



# Age and the Workplace

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## **Acknowledgement**

**This guide is based on the Acas publication “Age discrimination : key points for the workplace” and has been adapted for the Isle of Man. MIRS acknowledges, and thanks Acas for, their consent to use their source material.**

## **Introduction**

The Equality Act 2017 makes it unlawful for an employer to discriminate against employees because of their age. The Act does not require any minimum length of continuous employment, or any employment at all in the case of a job applicant, for a discrimination claim to be made. It makes discrimination unlawful at all stages - from when a role is advertised and interviewed for, through to the last day of employment and beyond, including any job references.

## **Guidance for Employers**

### **What the Law Says**

In summary it is unlawful because of age to:

- discriminate directly against anyone – that is, to treat them less favourably than others because of their actual or perceived age, or because they associate with someone of a particular age unless it can be objectively justified
- discriminate indirectly against anyone – that is, to apply a criterion, provision or practice which disadvantages people of a particular age unless it can be objectively justified
- subject someone to harassment related to age
- victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination because of age
- discriminate against someone, in certain circumstances, after the working relationship has ended, unless objectively justified
- compulsorily retire an employee unless it can be objectively justified.

### **Direct discrimination**

Direct discrimination means that employees or job applicants are treated less favourably because of their actual or perceived age or because they associate with someone of a particular age. For example it is unlawful to:

- decide not to employ someone
- dismiss them

- refuse to provide them with training
- deny them promotion
- give them adverse terms and conditions

because of their age, unless that treatment is objectively justified.

**Example:** Whilst being interviewed, a job applicant says that she took her professional qualification thirty years ago. Although she has all the skills and competences required of the job holder, the organisation decides not to offer her the job because of her age. This is direct discrimination.

*NB: A job applicant can make a discrimination claim that may result in a claim to an Employment and Equality Tribunal.*

## **Indirect discrimination**

Indirect discrimination means selection criteria, policies, benefits, employment rules or any other practices which, although they are applied to all employees, have the effect of disadvantaging people of a particular age unless the practice can be objectively justified. Indirect discrimination is unlawful whether it is intentional or not.

## **Lawful discrimination**

There are limited circumstances when it is lawful to treat people differently because of their age. It is not unlawful to discriminate on the grounds of age if:

- there is an objective justification for treating people differently – for example, it might be necessary to fix a maximum age for the recruitment or promotion of employees (this maximum age might reflect the training requirements of the post). Such objective justification must however be proportionate and in response to a legitimate need (see page 23)
- the discrimination is covered by one of the exceptions or exemptions – for example pay related to the Minimum Wage Regulations
- there is an occupational requirement (OR) that a person must be of a certain age – for example, if you are producing a play which has parts for older or younger characters.

For more details see the section '*Objective justifications, exceptions, exemptions and occupational requirements*' on page 23

## Harassment

Harassment is unwanted conduct related to a relevant protected characteristic, such as age, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual.

It may be intentional bullying which is obvious or violent, but it can also be unintentional, subtle and insidious. It may involve nicknames, teasing, name calling or other behaviour which is not with malicious intent but which is upsetting. It may be about the individual's age (real or perceived) or it may be about the age (real or perceived) of those with whom the individual associates. It may not be targeted at an individual(s) but consist of a general culture which, for instance, appears to tolerate the telling of age-related jokes.

**Example:** A young employee is continually told he is 'wet behind the ears' and 'straight out of the pram' which he finds humiliating and distressing. This is harassment.

**Example:** An employee has a father working in the same workplace. People in the workplace often tell jokes about 'old fogies' and tease the employee about teaching 'an old dog new tricks'. This may be harassment because of age, even though it is not the victim's own age that is the subject of the teasing.

The harassing behaviour may not always be overtly related to age. For example, an individual could be ostracised or excluded by colleagues because of their age.

Employees may be able to claim harassment in circumstances where the unwanted behaviour is not directed at them, but at a colleague for example, if they can demonstrate that it created an offensive environment for them. The complainant need not have the same age as the person who is being harassed.

**Example:** Julie is in her late sixties and is claiming harassment against her line manager after he frequently teased and humiliated her about her age. Caroline shares an office with Julie and she too is claiming harassment, even though she is in her thirties, as the manager's behaviour has also created an offensive environment for her.

You may be held responsible for the actions of your staff as well as the staff being individually responsible. If harassment takes place in the workplace or at a time and place associated with the workplace, for example a work related social gathering, you may be liable and may be ordered to pay compensation unless it can be shown that you took reasonable steps to prevent harassment. Individuals who harass may also be ordered to pay compensation.

## Harassment at work by others

An employee can make a complaint against their employer where they are harassed by someone who doesn't work for that employer such as a customer, client or passenger. As an employer, once you are aware of this unwanted behaviour you should take reasonable and proportionate action to address the issues.

**Example:** Paul runs a coach company and one of his drivers Jack, who is in his forties but looks like a man in his early twenties, tells him that he is feeling very distressed after regular passengers from a football team poked fun at him about his perceived age, calling him "laddie" and asking if he is old enough to have a driving licence. This isn't the first time this has happened and Jack says that this name calling is affecting his confidence as a driver. Paul reacts by having a word with the manager of the football team asking them not to talk to the driver in this fashion and making it clear that forms of harassment like this will not be tolerated on his coaches. Paul keeps Jack in the picture with what he has done and believes he is taking reasonable steps to protect Jack.

You should develop a reporting procedure for harassment, and should make all staff aware of the process for reporting an incident. You should also ensure that you put processes in place to manage customers who behave in an offensive way.

You may wish to consider placing signs on your premises or website stating that harassment of staff will not be tolerated. Handouts to workers visiting your premises could include a summary of your Equality Policy, as well as the more usual health and safety instructions.

## Victimisation

Victimisation is when an individual is treated detrimentally because they have made a complaint or intend to make a complaint about discrimination or harassment or have given evidence or intend to give evidence relating to a complaint about discrimination or harassment.

They may become labelled 'troublemaker', denied promotion or training, or be 'sent to Coventry' by their colleagues. If this happens and if you fail to take reasonable steps to prevent it from happening, you may be ordered to pay compensation. Individuals who victimise may also be ordered to pay compensation.

**Example:** An employee claims discrimination against their employer because of age. A work colleague gives evidence on her behalf at the Employment and

Equality Tribunal. When the work colleague applies for promotion her application is rejected even though she is able to show she has all the necessary skills and experience. Her manager maintains she is a 'troublemaker' because she had given evidence at the tribunal and should not be promoted. This is victimisation.

Discrimination, harassment or victimisation following the end of a working relationship covers issues such as references either written or verbal.

**Example:** A manager is approached by someone from another organisation. He says that Ms 'A' has applied for a job and asks for a reference. The manager says that he cannot recommend her as she was not accepted by other staff because she was 'too young'. This is direct discrimination because of age.

## **Age and the workplace – some key management considerations**

### **Recruitment**

Base your decisions about recruitment on the skills required to do the job. Provide training to help those making judgements to be objective and avoid stereotyping people because of their age.

### **Application form**

It is good practice to remove age/date of birth from the main application form and include it in a diversity monitoring form to be retained by HR/Personnel. In addition review your application form to ensure that you are not asking for unnecessary information about periods and dates. Asking for age-related information on an application form could allow discrimination to take place.

Monitor your decisions for any evidence of age bias, particularly after any shortlisting (see below).

## Job description and person specification

A job description outlines the duties required of a particular postholder. A person specification gives the skills, knowledge and experience required to carry out these duties.

Avoid references, however oblique, to age in both the job description and the person specification. For example, avoid asking for 'so many years' experience. This may rule out younger people who have the skills required but have not had the opportunity to demonstrate them over an extended period. A jobseeker could challenge any time requirement and you may have to justify it in objective terms.

**Example:** Scrape and Co, a local driving school have been advertising for instructors who must be qualified and have a minimum of 10 years driving experience. Effectively this would prevent people under 27 applying for this job and could therefore be discriminatory. Scrape would need to justify this 10 year experience criterion if challenged by a jobseeker under 27 especially as only four years' experience is formally required to qualify as a driving instructor.

Qualifications have changed and developed over the years. Make sure that the qualifications you specify are not disadvantaging people at different ages. Ask yourself:

- are the qualifications really necessary?
- are they still current?
- are there other ways of specifying the skill level you require?

If you are going to be specific about qualifications be sure you can justify their need in objective terms and make it clear you will consider equivalent or similar level alternative qualifications.

## Advertising

It makes sound business sense to attract a wide field of applicants – if you rely solely on the friends or family of current staff you will miss the opportunity to tap into the diverse skills of your local community and a broader pool of talent.

Advertise in a way that will be accessible to a large audience. For instance, avoid using a publication or employment agency that is focused on a niche market. This may limit the diversity of applicants and may constitute indirect discrimination.

Write your job advert using the information in the job description and person specification. Avoid using language which refers directly to age, such as 'young' or 'school leaver'. Think carefully before using terms such as 'mature' or 'energetic' that might imply that you would prefer someone of a certain age. If challenged, you will need to show that these terms are characteristics which are needed for the job, and not a veiled reference to age. You should avoid such terms unless the job has a real need for them. The abolition of the default retirement age means you can no longer specify an upper age limit for a job unless you can objectively justify it.

Be clear about what skills you actually need for the post – and what skills are merely desirable or reflect the personal preferences of the selector. Recruit and/or promote for these essential skills and aptitudes – you can always decide not to recruit or promote someone if the applicant does not have these necessary skills or abilities.

As well as considering the language, you use in adverts think also about the hidden messages that may be present in any promotional literature that you have, particularly the pictures.

## Graduates

If you ask for graduates, remember that the term can be interpreted as code for someone in their early twenties. Graduates can be any age. Make it clear that you are interested in the qualification and not the age of the applicant

Advertise in a way that will be accessible to a large audience. For instance, avoid using a publication or employment agency that is focused on a niche market. This may limit the diversity of applicants and may constitute indirect discrimination.

**Example:** A local engineering company is looking for a new Personnel Officer and asks for applicants to be graduates and hold the CIPD qualification. As many more people attend university today than say 25 years ago, there is a lower chance that older Personnel Officers will be university graduates even though they might hold the CIPD qualification and have considerable practical experience. This graduate requirement might thus be indirect age discrimination if the employer is unable to justify it. Remember also that the CIPD qualification was formerly the IPM qualification.

If you limit your recruitment to university 'milk rounds' only, you may find that this is indirect age discrimination as this practice would severely restrict the chances of someone over say, 25 applying for your vacancies. If challenged you would need to objectively justify this practice (*see section on Occupational requirements, objective justifications, exceptions and exemptions*).

Consider enhancing any 'milk round' programme with a broader recruitment strategy, using other avenues to capture a wider pool of applicants of differing ages.

## **Shortlisting**

If you have removed age-related information from your application form then you will generally not know a person's age although applicants may make reference to their age on the form so this is not always the case.

Whether or not you know someone's age, it is important that those doing the shortlisting, ideally more than one person, base their decisions on skills and ability alone. They should be trained, reminded of their responsibility not to discriminate on age grounds and use the requirements of the person specification to judge applicants.

Before moving on to the next stage of the recruitment process, check that no bias, deliberate or unintentional, has influenced decisions. In all organisations this check should be carried out by someone who has not been involved in the shortlisting. In all instances, you should record your decisions and retain these records, ideally for 12 months.

## **Interviewing**

When interviewing, avoid:

- asking questions related to age, for example, "how would you feel about managing older/younger people?"
- throwaway comments such as "you're a bit young for a post of this responsibility" or "don't you think someone like you should be looking for something with more responsibility".

Focus on the applicant's competence. Where more than one applicant demonstrates the required competences the one who is more competent or offers the best skill mix should be appointed.

Check decisions for any bias and make sure interviewers have received training in the skills required and equal opportunities/diversity.

Again, in all instances, record your decisions and retain these records, ideally for 12 months from the date of the interviews.

## **Working with employment agencies**

If you use a recruitment agency you need to be sure the agency acts appropriately and in accordance with your company's equality and diversity policies.

If you tell an employment agency to discriminate on age grounds because you consider you have objective justification for doing so, then the law enables the agency to rely on this justification if challenged. In such circumstances the agency should obtain this justification in writing from the employer and if at all unhappy to raise that with the employer.

## **Vocational training**

As well as training provided by employers for their own employees, the Equality Act also covers organisations providing vocational education and training to the wider community.

For the purpose of anti-discrimination law, all forms of vocational training, including general educational provision at further, higher and other adult education institutions will be covered.

This means that vocational training providers will not be able to set age limits or age-related criteria unless these can be objectively justified:

- for entry to training, or
- in the terms under which they provide training, for example when offering help with costs to encourage participation among under-represented groups of people.

As an employer, training provider, college or university you will need to consider the following questions:

- do you set a minimum or maximum age for entry generally or in relation to admission or access to particular courses? If so, what are the supposed justifications for these?
- even if you do not have formal minimum or maximum ages, is age taken into account when you consider applications for admission or access, e.g. do you offer preferential fee discount arrangements based on age?

In either case, you need to consider:

- can you objectively justify any age-related criterion, e.g. what evidence have you in support of restricting such financial help to a particular age group?
- what legitimate aim does any age-related criterion help you achieve, e.g. have you clear evidence that demonstrates particular age groups would be excluded from your learning provision if they had to pay full fees?
- are your age-related criteria a proportionate means of achieving that aim?
- is there another way of achieving that aim without resorting to discrimination?

The law allows for the setting of age requirements relating to institutions of further and higher education and in respect of access to vocational training if they can be objectively justified, for example on the grounds of vocational integration.

### **Retaining good staff**

Many factors motivate employees and make them want to stay with an organisation. People are more likely to feel positive about an organisation if they are treated fairly and with consideration regardless of their age.

### **Promotion and training**

Opportunities for promotion and training should be made known to all employees and be available to everyone on a fair and equal basis.

Where employees apply for internal transfers take care with informal and verbal references between departmental heads, supervisors, etc. These references are covered by the law and should be fair and non-discriminatory.

Job-related training or development opportunities should be available to all employees regardless of age but if you have age criteria you must ensure that you have an objectively justified reason for these – monitor the provisions of training to make sure no particular age group is missing out. Review the style and location of training to ensure:

- there are no barriers to any particular age group participating
- it is suitable for people of all ages
- everyone is encouraged to participate.

For example, if you are using computer-based training, do not assume everyone will be fully competent using a PC or that older people will not be interested or capable of undertaking this.

## **Age discrimination awareness**

However large or small an organisation, it is good practice for them to have an Equality Policy and to train all employees and update them on a regular basis. This will help to reduce the likelihood of discrimination, harassment and victimisation taking place and may help to limit liability if a complaint is made.

All employees should understand:

- what the terms 'discrimination' and 'harassment' mean
- why discrimination and harassment are hurtful, unlawful and totally unacceptable
- what to do if they witness it or are subjected to it.

Tell all employees about your company policy on age discrimination and train those who make decisions that affect others. Training should apply not only to those who recruit and select but also to those involved in day-to-day decisions about work allocation, performance appraisal, etc. Supervisors and managers also need training in recognising and dealing with bullying and harassment.

## **Performance appraisal**

Check any performance appraisal system you have to ensure that it is working fairly and without bias. Many people have preconceptions about age and these can influence the judgements we make about people. If these preconceptions appear in performance appraisals through use of inappropriate comments – such as 'does well despite their age' or 'shows remarkable maturity for their age' – they will undermine the whole basis of a fair appraisal system. Such comments could also lead to further discrimination when decisions about promotion or work allocation are being made. Assessments should be based on an employee's actual performance unclouded by any preconceptions about their age.

**Example:** Two candidates have done equally well for the post on offer, so the selectors decide to review previous assessments to try and draw a fair distinction between them. On one they read: 'Despite his many years with the company John

remains capable and enthusiastic' and 'John does very well at work considering his age'.

There are no such comments on Mark's assessments.

Which candidate now has a question mark against them?

Treat all employees consistently when setting objectives or measuring performance. Ignoring shortfalls in performance because an employee is older may be discriminatory – particularly if the same shortfalls are addressed in younger employees.

You may wish to use the annual performance appraisal review meeting to discuss employees' aims and aspirations and this can be particularly helpful in managing staff without the default retirement age, see page 21.

## **Redundancy selection**

Check that your selection processes for redundancy are free of age discrimination. Practices such as last in first out (LIFO), and using length of service as selection criteria may be used as one of a range of criteria but relying solely on them is likely to be age discriminatory.

## **Policies and procedures**

Review policies and procedures for age bias, including those covering:

- sick absence
- leave and holidays
- discipline and grievances
- staff transfers
- flexible working
- use of computers
- individual space requirements (ergonomic policies).

Annex 4 shows you how to use an age impact assessment as a template to carry out these kinds of reviews. Exceptions around pay and benefits can be found on page 25 of this guide and where pay and benefit arrangements fall within these exceptions they need not be included in your review.

## **Bullying and harassment**

Every individual member of staff has the right to be treated fairly and with dignity and respect. Harassment occurs when someone engages in unwanted conduct which has the purpose or effect of violating someone else's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

It is not the intention of the perpetrator which defines whether a particular type of conduct is harassment but the effect it has on the recipient. Bullying is just as unacceptable as any other form of harassment.

People can become targets of harassment because of their age. Harassment could take the form of:

- inappropriate comments – for example, by suggesting someone is too old ('over the hill') or too young ('wet behind the ears')
- offensive jokes
- exclusion from informal groups such as social events.

**Example:** George is in his 60s and works in an office with a team of younger colleagues in their 20s and 30s. The team, including the manager, often go out socialising. They do not ask George because they feel that he wouldn't like the venues they choose for such events. However, George finds out that many workplace issues and problems are discussed and resolved during these informal meetings. George feels undervalued and disengaged by this unintended action. This is a form of harassment, even though unintended, as George is being excluded from the team. To prevent this, the manager ought to consider office-based meetings to consult more fully with all staff in decision-making to prevent George feeling excluded because of his age.

## **Dealing with harassment**

Make sure your anti-harassment policy covers age. You may have a stand - alone policy or one that is part of a wider equal opportunities policy. If managers see unacceptable behaviour whether or not a complaint is made they need to treat the matter seriously and take action to eliminate the behaviour in question. This may involve just pointing out to someone the effect that their behaviour has on others and getting them to stop. If this informal approach fails, or in more serious cases, or where the person being harassed prefers, it will be necessary to take formal action within the normal disciplinary procedures of the company.

## **Employer Justified Retirement Age**

An employer can retire an employee lawfully at a set age provided that the retirement age can be objectively justified, which means that it is a proportionate response to a legitimate aim. We refer to this in our guidance as Employer Justified Retirement Age (EJRA). The justification of a set retirement age will be particularly important in the event that such a policy is challenged in an Employment and Equality Tribunal.

Currently EJRA's tend to be used in exceptional circumstances in which an employer has a retirement age under 65. For example, posts in the emergency services which require a significant level of physical fitness or other occupations requiring exceptional mental and/or physical fitness such as air traffic controllers.

Employers who wish to use an EJRA need to consider the matter carefully. They will need to ensure that the retirement age meets a legitimate aim, for instance workforce planning (the need for business to recruit, retain and provide promotion opportunities and effectively manage succession) or the health and safety of individual employees, their colleagues and the general public. As well as establishing a legitimate aim an employer will also need to demonstrate that the compulsory retirement age is a proportionate means of achieving that aim.

The test of objective justification is not an easy one to pass and it will be necessary to provide evidence if challenged; assertions alone will not be enough. When looking to establish an EJRA it can be helpful to first set out the reason why you wish to do so clearly on paper. Then ask yourself whether you have good evidence to support this reason and then finally consider if there is an alternative, less or non-discriminatory way of achieving the same result. Throughout, you should always remember that you need to show 'objective' justification not 'subjective' justification.

Having established an EJRA, any retirement of an employee as a result will be considered as a dismissal for some other substantial reason. Employers should also

follow a fair procedure in retiring people at the compulsory retirement age. You should give the employee adequate notice of impending retirement and, if circumstances permit, consider any request by an employee to stay beyond the compulsory retirement age as an exception to the general policy – although it would be important in such circumstances to ensure consistency of treatment as between employees who might request to stay on.

## **Dismissal**

Unless it can be objectively justified it is no longer permissible to dismiss an older worker on grounds of retirement. Older employees can still voluntarily retire at a time of their choosing and draw any occupational pension they are entitled to in line with the scheme's rules. Removing the default retirement age does not mean that employees will never be able to retire. It just means that employers cannot force employees to retire at a set age unless the age can be objectively justified. Open discussion between employers and employees about future plans, conducted in an atmosphere of trust can help facilitate the transition from work to retirement for both the individual and the business.

Some points to consider about how to encourage and get the most out of these discussions are given below.

## **Workplace discussions**

Whatever the age of an employee, discussing their future aims and aspirations can help you identify their training or development needs and provide an opportunity for you to discuss your future work requirements and how these impact on the employee. These discussions may be new for some employers whilst for others they may be a normal part of their management process. It is for you to decide whether you wish to hold workplace discussions or not but they are a good way of raising the issue of retirement with older employees.

For all employees workplace discussions may involve a discussion around where they see themselves in the next few years and how they see their contribution to your organisation. These discussions can take place as frequently as you see fit but it is good practice to hold them at least annually.

Whatever the size of your organisation, these discussions can be simple, informal and confidential. You might find it helpful to use the following framework for carrying out these discussions:

***Workplace discussions – areas to talk about***

- Performance to date against targets, activities and outcomes
- Developmental or training needs
- Future plans (employer)
- Aims and aspirations (employee)
- Future performance

(See annex 2 for a description of each area.)

Whilst such discussions are best undertaken voluntarily and in an atmosphere of trust, you, as the employer, need to be able to plan your workforce requirements to meet future business needs.

Employees have a right to be treated fairly and should participate in these discussions in as open and frank manner as they possibly can.

These discussions do not have to follow exactly the same questions to all employees irrespective of where they are in their careers. However you must not ask questions which could be seen as discriminatory, for example:

**Example:** Rouji works on the production line in a car factory and is having a workplace discussion with her supervisor. Rouji, who is 25 is asked whether she intends to start a family. After the meeting Rouji feels uncomfortable with this question and tells the line manager Julia who assures her that was not the intention. However Rouji feels she is being treated worse than her colleagues and she makes a claim for sex discrimination.

And

**Example:** Joe is called into a workplace discussion and is told that he is getting a bit “long in the tooth” and why doesn’t he retire and avoid an undignified sacking. Joe is shocked by this news as he has never been told he was not doing his job well and was a valued member of the company. Joe asks to stay working but the boss then says he is blocking opportunities for younger workers who need the money more than he does. After the meeting Joe is deeply upset and worried that the boss is going to treat him badly. Joe takes some advice and claims age discrimination against his boss and the company.

Workplace discussions may also help identify employee aims and aspirations that were previously unknown:

**Example:** Hanif, who is six months short of his 60th birthday, has worked on the production line of a small electronics company for 10 years. When Hanif arrives for his workplace discussion, his manager fully expects him to say that he will be retiring and drawing his pension when he gets to 60. However, somewhat to the manager's surprise, at the interview Hanif says that he would like to move from the production line into the company's admin office.

In discussion it turns out that Hanif looks after all of the accounts and administration for his wife's fashion shop and is well used to dealing with figures and correspondence. The company have been looking, without success, for a new accounts clerk and it is therefore agreed that Hanif will undergo some developmental training to familiarise himself with the company's systems before moving to the accounts section on a trial basis.

Asking open questions can provide you with the basis of workplace discussions and can avoid suggesting discrimination. A useful exercise is to ask employees about plans and aims for:

- the short term
  
- the medium term
  
- the long term.

This will help you to organise training and development and appropriate succession plans, and should not just be limited to older workers. It also allows employees to focus their future goals.

When discussing future plans also think about the skills your workforce possesses and how best to deploy these. Holding such discussions could help match your needs with your employees' aspirations and benefit your business

Workplace discussions about future aims and aspirations can apply to all staff.

**Example:** Brian is asked by the boss during a workplace discussion where he sees himself in the next few years. Brian, who is 60, tells the boss he is thinking of leaving to draw his pension in 18 months or so. They further discuss succession issues and how the company can retain all the accumulated experience that Brian has for the benefit of other employees. The boss points out that Brian can change his mind as with any change of circumstances although once he has handed his

notice in then it may well be final as the employer would not be obliged to accept a withdrawal of notice.

Whilst it is not necessary for workplace discussions to be held as part of a formal appraisal process some employers may find it helpful to do so.

**Example:** Lin is 35 and has just got married. Before he decides to settle down and have kids, he wants to travel around Asia. He is not sure how to raise this with his employer as he would prefer a career break, rather than leaving the company. During his end of year review, Lin's manager asks him about his short-term and long-term plans. Lin explains his desire to go travelling for a year, but also highlights that he sees his long-term career with the company. Lin's manager does not want to lose Lin as he is a very productive member of staff, and so arranges a six month career break for him, with the guarantee of a job on his return.

The outcome of workplace discussions should be recorded and held for as long as there is a business need for doing so. It would be good practice, build trust and aid transparency to give a copy of the discussion record to the employee.

## **Managing your business needs and employee expectations**

### **Setting work objectives and expectations**

Objectives, targets and work expectations do not need to be identical for all employees. However, they should not be different for reasons of age or other protected characteristics unless you can justify these.

**Example:** John is a production manager and tells you he wants to downshift his working life as he approaches his final year before his pension is payable when he also intends to leave your organisation. You make arrangements to accommodate a more flexible working shift for John in line with your flexible working policy that you apply to other employees consistently, and adjust his performance expectations proportionately. John is keen to pass on his knowledge and you therefore engage him in training and mentoring his successor passing on his acquired knowledge and skills.

### **Disability discrimination**

As employees get older they may possibly acquire more impairments than a younger employee so you need to be careful that your decisions do not discriminate against an employee because of disability. If an employee is disabled, or you suspect they may be disabled, you must make reasonable adjustments to remove any barriers to their performance.

## Poor performance

If an employee is performing poorly you should discuss this with them to establish the causes. Failure to address poor performance in older workers because, or in the expectation, that will be leaving soon to draw their pension, or that it may be seen to be undignified, may well be discriminatory. You should also avoid falling into the stereotype that poor performance is more likely to be associated with older workers. Establishing the reasons for poor performance, setting improvement periods and agreeing what training and development would help the employee meet your work or business expectations are key to managing this conversation.

**Example:** Kumar who is 64 years old has been a good and loyal employee of his company for 30 years but recently his performance has begun to show signs of decline. At a workplace discussion it becomes clear that although Kumar will soon be old enough to retire and claim his company pension he does not want to leave work as he needs the money it provides. His manager says that he is happy for Kumar to remain but that his performance must improve. They talk about what must be done and Kumar says that things will improve.

Unfortunately over the next few months his performance does not improve and his employer therefore instigates the company's unsatisfactory performance procedure. Kumar is called to a formal meeting at which a performance improvement plan, including special training, is agreed. Despite the improvement plan Kumar's performance does not get better and he is called into another formal meeting where it is explained that unless his performance improves in the next six months he will have to be dismissed. Despite this warning, and further help from the company Kumar cannot reach a satisfactory performance level and, reluctantly, his employer decides to dismiss him on capability grounds.

## Monitoring age in your workplace

You will probably have information that shows the ages of your employees. It makes sense to analyse this information (probably in age bands – see Annex 5) to get an age profile of your workforce. This profile will help you decide whether there is a need for any remedial action. For example, do you need to:

- plan for a peak of older workers leaving the organisation?
- take positive action to rectify any obvious imbalance in the age bands?

You can also use this profile to check that your entire workforce is getting access to training and other facilities.

Staff attitude surveys and exit interviews can also give you valuable insights into how people view their work and you as an employer, and help you to create a positive working environment.

It is important to monitor in this way if you wish to claim an objective justification or, when reviewing service related benefits, (see section on occupational requirements, objective justifications, exceptions and exemptions). In considering these matters you should always use evidence in your decision-making rather than merely continuing old working practices or relying on 'gut feeling' as these may be based on discriminatory assumptions.

Annex 5 sets out a framework for age monitoring.

## **Positive Action**

You can take Positive Action to prevent or compensate for disadvantages linked to age where it reasonably appears that it will prevent or compensate for the disadvantages.

This might involve:

- giving people of a particular age access to vocational training; or
- encouraging people of a particular age to take up employment opportunities.

For example, you might place advertisements where they are more likely to be seen by people in a disadvantaged group. Or you might limit access to a computer training course to those over 60 because there is evidence to show they may have had less exposure to such training in the past.

Positive Action on age can help you to attract people from all age groups in your local community.

**Example:** Green and Co, a transport company, see from their internal monitoring processes that the company has a mature age profile with disproportionately fewer workers under 40. Not wanting to miss out on the talents of all the local community, they include a statement in their next advert saying "We welcome applications from everyone irrespective of age but, as people under 40 are under-represented among our current workforce we would especially welcome applications from these jobseekers. Appointment will be on merit alone".

## **Objective justifications, exceptions, exemptions and occupational requirements**

Treating people differently because of their age will only be justifiable in the following exceptional circumstances. Only the Courts can define what objective justification is, and so this guidance gives examples of the points you would need to consider.

### **Objective justification**

You may treat people differently on the grounds of their age if you have objective justification.

An objective justification allows employers to set requirements that are directly or indirectly age discriminatory. Remember that different treatment because of age will only be possible exceptionally for good reasons (see below).

You will need to provide real evidence to support any claim of objective justification. Assertion alone will not be sufficient and each case must be considered on its individual merits.

Both direct and indirect discrimination will be justified if it is:

- a proportionate means (of)
- achieving a legitimate aim.

### **What is proportionate?**

This means:

- what you are doing must actually contribute to a legitimate aim, e.g. if your aim is to encourage loyalty or facilitate the recruitment and retention of employees then you ought to have evidence that the provision or criterion you introduce is actually doing so
- the discriminatory effect should be significantly outweighed by the importance and benefits of the legitimate aim

- you should have no reasonable alternative to the action you are taking. If the legitimate aim can be achieved by less or non-discriminatory means then these must take precedence.

## **What is a legitimate aim?**

A legitimate aim might include:

- economic factors such as business needs and efficiency
- the health, welfare and safety of the individual (including protection of young people or older workers)
- the particular training requirements of the job.

A legitimate aim must correspond with a real need of the employer – economic efficiency may be a real aim but saving money because discrimination is cheaper than non-discrimination is not normally viewed as sufficient justification. The legitimate aim cannot be related to age discrimination itself.

The test of objective justification is not an easy one and it will be necessary to provide evidence if challenged; assertions alone will not be enough.

Jones and Company are unsure if they need an objective justification. To help make the decision they consider the following:

- STOP – Why do we want to do this?
- Set out the reason clearly on paper
- Do we have evidence to support us in this reason?
- Are we certain this is real hard evidence and not just based on assumptions?
- Is there an alternative less or non-discriminatory way of achieving the same result?

The HR director seeks a second opinion from the Board and keeps all records of how the decision was made in case it is reviewed in the future.

In a smaller company, you could consult your partner or colleague.

## **Exceptions and exemptions**

There are also exceptions to or exemptions for age from the Equality Act in the following areas:

- pay and other employment benefits based on length of service
- pay related to the Minimum Wage
- acts under statutory authority
- enhanced redundancy payments
- handling insured benefits
- occupational pension systems (not covered in this guidance).

## **Payments and benefits based on length of service**

In many cases employers require a certain length of service before increasing or awarding a benefit such as additional holiday entitlement. Without the exemptions contained in the Act this could often amount to indirect age discrimination because some age groups are more likely to have completed the length of service than others.

Any benefit earned by five years service or less will be exempt. Employers may use pay scales that reflect growing experience or limit the provision of non-pay benefits to those who have served a qualifying period, subject to the five year limit.

The use of length of service of more than five years for all types of employment benefits is lawful if it fulfils a business need. These could be:

- awarding or increasing the benefit is meant to reflect a higher level of experience of the employee, or to reward loyalty, or to increase or maintain the motivation of the employee;
- the employer has reasonable grounds for concluding that using length of service in this way fulfils a business need of his undertaking.

In order to meet these requirements employers would need evidence from which they can conclude there is a benefit to the organisation. This could include information the employer might have gathered through monitoring, staff attitude surveys or focus groups for example.

### **Minimum Wage**

Nothing in the Equality Act alters the provisions of the Minimum Wage Regulations. The exemption linked to the Minimum Wage will allow employers using exactly the same age bands (i.e. 16 to 17, 18 and over or those classed as Development Workers) to pay at or above the national minimum rates provided those in the lower age groups are paid less than the adult minimum wage.

The exemption does not allow employers to pay different rates to those in the same age category. Apprentices not entitled to the Minimum Wage may continue to be paid at a lower rate than those that are.

### **Acts under statutory authority**

Age criteria are widely used in legislation, notably to qualify for various licences. Where this is the case the employer must follow the criteria laid down by statute and will not be contravening the Equality Act by doing so.

### **Enhanced redundancy payments**

The exemption linked to statutory redundancy payments is for an employer who wants to make more generous redundancy payments than under the statutory scheme. It allows an employer to use a different method of their own to calculate the amount of redundancy payment provided that the amounts are calculated on the same basis e.g. an employer could enhance the statutory payment by a factor of 2 for all employees if it chose to do so. If the method of calculation is based on length of service, and if an employee brings a discrimination claim under the Act, the employer will have to objectively justify it in so far as age discrimination arises. (This is because the exception for pay and benefits based on length of service does not apply to redundancy payments.)

### **Handling insured benefits**

Some employers provide group risk insured benefits (including income protection, sickness and accident insurance, as well as private medical insurance) for their

employees and their employees' dependents. These benefits will be exempt from the principle of equal treatment on the grounds of age so that it will be possible for employers to cease to provide or offer insured benefits to employees aged 65 or above, even if they continue working beyond that age.

## **Occupational requirement (OR)**

In very limited circumstances it will be lawful for an employer to treat people differently if it is an occupational requirement that the job holder must be of a particular age. When deciding if this applies, it is necessary to consider the nature of the work and the context in which it is carried out. Jobs may change over time and you should review whether the requirement continues to apply, particularly when recruiting.

**Example:** An organisation advising on and promoting rights for older people may be able to show that it is essential that its chief executive – who will need to be able to empathise with the issues faced by older people and be the public face of the organisation – is of a certain age. The age of the holder of the post may be an occupational requirement.

## **Guidance for the Individual**

### **What do I do if I think I have suffered discrimination or harassment?**

#### **Expressing your concerns**

If you think you are being harassed or discriminated against it is a good idea to make it clear to the person who is harassing you that their behaviour is unwelcome and that you want it to stop. However, you do not have to do this, particularly if you are feeling bullied or intimidated. If you do choose to address your concerns to the person, be clear and assertive but take care that you are not perceived to be bullying the individual. Some people may find it helpful to ask a friend, colleague, welfare officer or trade union representative to be with them in a support role.

If speaking to the person in question has failed to stop the problem, you should talk to your manager or your trade union representative. If it is your manager or supervisor who is harassing you, speak to someone higher up. Employers should deal with such complaints quickly, thoroughly and sympathetically.

It is usually best to try and sort things out quickly and as close to the problem as possible. If your organisation has a personnel or human resources department or an

equality adviser you might find it helpful to talk to them. Discrimination can happen accidentally or through thoughtlessness. Harassment can be unintentional. Often, once a manager understands the problem, he or she will be willing to try and put things right.

### **Using the grievance procedure**

If your manager is unable to help you, or refuses to help you, you should use your organisation's grievance procedure if you wish to proceed with your complaint. You also have a legal right to be accompanied by a trade union representative or a work colleague at any hearing into your grievance.

If you are not satisfied with the result of a grievance procedure, your employer should allow you a right of appeal which should be heard, if the organisation's size allows it, by someone different from the person who conducted the original grievance hearing. You have a right to be accompanied by a trade union representative or a work colleague during the appeal hearing.

### **Mediation**

An independent third person or mediator can sometimes help resolve disciplinary or grievance issues. Mediation is a voluntary process where the mediator helps two (or more) people in dispute to find a solution to the issue that they can both agree to. The mediator does not take sides or tell those in dispute what to do.

Mediation is most likely to be successful if both parties:

- understand what mediation involves
- enter into the process voluntarily
- are seeking to repair the working relationship.

Mediation can be a good way of dealing with bullying, discrimination or harassment situations depending upon the nature of any allegations. Discrimination or bullying actions can range from unintentional misunderstandings and lack of awareness through to deliberate and malicious acts. In some cases the individual and/or the

organisation may view the allegations to be of such a nature that investigation and possible disciplinary action is the only alternative.

Mediators may be employees trained to act as internal mediators in their own workplace in addition to their day jobs. Or they may be from an external mediation provider.

## **Making a claim to an Employment and Equality Tribunal**

When you have tried all these things, or if your employer does not have a grievance procedure, or if you feel too intimidated to use the internal procedures, you may be able to bring a complaint to an Employment and Equality Tribunal under the age discrimination section of the Equality Act 2017.

You, and any witnesses, have a right not to be victimised for following up a grievance or bringing a complaint to an employment tribunal provided this is done in good faith.

If you have been dismissed because you objected to conduct towards you, you may be able to bring a complaint of unfair dismissal to an employment tribunal as well as a complaint of victimisation.

Complaints to an Employment and Equality Tribunal must normally be brought within three months of the act you are complaining about. Care should be taken to ensure that the three month point is not exceeded during any internal grievance/appeals process.

## **Annexes**

### **Annex 1: An age healthcheck for employers**

#### **Purpose**

These questions are designed to kick start the planning and thinking process in your organisation. The answers to these questions should tell you if:

- any key personnel decisions are influenced by age
- your recruitment is attracting people from everyone in the local community.

#### **The Checklist**

1. Look at your records to establish your company age profile – insert % 16 – 21, 22 – 30, 31 – 40, 41 – 50, 51 – 60, 60 – 65, 65+

(These age bands are for illustration only; you may wish to choose different ones to suit your company circumstances.)

Compare this to census data available from websites, libraries, business and Chambers of Commerce. What do you find?

2. Look at your applications forms for recent recruitments and compare with your age profile. Are you missing out on potential talent? Yes/No
3. Is your equality and diversity policy visibly supported by your board and chief executive? Yes / No
4. Do you train employees to recognise and tackle age discrimination? Yes / No
5. Is age ever used as a factor in staff recruitment/ selection or training and development? Yes / No  
If yes, can it be justified? Yes / No
6. Do you offer variable and alternative working patterns to employees regardless of age? Yes / No
7. Are your managers aware of what behaviour could be perceived as harassment because cause of age? Yes / No / Not Sure

## **Annex 2: Workplace discussions – points to consider**

### **1. Performance to date against targets, activities and outcomes**

A job title and a brief description of the main objectives and duties of the role will give you an indication of the performance measures that would help you determine if the employee is meeting the business needs of your organisation. In some jobs performance may be measured in quantitative terms; in others it may be a narrative account of the individual's contribution to the organisation.

Performance can be based on outcomes, what the employee has delivered or equally performance can be based around volumes or activities that you particularly value.

It is good practice to agree these expectations with an employee, and ensure these are "SMART" (Specific, Measurable, Achievable, Realistic and Timebound).

### **2. Developmental or training needs**

Discussing individual performance may identify areas where the employee needs further support or training. Don't make assumptions about an individual's needs based on their age or length of experience and treat employees consistently in this area.

Employees do not have to undertake further training but if their performance is below what you would expect of them, then you should insist as you do not have to tolerate an employee who is not performing satisfactorily.

### **3. Future plans (employer)**

This is about how the employee's skills and abilities can be matched to your future business plans. It is your opportunity to set out where you see the organisation in the short to medium-term and the sorts of skills and abilities that will be needed.

This part of the discussion can cover alternative and flexible working patterns where the business case for the organisation can match the needs of the employee.

#### 4. Aims and aspirations (employee)

This part of the discussion is about the employee and their plans for the future. The range of issues covered may be very wide; for some it might be their aspirations for different roles within the company, for others who may be approaching a time when their pension becomes payable, it may cover where they see themselves working in your organisation. It will relate back to section 2.

You cannot hold an employee to what is said in this part of the discussion. They can change their mind but it gives you the opportunity to start thinking about the longer term and succession planning.

Where an employee indicates that they do wish to retire at some future date they may well want to discuss adjusting their working hours, reducing their duties or altering their job in some other way as a lead up to retirement. However, you do need to think carefully before you change an employee's job in the light of information given at this stage of the discussion. If you transferred an employee from a project without their agreement when they tell you they intend to leave and draw their pension in the coming year you may well face a claim for age discrimination and be required to justify why you did this.

#### 5. Future performance

Just as part 1 of the workplace discussion is a backward review of performance and activity, so, having discussed the organisation's and the individual's plans, this final part of the discussion looks to the immediate future and it is where you set out your expectations of the employee.

Remember, it is not discrimination to have different objectives for employees undertaking the same roles to reflect training or other reasons, such as returning from a period of absence or as a reasonable adjustment for a disabled employee. Setting objectives differently just because the employees have different ages is likely to be discriminatory.

Workplace discussions can be part of existing appraisal systems you may have or other means of talking to employees. You do not have to call them by this name but by one that makes operational sense to your organisation.

## **Annex 3: Practical impact assessing for age bias in policies**

### **Purpose**

Impact assessments are designed to measure the impact of policies and processes on different groups of people. They can help to inform planning and decision-making.

Ask yourself:

- What is the purpose of a policy or practice?
- What is it achieving?
- Do any age groups benefit and, if so, do any not? And how?
- What are the differences and adverse outcomes (if any) by age group?

To answer these questions you will need to look at:

- Your monitoring data (see page 21)
- Anecdotal views from managers and employee representatives about the way a policy is working locally
- Attitude surveys, focus groups, exit interviews and specific research and evaluation exercises you may wish to carry out
- What has worked elsewhere and why by comparing your data with that of other business groups / employer organisations.

This process will give you evidence of different outcomes by age groups. It is important to remember that not all differences are necessarily wrong and you need to ask the question "is it justifiable for this to continue?" Our guidance on objective justification can give some pointers here.

We would suggest that it would be good practice to undertake these assessments openly in the organisation as a sign of your commitment to tackle unwitting age discrimination.

## **Annex 4: Age monitoring – a framework**

Age monitoring can help you to:

- identify any problems
- gather evidence that might be needed by the courts for objective justification of any age discrimination (see page 23)
- provide evidence to help with any claims of unlawful age discrimination that might be made.

The following age bands might provide a useful starting point for gathering your information: 16 – 21, 22 – 30, 31 – 40, 41 – 50, 51 – 60, 61 – 65, 65+

Keep records on how all your employees fit into these age bands. Also keep data on employees who:

- Apply for jobs (and those who are successful)
- Apply for training (and those who receive training)
- Apply for promotion (and those who are successful)
- Are being assessed to measure their performance
- Are involved in disciplinary and grievance processes (and the outcomes of these processes)
- Leave the organisation.

Another source of monitoring information are staff attitude surveys that can be used in concluding a business benefit when considering the exemptions surrounding service related benefits (see page 25).

Staff consultation groups and trade unions can also be valuable sources of information that can add to raw data figures.



## **Manx Industrial Relations Service**

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint - see date below. For more up-to-date information please check the MIRS website at [www.mirs.org.im](http://www.mirs.org.im)

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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