

Age discrimination



Overview

Discrimination, victimisation and harassment of an individual in the workplace because of their age is prohibited under the Equality Act 2010 ('The Act'). It is unlawful to treat a person differently in the workplace because of their age, unless it can be objectively justified or is covered by an exemption or genuine occupational requirement.

The definition of age

The Act is both wide and vague in its definition of age, so it can cover all individuals of any age. Commonly, the most obvious forms of age discrimination concern older individuals, but the protection applies equally in relation to treatment of individuals of any age, old or young.

The protection provided by The Act

When are you protected?

The Act applies to advertising for jobs, recruitment, employment, vocational training, dismissal, and after employment, for instance, if an employer provides a discriminatory reference.

Who is protected?

Under The Act, 'employment' is widely defined, with a wider set of circumstances constituting 'employment' than, say unfair dismissal legislation. 'Employment' includes those employed under an employment contract, workers, those working under apprenticeships, Crown employees, and members of the House of Commons and House of Lords. If you are supplied by your employer to work for another employer (contract workers), or are an office holder (company directors and members of some independent public bodies) you will also be protected. The

Act extends further to the police, barristers, partnerships, providers of vocational training, employment agencies and trade organisations, among others.

What is prohibited?

The Act outlaws direct and indirect discrimination, victimisation and harassment. The prohibited behaviour does not have to be directly committed by the employer and employers may be responsible for the acts of their employees.

Discrimination, victimisation and harassment

Direct discrimination

It is unlawful to treat a person less favourably because of age. In order to succeed in a claim of direct discrimination, you must show:

- That you have been treated less favourably because of age.
- That you can compare your treatment to someone (actual or hypothetical) with similar characteristics to yourself save for your age.
- That you were subject to disadvantage or detriment as a result of the treatment.

The comparator

The Act requires that like must be compared with like, so the less favourable treatment must be compared with that of someone

of a different age, known as a comparator. Your comparator must be a person (real or hypothetical) who in all other respects is in a similar or not materially different position to you.

Conscious or unconscious acts

There is no need to show motive or intention behind the discriminatory treatment as it is accepted that discriminatory treatment can be unconscious. Further, it does not matter if the discriminator shares the age of the individual being discriminated against.

Your age or someone else's age

The less favourable treatment does not necessarily have to be because of your own age. For example, someone who is treated less favourably because of the age of a third party (because of the age of your partner or child, for example) would also be protected.

Your perceived age

The Act also protects those who are treated less favourably because of their perceived age.

Indirect discrimination

The Act provides that a person also discriminates if an arrangement or formal or informal policy relating to the employment (technically known as a provision, criterion or practice ('PCP')) is applied or would be applied equally to all employees, but:

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- Puts people of a particular age group at a particular disadvantage when compared with people of another age group.
- Puts you at that disadvantage; and is not a proportionate means of your employer reaching a legitimate business aim (in other words, the PCP is not objectively justified).

The PCP must have been applied universally to all. For example, an employer specifying that all workers in a particular role must have at least twenty years' experience in that role would make it effectively impossible for persons below a certain age to satisfy the criterion. This requirement would be unlawful unless it could be objectively justified by the employer.

Victimisation

Victimisation is another form of discrimination. It is unlawful to treat a person unfavourably because they have been involved in a complaint of discrimination under The Act. This could include you bringing a claim of discrimination, giving evidence or information in connection with a claim against your employer or making an allegation that a person or your employer is in breach of The Act. Therefore, if, for example, you raised a grievance that your employer had subjected you to age discrimination and you were then demoted or dismissed, you may have a claim for victimisation.

Victimisation following termination of employment is also unlawful.

Harassment

Harassment related to age is a form of discrimination. It is defined as being:

- Unwanted conduct;
- Relating to age;
- That has the purpose or effect of violating a person's dignity; or
- Creating an environment that is intimidating, hostile, degrading, humiliating, or offensive.

An essential characteristic of the behaviour is that it is unwanted. In considering the effect of the conduct, the Tribunal will consider the individual's own subjective experience together with whether it was reasonable for the conduct to have had that particular effect.

A claim can be brought if harassment occurs because of an association with someone of a particular age.

A claim can be also brought if harassment occurs if someone is perceived to be of a particular age.

Burden of proof

It has long been recognised as difficult for those bringing discrimination claims to find evidence to support their case. To combat this, The Act provides that the Claimant is required to establish clear facts which could enable the Tribunal to conclude that discrimination has occurred. It is then for the Respondent (the employer) to provide evidence for the reason why the Claimant was treated in that way. In the absence of an adequate non-age based explanation from the Respondent, the Tribunal must draw an inference of discrimination.

Where an employer has failed to comply with relevant statutory Codes of Practice, the Tribunal may also draw inferences from this failure. For example, an employer may have failed to follow the Codes of Practice in relation to the way in which they have investigated an employee's grievance or recruited an individual to a post.

Discrimination Questionnaire

You can serve a questionnaire on your employer to obtain information relating to your complaint. ACAS have prepared guidance on 'asking and responding to questions of discrimination in the workplace' which is available on their website at www.acas.org.

Time limits and ACAS Early Conciliation

Most claims will need to be brought in the Employment Tribunal 3 months less one day of the treatment you are complaining about, subject to the rules on ACAS Early Conciliation outlined below. Where that treatment amounts to a continuing course of conduct by your employer, the claim may be brought three months less one day from the end of the conduct, subject to the rules on ACAS Early Conciliation. In some instances, if a claim is lodged out of time, the Employment Tribunal has the power to extend time limits if it is just and equitable to do so. However, this power should not be relied on.

You must start the mandatory ACAS Early Conciliation process before the time limit. This process is compulsory for most claims including those of discrimination and must be completed and a certificate issued by ACAS before you can lodge a claim with the Employment Tribunal.

Starting the ACAS Early Conciliation process may operate to extend the time limit for lodging an employment tribunal 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.

What if you have been dismissed?

If you have been dismissed and you feel that dismissal was on grounds of discrimination, again you must lodge your claim in the Employment Tribunal 3 months less one day of the date of dismissal, subject to the rules on ACAS Early Conciliation outlined above.

ACAS Code of Practice on Discipline and Grievance Procedures

In most cases, you will also need to follow the ACAS Code of Practice on Discipline and Grievance Procedures

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(which can be downloaded from the ACAS website). 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.



Remedies

If the tribunal finds that you have been unlawfully discriminated against, it may grant whichever of the following remedies it considers 'just and equitable':

- A declaration on the rights of the parties;
- A recommendation that the employer take a particular course of action;
- Re-engagement or reinstatement if the individual has been successful in an unfair dismissal claim; and
- Compensation (plus interest) for loss of past and future earnings (if any), loss of congenial employment, injury to feelings, and in some cases, injury to health. There is no limit on the amount of compensation that can be awarded, but you can only be compensated for the damage which was directly caused by your employer's unlawful discrimination as found by the Employment Tribunal.

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