

Age discrimination and benefits

Your rights under the Equality Act 2010



Overview

The Employment Equality (Age) Regulations 2006 (the 'Age Regulations') came into force in October 2006, and made it unlawful to treat a person differently in the workplace because of their age, unless there is very good justification for doing so. As of 1st October 2010, all existing equality legislation (including the Age Regulations) was consolidated into the Equality Act 2010 (the 'Act').

The fact is, service related pay and benefits are widely used to motivate staff, reward loyalty and recognise experience at work. So, although such practices may discriminate against younger workers, they are generally thought to be good for the workforce as a whole. That is why these kind of benefits were given some protection by the Age Regulations. This protection has now been incorporated into the Equality Act.

This factsheet looks at how the law on age discrimination affects pay scales, service-related benefits, employee share schemes, life assurance cover, and statutory benefits.

Pay Scales

Pay scales based on age are directly discriminatory and not usually justifiable by an employer. The National Minimum Wage age bands are an exception and are specifically exempted.

If pay scales use length of service as a criterion for progression up the scale, this may be indirectly discriminatory. This is because younger workers will be less likely to have long service, even though they may still offer the same skills as older workers. This applies both to formal pay scales and more informal practices where length of service is used as a factor in awarding pay increases.

The Act provides two potential exemptions in relation to pay scales, which come under a general

exemption for service-related benefits (see below):

- Pay scales relating to a period of five years or less: an automatic exemption. Your employer is entitled to calculate the five-year period either from the start of your employment or from the date that you started work at a particular level/grade (provided the level/grade is sufficiently distinct from other levels/grades)
- Pay scales relating to a period over five years provided that your employer reasonably believes that the length of the scale fulfils a business need. For example, motivating employees or retaining skilled employees. In such a case, the employer will usually need to show some evidence of how the practice supports a business need.

Service-related benefits

Other benefits that depend on a qualifying period of service are to be treated in the same way as pay scales (see above).

So, for example, if your employer gives employees with four years' service an extra day's annual leave per year compared with employees with three years' service, this will be automatically permitted.

However, if employees with seven years' service get an extra day's annual leave per year when compared with employees with six years' service, this will only be legal if your employer has a reasonable

belief in the business benefit of granting this extra leave.

Gifts to employees to mark 'milestones', such as ten or twenty years' service, can also fall foul of the Act. Unless your employer can point to a reasonable belief in the business benefit of this practice, it will be discriminatory.

The concept of a service-related benefit has been interpreted widely; to include, amongst other things, giving credit for length of service in a redundancy selection exercise.

Employee share schemes

The law on age discrimination applies to employee share schemes as much as it applies to any other employment-related benefit. The most obvious ways in which the provisions of the Act, and the exemptions, apply to employee share schemes are:

- Some share schemes may have a length of service requirement that must be satisfied before an employee can participate in a scheme. It is highly unlikely that the required period of service would exceed five years, but, if it did, whether or not such a provision was discriminatory would depend on the employer demonstrating a reasonable belief in the business benefit of this requirement.
- Most share schemes require an employee to remain in employment between the date of a grant of an award and the date from which its benefits can

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be taken. Provided that this period is less than five years it will be automatically permitted. If it is not, there would again have to be a reasonable belief by the employer in the business benefit of the requirement in order for it to be permitted.

- Some companies have share awards that activate depending on a future event, such as the listing of the company or the sale of a part of the company. The rules relating to length of service of less or more than five years do not apply to such schemes, so if you're required to retire before your award becomes exercisable your employer will have to justify this provision objectively.
- The Act states that any action taken to comply with a requirement of any statutory provision won't be made unlawful by its age discrimination provisions. This means that it is lawful for SAYE and SIP plans to contain provisions which treat retiring employees favourably at retirement by being able to receive shares. However, the statutory exception will not apply to all provisions relating to SAYE and SIP schemes. Any provisions included at the discretion of the company, rather than those included as a statutory provision, will be open to challenge. In such circumstances the company would have to rely on the defence of 'objective justification'.

Most share schemes contain provisions allowing employees who retire at a specified retirement age, or later, to receive shares early. On the face of it, this is discriminatory; both against employees who retire earlier than the specified date and those who leave employment, but who are not retiring. In such circumstances, it will be up to the company to provide an objective justification for such requirements.

Life Assurance cover

If you have been given life assurance cover after you have retired early on ill health grounds it is lawful for your employer to withdraw cover when you reach 65, or the normal retirement age that applied when the cover was arranged for you.

Statutory benefits

The Age Regulations removed the age limits for entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay. This means that:

- Employees over the age of 65 are entitled to statutory sick pay
- Employees under the age of 16 are entitled to receive statutory maternity pay, statutory paternity pay and statutory adoption pay.

What to do if you have been discriminated against

A claim of age discrimination needs to be lodged at an Employment Tribunal. Please note that strict time limits apply in respect of bringing a claim. Most claims will need to be issued within three months less one day of the treatment you are complaining about.

Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought within three months less one day from the end of the conduct. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend the time limits if it is just and equitable to do so. However, this exception should not be relied upon.

Mandatory ACAS Early Conciliation

If you are thinking about making an employment tribunal claim, you will first need to notify details of your claim to ACAS, who will then offer early conciliation to try to resolve the dispute. The conciliation period can be up to one month. If the claim does not settle, ACAS will issue a certificate confirming that the mandatory conciliation process has concluded.

There are changes to time periods within which to lodge claims to allow for the period during which a claim is with ACAS. The period within which a claim is with ACAS will not count for calculation of time limits; and if the time limit would usually expire during that period, or within the month after the certificate is issued,

then you will have up to one month following receipt of the conciliation certificate in which to lodge a claim.

The process makes the calculation of time limits in employment tribunal cases more complicated. Claimants are advised to be aware of limitation issues and seek legal advice promptly. For further information on the ACAS early conciliation process visit: www.acas.org.

Grievances

You may need to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. The code can be downloaded from the ACAS website. The code is aimed at assisting parties to resolve disputes within the workplace. If your claim is successful, but the Tribunal considers that you have failed to comply with the Code, your compensation could be reduced by up to 25%. There are also penalties on the employer if they do not comply with the Code. Please note that the time limit for bringing a claim is not affected by compliance with the ACAS Code. It still needs to be brought within the time limits referred to above.

The Employment Tribunal has the power to make a financial award to an employee if the claim is successful. Compensation for age discrimination is potentially unlimited.

Further information

This factsheet sets out only basic information relating to age discrimination and benefits. If you need specific advice then please contact the Employment Team at Slater and Gordon Lawyers on 0800 916 9015. Please note that a factsheet containing a comprehensive overview of the law on age discrimination entitled '**Age Concerns**' is available through our website. You will also find other factsheets relating to further aspects of age discrimination.

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