the key points:

- The time-limit is 3 calendar months less one day from the act of discrimination.  
**For example:** if the act of discrimination was on 3rd April, then the tribunal Claim form must arrive at the tribunal on or before 2nd July (of the same year).
- Time runs from each act of discrimination, not just the last act. Therefore all significant acts of discrimination should be kept in time.

**For example:** you are refused a training opportunity on 3rd November and denied a promotion on 10th December. Time is counted from 3rd November if both claims are to be in time, making a deadline of 2nd February the next year.

- Time runs from the act of discrimination not from the outcome of any grievance or appeal. It is easy to miss earlier time-limits because there is often a gap in time between an act of discrimination and the outcome of a grievance.

**For example:** you are discriminated against by way of a warning on 5th March, but your appeal is not heard and rejected until 10th April. The time-limit for the warning is 4th June.

On this example, the rejection of the appeal may or may not constitute another act of discrimination, which will be in time until 9th July. However, the missing of the 4th June time-limit will mean that the tribunal is not required to make a finding on the warning itself.

Therefore it may be necessary to lodge a tribunal Claim while the appeal is still being pursued in order to protect the option of taking the case to tribunal. If the appeal is rejected, and this appears to be a discriminatory act, a further tribunal Claim would have to be completed.

- Although you may refer to earlier incidents as evidence, only acts within the time-limit form the grounds of the claim. Therefore even if discrimination has been going on for some while, so that earlier incidents are inevitably out of time, the more serious and provable recent incidents should be kept in time.
- There is a concept known as 'continuing discrimination', which may keep a claim in time, which would otherwise seem out of time.

**For example:** you are refused attendance on a training course on 8th February and on another training course on 23rd July. You should have lodged your Claim regarding the first refused course on or before 7th May. However, if you missed that time-limit and only took advice after the second refusal on 23rd July, you could try to claim there was a continuing failure to offer training on grounds of age. If you prove this, the time-limit for both refusals continues to run until 22nd October at least. The problem is that the tribunal may think the two refusals stand alone and are unconnected and not evidence of continuing discrimination.

The concept of continuing discrimination is commonly misunderstood and it only applies in limited circumstances where there is an ongoing discriminatory state of affairs, policy, practice or rule. It is best not to rely on it if at all possible.

- The tribunal does have power to permit a late claim to be made if it is just and equitable to do so, but it is very risky to rely on a tribunal allowing this.
- If further discrimination or victimisation occurs after a claim has been made, a further claim will need to be made within a further 3 month time-limit.
- If the statutory dispute resolution procedures apply (see Chapter 15), time-limits may be extended by 3 months from the normal time-limit as follows:

- In respect of any claim for a discriminatory dismissal (but not constructive dismissal), time will be extended only if, as at the date of expiry of the normal time-limit, you have reasonable grounds for believing a disciplinary procedure is being followed in respect of the complaint. (This position is the same as for unfair dismissal, see p106.)
- In respect of any claim where the statutory grievance procedure applies, eg constructive dismissal or any other act of discrimination apart from actual dismissal, you must send a step 1 grievance letter to your employer within the normal time-limit and wait 28 days before lodging your tribunal Claim. Provided you do this, the time-limit is automatically extended by a further 3 months from the expiry of the normal time-limit.
- The position with constructive dismissal under the statutory dispute resolution procedures can be complex and not all permutations are covered by this guide.
- If a tribunal Claim is mistakenly lodged before any step 1 grievance letter has been sent to the employer, the tribunal will return the Claim. You will still get a 3 month extension to resubmit the claim, but you must first send the step 1 grievance letter within 1 month of the original time-limit.

**As it is often uncertain whether the statutory dispute resolution procedures apply, it is safest to stick to the normal 3 month time-limit.**

## Time-limits for serving a questionnaire

The questionnaire is extremely important in gathering evidence for a discrimination case (see Chapter 17). There are strict time-limits for serving the questionnaire on your employer. If a time-limit is missed, you must ask the tribunal's permission to send it late. The tribunal may refuse. It is therefore vital not to miss the time-limit.

The questionnaire must be received by your employer on or before the time-limit. This is when the questionnaire is 'served' on your employer.

The questionnaire may be served within 3 months of the act of discrimination if the tribunal case has not yet been started.

Once a tribunal case has been started, if no questionnaire has yet been served, it must be served within 21 days.

**For example:** if the tribunal Claim form arrived at the tribunal on Tuesday 2nd February, the questionnaire must be received by the employer on or before Monday 22nd February. This is so even if the tribunal Claim was lodged well within the time-limit for starting a case. Equally, it is so even if the tribunal Claim was lodged on the last possible day for starting a case.

appendices

## Chapter 19: Age and disability

### Introduction

**If you feel at a disadvantage at work because you have developed an impairment or health condition, the Disability Discrimination Act 1995 (DDA) may be able to help you. The DDA can be more useful to you than the Age Regulations. This is because in some circumstances the DDA requires the employer to take positive steps to adjust your working conditions.**

The following is only a brief summary of who is covered by the DDA and what kinds of reasonable adjustments an employer should make. For more detail, see *Proving disability and reasonable adjustments: A worker's guide to evidence under the DDA* by Tamara Lewis (bibliography, Chapter 23).

### Who is covered by the DDA?

Statistics indicate that over one third of people between 50 and retirement age are disabled within the meaning of the DDA. This is because the DDA does not only cover conditions conventionally thought of as a disability. It can cover a wide variety of physical or mental impairments or long-term ill-health, for example (depending on the severity):

- Arthritis
- Back impairment
- Depression
- Diabetes
- Hearing or visual impairment
- Heart condition
- Restricted mobility (not necessarily using a wheelchair)
- RSI

Whether or not a condition is covered depends on its particular effect on you. It is only covered if it has serious effects which have lasted – or are likely to last – at least 12 months.

## Reasonable adjustments

An employer must not unjustifiably discriminate against you for a reason related to your disability. More importantly, if you are put at a disadvantage due to your disability, your employer must make any adjustments to the premises or your working conditions which a tribunal would consider reasonable.

If necessary, this may involve treating you more favourably than your colleagues in order to remove the disadvantage. For example, if it is reasonable, an employer should:

- Reallocate some of your duties or even transfer you to an existing vacancy.
- Alter or reduce your hours, eg to avoid rush hour travel or fatigue.
- Adjust premises or locate you somewhere else.
- Acquire or modify equipment, eg ergonomic chairs, accessible office equipment, computer software or hardware.
- Provide interpreters or support.
- Provide additional or modified training.

When deciding how much an employer should have done, a tribunal will take into account factors such as:

- The employer's size and financial and other resources.
- The cost of the adjustment and availability of grants. There are grants available from the Access to Work Scheme administered through JobCentre Plus.
- The practicality of the adjustment and the extent to which you are willing to co-operate (although you need not co-operate with an unreasonable adjustment).

## Examples of adjustments which may be appropriate

The following adjustments were cited as good practice in Age Positive's report, *Good Practice in the Recruitment and Retention of Older Workers: Case Studies*. [14] They illustrate the sort of adjustment which tribunals would expect.

- Age Concern, Hull: A member of staff in her early 60s developed arthritis. She worked in an upstairs office. She was offered the choice of moving to a downstairs office and a heater was provided, because she was increasingly affected by the cold.
- Age Concern, Hull: A member of staff in her early 50s returned to work after a period of illness. She was offered the chance of working shorter hours, so she could avoid morning and evening rush hour.
- Gloucestershire Housing Association: A 60-year old clerk of works had some hearing difficulty. He found it hard to use a mobile telephone when out on site, which was essential to his job. A hands-

free kit and signal amplifier were fitted to his vehicle.

- ❑ Kappa Packaging: An older worker with a serious health condition was offered a number of flexible work options, including reducing his hours or working day shifts. He chose to change his two-shift pattern of work to regular days.

These are some other possibilities:

- Older manual workers may develop back or shoulder injuries. Reasonable adjustments could include reallocation of lifting duties or more sedentary duties.
- A worker with arthritis could require a modified keyboard or reallocation of his/her typing duties as a reasonable adjustment.
- A worker with a heart impairment following a heart attack could request light duties or reduced hours.

In one case, a caller to Help the Aged had hurt her back and had to take some time off. She wanted to be transferred to another department which would not involve tasks which would further damage her back. However, she was told no one would want her because she was close to 60. Eventually she handed in her notice.

In a case like this, the caller could claim:

- ❑ Direct age discrimination under the Age Regulations, if the failure to transfer her due to her age was unjustified.
- ❑ Failure to make reasonable adjustments as required by the DDA.

### **Disability discrimination: key points**

- If you are discriminated against due to your disability, you can claim under the DDA.
- You can also claim that your employer should make reasonable adjustments. This is a more positive duty than the right not to be unjustifiably discriminated against on age grounds under the Age Regulations.
- If you are disadvantaged due to your disability, you may be able to claim under the DDA instead of or in addition to any claim you may have under the Age Regulations.

## Chapter 20: Older workers – looking for work?

Unfortunately, evidence shows that older workers do face discrimination when trying to find a new job. This does not mean that it is hopeless. Not every employer discriminates and many employers recognise the benefits of employing older workers. It is to be hoped that the new law will also change attitudes and practices.

*“I am 48 years old and have in the last 2 years tried to get a new job after 30 years with my previous employer. I came across direct and indirect ageism. I am pleased to say I am now back in full-time work but only because my new employer had the foresight to think experience was worth its weight in gold.”*

Caller to Help the Aged.

Various employers are supporting the government’s Age Positive campaign as Employer Champions. For a list of age-friendly employers, go to the home site of the Age Positive website at [www.agepositive.gov.uk/index.cfm](http://www.agepositive.gov.uk/index.cfm) and click on the link to “Champions”.

*“We firmly believe that our active policy of recruiting older workers has directly contributed to the ongoing success of our business.”*

Ian Cheshire, Chief Executive B&Q

There are recruitment and advice agencies which offer specialist help for older people seeking work. For a list of such agencies, go to the home page of the Age Positive website at [www.agepositive.gov.uk/index.cfm](http://www.agepositive.gov.uk/index.cfm), click on the link to “Job seeking” and then the link to “Recruitment and advice agencies”.

If you have been out of work for a while, *New Deal 50 plus* is a programme for people aged 50 or over who have been out of work and claiming benefits for at least six months. The programme can provide advice

and assistance in getting work and an in-work training grant of £1200. You can ask about *New Deal 50 plus* in your local job centre. For more details of the programme, go to the Age Positive website's home page and click on the link to "New Deal 50 plus". *New Deal 50 plus* is administered by Jobcentre Plus. They can also help you with alternative training and volunteering opportunities.

*Next Step* and *learnirect* can provide careers and training information and advice. Find your local information and advice providers at [www.naega.org.uk/links/guidance-providers/](http://www.naega.org.uk/links/guidance-providers/) or contact *learnirect* at [www.learnirect.co.uk/](http://www.learnirect.co.uk/)

The Age and Employment Network (TAEN) is also able to support older job seekers and learners, see [www.taen.org.uk](http://www.taen.org.uk)

For those who wish to consider self employment over 50, PRIME can help you, see [www.primeinitiative.org.uk](http://www.primeinitiative.org.uk)

## Dealing with employers' stereotypes

There are many age stereotypes regarding both positive and negative characteristics associated with older and younger workers. Some of these are set out in Chapter 21. There are various ways of dealing with these stereotypes if you feel they may be reducing your chances of getting a job:

- If possible, don't mention your age. Unfortunately, of course, your age may become obvious from your employment history or qualifications.
- Change the order of information on your CV, so that you can make an initial strong impression with your skills, before the recruiter reaches your employment history. Unfortunately, this reordering will not be possible if you have to complete an application form.
- Emphasise those of your good qualities which employers tend to associate with and value in older workers, eg your experience, loyalty and reliability.
- Emphasise those of your good qualities which employers tend to associate with and value in younger workers, eg your enthusiasm, energy and interest in career development.

Interestingly, a 1996 study *Employment Discrimination* carried out in the US by Bendick, Jackson and Romero (referred to on the BBC's Panorama website) found that the worst thing an older jobseeker can do is emphasise those of his/her positive qualities which employers associate with older workers. The best approach was to emphasise qualities associated with younger workers.

Some recruitment experts (spoken to by Panorama) also suggest that it helps to dress at interview in a way which confronts the employer's stereotypes of older workers. Although appearance really should not matter, in reality it does. Up-to-date, appropriate clothes, haircuts, accessories etc can make a difference.

## General tips

- Do not stereotype yourself. You should not rule yourself out of opportunities or underestimate your capabilities because you have absorbed prevalent social stereotypes.
- Look after your general health and well-being. Exercise, eat well and keep in touch with people.
- If losing your job has had severe financial consequences, get specialist financial advice.
- Link up with other people in similar circumstances, eg through community centres and adult education classes.
- Consider volunteering. See [www.volunteering.org.uk](http://www.volunteering.org.uk) for details of your local volunteering bureau
- Update your skills where possible, through training or voluntary work. Consider trying a completely different type of work.
- Don't give up.

## Working beyond state pension age

Employers are not required to employ employees (as opposed to other categories of worker) beyond the age of 65 (see p41 and Chapter 14). However, an increasing number of employers are willing to allow workers to continue beyond the age of 65, because they can appreciate the benefits of doing so.

If you do continue working beyond state pension age, you may wish to put off receiving your state pension for a while. This should enable you to claim a higher pension or lump sum payment when you do eventually claim. Alternatively, you can claim your state pension while working. For details, see <http://www.the-pensionservice.gov.uk/statepensiondeferral/home.asp>

## Chapter 21: Myths and Stereotypes

*“Employers as well as younger and older employees tend to have stereotyped views about the strengths and weaknesses of people based on their age.” [6]*

Stereotyped attitudes towards younger and older workers are depressingly ingrained. Over the last 20 years and right up to the present, research report after research report shows the same stereotypes put forward by employers.

The most common negative stereotypes about older workers are:

- Lack of ambition.
- Resistance to change; less adaptable; inflexible.
- More prone to ill-health.
- Outdated skills.
- Slow to learn, especially in relation to IT.
- Interested in job security rather than performance.
- More confident in asserting their employment rights.
- Old-fashioned; less liberal in attitudes.

The most common negative stereotypes about younger workers are:

- Poor time-keeping and attendance.
- Lack of a work ethic.
- Unreliable.
- Inexperienced.
- Over-ambitious and not loyal to the company.
- Motivated by money.

There are also positive stereotypes. The most common positive stereotypes about older workers are:

- Increased reliability, responsibility and stability.
- Hardworking.
- Greater commitment and loyalty.
- Improved social skills and customer service.

- Better at handling awkward situations.
- More likely to think before acting.

The most common positive stereotypes about younger workers are:

- Enthusiastic.
- Ambitious.
- Keen to learn.
- Flexible.
- Physically fitter and more stamina.
- More liberal.

(Sources: Numerous, but stereotypes are substantially addressed in section 7 of the *Evaluation of the Code of Practice on Age Diversity in Employment* [6]. See also the review of research since 1990 in *The Case for Older Workers at Tesco* [16], plus other sources listed in the bibliography, particularly those numbered [19], [23], [25] and [26].

Many stereotypes are simply not accurate. Some stereotypes may be true as broad generalisations, but this does not mean they apply to everyone and it does not mean they apply to you. If your employer acts on a stereotyped assumption about workers of a certain age, s/he will probably be guilty of unlawful discrimination. Even if an assumption is true of a group generally, it may not be true of a significant number of individuals within that group, as has been pointed out by the House of Lords in the context of race discrimination (*R (on the application of the European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another* [2005] IRLR 115, HL).

In *Victims of Ageist Attitudes*, [12] a self-assessment was carried out of those aged 40 or over regarding different areas of competence. The majority of those surveyed said that 10 out of 16 areas of competence remained stable with age, ie flexibility in work; initiative; creativity; productivity; willingness to learn new things; learning and development needs. Moreover, 60% said that age had improved their experience, social skills, ability to make decisions and solve problems. Almost 50% said their ability to handle stress had improved with age. The only area which a majority said declined with age was physical capacity. The research was carried out on people of above-average education, which the researchers said may be relevant.

*“It is important to remember that most of us don’t work at the top of our game 100% of the time. Most of us work well within our physical and mental capacities. So that means even with declining capacities, we can still perform more or less at optimum levels in most workplaces.”*

Dr Philip Taylor, Research Centre on Ageing, Cambridge.

Interestingly, most of the negative stereotypes applicable to older or younger workers are mirrored by

positive stereotypes of the opposite age group. This would suggest that age diverse workforces are the most beneficial, but it seems that employers instinctively aim for homogeneous workforces.

Research shows that even though many employers are aware of the benefits of employing older workers or have adopted the positive stereotypes, they still tend to discriminate against them. This suggests that prejudices and unconscious attitudes are very deeply ingrained.

## Why do we need to know about the stereotypes and myths?

*“Age discrimination happens because assumptions are made about employees or prospective employees – young and old – that are based on inaccurate, outdated and inappropriate stereotypes. Such attitudes work against the interests of the individual, the workforce and employers.”*

DTI (2003)

On page 119 are some of the most common myths, together with the reality. It is worth being aware of these myths and stereotypes. Age-based attitudes are embedded in our society. They are likely to affect the views of our employers, colleagues and friends. We may even have absorbed some of these stereotypes ourselves. It is important to be aware of this. If you absorb some of the negative stereotypes about your own age group, this can make you uncertain about whether you are justified in challenging age discrimination.

Because these stereotypes are so common, any explanation given by an employer for less favourable treatment must be treated with suspicion.

**For example:** when an employer gives a worker a poor appraisal because s/he is supposedly inflexible and resistant to change, is that in fact true or is it just applying an unconscious stereotype? What evidence is there that it is true of the particular worker?

The myths and stereotypes are also relevant when considering whether an employer can justify a generic policy, whether this is directly or indirectly discriminatory.

**For example:** an airline employer decides to dismiss all pilots at age 55 for health and safety reasons. But is the employer relying on a general assumption which is not backed by the facts? Several airlines now recognise that individual and regular health assessments are more valid than a generalised age cut-off.

A final word of caution. The bulk of age-related discrimination appears to be directed towards older workers. But we must be careful that in debunking myths about older workers, we do not create negative myths about younger workers. These are all generalisations and each individual should be considered and treated as such.

**Myth:** Older workers are more prone to ill-health / take more time off sick.

**Facts:**

- Older workers have a lower short-term sickness rate, although they do have more long-term or certified sickness absence. [19] [25] The latter is easier for a business to manage. [30]
- A research report into Tesco showed the incidence and length of sickness and of unauthorised absences were lower among older workers than younger workers. [16]
- In 1991, a B & Q store staffed entirely with people over 50 reported 39% less absenteeism than the average B & Q store. [19]
- Age Positive employers in 2004 reported lower absenteeism among older workers. [24]
- Health is influenced by many other factors, particularly lifestyle, exercise and nutrition. The general health of older workers is increasingly improving.

**Myth:** It is not worth training older workers because they have shorter pay-back times.

**Facts:**

- Older workers stay longer with their current employer than younger ones. [19] [13]
- Age Positive employers in 2004 reported lower staff turnover rates among older workers. [24]
- A research report into Tesco showed turn-over rates were considerably lower at the higher age bands. [16]
- Employees aged 50+ spend an average of 13 years in their current employment compared with 7.2 years for those aged 16 – 24. [17]
- Skills need updating every 3 – 5 years in any event. [22]

**Myth:** Older workers are less adaptable / are inflexible and reluctant to change.

**Facts:**

- The majority of older workers self-assessed flexibility in work as remaining stable with age. [12]
- A research report into Tesco found no evidence of older workers having a reluctance to change or perceived tendency to resist management. [16]

- Older workers do not generally have difficulty adapting to change, but in some situations they may question the value of change. Resistance to change can occur at any age. Effective change management normally comes from proper, good quality communication and consultation by management. [25]

**Myth:** Older workers are difficult to train.

**Facts:**

- Older workers may be slower to learn or prefer more on-the-job style of training, but they are equally likely to acquire and retain the information. [26]
- It is good practice with workers of all ages and backgrounds to tailor methods to their individual needs. [25]
- Older workers may take longer to learn because they are applying the new information to a wider range of stored knowledge. This can be beneficial in the long run. [25]

**Myth:** Older workers have exhausted their creativity.

**Fact:** The majority of older workers self-assessed creativity as remaining stable with age. [12]

**Myth:** Older workers are unmotivated and uninterested in their job. They are just marking time.

**Fact:** A research report into Tesco showed older workers had higher intrinsic motivation regarding the nature of the work [activity, esteem, relationships] rather than external motivating factors, precisely because they did not intend to move on. [16]

**Myth:** A homogeneous workforce and like-minded teams are beneficial. [See p49.]

**Facts:**

- In theory, many employers recognise that an age diverse workforce is beneficial, but the need for new staff to integrate with the existing workforce continues to be a source of subconscious age discrimination. [6]
- Tesco staff of all ages, male and female, surveyed in 2002 said they enjoyed working in a mixed age environment. Many believed this allowed staff to learn from each other. [16]
- A survey of Age Positive employers in 2004 showed most employers felt having a mixed-age workforce was the most effective business approach. [24]

**Myth:** Older workers are less productive.

**Facts:**

- Older workers' productivity is the same as that of younger workers for most kinds of work. [19]
- Over one third of employers say that productivity increases with age. [23]
- The majority of older workers self-assessed productivity as remaining stable with age. [12]

- There is great individual variation in ability to work with age, so generalisations should not be made. [25]
- Productivity is likely to be affected by attendance, which is no worse for older people. [25]

**Myth:** People over a certain age cannot do the job properly.

**Facts:**

- There is no discernible deterioration in performance due to age in the majority of jobs at least up to the age of 70. The amount of training is far more likely to impact upon performance [something which older workers can be excluded from]. [18]
- A research report in Tesco showed older workers had higher levels of experience and knowledge, and delivered superior customer service. [16]

**Myth:** Older workers dislike working for a younger boss.

**Fact:** A research report in Tesco showed that most shop floor workers did not think the age of their manager was an issue. However there was a source of tension in that some younger managers felt uncomfortable managing older workers. [16]

**Myth:** Retaining or giving new jobs to older people takes jobs away from younger people.

**Fact:** Economists know this as the “The Lump of Labour Fallacy”. In fact, increasing the number of people competing for jobs actually increases the number of jobs in the economy because it drives down wages and therefore reduces inflation and interest rates, thus making employers more successful and able to offer jobs. [13]

There are also myths and stereotypes about younger people.

Some further myths are referred to in Chapter 10 on training, and Chapter 12 on redundancy. See also the useful report *Facts and Misunderstandings about demography and the workforce*. [25] There are many useful fact sheets on the TAEN website, [www.taen.org.uk](http://www.taen.org.uk) under ‘Resources’.

## Chapter 22: Sources of advice and representation

**You are entitled to represent yourself in an employment tribunal or to ask a friend to represent you. However, you will probably find it easier if you can get advice and assistance from a solicitor or voluntary sector advice agency. If you are a trade union member, you should always ask your union for help first.**

Depending on your means, you may be able to get free assistance under the legal help scheme from a private solicitor who has a Community Legal Service (CLS) contract. For details of solicitors working under this scheme, you can ask the law society (tel: 0870 606 6575 or at [www.lawsociety.org.uk](http://www.lawsociety.org.uk)), ask a local advice agency, or ask the CLS (tel: 0845 608 1122 or at [www.clsdirect.org.uk](http://www.clsdirect.org.uk)). You need to select a solicitor who has experience in employment law and ideally in discrimination law. Unfortunately the legal help scheme only covers advice and case preparation, and does not generally cover the cost of representation at the hearing itself (except in Scotland).

Alternatively, you may get free advice from a voluntary sector advice agency in your area. Most advice agencies work within a local catchment area. Advice agencies have different levels of expertise, but they are always a good starting point. Some agencies will simply refer you to a more specialist agency. Others will be able to offer you advice and a certain amount of hands-on assistance. The more specialist will take on your case and may even represent you at the tribunal hearing. Possible advice agencies in your area are:

- Law Centres.
- Citizens Advice Bureaux.
- Independent advice agencies.
- Age Concern offices.

If you are within the catchment area of a law centre which carries out employment work, this is probably your best chance of getting full assistance and representation. Nevertheless, each law centre has its own priorities and criteria for taking cases on. The level of help offered by the other agencies mentioned will depend on their location and the particular agency concerned.

■ **Law Centres Federation**

For a list of law centres and details of their catchment areas, telephone 0207 387 8570 or look up the LCF website at [www.lawcentres.org.uk](http://www.lawcentres.org.uk)

■ **Citizens Advice**

For details of your local CAB, telephone: 0207 833 2181 or look up the website at [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)

■ **Advice UK**

For a list of independent advice agencies affiliated to Advice UK, telephone 0207 407 4070 or look up the website at [www.adviceuk.org.uk](http://www.adviceuk.org.uk)

■ **Age Concern**

For a list of local offices, telephone 0208 765 7200 or look up the website at [www.ageconcern.org.uk](http://www.ageconcern.org.uk)

## Chapter 23: Bibliography

### Legislation

1. Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC).
2. The Employment Equality (Age) Regulations 2006.

### ACAS Guidance

3. *Age and the Workplace: Putting the Employment Equality (Age) Regulations 2006 into practice.* Available at [http://www.acas.org.uk/media/pdf/s/3/Age\\_and\\_the\\_Workplace.pdf](http://www.acas.org.uk/media/pdf/s/3/Age_and_the_Workplace.pdf)

### The Voluntary Code

4. *Age Diversity in Employment.* DfEE, 1999. (The voluntary Code of Practice.)
5. *Being positive about age diversity at work.* Age Positive, 2002. (The updated Code of Practice.)
6. *Evaluation of the Code of Practice on Age Diversity in Employment.* NOP Social and Political for the DWP. 2001.

### Government consultation

7. *Equality and Diversity: Age Matters.* Age Consultation. DTI, 2003.
8. *Age Matters: Towards Equality and Diversity: Report of Responses on Age.* DTI. June 2003.
9. *Equality and Diversity: Coming of Age.* Consultation on the draft Employment Equality (Age) Regulations 2006. DTI. July 2005.

## Other research reports

10. *Older workers and age discrimination in the labour market*. Dr Philip Taylor, 1998.
11. *Age Discrimination in Employment*. M. Sargeant, 1999, Institute for Employment Rights, London.
12. *Victims of Ageist Attitudes – but how do the older workers themselves view their competence?* Paloniemi and Tikkanem, 2000.
13. *Winning the Generation Game*. A Performance and Innovation Unit Report, 2000. Available by link on [www.strategy.gov.uk/work\\_areas/active\\_ageing/index.asp](http://www.strategy.gov.uk/work_areas/active_ageing/index.asp)
14. *Good Practice in the Recruitment and Retention of Older Workers: Summary*. Age Positive, 2001. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/goodpracticeolderworkers.pdf>
15. *Age discrimination in public policy: A review of evidence*. Help the Aged, 2002.
16. *The case for older workers at Tesco: An examination of attitudes, assumptions and attributes*. Carleton University, Working Paper No.53, 2002. Available via Carleton University's home page, [www.carleton.ca](http://www.carleton.ca), search Tesco age.
17. Labour Force Survey 2003, reported in *Welfare to Work*. See [19] below.
18. *Retirement ages in the UK: a review of the literature*. Pamela Meadows, 2003, DTI Employment Relations Research Series No.18.
19. *Welfare to Work: Tackling the Barriers to the Employment of Older People*. Report by the National Audit Office, 2004. Available at [www.nao.gov.uk](http://www.nao.gov.uk)
20. *Training a Mixed-Age Workforce: Practical Tips and Guidance*. Age Partnership Group, 2004. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/trainingmixedageworkforce.pdf>
21. *Everyday age discrimination: what older people say*. Help the Aged, 2004
22. National Audit Office report, cited in *Training a Mixed-Age Workforce: Practical Tips and Guidance*. Age Partnership Group for the DWP, 2005.
23. *Tackling age discrimination in the workplace. Creating a new age for all*. CIPD, 2005. Available at <http://www.cipd.co.uk/NR/rdonlyres/9011EE0F-3DD0-4090-BE6C-65181FFDECBF/0/agedisc1005.pdf>
24. *Age Positive Business Case Studies*. Age Partnership Group, 2005. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/agepositivebusinesscasestudies.pdf>

25. *Facts and Misconceptions about age, health status and employability*. Age Partnership Group, 2005. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/agehealthemployability.pdf>
26. *Facts and Misunderstandings about demography and the workforce*. Age Partnership Group, 2005. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/factsaboutdemography.pdf>
27. *Examples of International Case Law on Age Discrimination in Employment*. Age Partnership Group, 2005. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/caselawagediscrimination.pdf>
28. *Factors affecting the Labour Market Participation of Older workers*. DWP Research Report 281, 2005. Available at <http://www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep281.pdf>
29. Research by Dr Peter Riach and Dr Judith Rich, broadcast by Panorama, BBC TV, April 2006. Available at [www.bbc.co.uk/panorama](http://www.bbc.co.uk/panorama) – search archive for ‘Must have more teeth’.
30. *Flexible retirement comes of age at Nationwide*. Article in IDS Diversity at Work No.23, May 2006.
31. *Insurance barriers in the workplace – Facts to explode ageist Myths*. Available at <http://www.agepositive.gov.uk/agepartnershipgroup/research/insurancebarriers.pdf>
32. *How Ageist is Britain*. Age Concern.
33. *Older workers and options for flexible work*. Working paper series No.31. Loretto, Vickerstaffe and White. Available at [http://www.eoc.org.uk/PDF/older\\_workers\\_-\\_full\\_report\\_wp31.pdf](http://www.eoc.org.uk/PDF/older_workers_-_full_report_wp31.pdf)
34. *Age Legislation and Funding of Training*. TAEN Briefing June 2006. Available at [www.taen.org.uk](http://www.taen.org.uk), under ‘Resources’.
35. *Extending working lives: adapting pensions for an older workforce*. Published by National Association of Pension Funds, tel: 020 7808 1333 or e-mail [napf\\_services@napf.co.uk](mailto:napf_services@napf.co.uk)
36. *Survey of employers’ policies, practices and preferences relating to age*. Metcalf with Meadows. DWP research report, no.325. 2006.

## EU case law

37. *Mangold v Rudiger Helm* C-144/04; [2006] IRLR 143, ECJ. (The first ECJ case on age discrimination.)

## Age discrimination law in other jurisdictions

38. *Age discrimination: the Irish Experience*. Article in 147 EOR.

## Legal textbooks and guides

39. *Golden threads among the silver: principles for age discrimination law*. Michael Rubinstein. Article in EOR 115, March 2003.
40. *Older disabled workers – using the Disability Discrimination Act*. Louise Curtis. Article in EOR 139, March 2005.
41. *Proving disability and reasonable adjustments: A worker's guide to evidence under the DDA*. Tamara Lewis. Available from Central London Law Centre. Tel: 020 7839 2998.
42. *DDA Questionnaires: Guide to writing questionnaires under the Disability Discrimination Act*. By Tamara Lewis. Available from Central London Law Centre, tel: 020 7839 2998 or on Disability Rights' Commission website at [http://www.drc-gb.org/usingyourrights/employment/resources/3\\_2\\_index.asp](http://www.drc-gb.org/usingyourrights/employment/resources/3_2_index.asp)
43. *Age Questionnaires: Guide to writing questionnaires under the Age Regulations*. By Tamara Lewis. Available from Central London Law Centre from October/November 2006, tel: 020 7839 2998. This guide gives practical guidance to writing questionnaires and using the procedure (see p103 above) together with several precedents for different situations. It is written as a companion to this publication.
44. *Employment Law: An Adviser's Handbook*. Tamara Lewis. Legal Action Group. Edition 6, 2005. Tel: 020 7833 2931. This book, updated every 2 – 3 years, provides detailed guidance to law, evidence, running a case, tribunal procedure and precedents, across all areas of employment law with a large discrimination section.

## Websites

- **ACAS**  
To download ACAS guidance [www.acas.org.uk](http://www.acas.org.uk)
- **Advice Now** [www.advicenow.org.uk](http://www.advicenow.org.uk)
- **Age Positive**  
Government campaign. Many interesting reports attached. [www.agepositive.gov.uk](http://www.agepositive.gov.uk)
- **DTI**  
Informative website publishing guidance on many areas of employment law + consultation papers on Age Regulations. [www.dti.gov.uk](http://www.dti.gov.uk)
- **Help the Aged** [www.helptheaged.org.uk](http://www.helptheaged.org.uk)
- **NIACE**  
National Institute of Adult and Continuing Education.  
Useful for issues of age discrimination in vocational training. [www.niace.org.uk](http://www.niace.org.uk)
- **OPSI**  
Formerly HMSO. The Age Regulations are at [www.opsi.gov.uk/si/si2006/20061031.htm](http://www.opsi.gov.uk/si/si2006/20061031.htm) [www.opsi.gov.uk](http://www.opsi.gov.uk)
- **TAEN (The Age and Employment Network)** [www.taen.org.uk](http://www.taen.org.uk)