

The Employment Equality (Age) Regulations 2006: A Legitimation of Age Discrimination in Employment

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ABSTRACT

The Employment Equality (Age) Regulations, which implement the Framework Directive on Equal Treatment and Occupation, take effect in October 2006. Tackling age discrimination is seen to be a means of achieving a more diverse workforce, yet in trying to achieve this objective there have been compromises with the principle of non-discrimination. During the consultation exercises preceding the Regulations there have been important differences of approach between employers and trade unions. The Government has, mostly, adopted the approach supported by employers. The result is a set of Regulations, which, although an important step forward in tackling age discrimination, have numbers of exceptions which effectively legitimise some aspects of age discrimination at work.

1. INTRODUCTION

The Labour Government which came to power in 1997 had a commitment to taking some action on age discrimination in employment, although it was not clear what action would be taken. In the event it took a voluntarist route, which few thought would succeed. At the same time the European Commission had been developing its own approach to a forecast and significant ageing of the population of the EU. The result of which, amongst other measures, was the Framework Directive on Equal Treatment in Employment and Occupation,¹ which included age discrimination in employment amongst its provisions. The Directive allowed Member States to apply for an extension of up to three years from the original implementation date of 2 December 2003 'in order to take account of particular conditions'. The United Kingdom, with others, took an extension with the result that, in the United Kingdom, the new Regulations will take effect from 1 October 2006.

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¹ Directive 2000/78/EC.

2. THE FRAMEWORK DIRECTIVE

The purpose of the Directive is set out in Article 1 as being to lay down a general framework for combating discrimination and putting into effect the principle of equal treatment. This is virtually identical to Article 1 of the Race Directive (2000/43/EC).

Articles 4 and 6 of the Framework Directive provide for exceptions to the principle of equal treatment as they apply to age. Article 4(1) states that Member States may provide that a difference of treatment which is based on a characteristic related to age shall not constitute discrimination where such a characteristic 'constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. As a House of Lords Select Committee² pointed out, it was strange to say that a difference of treatment based on such a characteristic did not constitute discrimination. Such a difference of treatment is discrimination, but it is permissible discrimination because it can be justified within the terms of the Directive.

Article 6 then takes this further. It actually provides for specific exceptions to the principle of equal treatment. Firstly it again states that differences of treatment on grounds of age shall not constitute discrimination under certain circumstances. They must be 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives'. In addition the means of achieving the aim must be 'appropriate and necessary'. It is not clear what 'legitimate employment policy' means. The result is that the ultimate boundaries of age discrimination legislation are to be left to the courts with, one suspects, a large amount of litigation and uncertainty.

Article 6 then continues to give some specific examples of differences in treatment which could be justified. Age discrimination is the only ground of discrimination in the Framework Directive that receives this special attention in having its own specified lists of areas where discrimination is to be justified. The list is:

- (i) the setting of special conditions on access to employment and vocational training, employment and occupation (including dismissal and remuneration conditions) for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection. These differences in treatment could, of course, be positive as well as negative; so extra protection for young workers in terms of working hours, health and safety and so on might be justifiable here. What is perhaps most interesting, apart from the lack of definition, is the groups affected, namely young workers, older workers and those with caring

² *EU Proposals to Combat Discriminatio*, HL 68 May 2000.

responsibilities. Who is a young person? Who is an older worker? Those aged in between are not a subject of these allowable exceptions. There is no interpretive article in this directive, so it will be left to the courts to decide in each circumstance presumably, somewhat adding to future uncertainties.

- (ii) the fixing of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment. Clearly there are some jobs which require certain levels of experience or seniority of service, but why cannot these be quantified without the use of age in the criteria? There are some jobs which might just require some 'life experience', but this needs to be justified. The inclusion of a minimum age must be wrong because it assumes that experience and knowledge is gained at a uniform rate amongst the population, which is self-evidently untrue.
- (iii) the fixing of a minimum age for recruitment which takes into account the training period and the need for a reasonable period of work before the individual retires. This difference of treatment assumes a retirement age which will limit a person's working life and therefore limit the return that an employer might receive. This rule might become more complex if mandatory retirement ages did not exist. When discussing similar proposals, before the House of Lords Select Committee, Eurolink Age stated that this article would 'not produce any clear benefits for older workers in Europe who currently suffer from age discriminatory practices'. The list is non-exhaustive as it is headed by the statement : 'Some differences of treatment may include, among others ...'

The Commission representative at the House of Lords hearings into this matter stated that Article 6:

was designed to fix clear limits, to insist on the principles of objective justification, necessity and proportionality, and to give some indicative examples in order to clarify the type of exception which is envisaged, and provide certainty concerning the most widespread and clearly justified examples.

Article 6(2) provides that retirement ages can be fixed for the purposes of admission to or retirement from social security and invalidity benefits, and the use of ages for actuarial purposes in such schemes.

3. THE UK APPROACH

All UK Governments, prior to the adoption of the Equal Treatment in Employment and Occupation Directive, consistently opposed attempts to introduce legislation on any aspect of age discrimination in employment. Back benchers

who had tried to introduce legislation on aspects of age discrimination had all been opposed by the Government of the day.³

In May 1997 the new Government announced that it would consult on the best way to tackle age discrimination in employment. The results of this consultation were published in *Action on Age*.⁴ A major contributor to this consultation was some research which had already been commissioned by the DfEE in 1996. The report entitled *Characteristics of Older Workers* was published in January 1998.⁵ The purpose of this report was to identify the effect of age on economic activity and to explore the characteristics of older workers, using data from the Family and Working Lives Survey. The study concluded that any 'older workers effect' becomes apparent around the age of 50 years and stated that:

Once they had become 50, the risks of leaving work to become unemployed or inactive tended to increase. And the chances of returning to paid work for those who were inactive or unemployed tended to decrease.

One interesting aspect of this consultation was its incompleteness, as it did not include a consideration of retirement ages or what happened to workers after normal retirement age. The issue of retirement was raised a lot during the consultation. The document, however, stated 'this is [retirement age] outside the scope of the consultation, as like other terms and conditions of employment, retirement ages are a matter for negotiation between individual employers and their employees, or their representatives'.

A. Legislation or Voluntarism?

The issue of whether to introduce legislation or continue on a voluntarist route was considered as part of the consultation. The consultation document stated, however, that 'on balance, there was no consensus of opinion on legislation and a strong case for legislation was not made during the consultation'.⁶

Major employer organisations did not support a legislative route and it may be that this deep seated opposition still manifests itself when considering the practical aspects of the Age Regulations. The Institute of Directors welcomed the Government's decision at the time not to introduce legislation and believed that such legislation would entail an unwarranted restriction on an employer's right

³ Such as Linda Perham MP in 1998, David Winnick MP in 1990 and 1996, Gwynneth Dunwoody MP in 1992 and Baroness Philips in 1989.

⁴ DfEE, *Action on Age*, Report of the Consultation on Age Discrimination in Employment 1998.

⁵ Stephen McKay and Sue Middleton, Centre for Research in Social Policy, Loughborough University (1998) DfEE.

⁶ Para 2.31.

to organise their business. It also doubted whether legislation would be effective as there was little evidence that the problem had been eliminated in those countries which had introduced laws on the subject. The Institute did state that discrimination in all its forms was wrong and can be damaging to individual enterprises and the economy. It was legitimate, however, to discriminate on the basis of age on occasions when the job or situation demanded. The Confederation of British Industry (CBI) also supported a voluntary approach. Their Director of Human Resources was quoted as saying that the CBI believed that the eventual Code of Practice will 'help drive attitudinal change and achieve fair treatment for all ages in the workplace'.⁷ The CBI was opposed to legislation because 'the law is a blunt instrument to change outmoded attitudes'.⁸

In contrast there was strong support for legislation from the trade union participants in the consultation. The General Secretary of the Trades Union Congress (TUC) summed up the union point of view in a 1998 statement:

The TUC has long been concerned that the talents and experience of many older working people are being wasted as a consequence of prejudice and misconception. We have no wish to see all aspects of the employment relationship regulated by legislation. But in the case of age discrimination we consider that legislation similar to race and sex discrimination laws would be helpful in changing attitudes.⁹

In November 1998 the Government published a consultation on a *Code of Practice for Age Diversity in Employment*. It is not at all clear how a proposed code of practice on age *discrimination* in employment became a draft code of practice on age *diversity* in employment. It perhaps reflected the Government's unwillingness to take effective action against the causes of discrimination. Rather they appeared to be concerned with encouraging employers to realise the advantages of an age diverse workforce and encouraging them to adopt policies that would achieve this.

It can be argued that there is a conflict between encouraging an age diverse workforce and ending age discrimination and an apparent refusal to see this conflict is a theme that runs through much of the Government's and the European Commission's policies.¹⁰ If the policy objective is to encourage age diversity then it may be necessary to discriminate in order to achieve this, e.g. making a decision to recruit from a certain age group at the expense of other age groups in order to balance the workforce. This conflict has reduced the effectiveness

⁷ Mr John Cridland, CBI press release (June 1999).

⁸ CBI press briefing (16 November 1998).

⁹ TUC press release (30 January 1998).

¹⁰ The European Commission has organised an EU wide campaign called 'For Diversity, Against Discrimination'.

of the Framework Directive and it will limit the effect of the UK Age Regulations.

B. Towards Equality and Diversity

In December 2001 the Government published a further consultation document titled 'Towards Equality and Diversity'.¹¹ It was concerned with implementing the Race Directive¹² and the Framework Directive.

Apart from a general summary of the approach to implementing these Directives, the consultation document contained one chapter¹³ on some specific issues relating to age. This began with the statement that 'we intend to legislate to tackle age discrimination at work and in training'. This, of course, was a major step forward, and was the result of the adoption of the Framework Directive in 2000. It was also clear, however, that the voluntarist route had failed and that the only way in which age discrimination was going to be effectively tackled was through legislation. It is, however, impossible to know whether the UK Government would have progressed to this stage without the need to transpose the Framework Directive.

Towards Equality and Diversity was a document which was clear in its appraisal of what was likely to come. The justification for the proposed legislation was a business one. Diversity is good for business and anti discrimination legislation is one part of achieving that diversity. It is this approach that has consistently shaped the decisions reached by the Government in its progress towards the adoption of Age Regulations. The document states, in relation to age, that 'we need to be clear about what we are trying to achieve with legislation'. The answer was to identify and prohibit unfair practices based on discriminatory attitudes or inaccurate assumptions. There was, however, recognition that there may be differences in treatment that could be justified. These include, firstly, those initiatives that improve the opportunities of people to enter work or training and, secondly, those employment practices which can be 'clearly and objectively justified'. Thus 'a key goal' of the consultation was to identify which types of treatment were 'acceptable' and which were not.

¹¹ DTI, *Towards Equality and Diversity; Implementing the Employment and Race Directives* (2001).

¹² Directive 2000/43/EC of 29 June 2000 which concerned the principle of equal treatment between persons irrespective of racial or ethnic origin.

¹³ Chapter 15.

C. Age Matters

In July 2003 the Government published its next consultation, *Age Matters*.¹⁴ Again, it is interesting to consider the approach as stated in the document. The proposals aimed to:

- (a) strike the right balance between regulating and supporting new legislation through other measures designed to achieve culture change
- (b) achieve as coherent an approach as possible across all the equality strands, since that should reduce costs for business and bureaucracy for individuals.

It would have been refreshing if one of the aims had been, in accordance with the Directive, to protect and promote individuals' rights not be discriminated against on the grounds of age. Instead we have a 'pragmatic' approach that seeks to balance the effectiveness of legislation with the need not to impose too much of an extra burden in terms of costs or 'bureaucracy'.

It was to be possible to treat people differently on the grounds of age if the employer could justify doing so by reference to specific aims which were appropriate and necessary. These aims could be:

- (1) health, welfare and safety, e.g. the protection of younger workers;
- (2) facilitation of employment planning, e.g. where a business has a number of people approaching retirement at the same time;
- (3) the particular training requirements of the post in question, including those that have lengthy training periods and require a high level of fitness and concentration;
- (4) encouraging and rewarding loyalty;
- (5) the need for a reasonable period of employment before retirement.

Certain discriminatory laws may also be capable of objective justification, e.g. the national minimum wage where younger people receive a different rate can be justified because it helps younger workers to find jobs in competition with older workers.

The consultation document also contained a proposal for an alternative approach to just removing the mandatory retirement age. It is worth noting that the document quotes the Green Paper *Simplicity, Security and Choice*¹⁵ as stating that:

Under the Directive, compulsory retirement ages are likely to be unlawful unless employers can show that they are objectively justified.

¹⁴ DTI, *Equality and Diversity: Age Matters* (July 2003).

¹⁵ DWP, *Simplicity, Security and Choice: Working and Saving for Retirement* (2004).

Thus there was likely to be a need for objective justification for any rule that makes it compulsory for an individual to retire at a certain age. The majority of respondents to the consultation had been opposed to allowing employers to retire employees at a certain age. The consultation proposed that compulsory retirement age be made unlawful but that employers could require employees to retire at a default age of 70 years, without having to justify their decision. How this differs from a mandatory retirement age is difficult to comprehend. It is difficult to see how it could have been justified as a proper implementation of the Directive. How would the Government have been able to justify the age of 70 years in some future legal challenge. Why 70, rather than 69 or 71?

Other proposals in the consultation document were that the age restrictions on making a claim for unfair dismissal should be removed (except of course for the moment when an employee is retired) and that the age related aspects of the basic award element of unfair dismissal compensation be removed. Perversely the Government also then proposed to keep the 20-year limit on the length of service that counts towards the basic award, thus continuing to discriminate against younger and older people. A similar approach was also proposed for statutory redundancy payments, which contained a significant age element, where half a week's pay is given for each year of service between the ages of 18 and 21 years, one week's pay¹⁶ for service between the ages of 22 and 40 years and one and a half week's pay for each year of service between the ages of 41 and 65 years, although there was a steep tapering off of benefits for the year before retirement age. The age limits were to be removed, but, in an astonishing piece of parsimony, the Government proposed changing the payment to one week's pay per year of service for everyone. This had the effect of removing the age differential, but potentially made the situation worse for every worker over the age of 41 years who would see their entitlement cut. This appeared to be in contradiction of Article 8(2) of the Framework Directive which states that:

The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

The response to this consultation was published in 2005.¹⁷ This was the final statement of views before the publication of the Age Regulations. Generally, the 427 respondents welcomed the proposals to outlaw age discrimination, but there were clearly uncertainties and differences of opinion. This may be partly a result of the Government only consulting on the economic/business case for legislation,

¹⁶ Subject to the statutory maximum for a week's wage.

¹⁷ DTI, *Equality and Diversity: Age Matters Age Consultation 2003 Summary of Responses* (2005).

rather than any other more fundamental approach. Difficulties generally that were listed included:

- (i) difficulties in understanding how one could justify direct discrimination and, indeed, the fact that it was possible in the first place.
- (ii) the proposed specific aims which might justify differences in treatment¹⁸ were supported by employers and employer organisations, but opposed by the TUC, other than any concerned with the health and safety of young workers. This is a division that repeats itself elsewhere in regard to the retirement age.
- (iii) whether there should be an upper age limit on training and education opportunities. Such upper limits were opposed by a number of organisations, including the Policy Research Centre on Ageing and Ethnicity which wanted the abolition of the upper age limit of 54 years for student loans in higher education. An opposing view was put by employers who were concerned about financing training or education within too soon a period before the employee was due to retire.
- (iv) several trade unions expressed the view that retaining a lower rate for the national minimum wage was discriminatory.
- (v) a number of unions and others favoured extending the legislation to include goods and services.

The document also discussed issues around the retirement age. A majority of respondents¹⁹ were in favour of a default retirement age, although almost two thirds were against having that age set at 70. Some 82.4% of respondent employers opposed a higher default age.

When it came to unfair dismissal and redundancy payments, there were a large majority of respondents in favour of removing the age aspects of redundancy payments and the basic award for unfair dismissal.²⁰ There was also a large majority who thought that an employer who dismisses employees on grounds of retirement should be able to defend the dismissal as fair.²¹

Almost three quarters of respondents were in favour of allowing employers to apply an upper age limit to recruitment if they could justify doing so by reference to aims set out in the legislation. A number of organisations responded by connecting the upper age limit to issues of retirement. If there were no mandatory

¹⁸ Health, safety and welfare; facilitation of employment planning; the particular training requirements of the post in question; encouraging and rewarding loyalty; the need for a reasonable period of employment before retirement.

¹⁹ Yes: 51.8%; no: 42.9%.

²⁰ 74.3% in favour of removing the age elements of the basic award; 79.1% in favour of making service below the age of 18 years count for the purposes of redundancy payments.

²¹ 66% in favour; 30.5% against.

retirement age, then it would be more difficult to justify having an upper age limit on recruitment. Lastly the document looked at pay and non-pay benefits where a large majority (77.7%) of respondents were in favour of a justification defence for basing some pay and benefits on length of service or experience, even though it might amount to direct discrimination.

It is self evident that if you set the agenda in a certain context, then the responses to a consultation such as this will be within that context. The Government context has been one concerned with encouraging diversity. In order to encourage this diversity there may need to be exceptions made to the general principle of non-discrimination. To do otherwise would, according to this standpoint, inhibit the development of an age diverse workforce. Sometimes exceptions are made, therefore, which are to the long term benefit of the group affected by these exceptions. There is an almost irresistible attraction to this argument. There is a default retirement age in order to save the dignity of employees, so that they do not end their careers going through a disciplinary or dismissal procedure because of their failing competence. Employers are to be allowed to make exceptions to facilitate staff planning, so that young people will be able to enter work forces, albeit at the expense of the older worker. Training opportunities can be withheld from older workers because there is not enough time for the employer to gain an adequate return on their investment. All these measures will work positively towards diversity, but how different the approach might have been if one started from an individual rights perspective, where each individual has the right not to be discriminated against for reasons connected to group stereotyping. This latter approach would argue that the ending of age discrimination is the first priority and thus these exceptions would not be permitted. If age discrimination is ended it is possible that an age diverse workforce would follow. It should not be used as a tool to create the desired diverse work force.

4. THE EMPLOYMENT EQUALITY (AGE) REGULATIONS 2006²²

Evidence that the Government has been sympathetic towards the employer's agenda in dealing with age discrimination is provided by the responses to the 2005 consultation on its draft age regulations, called *Coming of Age*. The Confederation of British Industry stated in its response:

The *Age Matters* and *Coming of Age* consultations, as well as the ongoing dialogue that has been conducted with employers and other parties, have been highly beneficial in producing draft regulations that take business concerns into account as well as combating age discrimination.

²² SI 2006/1031.

The Engineering Employers Federation (EEF) also responded by saying that the:

EEF is pleased to record its appreciation that the DTI has listened to many of the concerns of employers in formulating the draft Employment Equality (Age) Regulations.

In contrast the Trades Union Congress (TUC) stated that ‘the responses of the TUC and the unions to previous consultations have been effectively rejected’, whilst another trades union, NATFHE,²³ stated that:

Our overall response to the draft age regulations is one of great disappointment. An opportunity to right some of the historical inequalities related to age has been largely squandered in an effort to keep those employers who are not committed to age diversity from protesting.

It appears that, perhaps partly to limit employer opposition and partly to encourage its diversity agenda, the Government has produced Regulations that effectively legitimise age discrimination in employment. Prior to the introduction of the Regulations there were some statutory areas that introduced age restrictions into employment rights, such as sections 109 and 156 Employment Rights Act 1996 in relation to the right not to be unfairly dismissed and the right to receive redundancy payments. The situation now is that there is to be significant age discrimination introduced by Regulation and which, in the name of diversity, will have the effect of legitimising discrimination against individuals and groups solely because of their chronological age. These can be seen in the provisions concerning direct discrimination, objective justification and retirement. The Government, in its consultation document,²⁴ states that it has followed the approach adopted in the Regulations concerning sexual orientation and religion or belief.²⁵ It is the places where it has not followed the approach in these other Regulations that one can identify the exceptions and understand how discrimination on the grounds of age is to be treated in a different way to all other grounds of discrimination upon which there is legislation.

A. The Meaning of Discrimination

As with the other Regulations protection is offered against direct and indirect discrimination, harassment and victimisation. The definition of direct and indirect discrimination is the same. The difference is that, unlike other forms of

²³ National Association of Teachers in Further and Higher Education.

²⁴ DTI, *Equality and Diversity: Coming of Age Consultation on the draft Employment Equality (Age) Regulations 2006* (July 2005).

²⁵ Employment Equality (Sexual Orientation) Regulations, SI 2003/1661, and Employment Equality (Religion or Belief) Regulations, SI 2003/1660.

discrimination,²⁶ it is to be permissible to directly discriminate on the grounds of age in some circumstances. There is a requirement to show that the less favourable treatment is a 'proportionate means of achieving a legitimate aim'.²⁷ The Regulations use the word 'proportionate' rather than those used in the Directive, which are 'appropriate and necessary'. The Government's notes attached to the Regulations state that this was because the Court of Justice used these two phrases interchangeably. 'Appropriate and necessary' might, according to the notes, impose too strict a test by suggesting that the legitimate aim should be essential. The word 'proportionate' is preferred because it suggests a balancing between the discriminatory effects and the importance of the aim pursued. This, perhaps, is an example of a rather less than strict approach to ending discrimination.

In the 2005 draft Regulations the Government had proposed some examples where direct discrimination could be justified as a proportionate means of achieving a legitimate aim. These were, firstly, the setting of age requirements to 'ensure the vocational integration of people in a particular age group'. This might include, presumably, the lower rate of the national minimum wage paid to those under the age of 22 years. Secondly, the fixing of a minimum age to qualify for certain employment advantages in order to recruit or retain older people. Thirdly, the fixing of a maximum age for recruitment or promotion based on the training requirements of the post and 'on the need for a reasonable period in post before retirement'. All three of these exceptions are, of course, debateable. All three, however, did permit direct discrimination on the grounds of age in the interests of both diversity and, perhaps, acceptability. In the final version of the Regulations, this list has been removed. A list does, however, remain in the Directive so is likely to be relied upon by the courts.

The further matter for concern here is that this was not an exhaustive list. The 2005 consultation document stated that 'we would not want to prevent employers or providers of vocational training from demonstrating that age-related practices could be justified by reference to aims other than those in such a list'.²⁸ An example contained in the 2005 consultation document was that 'economic factors such as business needs and considerations of efficiency may also be legitimate aims'.²⁹ This, combined with a further suggestion in the 2003 Consultation, *Age Matters*, and repeated in the 2005 Consultation, that the 'facilitation of employment planning' might be an example of legitimate justification provide some concern about how far employers will continue to be able to discriminate directly as well as indirectly. It is not conceivable that these exceptions would be allowed for sex, race or disability discrimination or on the grounds of sexual orientation or religion or belief.

²⁶ Except in relation to genuine occupational qualification.

²⁷ Regulation 3(1).

²⁸ Para 4.1.5 (2005) Consultation document.

²⁹ Par 4.1.16 2005 Consultation document.

B. Further Exceptions

Part 2 of the Regulations deals with discrimination in employment and vocational training and provides that it is unlawful to discriminate against applicants and employees, including harassment, on the grounds of age. However Regulation 7(4) provides that applicants who would become employees³⁰ can be excluded from protection if they are older than the employer's normal retirement age or, if the employer does not have such an age, 65 years. It also excludes those who, at the date of application, are within a period of six months of such an age. The justification for this is that there would be little point stopping an employer discriminating on recruitment if the same employer could legitimately discriminate (without it amounting to discrimination) under Regulation 30 (exception for retirement). This is correct, of course, but perhaps the answer would have been not to introduce a default retirement age thus making such a measure as Regulation 7(4) unnecessary. All applicants over the age of 64½ years may be turned down on the grounds of their age only. This also, presumably, means that it may be legitimate for employers to ask a question on the application form concerning whether the applicant is of such an age. Difficulties in obtaining work are amongst the most common forms of discrimination suffered by older people and some discrimination in this area is to be allowed to continue under the new Regulations.

Part 2 also contains an exception, as do other grounds of discrimination, for genuine occupational requirement. The Government has stated that it was likely to be construed narrowly and in one consultation gave the example of the acting profession.

Part 4 of the Age Regulations is devoted to 'general exceptions to parts 2 and 3'.³¹ These are in addition to those already mentioned in respect of direct discrimination. There are exceptions for complying with statutory authority, safeguarding national security and positive action.³² There are also exceptions relating to the national minimum wage, certain benefits based on length of service, retirement, the provision of enhanced redundancy payments and the provision of life assurance to retired workers.³³

Service related pay and benefits is a difficult issue. Their retention is clearly favoured by employers and employees who benefit from them. Such benefits may include salary scales, holiday entitlement, company cars etc, all or some of which may be related to length of service. Without some action benefits linked to

³⁰ Which in this case means those defined in section 230(1) Employment Rights Act 1996 and crown and parliamentary staff.

³¹ Part 3 is concerned with 'Other Unlawful Acts' including aiding unlawful acts and the liability of employers and principals.

³² Regulations 27–29.

³³ Regulations 30–34.

length of service may amount to age discrimination as younger people who have not served the necessary time required may suffer detriment. Whether one approves of this approach or not, to specifically allow them without the need to objectively justify their retention amounts to a further legitimisation of age discrimination.

Thus Regulation 32 provides that an employer may award benefits using length of service as the criterion for selecting who should benefit from the award. Firstly there is no need to justify any differences related to service less than five years. Where it exceeds five years it needs to fulfil 'a business need of the undertaking':

for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers.³⁴

This seems to be a wholly subjective test and will surely be very difficult to challenge. All such benefits are likely to be justifiable in terms of rewarding experience. Even this test, however, is removed for service related differences of five years or less.

It undoubtedly can be argued that having pay scales of a certain length is justified to recognise experience and, maybe seniority. It can even be argued strongly that workers who have been with an employer for five years should receive some preferential treatment compared to those that have just joined an organisation. These are, however, exceptions to a rule requiring the principle of equal treatment and are therefore serious enough to require objective justification, rather than a blanket exemption.

There is also a general exemption concerning the national minimum wage so that employers can pay the lower rate for those under 22 and under 18 years without it amounting to age discrimination.³⁵ It is, of course, age discrimination against the younger person, but he or she will be prevented from claiming this. The intention is to help younger workers to find jobs, by making them more attractive to employers. One question is whether such a measure is a proportionate response to the problem. In *Mangold v Helm*³⁶ the European Court of Justice considered a German law which restricted the use of fixed term contracts, but did not apply these restrictions to those aged 52 years and over. The Court accepted that the purpose of this legislation was to help promote the vocational integration of unemployed older workers and that this was a 'legitimate public-interest objective'. It is not only the objective that needs to be legitimate, but the means used to achieve the objective need to be 'appropriate and necessary'. The

³⁴ Regulation 32(2).

³⁵ Regulation 31.

³⁶ Case C-144/04 [2006] IRLR 143; see also Marlene Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment' (2006) 7 *German Law Journal* 505–23.

problem with the German law was that it applied to all workers of 52 years and above, whether unemployed or not. The result was that a significant body of workers was permanently excluded from 'the benefit of stable employment' available to other workers. The Court then stated:

In so far as such legislation takes the age of the worker concerned as the only criterion [for the application of a fixed-term contract of employment], when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective [which is the vocational integration of older workers], it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued.

There must be a question about whether the application of a universal lower minimum wage for younger people is an appropriate and necessary response to the problem of youth unemployment.

One of the difficult issues that appears to have delayed the adoption of the new Age Regulations was the question of what to do about the age related aspects of redundancy payments. The Government had proposed removing these and paying a uniform rate for all. Presumably when faced with the prospect of levelling upwards, so that no group would be worse off, the Government has decided that the age related aspects are now possible and can, presumably, be objectively justifiable. The lower and upper age limits to entitlement are to be removed and employers are to be allowed to enhance payments.³⁷

C. Retirement

According to the 2005 Consultation document the Framework Directive 'allows age discrimination if it can be objectively justified'.³⁸ The Government obviously is convinced that the proposed national default retirement age can be so justified. It will be difficult to argue that the allowing of compulsory retirement does not amount to less favourable treatment. It must therefore be able to objectively justify the introduction of this new concept of a national default retirement age. Employers and employees can agree about retirement and then the default retirement age need not apply, although compulsory retirement before the age of 65 years is to become unlawful, without further justification.

The Framework Directive does not say a great deal about retirement ages. Paragraph 14 of the Preamble states that the Directive shall be 'without prejudice to national provisions laying down retirement ages'. Article 6(2) allows for

³⁷ Regulation 33.

³⁸ Para 6.1.3.

the fixing of ages for invalidity and retirement schemes, and the use of ages for actuarial calculations, without it constituting age discrimination. Article 8(2) provides that any measures implementing the Directive shall not lessen the protection against discrimination that already exists in the Member State.

Unfortunately for the United Kingdom Government, there have been no national provisions laying down a retirement age. Most retirement ages are a matter of contract and are, ostensibly, a matter for negotiation between the employer and the employee or the employee's representative. A significant minority of people do not, however, have such a term in their contract of employment. It is difficult to see how a national default retirement age can be introduced without it being seen as a worsening of the position of those people without one prior to the Age Regulations.

In adopting the policy of introducing a default retirement age the Government has entirely adopted the concerns of employers. The 2005 Consultation document stated that:

In setting the default age, we have taken careful note of a number of representations we received in the course of consultations, which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. *This is our primary reason for setting the default retirement age* (italics added).³⁹

It will be interesting to see how the Government argues that employers lack of best practice amounts to objective justification for introducing the national default retirement age, in any future challenge at the European Court of Justice.

The fact that employers' concerns have been adopted can be seen in the responses to the 2003 Consultation. Most of the employer responses supported the introduction of the default retirement age and all the trade unions who responded opposed it. The employers were concerned with how to end peoples' careers with dignity, rather than through disciplinary procedures. There was a general assumption that older workers would decline in competence and capability as they aged, but would nevertheless wait to be dismissed or retired rather than leave voluntarily. Thus the British Hospitality Association stated that there were bound to be circumstances where employees wished to continue working and the employer wished them to retire. Having to go through the formal disciplinary procedure on competence grounds may be much more distressing than having to retire at a certain age. British Energy stated that 'we would not want to resort to using our capability/competence procedure for long serving loyal employees who chose to stay on to a point where it affects their ability to do the

³⁹ Para 6.1.14.

job effectively. The effect would be very negative on staff morale generally if this were to happen in organisations'. The Food and Drink Federation was also concerned that employees kept on at the moment until retirement would lose out. They stated that 'we think that the abolition of the mandatory retirement age would send entirely the wrong signal. We believe that the focus of this legislation should be ensuring fair treatment for older employees in their employment'.

In contrast to this the TGWU stated that:

the T&G has grave concerns that allowing a default mandatory retirement age of 70 [which was proposed at the time] will have the effect of creating a legislative justification for age discrimination. We are unclear why the government proposes to allow discrimination against 70 year olds when it is outlawing it for workers in their 60s, and we believe that the government's approach should instead emphasise choice for older workers, and a flexible period of retirement for people aged 50+. We want to encourage collective agreements in this area; failing competency is a completely different issue from ageing and the two should be clearly separated;

Most other unions supported this call for flexibility, such as the GMB which stated that some members look forward to a fixed retirement age and others wanted more flexibility: 'The GMB wants to see a framework which enables employers and trade unions to come together to develop a flexible approach to retirement. This would enable older workers to scale down their activity gradually by working part-time.'

The Government proposes to review the default retirement age after five years. Until then employers will be able to enforce retirement at the age of 65 years, and at other ages if this can be objectively justified. It is possible to view the employers' arguments in favour of the retirement age with scepticism, but it must be accepted that the abolition of a mandatory retirement age would cause problems for employers, especially small ones. The 'dignity' argument may also be accepted in a number of cases. These arguments, however, have to be balanced against the effect of mandatory retirement on employees who do not wish to retire. The effect of retirement upon individuals may also be significant when forced to leave the workforce. In this debate the Government has accepted, at least until 2011, the employers' view, but this must be at the expense of employees for whom the default retirement age represents another form of age discrimination at work.

Thus we are to have a default retirement age of 65 years. Retirement below the age of 65 years will need to be objectively justified and presumably this will be entirely possible and proper in some cases. Section 98 of the Employment Rights Act 1996 is amended to add another fair reason for dismissal which will be 'retirement of the employee'. There is, however, no requirement to go through any statutory dismissal procedure. This is replaced by a statutory

retirement procedure as outlined in new sections 98ZA to 98ZF of the Employment Rights Act.

For retirement to be taken as the only reason for dismissal, it must take place on the 'intended date of retirement'. There is still the opportunity for the employee to claim that the real reason for dismissal was some other reason and that the planned retirement would not have taken place but for this other reason, or if the dismissal amounts to unlawful discrimination under the Regulations. This will not be easy and the 2005 Consultation states that there will be a heavy burden of proof on the employee. The operative retirement date is 65 years unless there is an alternative date which is the normal retirement age, in which case it is that date.⁴⁰ There is then a procedure in which the employer and employee must participate. Failure on the employer's part in this regard may render the dismissal unfair.

The statutory retirement procedure comprises a duty on the employer to consider a request from the employee to work beyond retirement.⁴¹ There is a duty upon the employer to inform the employee of the intended retirement date and the employee's right to make a request. There is then a statutory right for the employee to request that he or she be not retired on the intended retirement date. The employer then has a duty to consider this request. This is done by holding a meeting with the employee, unless not reasonably practicable. There is also an appeal procedure for the employee if turned down and timescales for meetings and decisions. Most notably there is an absence of criteria to be used by the employer in their consideration of the employee's request. There only duty is to follow the procedure and consider it.

Thus the situation will be that where there is no consensual retirement, the employer may dismiss the employee and this dismissal will be a 'fair' dismissal provided it takes place on the retirement date and the employer has followed the statutory retirement procedure for consideration of any request from the employee not to retire. The Government's 2005 Consultation document stated that 'We want to encourage employers and employees to extend working life beyond the national default retirement age'. It is difficult to comprehend this measure achieving this objective, given the employers' enthusiasm for a default retirement age in response to the Government's 2003 consultation.

The most likely outcome of any decision by the employer not to require the employee to retire at the intended retirement date is for the employer to agree a new date. In effect this will allow the employee to continue his or her contract for a fixed term.⁴²

⁴⁰ Sections 98ZA–98ZE Employment Rights Act 1996 as amended.

⁴¹ Schedule 6 of the Age Regulations; Schedule 7 makes provision for transitional arrangements.

⁴² Schedule 6 of the Age Regulations.

Thus older workers, i.e. those over 65 or the normal retirement date, will continue to be discriminated against. This will be as a result of the Age Regulations which were, perhaps ostensibly, intended to stop age discrimination. Older workers will have no security, knowing that their employer can legitimately dismiss them at each new retirement date, provided a procedure of information and consideration is followed.

5. CONCLUSION

One should not underestimate what an important first step these Regulations are in making discrimination on the grounds of age both unlawful and unacceptable.

There are, however, very important limitations upon their effectiveness. These limitations include, firstly, a limitation to employment and occupation, thus excluding the supply of goods and services. This, of course, may change when the promised single equality act is introduced in the future, but the current limitation puts age firmly at the bottom of any hierarchy of types of discrimination. Secondly, direct discrimination can be justified if it is a proportionate means of achieving a legitimate aim. Thirdly, older applicants for jobs may be turned down because of their age (Regulation 7(4)); Fourthly, there is an entire part of the Regulations (Part 4) which lists exemptions comprising some eight separate clauses, in comparison to the Regulations on Religion and Belief⁴³ and also those concerned with Sexual Orientation,⁴⁴ which have three such clauses. These exemptions reflect the complexity of regulation in this area, but include discrimination against the young, in terms of the lower rate of national minimum wage and the provision of benefits for long service. Fifthly, a default retirement age is introduced. It is difficult to see this as any thing but a national retirement age which must be open to challenge as an inadequate implementation of the Framework Directive. Finally the position of those workers aged 65 and over continues to be weak. They are to negotiate continuation of their working lives from a position of considerable weakness and the provisions removing the upper limit on unfair dismissal claims could turn out to have little meaning. It is inevitable that there will be litigation concerning the effective implementation of the Directive in some respects, but the ending of age discrimination in employment requires the Government to go further than the Directive and reduce the number of possible exceptions.

⁴³ SI 2003/1660.

⁴⁴ SI 2003/1661.

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