

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.

Redress - Dealing with a Case of Discrimination

In many cases you may have to take a legal action to enforce your rights under the Age Regulations.

Introduction

Upholding the Age Regulations when they are not being followed depends on the actions of individual workers, jobseekers, trainees, etc, and their representatives. In many cases, you may have to take formal action to get something changed.

Age discrimination is not about bad or unfair treatment, it is about less favourable treatment where the reason for the treatment is age. Proving that depends on comparing the treatment to that of other colleagues in similar circumstances. This is discussed in more detail further on in this guide.

The legislation and procedures for handling a discrimination case are complex and not very user-friendly. If you think you may have suffered discrimination

you should seek advice as soon as possible. Citizens Advice, Community Law Centres and the Equality and Human Rights Commission (EHRC) can provide free advice.

Statutory procedures with strict rules governing grievances raised by employees, and the disciplinary and dismissal processes of employers, were introduced in October 2004. These are being phased out from 6 April 2009, but employees will then be expected to follow the minimum procedural standards set out in the Acas Code of Practice. Acas (the Advisory Conciliation and Arbitration Service) is a non-departmental body funded by the Department for Business, Enterprise and Regulatory Reform (BERR), that provides information and guidance for employers and employees in workplace disputes. Acas also publishes more detailed guidance to accompany the Code. Although the Code of Practice is not compulsory, it will be important for employees to follow it carefully, since under the new rules employment tribunals will be able to adjust any compensation awards (up or down) by up to 25 per cent for an unreasonable failure to comply with the code.

In cases where everything the age discrimination complaint is about happens after 6 April 2009, the new rules will apply. However, in all other cases, the question is rather more complicated, and it is sensible to take advice about which procedure to follow.

(The law on statutory grievance and disciplinary procedures is changing. It is important that you get advice about what you need to do during this time. This guide will be updated in July 2009.)

There are several possible starting points to consider:

A. An employee who wishes to bring a tribunal case on any kind of discriminatory action - other than dismissals

The statutory grievance procedures apply in all instances except dismissal, but do cover situations where you are forced to resign because of your employer's treatment, sometimes called 'constructive dismissal' (a term used to describe situations where an employer has acted so reprehensively that an employee has no other option but to resign, and so is effectively forced out due to the employer's conduct.)

The employee initiates the procedure with a **letter** to the employer setting out the nature of his or her complaint. There are procedures about how this letter is written and advice should be sought. If the employer requests a **meeting** to discuss the letter the employee must attend if they want to take their case forward. There are procedures about the conduct of this meeting. Under this procedure, you must wait 28 days after raising the grievance with your employer before starting a tribunal claim.

After 6 April 2009, it is still advisable to raise a complaint with your employer in writing, since (even if you are not able to resolve the issue without tribunal proceedings), your eventual compensation could be reduced by up to 25 per cent if you do not.

Obtaining evidence

The success of a case will be determined by the **evidence** presented. For example, in a direct discrimination claim, it is necessary to show that the claimant has been treated differently (less favourably) than another similar person (of a different age or age group) on grounds of age. As well as evidence of the key facts in the case, evidence of the general working environment and practices can also be relevant, since this helps to build a picture of an employer's conduct from which an employment tribunal can infer that discrimination took place.

In order to understand the reasons for your treatment fully, and consider whether it may have involved discrimination, the Age Regulations allow you to ask your employer specific questions using the statutory **questionnaire** process. A BERR template for the questionnaire is at: <http://www.berr.gov.uk/files/file32724.pdf>. You can find sample questions in the Age Legislation section of the TAEN website.

You must send the questionnaire to your employer within 21 days of bringing a tribunal claim. You can send it before deciding on whether to bring a case, to help you decide whether you need to bring proceedings. If your employer fails to respond to the questionnaire within eight weeks of receiving it, or responds in a false, equivocal or evasive manner, a tribunal can make a finding of age discrimination against them.

Taking a case forward

To start a tribunal case, you must **lodge the case** with the employment tribunal within three months less one day of the discrimination you are complaining about using the standard claim form (ET1) available on the Employment Tribunal Service website. If your claim is one where the statutory grievance procedures apply, you may have an extension of time of three months to bring your claim. Please seek advice.

The employer then has 28 days to send the tribunal its response (ET3). The response will be copied to the claimant. The tribunal then invites both parties to attend a case management discussion and sets out a timetable for the case.

At an early stage, Acas will contact the claimant and employer and offer help to negotiate a settlement if they wish to do so. A substantial number of cases are resolved through Acas, though often not until a later stage in the case.

The Acas conciliator is a neutral and independent officer, who does not make any legal assessment or give legal advice to the parties. Negotiations are off the record.

If no settlement is agreed at any stage, the case goes to a hearing in the tribunal. At the hearing, the tribunal decides whether there is sufficient evidence to suggest a discrimination claim took place. If so, the **burden of proof** then falls on the employer (the respondent) to explain why it was in no sense whatsoever discrimination on the grounds of age.

B. An employee who wishes to bring a tribunal case about dismissal.

The statutory dismissal and discipline procedures also require the employer to follow a strict procedure before dismissing staff. Following 6 April 2009, the Acas Code of Practice should be followed. In these cases, it is for the employer to initiate the relevant procedure.

You can appeal the decision. Both parties should follow the appropriate procedure. If you later win an unfair dismissal case in the employment tribunal, the level of compensation may be increased or reduced by 25 per cent for an unreasonable failure to comply with the Acas Code of Practice.

Dismissal cases must be lodged in an employment tribunal within three months less one day of the dismissal. Unlike discrimination cases, there are limits on the amount of compensation that can be awarded for unfair dismissal.

Where the complaint concerns certain forms of disciplinary action which is discriminatory, it is possible that both the grievance and disciplinary and dismissal procedures could apply.

This new procedure will apply to England, Wales and Scotland but not Northern Ireland.

C. An employee who wishes to take action in relation to the retirement procedure

Your employer must follow the **correct procedure** and **timetable** for a retirement dismissal to be fair.

Where the employer **starts the procedure late** (less than six months before the date of the fixed retirement age) you can take the following two actions:

1. Lodge a claim with an employment tribunal for compensation of up to eight weeks pay (capped at the statutory maximum of £350 per week).
2. Lodge a complaint that the real reason is not a planned retirement, but an unfair reason (with supporting evidence). If the employment tribunal agree then they will make a finding of unfair dismissal.

Where the employer **fails to provide a minimum two weeks' notice** of retirement, this is automatic unfair dismissal (even if you have reached the employer's fixed retirement age).

D. A person who is not an employee but may be a jobseeker or another type of worker

The statutory grievance procedure for employees does not apply. A case must be lodged with an employment tribunal using an ET1 form within three months.

E. A trainee or student

A trainee who is also an employee should try to resolve the matter using the employer's internal grievance procedure first before starting a tribunal case, as set out at A and B above. A student of a Higher or Further Education College cannot bring a tribunal claim, but must issue proceedings at the County Court (in England and Wales) or the Sheriff Court (in Scotland) instead.

Comparators in discrimination cases

Basic position

Discrimination law requires claimants to demonstrate that they have been treated less favourably than another person or a group of people (e.g. women compared to men, minority ethnic groups compared to white people, disabled people compared to those without that disability, etc). To demonstrate that employment and training decisions have been based on your age rather than competencies and suitability raises the question: older or younger than whom? This is a highly technical legal issue. The aim of this brief is to draw your attention to it. Professional advice should be sought.

Direct discrimination

A comparator can be an actual person or a hypothetical person treated differently but for their age. It is not yet clear how much of an age gap is needed to convince a tribunal it is indeed age that had played a sufficient role in the decision. Supporting evidence evidencing the attitudes of those involved in making the decisions and the culture of the organisation itself will also play a role in this.

Indirect discrimination

In indirect discrimination cases the relevant comparator is more likely to be a more generalised age group. The comparator pool may be defined by an age group who, because of the circumstances, are ruled out of gaining an equal opportunity. Examples would include 20 to 24-year-olds for jobs that required

five years' professional experience or all those over 30 for a job that specified a qualification that had only been introduced 10 years ago, when accumulated prior experience might have been an alternative.

The Regulations use the term 'age group' but they contain no guidance about how to define age groups. As a result, it is not yet clear if the relevant comparison is with people who are 2, 10, or even 20 years older or younger.

In practice, the significant comparative age groups will depend on the facts of each case.

Data

Statistics can be relevant to proving discrimination. It may well be that statistics may be less or more supportive of a claim depending on the choice of group against which the comparator is made. Acas guidance advises employers to keep monitoring data on the workforce in 10-year age groups (annex 4).

Comparator pools in indirect discrimination

In indirect discrimination cases, the comparator pool may automatically be defined by an age group who, because of the circumstances, are ruled out of gaining an equal opportunity. Examples might include 20 to 24-year-olds for jobs that required five years' professional experience, or all those over 30 for a job requiring a recent qualification, without taking relevant experience into consideration.

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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