



Best Practice in Age and Employment

Age Discrimination and the Law

First Edition

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DISCLAIMER

The information in this guide is correct up to the date of publication (2021).

Legal information in this publication is for guidance only. It is not intended to be an authoritative statement of the law, as each particular case will have its own circumstances which will need to be taken into account. Also, case law is constantly evolving. If you do find yourself potentially facing legal problems, we strongly advise you to take professional legal advice.

1 About Wise Age

Time to change Wise Age has worked with age partners to produce these best practice guides relating to age and employment including an employer's guide and a senior's self-help guide to help over 50s back into employment or self-employment. This is now of crucial importance for the country, for employers and for older workers (50+), given the disruption to the labour market following the impact of the pandemic, the lockdowns, Brexit and the trading and distribution situation.

Who are we? Wise Age Ltd was founded in 2012, drawing on the experience of our predecessors Wise Owls, and has led the way in researching, promoting and working around the questions of age and employment. We are London's leading specialist 50+ employment charity, helping train and support over 50s back into work. We educate and inform employers from all sectors, including government decision makers, about the benefits that older workers and age diversity bring to business and how best to tap into this key labour and consumer resource. This programme is funded by **Trust for London** to help support over 50s back into work and enable employers to benefit from having an age diverse workforce.

Become the solution As an employer you can benefit greatly from the skills, knowledge, experience and aptitudes of older workers who bring many benefits to businesses and organisations. Our research and experience shows that an age-diverse workforce, including younger, middle-aged and older people, brings many business benefits, allowing you to get the most from all age-groups.

For more information on go to www.wiseage.org.uk

2 Introduction

Ageism is acknowledged as being the most widespread discrimination factor within the workplace in the UK. This unacceptable situation continues despite the introduction of new laws and an ageing population.

The aim of this Guide is to explain the age and employment equality law for employers. We lay out best practice solutions to the challenges of complying with Equality legislation, particularly in regard to age. No company wants to be dragged through an Employment Tribunal. It is expensive, demoralising, and can generate a lot of bad publicity. We also aim to show employers the many benefits older workers and an age diverse workforce brings in terms of improved profitability, productivity, staff retention and satisfaction, and understand that as older consumers grow in importance so does the need for an older and wider age range of workers.

Since the introduction of the Equality Act 2010 a number of cases involving age discrimination have made headlines. For example, there have been a lot of claims lodged against the BBC directly relating to age, while employers have had to pay tens of thousands at tribunals for breaking the age employment regulations. Elsewhere, in the UK: *Whitham v. Capita* case, Capita employed drivers at Heathrow and terminated people's Permanent Health Insurance schemes at age 55. This was found to be both indirect and direct discrimination. The authors hope that this publication will not only help employers avoid losing at employment tribunals but find positive ways to make age equality legislation work for their companies.

3 Age Discrimination—The Law in the UK

Overview

Age has been a protected characteristic in employment law since 2006 and is currently governed by the Equality Act 2010.

The Equality Act applies to job applicants, all workers including contract workers and agency temps, apprentices, office holders, the police and people in vocational training. It prohibits unjustified direct and indirect age discrimination, victimisation and harassment related to age, whether young or old. There is no qualifying period of service.

The Equality Act was amended in 2013 and people are no longer protected in law from being harassed by clients, contractors and members of the public. The right to claim discrimination on multiple grounds—for example, as both a woman and a disabled person—was also removed.

The second key piece of legislation is the **Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011**. This legislation abolished the default retirement age, making it illegal for employers to require workers to retire at age 65.

The final key area of legislation affects the pension age, which has now been increased from 65 to 66. (The **Pensions Act 2014** stipulates a further increase in pension age to 67, to be phased in between 2026 and 2028.) (Some professions can set an earlier retirement age where this is covered in other separate legislation, e.g. air traffic controllers).

It is unlawful to force people to retire because they have reached the age at which they can claim their state pension. Just as with younger workers, any decision to terminate the employment of an older worker who has reached pension age needs to be objectively justified, for example, by

performance reviews etc. showing that the employee is no longer capable of holding down the job. This can be a thorny area: we offer some advice around best practice below. [See Sections 5, 6 and 7.](#)

Key Facts

- There is no upper or lower age limit in respect of unfair dismissal or rights to statutory redundancy pay.
- Direct and indirect discrimination because of age is prohibited unless the employer can show objective justification for their actions.
- Bullying, harassment and victimisation on grounds of age is unlawful and employers must take all necessary reasonable steps to ensure that these do not occur, or are dealt with firmly and fairly if they do arise.
- Age discrimination after the working relationship has ended (e.g. providing a poor reference or no reference on grounds of age) is not allowed.
- To justify age discrimination, the employer must show that they had a legitimate aim and that the actions taken, or criteria applied represented an appropriate and necessary means of achieving that aim.
- Certain types of positive action are allowed if the employer believes that persons of a particular age group are under-represented, have special needs or are disadvantaged in relation to particular work and the employer wishes to address these issues.
- Employers may base differences in pay and benefits on length of service, but only if the length of service criterion used is five years or less; if longer,

the enhanced pay or benefits must be in place to encourage loyalty, reward experience or maintain/enhance motivation.

- A retirement age below pension age is unlawful unless the employer can justify it on objective grounds.
- Employers must give between 6 months' and 12 months' notice to employees before their intended retirement dates and inform them of their right to request not to be retired.
- Employees have the right to ask their employers to let them work beyond the retirement age (66) and such requests must be considered in good faith and according to a prescribed procedure.
- Certain types of positive action are allowed if the employer believes that persons of a particular age group are disadvantaged in relation to particular work and the employer wishes to compensate for that disadvantage.
- The upper age limits for unfair dismissal and statutory redundancy rights have been abolished.

4 When Discrimination Can Occur

There are recognised situations when discrimination can occur. Below are some examples:

- When advertising a job—discriminatory wording in job advertisements, job descriptions and person specifications.
- During the recruitment and shortlisting processes—discriminatory questions on application forms, during interviews and when deciding who to shortlist.
- When offering the job to someone—making an offer to one person can be difficult, especially if there are two or more applicants who seem equally good.
- During an employee's time with the company, while carrying out the job—bullying, harassment, victimisation, etc.—whether by the employer or by a member of the staff. NB: The legal right to protection from bullying and harassment by clients and members of the public was removed from the Equality Act in 2013, but this does not stop you from having strong policy statements around zero tolerance of abusive behaviour and reserving the right to ban abusive customers from using your services. There are potential health and safety issues around your employees' physical and mental health, which are still covered by legislation, so we strongly recommend that you continue to address this issue in your Bullying and Harassment Policy.
- When offering training opportunities and promotion to staff.

- When carrying out Appraisals, during disciplinary & grievance processes or when someone has become a “Whistleblower”.
- During the years leading up to and beyond an employee’s pension age.
- After the working relationship has ended: e.g. if references are requested.

The next section gives guidance on best practice to avoid discrimination in each of the situations above.

5 Best Practice to Avoid Discrimination

There are various steps you can take to avoid discrimination during recruitment.

A. When advertising a job

- Clearly describe the nature of the job.
- State clearly the skills, knowledge and experience required.
- State that you welcome applicants from all sectors of society. If your organisation has a shortage of older workers, you can state that you welcome applications from these people but that all applicants will be considered solely on the basis of their suitability in terms of skills, knowledge, experience etc. You must be clearly seen to be looking for the best applicant, not for someone who will make a cosmetic difference to your workforce's profile.
- Use clear, non-discriminatory language: avoid words like young, old, mature, or language suggesting you want people of a certain age e.g. energetic, dynamic (suggesting those younger) or distinguished, seasoned (suggesting those older).
- Look at other promotional materials, leaflets, websites, etc., especially if they use images—make sure that pictures represent the full spectrum of ages in your workplace (as well as other protected characteristics—do your visual images look like your customer base?
- Don't specify a minimum number of years of previous experience required unless this is

objectively justifiable—it could lead to accusations of age discrimination against younger people!

- Adopt an advertising strategy of aiming to reach out to people of all backgrounds, including older workers. A few well-placed advertisements in websites and publications catering for different communities could well be cheaper and more effective than one expensive advertisement with a big national website/ publication. If you know that your workforce is short of older people, try advertising in places older where people are likely to see them.
- Work towards being an **age-friendly employer**, [see our Best Practice in Age and Employment—Employers Guide](#). Once you have achieved this you can say you are an age-friendly employer on your website and publicity materials.

B. When setting out the application process

- Do not ask applicants their age or date of birth on the application form.
- Don't ask unnecessary questions about periods and dates in applicants' lives.
- Design an application form which concentrates solely on skills, aptitudes, qualifications, knowledge, experience and so on.
- Have a separate monitoring form which asks questions allowing you to monitor your equalities compliance by asking for age along with gender, ethnicity and so on.
- Make it clear, in your procedures and your information to applicants, that shortlisters will not see information on the monitoring form, which is purely used for statistical purposes.

- Produce a Job Description (JD) with the title of the job, the aims of the job, the main duties and the people in the organisation the job holder will report to/manage and so on.
- Produce a Person Specification (PS) which links to the JD and outlines the skills, knowledge, experience, and aptitudes etc. which are needed.
- As with the job adverts, be careful not to use ageist language, or ask for unnecessary minimum experience, or unnecessary qualifications. Bear in mind that some qualifications which older applicants may hold have now been replaced by others and make it clear (unless you can objectively justify otherwise) that these older qualifications are acceptable.

C. When shortlisting or interviewing

- If possible, have more than one person involved in the shortlisting process.
- Shortlisters should be trained to assess applicants solely on the criteria specified in the JD and PS, and also trained in anti-discriminatory practice.
- If possible, have the shortlist reviewed by someone else, to check for unintentional bias.
- Record all decisions and retain records for a minimum of 12 months.
- Ensure interviewers are trained in how to avoid discrimination, equality and diversity, and how to interview objectively focussing on applicants' competence.

- Prepare the same list of questions for all applicants, and train interviewers not to ask off-the-cuff remarks such as “aren’t you a bit too old for this job?”

D. When offering the job to someone

- Where two or more applicants have the required competencies, the job should be offered to the one who is most competent or has the best range of skills.
- Check any decisions for unintentional bias by having someone not on the interview panel review the decision.
- Keep records of all decisions and retain them for a minimum of 12 months.

E. Policy documentation to support employees

- Have an up-to-date Equality and Diversity policy in place, subject to regular review, and including age considerations.
- Have an up-to-date Bullying and Harassment policy in place, again, subject to regular review and including age considerations.
- Ensure all staff are aware of these policies.
- Train all staff in the meaning of terms such as discrimination, bullying and harassment, explaining why they are hurtful, and what to do if they experience or witness it.
- Train relevant staff (managers etc.) to deal with issues around work allocation, performance appraisal, discipline and grievance issues, etc. in a non-discriminatory manner, particularly around age.

- Keep records of all decisions and retain them for a minimum of 12 months.
- Check the company policies which may need to be reviewed to ensure compliance with age equality in Section 7 below. Appropriate training to relevant staff is strongly recommended for all these policies.

F. When offering training opportunities and promotion to staff

- Ensure opportunities for training and promotion are drawn to the attention of all staff and made available to all on a fair and equitable basis.
- Age should not be an issue with regard to the availability of training, unless there is an objective justification (e.g. someone planning to retire very soon).
- Managers should be trained to monitor the offer and take-up of training opportunities, to ensure that all are encouraged to participate, the training is suitable for all ages, no age group is missing out, and that there are no factors inadvertently preventing older workers (or other groups) from participating (style, location, time etc.).

G. Appraisals, Disciplinary & Grievance processes,

- Have an up-to-date Appraisals policy in place, subject to regular review, and including age considerations.
- Have an up-to-date Discipline and Grievance Policy and Whistle-blower's Charter in place, again, subject to regular review and including age considerations.

- Ensure all staff are aware of these policies, and train managers in how to implement them.
- Record all decisions and retain for a minimum of 12 months.

H. Pension protocol

During the years leading up to and beyond an employee's pension age

- Remember employees have the right to work beyond pension age if they wish.
- If the employee is no longer capable of doing the job, use performance reviews etc. to manage things, just as with a younger person.
- It is advisable to consult with older workers in the years leading up to their pension age to see what they want to do. They may want to retire, work more flexibly or part-time, change role, or continue in their current capacity.
- Workplace Discussions, as proposed by ACAS, are an excellent means of handling these issues. In addition to the wishes of the employee, they also offer a chance for the employer to outline their future plans, and hopefully reach an agreement which works for everyone. ACAS recommends that these discussions are held annually with those approaching pension age.

[See Section 6 below](#) for more on retirement.

I. References

- After the working relationship has ended: e.g. if references are requested. Do not write negative references, or refuse references, based on the age of the former employee.

6 Retirement: Key Points to Remember

Employees retire when they are ready to; enforced retirement will only be possible if it is objectively justified.

Employers must avoid discriminating against workers on the grounds of age.

This legislation is applicable to all employers and all company sizes and sectors. These changes do not affect an employee's state pension age and entitlements, which may well be separate from the age at which they retire.

Company Policies with Age Implications

All company policies should be regularly reviewed and updated. Policies which cover age-related issues are particularly relevant. Issues with age implications include:

- Equality and Diversity
- Bullying and Harassment
- Recruitment and retention of staff
- Discipline and Grievance
- Sick Leave
- Holidays and annual leave
- Staff appraisal,
- Staff training and development
- Staff promotions and transfers
- Flexible working
- Use of computers
- Space and ergonomic requirements

7 Making People Redundant

Redundancies are possibly the worst situation employers must face when running their businesses or organisations during difficult times. They directly affect people's lives and if done badly, can leave your company with added problems in addition to the redundancies themselves.

Selection

When selecting employees for redundancy, it is of vital and legal importance that you know you are not making decisions which discriminate, either directly or indirectly, against people because of their age, disability, ethnicity, gender, maternity, gender reassignment, marriage or civil partnership status, religion or belief, or sexual orientation.

Redundancy selection criteria

Clear criteria are essential to aid you in the identification of which employees to make redundant. The 'selection pool' (as it is known), can help you avoid making discriminatory decisions. The criteria must be objective, fair and equally applicable across a particular 'selection pool' of employees. All staff should be judged on the skills required in your organisation, but you may also consider criteria such as:

- Length of service
- Attendance levels (be aware that someone's attendance record might be affected by a protected characteristic: for example, sickness absence during pregnancy)
- Qualifications and previous training
- Punctuality
- Disciplinary record
- Adaptability for different types of work

- Standard of work performance

It is possible to be unfair to certain groups simply by not thinking through the consequences of using certain criteria. For example, some older workers may have missed out on access to training as older workers have often been overlooked in the past. In this situation, it would be unfair to place too much weight on qualifications as a criterion.

Fairness

To ensure fairness to all your employees, choose more than one criterion—ideally a whole list of them. Rank your employees (perhaps through a points system) against the criteria. This method should help you ensure that you are making the best decision for your organisation. (Note, age diversity makes good business sense.) Once the employees have been matched against the criteria, then you decide which you intend to make redundant. This is critical and may be the point where any legal action will come. Make sure you can justify the decisions made. Record all decisions and retain for at least 12 months.

Age and redundancy payments

Before 2006, older workers used to lose some of their rights to redundancy pay after the age of 64. The introduction of Age Equality legislation means that this is no longer true. Older workers (as well as workers under the age of 18) now retain their full rights to redundancy payments.

Enhanced redundancy payments are allowed based on age. However, these must be calculated in exactly the same way as statutory redundancy payments to avoid age discrimination claims. Provided the scheme mirrors the statutory scheme, then you can choose to be more generous.

If you have your own **contractual redundancy scheme**, then you need to examine this and check that its conditions can be justified as a proportionate means of achieving a legitimate aim and so are not discriminatory. If you think your scheme is discriminatory then you need to take further advice.

8 Unlawful or Lawful? Summary Information

Unlawful Practices (Source: ACAS Age and the Workplace, 2014)

It is unlawful because of age to:

- Discriminate directly against anyone: this means treating some people less favourably than others because of their actual **or perceived** age, or because they **associate with someone of a particular age**, unless it can be **objectively justified** (Bold text by Wise Age).
- Discriminate indirectly (**whether intentionally or not**) against anyone. This means applying criteria, provisions or practices which people of a particular age group (e.g. under 23 or over 50) are targeted unless it can be **objectively justified**.
- Subject someone to harassment (i.e. unwanted, intimidating or offensive words or actions) related to age.
- Victimise someone because they have made or intend to make a complaint or allegation, or have given or intend to give evidence in relation to a complaint of discrimination because of age.
- Discriminate against, harass or victimise someone in certain circumstances after the working relationship has ended, unless discrimination can be **objectively justified**.
- Compulsorily retire an employee, unless it can be **objectively justified**.

Lawful Practices

In certain limited circumstances, age discrimination can be lawful, for example, in cases where there is an objective justification, where there is an occupational requirement, or where there is a specific exemption in law. (See below).

A. There is an objective justification

- Objective justification can only be possible in exceptional circumstances and for good reasons.
- Real evidence will need to be provided in order to support any objective justification—it is not enough just to assert that it is needed. Courts would judge each case on its own merits.
- Objective justification for direct and/or indirect discrimination must be a proportionate means of achieving a legitimate aims.

Legitimate aims might include:

- Factors to do with economic efficiency (but not just saving money because it is cheaper to discriminate than not to discriminate!)
- Particular training requirement of a job
- Health Safety and Welfare e.g. around protection of younger people or older workers.

Proportionate means you need to demonstrate:

- The discrimination actually contributes to a legitimate aim.
- The effects of the discrimination are significantly outweighed by the benefits and importance of the legitimate aim.
- There is no reasonable alternative—i.e. there are no non-discriminatory or less discriminatory means of achieving the legitimate aim.

B. There is an occupational requirement

This will be an exception laid out in the Equality Act 2010 allowing employers to discriminate where a particular characteristic is necessary for the job. Employers should quote the relevant exception when advertising such jobs.

C. The discrimination is covered

Discrimination may be covered by one of the exceptions or exemptions for age in the Equality Act, such as:

- (i) Pay and employment benefits based on length of service
- (ii) Pay related to the National Minimum Wage
- (iii) Enhanced Redundancy Payments
- (iv) Acts under statutory authority
- (v) Handling insured benefits
- (vi) Occupational pension systems

Objective justification is ultimately only definable in Courts, so it is very difficult to say exactly what is or is not allowed.



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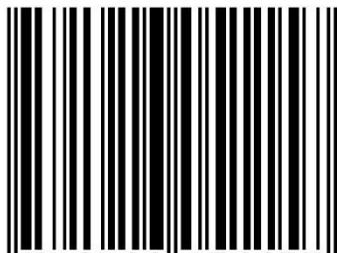
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