



*Dunbartonshire and Argyll & Bute
Valuation Joint Board*

**THE EMPLOYMENT EQUALITY (AGE)
REGULATIONS 2006**

AGE & THE WORKPLACE

GUIDANCE NOTES FOR MANAGERS

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GUIDANCE NOTES FOR MANAGERS

Age and the Workplace - The Employment Equality (Age) Regulations 2006

Introduction

The Employment Equality (Age) Regulations 2006 are legally binding as from 1st October 2006. The Regulations have arrived in advance of the December deadline set by the Equal Treatment Framework Directive (2000/78/EC) which requires the UK to implement national legislation preventing age discrimination

Age discrimination is the main area of discrimination which is protected in some other countries but which has not until now, been directly protected in the UK.

The new Regulations make it illegal to discriminate, victimise or harass in employment on the grounds of age and are in addition to existing legislation which protects against discrimination on grounds of sex, race, disability, gender reassignment, sexual orientation and religion or belief.

Experts have predicted a large rise in employment tribunal claims in response to the new legislation. The introduction of anti-age discrimination in the US resulted in a 40% increase in claims, with ageism cases increasing at a quicker rate than any other form of discrimination claim. In Ireland, age is now the basis of 19% of all employment claims.

Background

Like most European countries, the UK is facing the reality of an ageing population. People over the age of 50 will, by 2010, represent 40% of the population, and by 2020 – the majority. This means that all employers will have to think differently in order to retain necessary skills and talents and we will need to develop ways to attract older people into the workplace. These factors, together with growing pressure for ensuring equal opportunities at work, mean that our attitude to age must be challenged. In employment, age should be treated as an irrelevant factor as all decisions should be made by considering ability and competence.

It is estimated that age discrimination costs the economy between £19 and £31 billion a year in lost output. To be successful in an increasingly competitive market place, organisations need to attract and retain valuable employees and develop the talents of all their employees.

Some key points to note are:

- More people are living longer, active and healthier lives
- Evidence shows that differences in absenteeism between age groups are slight.
- Older workers stay in their jobs longer than younger people.

- Age discrimination leads to under-achievement, reduced self-confidence and motivation, lower self-esteem and loss of personal income and status.
- Findings from many studies show that younger and older workers are on average equally effective in their work.
- Research shows that, given the right training, older people are just as capable of learning new skills as younger people.

Ageism, age diversity, and age discrimination legislation are now significant aspects of employment, retirement, and life beyond work. Age diversity offers positive advantages for healthy organisations, just like any other sort of diversity in work and life. Treating people fairly, regardless of age, is central to the principles of ethical organisations.

Ageism and age-related issues are now especially relevant in the UK given the introduction of the new Regulations.

Age Diversity represents the range and mixture of ages in workforces and organisations, and the challenges and opportunities that we face in managing it. Equality means treating all people equally and valuing everyone for their strengths, capabilities, experience and potential. When an organisation values its people in this way, people respond positively, with loyalty, commitment and enthusiasm.

Good organisations regard diversity and equality as huge opportunities to improve and develop organisational quality and performance. Treating people fairly, and valuing everyone, promotes cohesion, unity and loyalty.

What the Regulations say

1. The Regulations protect employees and other workers (agency staff etc) from discrimination, harassment and any other unfair treatment, for example relating to recruitment, training, pay, promotion, retirement and pensions, on the basis of age.
2. Age means any age – not just older people.
3. People protected by the Regulations include:
 - Current employees and workers
 - Job applicants
 - Vocational trainees and applicants
 - People (in certain circumstances) for whom the working relationship has ended e.g. in giving references
4. The Regulations make it unlawful on the grounds of age specifically to:

Directly discriminate against anyone: this involves treating a person less favourably on the grounds of their age or perceived age than another person in a comparable situation and where there is no objective justification for doing so. An example of this can be a requirement for a

minimum or maximum age to apply for a job, training, promotion or age-based redundancy criteria.

Indirectly discriminate against anyone: ‘indirectly’ covers a very wide range of possibilities, including unintentional ones, such as processes or policies, which disadvantage a person because of their age. More specifically, it is where an apparently neutral provision, criterion or practice puts people of a certain age group at a disadvantage compared with others or a person of that certain group suffers disadvantage and there is no objective justification for the said provision, criterion or practice. An example could be a fitness test, a requirement for certain qualifications or length of service.

Harass or bully anyone or expose them to harassment or bullying by others: this would constitute unwanted conduct relating to a person’s age (or perceived age), which has the purpose or effect of violating that person’s dignity or which creates an intimidating, hostile, degrading, humiliating or offensive working environment. Harassment is always determined from the perspective of the effect it has on a victim – the perpetrator’s views and intentions are not the issue!

Victimise anyone: this would be where a person is treated less favourably because they have made a complaint under the Regulations, or assisted someone in doing so.

5. The implications of the legislation particularly affect and extend to:
 - Recruitment, interviewing and selection
 - Training
 - Pay and benefits
 - Performance appraisals
 - Promotion
 - Work related social activities
 - Dismissal
 - Redundancy
 - Retirement
 - Pensions
 - The general conduct of everyone in work, and their awareness of their responsibilities within the regulations
 - All documentation, systems and processes used in any of the above

6. The Regulations are not designed to force unreasonable or unsafe changes on people and organisations and so the rules provide for ‘**objective justification**’ to be used where any age discrimination can be proved to be ‘**proportionate**’ (appropriate) and ‘**legitimate**’ (truly necessary) for the purpose or aim of the organisation. In such cases the onus would be on us, as an organisation, to provide evidence of the ‘objective justification’, capable of withstanding scrutiny at an

Employment Tribunal. (Saving money is not a legitimate reason for exceptions to the rules!)

7. With regard to '**burden of proof**', an employee will need to provide facts for a Tribunal or court to determine that the discrimination took place. It would, however be up to us as the employer to prove that the discrimination has not taken place or that it can be objectively justified
8. **Liability** is an important area of the Regulations. Employers will be held liable for the discriminatory acts of their employees unless they can demonstrate that reasonable steps have been taken to prevent them. That includes responsibility for the behaviour of people working on our premises even if someone else employs them. Managers have a significant responsibility for ensuring that their employees understand the liability issues of the Regulations. Employees can be held personally liable for acts of discrimination or harassment and may have to pay compensation separate from, and in addition to, any compensation that the employer is ordered to pay.

Areas of Employment specifically affected by the Regulations

As indicated above, there are several areas of employment, which are affected by the age discrimination legislation. Those, which are critically important for Managers, are detailed below. These areas include some exceptions and exemptions from the Regulations, which must be considered and justified via the system of 'objective justification' as outlined above.

1. Recruitment, Selection and Post Employment

Recruitment and selection is one of the areas most affected by the Regulations. This is because there is significant evidence that age discrimination happens at this stage. There is also considerable scope for discrimination to take place within the recruitment and selection process.

The following areas need to be the subject of considerable scrutiny:

Job Requirements and Advertising: Managers will require to very carefully prepare adverts to ensure that all ageist language is removed and the text focuses on the needs of the job. Where experience is required this should be described in terms of the job requirements and not in terms of a specific number of years' experience e.g. 'This post requires candidates to evidence experience of managing and monitoring the performance of a group of professionally qualified staff'. Similarly, care needs to be taken to ensure that unnecessary qualifications do not disadvantage certain groups of staff. Please ensure that West Dunbartonshire Council's Personnel Department checks all adverts before submission.

Application Forms: West Dunbartonshire Council's Personnel Department will ensure that our current Application Form is 'fit for purpose' until a proper review takes place. There are some important points to note:

1. Date of birth will not be asked for on the application form, as this information is irrelevant unless the job has a statutory age requirement.
2. It is also recommended that we do not ask for dates of obtaining qualifications.
3. Asking for dates of previous employment also has potential for age-related discrimination. It is acknowledged that we may have good reasons for asking for this information eg amount of relevant experience, years spent with each employer and gaps in employment, but caution must be taken not to use this to determine a person's age. In asking for this information we must be able to demonstrate sound business reasons in case a discrimination claim is made.

Shortlisting, Interviewing and Selection: the selection process must be made on relevant criteria based on skill knowledge, and competencies, without considering irrelevant factors, such as age. Well designed Shortlisting and Selection tools such as job descriptions, person specifications, interview plans and presentation tests can help Managers make sound decisions and will also provide evidence in case of a claim being made.

It is critically important that all Managers conducting interviews are trained in recruitment processes. Everyone involved in recruitment and selection must understand the dangers of bringing prejudices into the process as well and the avoidance of discriminatory language.

Monitoring: The Board has adjusted the Monitoring form to include information on age as recommended by ACAS. As part of the review process we will also review our monitoring practice to ensure we capture information for applicants as well as people who are shortlisted, interviewed, and appointed.

Employment Agencies: It is not our normal practice to use employment agencies, and this option would only be explored as a last resort. If you are using the services of an employment agency then it is important to be aware that employers are responsible for the actions of agencies in the eyes of the law. It is therefore imperative to ensure that the agency acts in accordance with all our equality and diversity policies.

Age Discrimination Claim: Job applicants who believe they have been rejected because of their age can make an age discrimination claim to an Employment Tribunal. Please remember that that it is not necessary to have been employed to raise a claim against an employer. The DTI has published the official Age Discrimination Questionnaire which sets out how an employee can complain about alleged discrimination and how employers must respond. The questionnaire is designed to help the alleged victim to obtain information from their employer to decide whether to bring legal action and in the event of such action to present their complaint in the most effective way. The form warns that if the employer does not reply within 8 weeks or 'replies in an evasive or equivocal manner, without a reasonable excuse', a court or tribunal may 'draw adverse inferences from it' if the complainant decides to bring an action.

Post Employment: When a working relationship has finished, employers and staff of the employer are still liable under the age discrimination legislation for any behaviour that could be deemed to be discrimination, harassment, or victimisation against the departed worker. For example, in giving a reference, which includes any comment, which mentions the person's age (directly or indirectly) in an unhelpful way, is unlawful. Such action would be unlawful even though the person is no longer an employee.

2. Training and Career Opportunities

Skills and experience must guide managers when making training and promotion decisions. There must be no age discrimination in training and promotion opportunities offered to employees (unless objectively justified). Failure or refusal to provide training, advancement or opportunity to anyone on the basis of age – any age – is unlawful. In order to ensure this the Board will monitor training programmes to ensure that the style and location of training:

- i. has no barriers for any age group and is suitable for people of all ages
- ii. encourages all employees (regardless of age) to participate.

3. Retirement

The Board has developed a Retirement Procedure and this should be carefully followed in all cases of retirement where the retirement age is reached.

Dunbartonshire and Argyll & Bute Valuation Joint Board has set its retirement age at the national default age of 65. The effect of this decision means that no employee can be compulsorily retired prior to the age of 65. It does not affect the rights of employees, as at present, to retire prior to this age. There are, of course, implications for many staff, in terms of the superannuation regulations, if they decide to retire before the age of 65.

The Government will review the default age of 65 in 2011 and at this stage will consider whether it is necessary to continue to maintain a national default age or whether the retirement age should be abolished altogether.

Retirement has now been added to the list of 5 potential fair reasons for dismissal. In order to avoid an unfair dismissal the correct procedure must be followed and the real reason for dismissal must be retirement

In summary, the main points of the Regulations as incorporated into the new procedure are:

A fair retirement is one that:

1. Takes effect on or after the retirement age of 65 and
2. Where we have given an employee written notice of the intended date of retirement and advised them of their right to request working beyond that date.

The Retirement Procedure:

- The Procedure requires Managers to write to all employees approaching their 65th birthday providing them with their retirement date and informing them of their right to request to work beyond that date. The letter must be given to employees no more than a year before and no less than six months before the retirement date.
- Employees have up to three months prior to their retirement date to lodge their request to work beyond their retirement date. If the employee lodges such a request, then the Manager must arrange a meeting to discuss the request and the options, and then give a decision in writing, with the right to appeal against the decision.
- Managers are not required to give reasons for their decision; however, it is good practice to do so. The decision-making process must be based on objective criteria relating to the situation and not on stereotypes or assumptions. Managers may wish to consider the following when reaching their decision:
 - i. Business need – to deliver a project, product or equivalent
 - ii. Roles where there are wider corporate skill shortages as evidenced by poor retention rates, high turnover, or where filling vacancies may be difficult and costly.
 - iii. Continuation of employment on a part time basis to conclude time limited or development work
- The employment must continue up to the time of giving the employee a decision in writing, otherwise the dismissal will be automatically unfair.
- The employee has a right to be accompanied by a fellow at the meeting.
- If a request to work is granted, expectations must be clarified regarding the hours and content of work.
- The procedure must be repeated every time an individual approaches their new set retirement age, at least six months prior to that date. It is therefore advisable to make a period of work as long as both Manager and employee feel that the arrangement might last.
- If the employee decides to appeal, the meeting should be held as soon as possible to allow them to make plans for their retirement or alternative employment. The appeal meeting can be held after the retirement has taken effect and if a decision is that of allowing the employee to work on, they should be re-instated. An employee has the right to be represented at the appeal meeting.

Transitional retirement arrangements

The Regulations allow for transitional arrangements to apply for retirements taking place between 1st October 2006 and 31st March 2007.

The Regulations require that retirements be treated in a particular way and if we follow our procedures incorrectly, a retirement dismissal could be automatically unfair. However, it is clearly unjust to impose this result on employers immediately after 1 October 2006 and the Regulations, therefore, cater for a transitional period until 31 March 2007. These arrangements vary depending on when the notice is given:

i. Notice of retirement given before 1st October 2006

If notice is given to an employee before 1 October 2006 that they will retire after 1 October 2006 but on or before 31 March 2007 then the Manager must have:

- given notice which is at least the employee's contractual notice, and no less than 4 weeks
- on 1 October 2006, or as soon as reasonably practicable afterwards, write to the employee telling them of the right to request to work longer. (The onus then falls on to the employee to inform the Manager in writing of the request to work beyond the retirement date).

ii. Notice of retirement given after 1st October 2006

If notice is given after 1 October 2006 that an employee is to be retired before 31 March 2007, then the Manager must:

- write to the employee notifying them of the intended retirement date, giving either contractual or statutory notice (whichever is the greater)
- notify the employee that they have the right to request working beyond that date. (The onus again falls on to the employee to inform the employer in writing of the request to work beyond the retirement date.)

Managers must comply with the full retirement procedure for employees who are due to retire on or after 1st April 2007.

Procedure for dealing with existing older employees including those who are already over 65 years of age.

Where there are currently employees already over 65 years of age and where they wish to retire that employee after 1 October 2006 then the key steps which must be implemented are the planned retirement and the 'duty to consider' procedures. These must be implemented as normal for each employee over the age of 65.

The other steps to be taken depend upon the precise nature of the current arrangement with the over 65 employee which will differ from employee to employee. In many cases there will be a pre-existing written agreement which has, perhaps, been varied verbally on a fairly ad hoc basis. In each case the Manager should be at pains to honour the employee's written and verbal contractual rights by, for example, honouring the agreed or statutory maximum notice period.

As a matter of best practice in all cases (but particularly in cases where there may be some uncertainty as to the terms of the current arrangement) the Manager should write to all the over 65 employees concerned:

- advising them of the Employment Equality (Age) Regulations 2006,
- if appropriate, reassuring them that their job will continue as normal,
- confirming their retirement date (if one has already been agreed),

- providing the details of the planned retirement procedure,
- confirming the right to request continued working, and
- concluding that you will contact them again in advance of the intended retirement date.

If no retirement date has been agreed and the issue has therefore been left open, then the Manager may wish to take this opportunity to fix that date with the employee's agreement, choosing a mutually acceptable new retirement date.

It is important to note that whatever the agreement with the employee, if the planned retirement and duty to consider procedure is not followed then any over 65 employee will have a claim for unfair dismissal.

Frequently Asked Questions

The Regulations are complex and a number of questions have been raised with regard to both their development and the procedural implications. Some of the answers emphasise the above guidance.

Question 1 - Isn't age discrimination merely EU 'political correctness' gone mad?

This is perhaps the most frequently asked question. The answer is "no". Although the Employment Equality (Age) Regulations 2006 implemented on 1 October 2006 are ultimately EU-derived legislation, the real reason not to discriminate on grounds of age does not come simply from the EU. The commercial realities of the available workforce are changing rapidly. Social change often precedes a change in the law. Declining birthrates show that there is an ageing population in the UK. For example:

- by 2010, almost 40% of the workforce will be aged 45 or over
- by 2007, there will be more people over state pension age than aged under 16
- by 2051 the number of people aged 85 will nearly quadruple to approximately 4 million, some 6 per cent of the UK's population.

Employers will find it increasingly necessary to design packages which attract and retain older workers, and younger workers will also be more in demand. Research has shown that there are real business benefits in employing a mixed-age workforce, and employers who fail to accommodate this may find they are unable to recruit the necessary staff. The benefits of being positive about age include improved staff retention, higher morale and productivity, fewer absences and a wider range of skills and experience.

There is considerable evidence of age discrimination having previously taken place in the UK and employers who do not take the legislation seriously may attract expensive claims. The Department of Trade and Industry estimate that:

- half a million 16-25 year olds are likely to have met age discrimination

- 67% of job candidates of all ages think age is a factor in the interview process
- 40% of workers think they have experienced age discrimination at work.

It is also important to remember that an employer does not have to employ people if they cannot actually do the work. An employer can always defend accusations of age discrimination or an actual claim if they can show a genuine business need for the allegedly discriminatory act. The new regulations provide that both direct, as well as indirect, age discrimination can be justified if the appropriate test is met.

Question 2 - What are the forms of discrimination and who does the discrimination legislation cover?

Age discrimination follows a similar (but not identical) pattern as existing forms of discrimination covering the standard four types of discrimination, namely direct discrimination, indirect discrimination, victimisation and harassment.

The Employment Equality (Age) Regulations 2006 provide that direct, as well as indirect, age discrimination can be justified if the treatment or provision in question is a proportionate (appropriate) means of achieving a legitimate (truly necessary) aim. This is in contrast to other forms of discrimination where usually only indirect discrimination can be justified.

For example, using phrases like 'experienced and mature' in advertisements could be indirectly discriminatory to younger workers, although it will be open to an employer to attempt to justify that the discrimination is a proportionate (appropriate) way of pursuing business objectives.

It is also quite common at present for many workplaces to tolerate an environment where it is acceptable to undermine an employee by reference to their age. Although much banter is taken light-heartedly, the Regulations provide a legal framework for employees who feel that they have been discriminated against, to take action. To avoid such harassment claims managers must be seen to suppress ageist attitudes in the workplace. As with other forms of discrimination, individuals may be personally liable for harassment claims if they adopt conduct which violates another individual's dignity or creates an intimidating, hostile or offensive working environment.

Age discrimination encompasses discrimination against both the elderly **and** younger people at all stages of the recruitment, promotion, employment and redundancy process.

Both workers and employees are covered in the Regulations. The length of service, retirement, and right to request issues apply to the narrower category of 'employees' but all the non-discrimination rights apply to a broader category including both employees and workers.

Question 3 - How does an employer know if their benefits which are based on length of service could be discriminatory on grounds of age?

To a certain extent, seniority in service is viewed as a legitimate tool for attracting, retaining and rewarding experienced staff and maintaining work force stability. In essence, any benefit based on a length of service requirement of five years or less is exempted from the Employment Equality (Age) Regulations 2006 and is deemed not to be unlawful age discrimination

Benefits based on length of service requirements which are longer than five years will only be discriminatory if the employer cannot show that they have awarded the benefit to:

- reward loyalty, or
- encourage motivation, or
- recognise experience.

Employers can therefore continue awarding benefits to employees using the criterion of length of service, but where a service-related benefit is awarded on achieving five years or more service, the new regulations require an employer to demonstrate that the service requirement fulfils a business need. The burden is on the employer to show that it 'reasonably appears' that the service requirement of over five years fulfils the business need. The employer will have to show that it has considered if and how the benefits practice based on more than five years service assists in encouraging loyalty, increasing motivation or rewarding experience etc, whereas a criteria of less than five years service would not.

There is a clear intention to allow employers to be able to offer benefits based on length of service and therefore in theory it should not be a difficult test to satisfy. However, the difficulty in practice will be producing the requisite evidence. For example, if an employer says that they provide extra paid holiday to employees who have remained for six years and that this encourages loyalty, then the employer must have evidence that the extra holiday provision actually contributes to that legitimate aim. The evidence could include information the employer has obtained from monitoring, staff surveys or focus groups.

Question 4 - How will the new regulations help an employee establish that they have been discriminated against on grounds of age?

Regulation 41 of the new age discrimination regulations provides for a questionnaire procedure similar to those available in other fields of discrimination. This mechanism will be an important tool for employees to use. For example, employees may ask questions such as:

- Do you accept that your treatment of me was unlawful harassment?
- If not why not?
- For what reason did I receive the treatment accorded to me?
- How far did considerations of age affect your treatment of me?

Questionnaires are admissible in tribunal proceedings under the new regulations and employers have eight weeks to respond. If they do not, then a tribunal may draw any such inference as is just and equitable from a failure to reply or from an evasive or equivocal reply. The main inference which may be drawn is that the employer has indeed committed the discrimination.

Question 5 - What age should employers put as a retirement age in their terms and conditions if they decide to use one at all?

From 1 October 2006 the Employment Equality (Age) Regulations 2006:

- prevent employers setting a retirement age at less than 65 unless they can show it is objectively justified (ie it is a proportionate means of achieving a legitimate aim)
- set a default retirement age of 65 for men and women after which employees can be made to retire without the need to show justification, provided the correct procedure is followed
- create a right to request working beyond compulsory retirement age.

The new legislation will be reviewed by 2011 (with the possible increase or abolition of the default age at that point, depending on the review of the 2006-2011 period).

Question 6 - Does any retirement age adopted by an employer in their standard terms and conditions of employment have to be the same for men and women?

The age chosen does have to be the same for men and women. It is unlawful for employers to specify different contractual pension or retirement ages for men and women.

Question 7 – Can an employee who is dismissed over the age of 65 claim unfair dismissal?

From 1 October 2006 employees over 65 can claim unfair dismissal where the dismissal has occurred after that date. The Employment Equality (Age) Regulations 2006 draw a distinction between 'planned' and 'unplanned' retirement for the purposes of unfair dismissal law.

These Regulations introduce a sixth potentially fair reason for dismissal in addition to conduct, capability, redundancy, contravention of an enactment and some other substantial reason: retirement of an employee is a potentially fair reason to dismiss. Section 98 of the Employment Rights Act 1996 includes reference to retirement as a circumstance that can be considered as a fair dismissal.

'Planned' retirement of employees where the normal retirement age is 65 or above will be fair and without any penalty for employers under unfair dismissal law provided that:

- the employer complies with the relevant notification of retirement requirements, including giving the employee at least six months notice of the retirement, and
- the employer has followed the 'duty to consider' procedure properly (see the question below on the statutory procedures that apply to retirement dismissals), and
- the contract of employment then terminates on the intended date of retirement.

If the requisite steps are not followed by the employer, then a retirement is deemed to be 'unplanned' and an employee may be able to claim unfair dismissal. The employer may have a defence if they can show that the reason for the dismissal is genuinely 'retirement' and not some other reason. If retirement is a 'planned' retirement, then it will only be a fair dismissal if the employer has also complied with the 'duty to consider' procedure. Once a tribunal has concluded that retirement is the reason for dismissal, then the procedural fairness of the dismissal will depend on whether the employer has complied with the 'duty to consider' procedure instead of the usual fairness test which is applicable for the other five potentially fair reasons.

Question 8 – Which statutory procedures apply to retirement dismissals?

Under the Employment Equality (Age) Regulations 2006, from 1 October 2006 employers must implement planned retirements and follow the 'duty to consider' procedure.

Planned retirements: A 'planned retirement date' will occur when a member of staff reaches age 65. The actual date will be any date for which the member of staff has been given at least the six months' written notice that they will be required to retire.

'Duty to consider' procedure: Employers must consider a member of staff's request to stay beyond retirement. The procedure contains a number of time limited steps and is similar to the familiar flexible working request procedure. Between 12 and 6 months before the dismissal date, an employer must give notice of:

- the planned retirement date (ie the date the organisation wishes to retire the member of staff), and
- the member of staff's right to request to work longer.

Employees who do not wish to retire can request that the employer considers allowing them to work past the normal retirement age (in which case the parties could agree a later retirement date). The employee will trigger the procedure by making a written request to remain beyond their retirement age.

Upon receipt of such a request, the employer must:

- consider the request, and
- notify the member of staff in writing of the decision, and
- allow the right to appeal.

In the case of a planned retirement and where the 'duty to consider' procedure has been followed, there will be a presumption in favour of the employer that the dismissal was fair. There is no obligation on the employer to grant the request. The final version of the Regulations removed the requirement that was in the draft that an employer had to consider a request 'in good faith', so the focus appears to be on procedure rather than substance as far as unfair dismissal law is concerned. However, an age discrimination claim may still succeed even though there is a fair reason for unfair dismissal purposes.

Further important points

- The onus is on the employee to prove that the dismissal was for a different reason. Therefore, employers should try to ensure that all retirement dismissals are planned retirements.
- A failure to comply with the elements of the 'duty to consider' procedure which require the employer to notify an employee of the date on which the employer intends them to retire and of their right to request to continue working, can lead to a finding of automatically unfair dismissal or a maximum penalty of eight weeks' pay (capped at the statutory maximum).
- There is a continuing duty to notify the employee in writing of their retirement date until the fourteenth day before the operative date of termination if the employer has failed to comply with the initial duty to notify.
- A failure to comply with other elements of the 'duty to consider' procedure could also lead to a finding of automatically unfair dismissal. These include:
 - i. the continuing duty to provide notification of retirement (if not already given)
 - ii. the duty to consider employee's request not to be retired
 - iii. the duty to consider the appeal against decision to refuse a request not to be retired.
- In the usual way, an employee has the right to be accompanied by a work colleague of their choice in meetings held as part of the duty to consider procedure, with an extra two weeks compensation if this right is denied.
- The minimum standard statutory dismissal procedures set out in the Employment Act 2002 (Dispute Resolution) Regulations 2004 do not apply from 1 October 2006 as there is an exception which covers cases where the principal reason for dismissal is retirement of the employee.
- Transitional provisions apply to retirements taking place between 1 October 2006 and 31 March 2007.

Question 9 – Can an employer allow an employee to work beyond the specified retirement date?

Yes, an employer can allow an employee to work beyond the specified retirement date and indeed is obliged to consider allowing them to do so. From 1 October 2006 the Employment Equality (Age) Regulations 2006 place employers under a duty to consider such requests in accordance with the 'duty to consider' procedure.

There is no reason why an employee should not be allowed to work beyond a specified retirement age if the employer agrees. In the event that such

requests are granted on a regular basis, it is important to consider the implications that employees might attempt to imply a normal retirement age for the purposes of the unfair dismissal legislation.

Question 10 - Can a Manager dismiss an employee for poor performance if the Manager regrets having allowed the employee to work beyond a specified retirement date?

Yes, employees, be they old or young can always be dismissed for poor performance. However the process to be followed is not a quick and easy one. A Manager in such a situation has a choice of either:

- Following the normal disciplinary or capability procedure for handling such situations. If health issues are involved then a medical prognosis will be necessary as well.
- Following the statutory retirement procedure

There are some advantages which suggest that the second route above is the preferred choice even if the real reason for terminating the employee's employment is not retirement. This is because it should be easier to demonstrate that the reason for dismissal is retirement, than proving the issues necessary to justify a capability dismissal. With the retirement procedure the focus appears to be on procedure rather than substance. However as long as all the retirement procedure steps are followed Managers should be able to defend an unfair dismissal or age claim. However, an employee whose poor performance is the result of ill health may threaten a disability discrimination claim which may be harder to defend.

The procedure to follow will sometimes be a difficult choice to make and advice should be taken especially until further case law guidance starts to emerge.

Question 11 – Can a Manager require an employee to undergo a medical examination before allowing them to work beyond 65?

The short answer to this question is 'no'. The best way is to seek the employees' consent to an examination. If they refuse then there are three potential claims employees may make:

- If the employee is under the 'normal retirement age' they may claim unfair dismissal in the event of dismissal for refusal to undergo the medical examination.
- It might also be possible for an employee to argue that the requirement to undergo a medical examination was in contravention of the Disability Discrimination Act 1995 (DDA) if they are suffering from a condition such that it amounts to a 'disability' for the purposes of the DDA and the requirement to undergo a medical examination is not objectively justified.
- Although it is hard to predict until cases under the Employment Equality (Age) Regulations 2006 start to emerge, but presumably requiring a

medical examination will amount to less favourable treatment on the grounds of age unless it can be objectively justified.

Question 12 – Are there any future developments expected in the area of age discrimination?

Yes. As indicated in the questions above, the UK has implemented the Employment Equality (Age) Regulations 2006. As the legislation and some of the concepts are new to UK law there will be interesting guidance and case law emerging on these Regulations by the early part of 2007.

Another future development is that a new body to be known as the Commission for Equality and Human Rights is to be formed which will take on responsibility for race, sex, disability, religious, and sexual orientation and age discrimination issues and fulfil the role of a human rights commission. It will replace the existing Equal Opportunities Commission, Commission for Racial Equality and the Disability Rights Commission.

Question 13 – Can employees continue to pay superannuation contributions after the age of 65 and will I receive my occupational pension if I continue to work?

Yes. From 6th October 2006 employees continuing in employment past their 65th birthday can continue to contribute to the superannuation scheme up until the day before their 75th birthday.

No. If you continue to work with Dunbartonshire and Argyll & Bute Valuation Joint Board you cannot receive your pension until you retire, you must retire before reaching your 75th birthday

Useful Sources of Information

More information can be obtained from the following websites:

www.dti.gov.uk

www.acas.org.uk

www.cipd.co.uk

www.agepositive.gov.uk

David Thomson

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