

Age Legislation and Funding of Training

This Briefing is TAEN's interpretation of the current situation. It is neither a legal opinion nor a statement of Government policy.

The purpose of the *Employment Equality (Age) Regulations 2006* is to outlaw employment and vocational training decisions based on a person's chronological age rather than their capacity, experience, aptitude and skills.

The aim is to remove barriers to opportunity based on a person's age. The *Regulations* implement an EU Equal Treatment Directive dating from 2000. They come into force in October 2006.

Paragraphs 20 and 23 of the *Regulations* say that Higher Education and Further Education institutions and all providers of training and guidance will not discriminate on the basis of age in the provision of training, the terms on which the training is provided or the treatment of learners during training.

Definition of training

The Government Legal Notes accompanying the Regulations make it clear that the interpretation of 'vocational training' is broad:

"All types of all levels of training which would help fit a person for any employment, vocational guidance, facilities for training, practical work experience and assessment related to the award of any professional or trade qualification." (para 61)

No attempt is made to draw a distinction between vocational and non-vocational training. Ministers have concluded (rightly in TAEN's view) that this would cause more trouble than it is worth.

All Government-funded activity, including Personal and Community Development Learning (PCDL), will be covered by the broad definition of vocational training. So will all training funded by employers and Jobcentre Plus.

Public policy and other exemptions

The age legislation is different from existing UK legislation on gender, race, disability, etc, in that it permits direct age discrimination, subject to certain provisos.

The EU Equal Treatment Directive 2000 contains an Article 6 in which different treatment on grounds of age can be exempt if there is a justifiable legitimate aim including "employment policy, labour market and vocational training objectives".

However, any different treatment has to be proportionate and the tests for justifying exemptions will be rigorous.

This means that employers and vocational training providers (in relation to their specific business circumstances) and Government (in relation to public policy) can advance a case for exemptions.

The Government has done this in the legislation, for example in respect of different age bands for redundancy pay and minimum wages and the introduction of the new default retirement age, set at 65. The items on which the Government set out exemptions in the UK legislation did not include training and its funding (see below).

There are two separate potential areas of exemptions which relate to training and vocational guidance which are included in the UK legislation:

- for employers in respect of training investment too close to a fixed retirement age to allow for a payback on the investment and
- for training targeted at – but not exclusively for – under-represented age groups, known as 'positive action'.

An IT course for older workers with less prior experience would be an example of targeted training. If challenged this positive action would have to be justified by reference to evidence on levels of participation.

It is important to note that the fact that the Government has decided that a certain public policy is exempt does not mean that it cannot, and will not, be challenged once the law comes into force.

Funding of training

Government legal advice is that the allocation of public training funding based on a person's age is outside the scope of the Directive. This is based on Article 3.3 of the EU Directive which says:

"The Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes."

A Brief on this was added in May 2006 to the Department of Trade and Industry website at www.dti.gov.uk/employment/discrimination.

The Government's view is that they do not need to justify age floors and ceilings for funding training. They draw a clear distinction between denying 'access' to a course (unlawful) and denying funding (lawful).

TAEN's view is that there are arguments for and against the Government's interpretation. Article 3.3 was envisaged in 2000 as relating essentially to social security schemes, though the wording is obviously broad. The interpretation needs to be squared with the statement in UK legislation that the terms on which training is provided should not be based on age.

The implications for other discrimination legislation need to be considered. The European Court of Justice has recently ruled that Member States should take account of the spirit as well as the letter of the law.

It is evident that Government needs to use age in a wide range of policy matters (pensions, criminal justice, social security, etc) and that the delineation of young people/foundation learning as distinct from adults/adult learning has to be based on age. What may be in contention is what age (and is it a single age?) constitutes the transition from a funding regime for young people and for adults and whether it needs to be objectively justified.

The current Acas Guidance (written before the publication of the DTI Guidance) on the regulations (pages 16-17) poses the questions:

- *"What evidence have you in support of restricting financial help to a particular age group?"*
- *"Have you clear evidence that demonstrates particular age groups would be excluded from your learning provision if they had to pay the full fees?"*

The Acas Guidance places considerable emphasis on the requirement for colleges, training providers, etc, to produce evidence to justify differentials in funding based on labour market and training participation data, for example. It is not clear to TAEN that there is data to support this.

Next steps

The Learning and Skills Council who administer funding of adult learning (and other bodies for Higher Education) are examining the implications and the guidance needed for training providers and Information, advice and guidance partners.

Once the Age Legislation comes into force in October 2006, developments will depend on individuals challenging exclusion from funding on grounds of age and/or an organisation bringing a Judicial Review of the regulations on the grounds that they do not correctly transpose the EU Directive. (This happened in the case of the Regulations on Sexual Orientation and Religion and Belief).

Challenges by individuals will be against training providers, Government agencies and employers whose funding offer will be differentiated by age groups.

What happens next depends on whether an Employment Tribunal or a County Court accepts the case for an exemption under Article 3.3. If they did not, the Government would effectively become the Respondent to a test case on whether their interpretation of Article 3.3 of the Directive is correct. Because there is no case law in the UK yet it is not possible to say what weight the courts would give to the various arguments.

The same situation applies for an employer participating in government-funded programmes who may be challenged by an employee who is not able to access training on the same terms as someone under 25.

Conclusion

The not-entirely helpful conclusion for public agencies, employers and training providers is to:

- Proceed on the basis of the age criteria built into the adult skills funding regime;
- Await challenges from those who suffer on account of being on the wrong side of one of the age ceilings or thresholds;
- Advance the public policy defence if you are challenged and refer the defence to Government if the Tribunal find against you.

These circumstances could change if the Government change their mind on any aspect of the use of age criteria in funding training.

TAEN
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