

Guide

The Employment Equality (Age) Regulations 2006

The TAEN Guides to the Age Regulations are primarily for employees, jobseekers and learners and aim to give a simple, clear explanation.

Recruitment and Selection

Overview

The Age Regulations 2006 make less favourable treatment on grounds of age in recruitment unlawful (direct discrimination).

They also outlaw imposing a provision, criterion or practice which is applied equally to all individuals but which puts people of a particular age or age group at a disadvantage when it comes to being recruited compared to persons of another age or age group (indirect discrimination).

In both cases, however, if the employer can 'objectively justify' the treatment or the provision, criterion or practice it will not be considered unlawful. This is a strict test. (For more information on 'objective justification', please see below.)

How do I prove it?

Proving age has been a factor in a recruitment decision is hard, just as it is in the case of race or gender. This is why the vast majority of discrimination cases which get to employment tribunals are about treatment once a person is in employment or their dismissal.

If you are not selected, an employer can always argue that “there was someone else better qualified for the job.” It is very unlikely that an employer will inform you that the reason you have not been selected for recruitment is that you are too old or young. With no direct or overt evidence of discrimination usually available, it is important to gather as much supporting evidence from the surrounding circumstances.

One of the key methods of gathering such information is to submit a statutory Age Discrimination Questionnaire to the employer asking for information about the employer’s workforce and policies generally and the reasons it chose not to recruit you specifically. An employer has eight weeks to respond to this and if it fails to do so or provides an evasive response, that evidence in itself may assist your claim of age discrimination.

Evidence to support your claim could include:

- The wording of an advertisement, the job and person description and description of the business itself, including the implications of the language used in them (e.g, “young, dynamic business”).
- The age profile of the existing workforce and evidence, or lack of it, of equality policies in the business.
- The age profile of the customers and marketing of the business.
- The fit of your competencies and experience with the job description, as compared to the short listed/selected candidates. You can request the interview notes of the selection panel to see how the job description and required competencies have been applied.
- The use of selection procedures including psychometric testing without adequate explanation which may indirectly disadvantage some age groups.
- Written or oral comments and explanations given to you. This could include the kind of questions put to you in interview and the behaviour of the interviewers e.g. “Do you think you are mature enough to take on this role?” or “Do you have the energy for this role?”
- Assumptions about pay levels and age, relating level of remuneration with your last job.

- The choice of media used to advertise a job vacancy, which can be very telling.
- Statistics about the age breakdown of the workforce.

Advertisements

If it is not carefully worded and targeted, a job advert may in itself be an example of unlawful age discrimination and a candidate who is rejected for a job may therefore use an advert in pursuing a claim for age discrimination.

Advertisements for roles should be targeted to a wide audience to ensure a diversity of applicants. If jobs are only advertised in a magazine which has an older readership for example, this could amount to indirect discrimination and provide supportive evidence for a claim of direct discrimination, if such targeting cannot be objectively justified.

The wording of advertisements is likely to be the subject of a great deal of scrutiny. Use of descriptive words such as “energetic” “dynamic” or “flexible” may suggest a younger employee, whereas “mature” and “experienced” may suggest an older employee.

The qualifications, skills and competencies required to fulfil the role should be clear in advertisements for vacancies to these requirements. Advertisements which go beyond this and use adjectives to describe personal characteristics may be useful evidence for an employee with an age discrimination claim.

Employment agencies

An agency may tell you that it is acting on instructions from an employer to find candidates with a certain age profile. If that is the case, both the employer and the agency are likely to be in breach of the Age Regulations and you may have a claim against both of them.

Application forms and selection criteria

Application forms which request date of birth or a photograph may lead to, or give the impression of, decisions being made on the basis of age, whether those decisions are conscious or subconscious. It is not unlawful for an employer to request either of these however. This has not as yet been tested by case law.

Some employers who wish to assess the diversity of the workforce and applicants do request such information on a separate monitoring form, similar to the race and ethnic origin monitoring forms used by some employers.

Questions relating to an applicant's number of years' experience can also be an indirect way to determine an applicant's age.

If an employer requires a certain number of years' experience, it should be able to justify why this is necessary, rather than listing the skills and competencies required for the job. If five years' experience is sought then an employer should be able to justify why somebody with three years' experience could not do the job. Depending on the job specification, it may not be reasonable to ask for any significant period of experience.

A requirement to pass a medical may potentially also be a form of indirect discrimination if there is evidence to suggest that older employees are more likely to have difficulty passing it. Once again, an employer would then be expected to justify any such requirement on objective grounds.

Graduate recruitment

An upper age limit on a graduate recruitment programme might be considered unlawful if it cannot be objectively justified. A 'graduate' is often interpreted as somebody in their early 20s so advertisements and job specifications should relate to the qualification, not the person's age.

Specific qualifications

You may be applying for a job which requires certain qualifications. In some cases a qualification may be a statutory requirement e.g. holding a driving licence, and it will not be possible to deviate from this. However, many qualifications sought by employers are not legal requirements.

In some cases, the qualification may not have existed when you started on your career or you may have acquired the same skills in your work without getting a formal qualification. Qualifications are not the only guide to skills and experience. The job specification may therefore indirectly discriminate against older workers. If you are in fact excluded for this reason but you can demonstrate you have the same skills as the qualification specification, you may have a claim. Employers should make clear in recruitment information that they will accept equivalent qualifications and experience to the specific ones mentioned, where this is possible. If not, they will need to justify their decision.

Suspect reasons for not recruiting

There are some reasons for refusing an application for employment which give rise to immediate concerns of age discrimination as set out below.

“Over-qualified”

This is often a polite way of saying you are too old for the job. This is not a strong explanation for not being selected for a role that you have applied for and it should be probed. A prospective employer may be concerned that if the job is not demanding enough for you that you will move on once you find something better. This could be advanced as a justification for avoiding recruiting those who are over-qualified for a role. However, you may have taken the decision to downshift at a later stage in your career and be committed to remaining in the role so a decision based on this sort of justification would have to be supported by strong evidence in relation to your specific circumstances rather than a stereotype.

Health and safety

You may be declined job opportunities on health and safety grounds, whether related to youth or age. These should be clearly related to the role for which you are applying and will need to be rigorously justified to be upheld. A very strong case would have to be made for a blanket restriction on an age group on health and safety grounds. Generalisations about the probability of any given health condition in any given age group (for example “incidence of heart disease increases over 50”) are open to challenge. If there are health and safety concerns in relation to a given role, medical examinations and screening prior to confirming appointment are usually a reasonable and less discriminatory alternative.

Positive action

Where people of a particular age or age group are disadvantaged in taking up work of a particular kind, the Age Regulations make it lawful for employers to take positive steps to:

- offer them training to assist them to do that kind of work; or
- encourage them to take advantage of opportunities to do that work.

However, this ‘positive action’ is very different from ‘positive discrimination’ which is unlawful. If somebody of a different age is not hired because of their age, in order to prefer a person from the disadvantaged age group, that would fall foul of the Age Regulations. The emphasis on positive action is on encouraging access and opportunity to certain kinds of employment so

that persons of the disadvantaged group get to the point of gaining relevant qualifications and applying for the role. Presently, the law provides that individual decisions about recruitment in any given situation should not be based on redressing a perceived age imbalance in the workforce.

An example of positive action would be where advertisements are placed in particular media which it is thought the disadvantaged group will access. For example, if an employer wanted to attract more older workers to balance out a predominantly young workforce, it might advertise in Saga magazine.

Objective justifications?

Age discrimination is only lawful if it meets a strict legal test of 'objective justification' (which is explained in more detail in the Guide on the Scope of the Age Regulations).

So what justifications do employers use or are they likely to use in relation to discrimination when it comes to recruitment?

Succession planning and recruitment

Much thinking about workforce planning is based on stereotypes about ages and career stages in the workforce, including assumptions about the age at which people will leave the business to retire. As a consequence, job opportunities may be constrained by the requirements of succession planning, particularly with jobs at senior levels in a business.

If a business wants to encourage its younger employees to work their way up to the top and show them that there are opportunities for them to develop, it may opt not to recruit highly qualified and experienced older employees from outside the business, preferring internal promotions. This could amount to age discrimination if it cannot be justified. A related argument has already been used in a recent case which went to the Employment Appeals Tribunal, *Seldon v Clarkson Wright and Jakes* UKEAT/0063/08, in relation to forced retirement of partners in a law firm at the age of 65. Although the claim was not successful, the EAT did say that age discrimination could potentially be justified by the legitimate aim of opening up opportunities to younger employees in the firm. However, in that case there was evidence that less discriminatory measures could have been used to achieve the same aim. Employers will need to show that there are no less discriminatory alternatives to the measures they seek to impose if they want to succeed in justifying them.

Impending retirement

The Age Regulations set out a national default retirement age of 65 which allows employers to set a retirement age of 65. An employer is exempt from liability if it refuses to recruit an individual within six months before the normal retirement age (where this is 65 or older).

Whether an employer will be permitted to refuse to recruit individuals before they reach that age due to the impending retirement of the individual e.g. someone who has just turned 64, will depend on whether an employer can show it is objectively justified. The costs of recruitment and training are likely to be cited but the validity of these arguments will depend upon individual circumstances. It may have more weight for senior posts and where individuals have to undergo significant training before being ready to take up their role. In an organisation where staff turnover is high in any event and employees regularly move on within less than a year, and where only a basic induction is required, this argument carries much less weight.

Increased costs due to age

An employer could argue that because an employee is younger (e.g. under 25), motor insurance costs more and the employer would prefer to recruit somebody older as a result. The same argument would apply to increased costs of more frequent medical examinations for older workers in some industries. Cost in itself is not a justification for an employer to discriminate on grounds of age. Economic efficiency may be a legitimate aim but saving money because discriminating is cheaper than not discriminating is not an objective justification.

Genuine occupational requirement

It is permissible to seek candidates of a particular age group only where it is established that being within that age group is a 'genuine occupational requirement' of a particular job. It is relatively rare to establish a genuine occupational requirement. An example might be where an actor for a role needs to reflect the age of the person he or she is playing.

Bringing a claim

If you think you are the victim of age discrimination, you may bring a claim to the employment tribunal. There is no length of service requirement for doing so. A tribunal claim usually needs to be submitted within three months less one day of the date of the discrimination taking place e.g. the decision not to recruit you. Tribunal time limits are strict so it is important to take legal advice promptly if you wish to bring a claim. You can also submit an age discrimination questionnaire to find out more information about your potential claim.

Please refer to the Guides on How to Make a Claim and Redress.

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

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

Care has been taken to ensure that the information provided in this Guide is accurate up to the date of publication (1 June 2009). However, we do not accept responsibility for mistakes or omissions. In particular, the information provided is for general educational purposes only and is not intended to be legal advice, taking into account your particular circumstances. Please do not use this information to disregard any legal advice, nor to delay in seeking legal advice or representation because of any material contained in it.

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