

Age Discrimination

An overview of the Employment Equality (Age) Discrimination
Regulations 2006

Background

The UK historically has not had any legislation prohibiting discrimination on the grounds of age.

The Government published a voluntary code of practice, the Code of Practice on Age Diversity in Employment in 1999, after consulting key employer and employee representative groups. Since the enactment of the EU Framework Employment Directive¹ in 2000, however, the Government has been required to implement legislation prohibiting age discrimination by December 2006.

So far in the process leading up to the introduction of anti age discrimination legislation, there has been an initial consultation process (called "Age Matters"). This came to an end on 20 October 2003. This led to the publication of the draft regulations, the Employment Equality (Age) Regulations (the "Regulations") for the purposes of a second consultation which ended on 17 October 2005.² A final draft of the Regulations were prepared based on the outcome of this consultation and these were laid before Parliament on 9 March 2006. The Government's stated intention is to bring them into force on 1 October 2006.

The Government has indicated that both the DTI and ACAS will produce guidance for employers on how to comply with their obligations under the new legislation, once the Regulations are in force.

This briefing note refers to the Regulations throughout, meaning the Employment Equality (Age) Regulations 2006.

Basic framework

The basic framework of the Regulations follows the format of the other anti-discrimination legislation in the UK. The Regulations only seek to outlaw discrimination in the areas of employment, vocational training and occupational pensions, however, and do not have the wider remit that is found in the Sex Discrimination Act, the Race Relations Act and the Disability Discrimination Act.

Scope of protection

The Regulations aim to provide protection for the following categories of individual:

- employee and former employees;
- workers;
- applicants for work;
- office holders;
- individuals undertaking or applying for employment related training;

¹ EC 2000/78

- people undertaking or applying for courses in further and higher education (but not schools); and
- members and applicants to become members of professional bodies and trade unions/organisations.

Organisations which will need to comply with the new obligations therefore include:-

- employers;
- providers of vocational training and further and higher education institutions; and
- trade unions, professional associations and employer's organisations.

In the employment context, individuals are protected in the process of applying for employment, throughout the employment relationship and after it has finished, with regard to³:

- the arrangements made for recruitment;
- the terms of any offer of employment;
- any refusal not to offer employment;
- opportunities for promotion, transfer, training or receiving any other benefit;
- subjecting the employee to any detriment;
- dismissal (including constructive dismissal⁴); and
- subjecting the employee to a post-termination detriment.⁵

Forms of discrimination

Direct discrimination

Direct discrimination on the grounds of age will become unlawful. The definition of direct discrimination used is the same as that found in the other anti-discrimination legislation, namely:

A person ("A") discriminates against another person ("B") if on the grounds of B's age, A treats B less favourably than he treats or would treat other persons.⁶

Essentially this means that B must be able to compare themselves with an actual or hypothetical comparator who is a different age and show that he was treated less well than that comparator because of his age. As with the other types of anti-discrimination legislation, providing B can show a difference in treatment that appears to be related to his age, the

² Equality and Diversity: Coming of Age

³ Regulation 7

⁴ Regulation 7

⁵ Regulation 24

⁶ Regulation 3(1) (a)

difference in treatment will be assumed to be based on age unless the employer is able to provide a satisfactory alternative explanation.⁷

The Regulations also make it clear that the phrase "B's age" includes B's apparent age, so that less favourable treatment of someone because they have the appearance of being a particular age, even though they are in fact younger or older, will also be covered.⁸

A major difference between the treatment of direct discrimination in the Regulations and in the other types of anti-discrimination legislation however, is the fact that direct age discrimination will not be unlawful if the employer can objectively justify it, or as the Regulations put it, where:

*A can show the treatment is a proportionate means of achieving a legitimate aim.*⁹

This is explained further below in the section on Objective Justification. In addition to the general ability to justify age discrimination there are also a number of specific exemptions throughout the Regulations, far more than in the other anti-discrimination legislation. These are dealt with in the specific issues section of this briefing note.

Indirect discrimination

Indirect discrimination based on age will also become unlawful when the Regulations come into force. Again the approach used in the Regulations is the same as in the legislation prohibiting discrimination on the grounds of gender, race, sexual orientation and religion or belief. Indirect discrimination arises when an employer applies an apparently neutral provision equally to all employees, but where the actual effect is not neutral. If an employee can demonstrate that the provision puts people of a particular age at a disadvantage and that he/she is personally affected, this will constitute indirect discrimination.

The definition of indirect discrimination in the Regulation states:

A person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B but:

which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

which puts B at that disadvantage.¹⁰

⁷ Regulation 37(deals with the burden of proof)

⁸ Regulation 3(3)(b)

⁹ Regulation 3 (1)

The use of the phrase “age group” is interesting. The Regulations state that this refers to a group of persons defined by reference to age, whether by reference to a particular age or a range of ages.¹¹

An example of potential indirect discrimination in the age context is the use of length of service as a criterion. The younger an employee, the less likely it is that he or she will have built up continuous service with a single employer and so younger employees will be indirectly discriminated against whenever length of service is used.

Another example is where an employer requires applicants for a courier job to have had a driving licence for a minimum of five years. Although this requirement does not mention age specifically, it is likely that a higher proportion of those aged over 30 will be able to satisfy this requirement than those aged under 30.

As with the other anti-discrimination legislation, an employer will be able to justify indirect discrimination on objective grounds. The same justification provision applies as for direct age discrimination, so that indirect discrimination will not be unlawful if:

A can show the provision, criterion or practice [being applied] is a proportionate means of achieving a legitimate aim.

As with direct age discrimination there are also a number of specific exemptions contained in the Regulations where indirect age discrimination is deemed to be lawful providing certain statutory conditions are met. These are dealt with in the section on specific issues.

Intention to discriminate

A new form of wording is introduced for the first time in these Regulations in a specific provision that seeks to outlaw the situation where an employer instructs an employee to discriminate against an individual on the grounds of age.¹² It is thought that this provision is intended to make it clear that the type of scenario that arose in the case of *Weathersfield v Sargent* is not acceptable. In that case a white receptionist at a vehicle rental company was told to tell black and Asian customers that no vehicles were available. The receptionist resigned in protest and won a claim for compensation under the Race Relations Act 1976.

¹⁰ Regulation 3(1)(b)

¹¹ Regulation 3(3)(a)

¹² Regulation 5

Victimisation

As with the other forms of anti-discrimination legislation, the Regulations provide protection for an employee who has raised a complaint of age discrimination. The relevant provision¹³ follows the format of the existing anti-discrimination legislation and seeks to protect any individual who has made a complaint of age discrimination to his or her employer, brought proceedings under the Regulations or who has assisted another in doing so.

Harassment

The new stand-alone definition of harassment found in the other types of anti-discrimination legislation is also found in the Regulations as follows:

A person ("A") subjects another person ("B") to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of:-

- *violating B's dignity;*
- *creating an intimidating, hostile, degrading or humiliating or offensive environment for B.*¹⁴

For the purpose of this definition, conduct is assumed to violate B's dignity or to create a hostile environment only if it should be reasonably considered to do so, taking into account all the circumstances including in particular the perception of B.¹⁵

The intention is to cover "age-related" banter and jokes which are genuinely found to be offensive, but without imposing an unreasonable restriction on what can be said in the workplace. This is clearly an area of interest as currently age-related banter is not generally perceived as offensive in the same way as, for example, language and jokes which are sexist or racist.

For more information about harassment please refer to our specific briefing note on this topic.

Enforcement of the regulations

Enforcement of the rights that are created by the Regulations is, for the most part, through the employment tribunal system. Consistent with other forms of discrimination, the tribunal has the scope to award potential claimants with unlimited compensation in cases of age discrimination. There is also a pre-claim questionnaire procedure as with the other forms of anti-discrimination legislation.

¹³ Regulation 4

¹⁴ Regulation 6 (1)

¹⁵ Regulation 6 (2)

Objective justification of age discrimination

As described above, the Regulations allow for both forms of discrimination, direct and indirect, to be lawful where the employer can provide objective justification for the discrimination. The formula that is used in the Regulations provides that discriminatory treatment (whether direct or indirect) will not be unlawful where the employer can demonstrate that:

- the treatment is in pursuit of a legitimate aim;

and

- the treatment is a proportionate method of achieving that aim.

Legitimate aims

It had been anticipated that the Government would provide a “list” of legitimate aims within the body of the Regulations, the pursuit of which would justify discriminatory treatment on the grounds of age. This is not the approach that has been adopted. Instead there is no limit on the potential aims that can be used to seek to justify age discrimination.

However, examples of aims which the Government considers are legitimate are given in the consultation document and include¹⁶:

- health, safety and welfare – for example, the protection of younger workers;
- facilitation of employment planning – for example, where a business has a number of people approaching retirement age at the same time;
- encouraging and rewarding loyalty; or
- recruiting or retaining older people.

The consultation document says that:

A wide variety of aims may be considered to be legitimate. The aim must correspond with a real need on the part of the employer. Economic factors such as business needs and considerations of efficiency

¹⁶ Equality and Diversity: Coming of Age paragraph 4.1.17 page 33

may also be legitimate aims. However, discrimination will not be justified merely because it may be more expensive not to discriminate.¹⁷

The consultation document also goes on to say that the legitimate aim cannot be related to age discrimination and gives as an example the case where a retailer of trendy fashion wants to employ young shop assistants because it believes that this will contribute to its aim of targeting young buyers. The consultation document says that trying to attract a young target group will not be a legitimate aim because this has an age-discriminatory aspect.¹⁸

Proportionality

It is not sufficient for the employer to rely on the argument that he or she is pursuing a legitimate aim. The employer must also demonstrate that the discriminatory treatment is a proportionate method of achieving that aim. The Government considers that this has a number of aspects including:

- *the discriminatory treatment must actually contribute to the achievement of the legitimate aim;*
- *the importance of the legitimate aim being pursued should be weighed up against the discriminatory effects. For instance if the legitimate aim is the protection of people's lives, it is likely that a bigger discriminatory effect will be permissible than where the legitimate aim is rewarding employee's loyalty;*
- *where the legitimate aim can be achieved equally well by a measure that has a big discriminatory effect and a measure that has a small discriminatory effect (or does not discriminate at all) the latter should be used.¹⁹*

This guidance on proportionality is contained in the consultation document and not in the Regulations themselves.

Specific issues

The Regulations and the accompanying consultation documentation address a number of specific issues which arise as a result of the prospect of prohibiting age discrimination. These include:

¹⁷ Equality and Diversity: Coming of Age paragraph 4.1.16 - page 33

¹⁸ Equality and Diversity: Coming of Age paragraph 4.1.18 – page 34

¹⁹ Equality and Diversity: Coming of Age paragraph 4.1.20 - page 34

- recruitment and promotion;
- pay and benefits;
- retirement; and
- the eligibility of employees to claim unfair dismissal or a statutory redundancy payment and the calculation of unfair dismissal compensation and statutory redundancy payments.

This section of this briefing note deals with each of these issues in turn.

Recruitment and promotion

In addition to the general ability of employers to objectively justify direct and indirect age discrimination, the Regulations include a number of exemptions which apply in a recruitment context.

Specific loophole

There is currently a specific provision in the Regulations such that an employer will not be held to have discriminated against an applicant for employment if he or she is:-

- aged over the employer's normal retirement age or,
- in the absence of a normal retirement age, aged over 65, or
- if he or she would have reached the normal retirement age or 65 within 6 months of the application to the employer.

This will be the case even if the employer's sole reason for not choosing the applicant is because of his or her age.²⁰

GORs

As with the other anti-discrimination legislation, the Regulations include the concept of genuine occupational requirements ("GORs").²¹ These arise where having a particular characteristic is a genuine requirement for a particular role.

For example, in the case of the sex discrimination legislation, choosing an applicant for a job because she is a woman is usually inappropriate and justly unlawful. However, the law recognises that in certain circumstances, being a woman (or conversely being a man) is necessary for a particular role. A typical example would be a woman being employed in a caring role for a female patient.

²⁰ Regulation 7(4)

In the case of age discrimination, it is difficult to identify any professions where age of itself will be a genuine occupational requirement, except perhaps acting.

Positive action exemption

The Regulations contain an exemption for positive action aimed at encouraging persons of a particular age or age group to take advantage of opportunities for doing particular types of work.²² This is not the same as positive discrimination, but will ensure, for example, that advertising campaigns that seek to emphasise the benefits of a particular job for a particular age group will not be outlawed providing the conditions set out in the exemption are met.

Statutory authority exemption

The Regulations contain an exemption which provides that an employer will not be unlawfully discriminating against an individual by imposing an age related requirement in order to comply with legislation.²³ An example is the requirement in licensing legislation requiring a licensee to be at least 21. At the same time as including this exemption, the Regulations also seek to repeal a number of age related provisions in a variety of legislation.

Insurance

The Government recognises that employers need to purchase various different types of compulsory insurance for their employees, such as employers' liability insurance. In some limited circumstances insurance may not be available to provide cover for employees of a certain age or will only be available at much higher premiums. In "Age Matters", the Government had proposed that where compulsory insurance was not available for employees of a certain age, the employer would be justified in not recruiting employees of that age.

This proposal is not specifically reflected in the Regulations because, according to the Government, of the feedback from the initial consultation process. Instead, employers who have this concern will need to ensure that they can justify any discriminatory treatment using the general objective justification provision. It is likely, from the comments made in the consultation documents, that the cost of higher insurance premiums alone will not be sufficient justification.

Pay and Benefits

Another key area where the issue of age discrimination is particularly tricky is the area of pay and benefits. The Regulations contain a number of specific exceptions to the non-discrimination principle in the case of certain practices based on age. The Government also recognises that differences of treatment between employees based on length of

²¹ Regulation 8

²² Regulation 29

²³ Regulation 27

service can amount to indirect discrimination on the grounds of age and so there are also specific exemptions dealing with this.

National Minimum Wage Act exemption

One very simple exemption is where an employer relies on the age-related bandings in the National Minimum Wage Regulations. Employers will continue to be able to pay employees in the lower age groups the minimum wage rate even if employees in the main age group receive more than the minimum wage.²⁴

Any differentiation in the rates paid to employees in the relevant age-related bandings, however, will be discriminatory. So, for example, employers will not be able to pay a 19-year-old less than a 20-year-old doing the same job, unless the employer can objectively justify this using the overarching test of objective justification.

In addition, the exemption will not cover any pay differences between employees in the lower age groups and employees in the upper age group where both groups receive more than the National Minimum Wage.

Length of service²⁵

The Regulations contain an exception which permits employers to lawfully operate different eligibility for pay and benefit using the criterion of length of service, despite the fact that this could constitute indirect discrimination on the grounds of age.

Benefits which are paid to certain employees because of their length of service will automatically be permitted where the disadvantaged employee has less than 5 years' service. In this context, service length will normally be calculated as the length of time the employee has been in a particular post rather than with the employer, although this may amount to the same thing.

The situation is slightly more complicated where an employee has more than 5 years' service, but is nevertheless not eligible for a benefit that other employees receive because their length of service is greater. In this case, for the length of service criterion to be lawful, the employer must show that it "reasonably appears" to the employer that the criterion of length of service "fulfils a business need", such as encouraging the loyalty or motivation, or rewarding the experience of some or all of the employees.

Most commentators agree that this test of "fulfilling a business need" will be easier to satisfy than the main overarching objective justification test that is in the Regulations.

²⁴ Regulation 31

²⁵ Regulation 32

Life Assurance Cover for Retired Workers

An exception has been introduced in respect of the provision of life assurance cover for retired workers who have retired early on the grounds of ill health, which permits employers to arrange for that cover to cease when the worker reaches the normal retirement age (if there is one) or the age of 65.²⁶

Retirement

Compulsory retirement ages

The UK does not have a national mandatory retirement age. In fact, a great deal of confusion exists as to what is meant by the phrase “retirement age”. Its meaning can vary according to the context in which it is used.

Many people think of retirement age as being 65. This is because 65 is the age from which the state pension becomes payable for men. Currently women qualify for payment from age 60, but this is being equalised so that both sexes will only be able to claim state pension from the age of 65 from 2020.

Employees who are members of a pension scheme usually have a normal retirement age under that scheme. This is the age, when they qualify for maximum pension benefits under the particular scheme. It is better to think of this as pension age, rather than retirement age. Occupational pension schemes are currently free to set the ages for admission or entitlement to retirement benefit at the discretion of the scheme. This will not change under the Regulations. Currently however an employee is unable to receive benefits under an occupational scheme unless he or she has given up working for their employer. The Government has separately introduced legislation which will allow people to draw their occupational pension while continuing to work for the same employer. This is due to come into force in April 2006.²⁷

Many employers operate contractual compulsory retirement ages such that when their employees reach a particular age their employment ends automatically. At present, such compulsory retirement ages are lawful. However, the Government recognises that forcing an employee to retire because they reach a specific age is contradictory to the principal of prohibiting discrimination on the grounds of age.

Initially the Government indicated that it was considering three options to deal with compulsory retirement ages including:

- A** The complete abolition of compulsory retirement ages.

²⁶ Regulation 34

²⁷ This has been enacted through tax legislation

- B** Making compulsory retirement ages generally unlawful, but allowing employers exceptionally to be able to set their own compulsory retirement ages if these could be objectively justified.
- C** Introducing a default retirement age of 70 which would work in a similar way to Option B but where employers would only need to objectively justify a compulsory retirement age if it was less than 70. There would be no need to have to objectively justify a retirement age of 70 or above.

The Government has decided that it prefers Option C, but with the default retirement age being 65. This is reflected in the Regulations. The Government has indicated, however, that this is to be reviewed in 2011.

The Government's reasoning is that without a default retirement age, employers would never be able to rely on an employee's retirement as a justification for terminating his or her employment. According to the Government consultation document large numbers of employers raised concerns about this as they consider they would be forced to have to go through the potential indignity of dismissing older workers on competence grounds at the end of their careers rather than allow them to retire naturally when they reach retirement age.

Procedure for requests to work after retirement

The Regulations introduce a new procedure²⁸ through which employers will be required to consider requests from their employees to continue working after the employer's normal compulsory retirement age. The request procedure is similar to that which operates where employees wish to request flexible working arrangements. The key difference in this case is that the employer must initiate the process by telling its employees in writing (not more than one year and not less than six months before the retirement date) that they are due to retire, but have a right to request to work on.

If an employee makes a request to continue working (which must state whether he/she wishes the employment to continue indefinitely, for a stated fixed period, or until a stated date), the employer must meet with the employee to discuss this, provide an answer in writing and offer a right of appeal. The employee has the right to be accompanied during any meetings which take place under this procedure.

There is no compulsion in the Regulations on the employer to grant any requests to continue working after retirement and no requirement that the employer justify a decision not to allow this by reference to any legitimate aim or other provision. The Regulations provide that if an employer fails to comply with the procedure the employee will be awarded up to 8 weeks' pay.²⁹ However, more importantly, if an employer fails to comply with the procedure the consequence is

²⁸ Schedule 6

²⁹ Paragraph 11, Schedule 6

that the employee is likely to be deemed to be unfairly dismissed under the new unfair dismissal retirement provisions referred to below.³⁰

Where an employee's request to work longer is granted and the employee stays on for longer than six months, the employer must go through the process of notification again, six months to a year ahead of the new retirement date. The employee can make again make a request to work on. In fact, there is no limit on the number of temporary extensions that can be granted.

Transitional Provisions – for Retirement Dates before 1 April 2007

The Regulations provide for a transitional period with regard to retirement dismissals, which will run from 1 October 2006 when the Regulations come into force, and 1 April 2007. Throughout this transitional period, in order for a retirement dismissal to be fair the following procedures must be followed:-

Notice given before 1 October 2006 – for Retirement before 1 April 2007

If an employee is given notice before 1 October 2006 that they are to retire after 1 October 2006 but before 1 April 2007, the notice given must be at least the period required by the contract of employment or where the period of notice required is greater than 4 weeks, at least 4 weeks.

On the 1 October 2006 or as soon as practicable afterwards the employer must write to the employee advising them of their rights to request to continue working. The employee can make the request after the contract has been terminated but no more than 4 weeks afterwards.

The meeting to discuss the request and any subsequent appeals must be held within a reasonable period.

Notice given after 1 October 2006 – for Retirement after before 1 April 2007

If the employee is given notice after 1 October 2006 that they are to be retired before 1 April 2007 the employer must write to the employee notifying them of the intended retirement date, giving the longer of either the contractual or minimum statutory notice periods, and inform the employee in writing that he/she has the right to request to continue working.

An employee who wants to exercise the right to continue working must make a written request where possible, 4 weeks before the intended retirement date or as soon as reasonably practical after being notified of the right to request. The request can be made after the employee's contract has been terminated but no more than 4 weeks afterwards.

³⁰ Schedule 6

Again, a meeting to discuss the request and any subsequent appeals must be held within a reasonable period.

Unfair dismissal and redundancy

Eligibility for Unfair Dismissal

The issue of compulsory retirement ages is very closely related to the eligibility of employees to claim unfair dismissal. Under the current legal framework, employees are prevented from claiming unfair dismissal once they have reached the normal retirement age for their job or the default age of 65. This is due to the provisions of section 109 of the Employment Rights Act 1996.

This statutory provision effectively means that an employee cannot complain about the fairness of his or her dismissal once they have exceeded the relevant age. This provision has been needed to prevent an employee claiming unfair dismissal whenever he or she retires, but also has the effect of preventing the employee bringing a claim even if the dismissal is not related to his or her retirement, but is instead on other grounds such as conduct or capability which a younger employee would be able to challenge. The Government recognises that this rule is incompatible with a policy of outlawing age discrimination.

This was the issue that was highlighted in the case of *Rutherford and Bentley v Harvest Town Circle*. In that case, two employees who were aged over the normal retirement age for their jobs, challenged the enforceability of section 109 of the Employment Rights Act 1996. The employees argued that section 109 was indirectly discriminatory on the grounds of gender because more men continued to work after retirement age than women. The argument was that section 109 of the Employment Rights Act 1996 unfairly disadvantaged men compared to women.

Although Mr Rutherford and Mr Bentley were initially successful at the employment tribunal stage of proceedings, they lost at the employment appeal tribunal. In its judgment, the employment appeal tribunal stated that denying employees over the age of retirement from eligibility for a claim for unfair dismissal was clear age discrimination, but that until there was a specific prohibition in the law, there was nothing that could be done about it.

In the Regulations the Government has extended eligibility to bring a claim of unfair dismissal to an employee of any age. However to avoid dismissals on the grounds of retirement being unfair, the regulations have had to include consequential amendments to alter the current test for unfair dismissal.

Retirement as a Fair Reason

The Regulations make *retirement* into a new fair reason for dismissal. However the Regulations set out a cumbersome series of provisions which indicate under which circumstances an employer may rely on *retirement* being the fair reason

for the dismissal, and under which circumstances the employer will not be permitted to state “retirement” as the “fair reason”.

The Regulations set out amendments to the relevant provisions of the Employment Rights Act 1996 in this regard.³¹

The determining factors under these provisions as to whether an employer will be able to give *retirement* as the “fair reason” are:

- whether there is a normal retirement age;
- at what age the dismissal actually takes effect;
- whether there is an intended date of retirement;
- whether the dismissal takes place on the intended date of retirement;
- whether the appropriate notification has taken place.

The Regulations provide for a number of different scenarios, depending on whether there is a normal retirement age and if so, what that age is. For example, a new Section 98 ZB provides that if:

- there is no normal retirement age; **and**
 - the actual termination happens on or after the employee’s 65th birthday; **and**
 - the employer has complied with the notification requirements; **and**
 - the contract does actually terminate on the intended date of retirement
- then** retirement **shall** be deemed to be the operating fair reason for the dismissal.

However, the same section 98ZB provides that if:

- there is no normal retirement age; **and**
 - the actual termination happens on or after the employee’s 65th birthday; **and**
 - employer has complied with the notification requirements; **and**
 - the contract does **not** terminate on the intended date of retirement but terminates **before** the intended date of retirement
- then** the employer cannot seek to argue that retirement should be treated as the reason for the dismissal.

Given the number of different scenarios which could arise, employers will be well advised to pay special attention to the legislation when contemplating a “retirement” dismissal.

³¹ Schedule 8

One novel aspect to note is that the Regulations will allow employers to “retire” employees who are over the age of 65, but who do not have compulsory retirement ages expressly stated in their contracts, simply by following the new notification procedure.

Unfair dismissal – Basic Award

The basic award for unfair dismissal is calculated taking into account the age of the employee. Whilst consideration was given in earlier drafts of the Regulations to removing age from the calculation, the final Regulations have not taken this approach. Accordingly, as with the statutory redundancy payments, age will still form part of the calculation. However the following amendments have been made:

- the upper age limit on bringing unfair dismissal claims will be removed (currently there is an upper age limit of 65)
- there will be no tapering of any award made to someone between the ages of 64 and 65
- an affected employee will be entitled to compensation of at least 4 weeks pay where the employer has not complied with its duties to consider working beyond retirement.

The Regulations do not address the calculation of the compensatory award for unfair dismissal. This award is intended to compensate the employee for his or her actual losses arising from the unfair dismissal. When considering an appropriate award, the tribunal will consider how quickly the employee could have mitigated his or her loss by finding alternative employment. A general rule of thumb has operated whereby unfairly dismissed employees who are not far off retirement age can often recover close to full compensation, because the tribunal considers that they will not work again up to the date of their retirement. With the future expectation that employees will continue to work for longer, it is clear that employment tribunals will have to review how they will consider the issue of calculating compensatory awards in future.

Statutory Redundancy Payment

Currently, the statutory redundancy payment uses age as a factor in the payment calculation. The Government did consider whether this was discriminatory and whether they should move to a single multiplier in the redundancy calculation, ignoring the age of the relevant employee. However, having considered and consulted on the matter it was decided that whilst the existing multiplier is based on age, this could be justified objectively and reasonably by a legitimate aim. Some changes have been made, however. The lower and upper age limits for redundancy payments have been removed by the Regulations, as has the tapering of the amount of the payment for employees aged between 64 and 65.

Enhanced Redundancy Payments

Given that statutory redundancy payments are permitted to be calculable by age, the Regulations include a further exception in respect of enhanced redundancy payments. The Regulations permit employers to lawfully give a qualifying employee an enhanced redundancy payment which is less in amount than the enhanced redundancy payment to another employee providing both are calculated in the same way.

This briefing note is intended solely as an overview of the law. It was last updated on 17 March 2006. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

For further information please contact Stephen Jenkins, Rhian Brace, Lowri Phillips, Emma Burns, Cerys Davies or Helen Irons at our Cardiff office on (029) 2023 8239.

age discrimination – early action points check list

Recruitment

- procedures, specifically how you agree job and person specifications
- consider criteria such as:
 - length of experience
 - precise types of qualifications (example media studies)
- application forms – do you ask for date of birth/ age? Can you justify this?
- adverts – content and media where placed
- training for those involved – particular in questioning
- use of agencies

Pay and Benefits

- can you justify any age related differences in employees' pay or benefits entitlement using the exemptions?
- do you use lengths of service of more than 5 years as a factor in awarding pay or benefit increases? Can you justify this?
- do you use lengths of service of more than 5 years as a factor in establishing entitlement to pay or benefits? Can you justify this?

Retirement

- review your compulsory retirement age
- review your retirement procedures
 - consider how you will comply with the requirement to provide at least 6 months' notice of retirement;
 - consider how you will deal with requests to continue working after retirement