

Age discrimination and redundancy

Protection for all ages in redundancy



Overview

It is unlawful to treat a person differently in the workplace because of their age, unless such treatment can be objectively justified or is covered by an exemption or genuine occupational requirement. The age discrimination provisions of the Equality Act 2010 (the 'Act') apply to the selection processes employers are entitled to adopt when deciding who should be made redundant.

What is prohibited?

Various forms of age discrimination are prohibited by the Act.

Direct Discrimination - Where a person is treated less favourably because of their age. For example, if an upper or lower age limit is set for a particular job and you fall outside that age bracket.

Indirect Discrimination - Where a provision, criterion or practice applied to all has a greater impact on workers in one age group than those in another. For example, a redundancy selection process which is based solely on 'last in, first out' is likely to discriminate against younger employees who may not have worked in a company for as long as older colleagues. However, length of service as one of a number of selection criteria in redundancy situations has been held to be objectively justified, despite indirectly discriminating against younger workers.

Victimisation - This is less likely to be relevant in the redundancy context. It may occur if, for example, you make a complaint/bring a claim of age discrimination because you have been overlooked for promotion, and you are then selected for redundancy as a result.

Harassment - This is also prohibited, but it is unlikely to be relevant in the context of a redundancy situation.

An employer that, on the face of it, treats an employee in a discriminatory manner may not fall foul of the law if it can show its actions can be objectively justified as a proportionate means of achieving a legitimate aim. In the case of age discrimination this applies to both direct and indirect discrimination.

Selection criteria for redundancy

Redundancy selection should not be based directly, or indirectly, on age. A number of examples of criteria that are based on age or length of service have been given above. However, your employer may be able to objectively justify such selection criteria. Therefore, it may not be enough for you to simply point to an age-based or age-related criterion or reason for selection in order to succeed in a discrimination claim. You may also have to show either that the employer did not have any good reason to impose this criterion, or that the criterion went further than it needed to in order to achieve any legitimate aim your employer was pursuing. As referred to above,

case law indicates that factors such as length of service may be included as part of a number of selection criteria in a redundancy situation without falling foul of age discrimination law.

How are statutory redundancy payments calculated?

Statutory redundancy payment calculations take both age and length of service into account.

Your redundancy payment is based on a week's pay, subject to a statutory cap, multiplied by length of service and a multiplier based on age. From 6th April 2020 the statutory cap on a week's pay is £538.

The multipliers are calculated by reference to age bands: you receive half a week's pay for your years of service during which you were aged 21 or under; one week's pay for each year's service when you were aged 22 to 40, and one and a half weeks' pay for any years of service during which you were 41 years old or above.

Statutory Redundancy payments are unaffected by the age discrimination provisions in the Act, even though the rate of payment is determined by age. There is a specific exemption in this regard.

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Enhanced redundancy payments

The Act also contains a specific exemption for enhanced redundancy payments. Your employer will be able to make enhanced payments, without risk of challenge, where its scheme is merely an enhanced version of the statutory scheme, mainly where the enhanced payments are calculated in accordance with the age bands used to calculate statutory redundancy payments (set out above).

However, if your employer's scheme is different in nature from the statutory scheme, then it will not be automatically exempt from challenge. For example, if the scheme does not use the same age bands as those used to calculate statutory redundancy payments, or does not use any age bands at all, but does take length of service into consideration, then it may be capable of challenge if there is less favourable treatment because of age or it gives rise to indirect discrimination (subject to any objective justification). Cases have indicated that linking payments to length of service may be justified where the aims are to encourage turnover of staff and create opportunities for junior staff, and also to reflect the fact that older workers are vulnerable in the job market.

Bringing a claim for age discrimination

Compensation for age discrimination is potentially unlimited. It will reflect the loss actually suffered as a result of the discrimination.

Please note that strict time limits apply in respect of bringing a claim. Most claims will need to be issued at the Employment Tribunal 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.

You may also need to Follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (the 'code'). This 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.

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.uk.

Further information

This factsheet is intended to deal only with the age discrimination provisions of the Equality Act that relate to redundancy. There are a number of other factsheets available on the Slater and Gordon website dealing with specific aspects of the law on age discrimination.

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