

House Committee

12 October 2006

Age Discrimination

1. Purpose

1.1 To inform House Committee of the requirements of the Employment Equality (Age) Regulations Act 2006 which took effect on October 1 2006.

2. Background

2.1 An EU framework Employment Directive in 2000 required member states to introduce legislation on age discrimination by 2006. Having operated a voluntary code since 2000 and published draft regulations in October 2005, the UK regulations have now been made. They apply to all employers, including the Assembly and Members as employers of AMSS.

2.2 The Regulations prohibit direct and indirect discrimination, harassment and victimisation on the basis of age and places discrimination on the basis of age on an equal legislative footing with other types of discrimination such as race and sex

2.3 As with other strands of equality legislation, appellants need no qualifying period of service in order to claim against an employer. The burden of proof will be on the employer to defend their position once the claimant can show the circumstances from which an inference of age discrimination can be shown.

2.5 The regulations cover people of all ages, young and old and also cover contractors and temporary staff.

2.6 Exemptions for employers will be allowed for reasons of Genuine Occupational Requirement and if there is an objective justification, although both may be difficult to prove.

3. Issues

1. Harassment

Harassment is defined in the regulations as ‘treatment which has the purpose or effect of either violating the person’s dignity or creating an intimidating, hostile, degrading environment for them, on the grounds of age’.

There is no case law to determine what is or is not acceptable practice or behaviour with regard to harassment on the basis of age. The employment tribunal will take into account the worker's own perception and the alleged offensive behaviour.

Sending age-related birthday cards or making age-related jokes and remarks, excluding older people from social events etc. could all therefore be deemed unacceptable.

3.2 Retirement Age

65 will be the default retirement age and a retirement age of younger than 65 would have to be objectively justified by the employer.

There is a duty on the employer to write to the member of staff between 12 and 6 months before they are due to retire and notify them of their right to request to continue working. If the employee wishes to continue working, they must make a request to do so between 3 and 6 months before the retirement date (there is no requirement for the individual to state the exact period for which they intend to continue working).

Employers have a duty to consider this request to continue working, but they do not need to explain any reason for refusal to allow employees to do so. The employee can however appeal the decision.

Any member of staff aged 65 or older with whom there were performance issues would have to be treated in the same way as any other member of staff, with the performance management system being used.

3. Recruitment

It is unlawful for an employer to discriminate in the arrangements for determining who is offered employment. Language used in advertising posts must be free of age bias – length of experience criteria is potentially discriminatory as it may preclude younger people from applying for a post

It is recommended that 'age' be moved to the Equal Opportunities monitoring section of application forms with interview questions job related only. Statistics on the ages of people applying for posts should be kept

Employers will not be held to have discriminated however where the applicant is over the employers normal retirement age (or aged 65 or older in the absence of a normal retirement age) or where the applicant is within 6 months of the normal retirement age

4. Length of Service-Related Benefits

Any length of service related benefits (e.g. long service awards, additional holidays for longer serving employees) need to be objectively justified

It is not discriminatory though to have service related benefits where the disadvantaged employee has fewer than 5 years service

Where the individual has more than 5 years service, the length of service criteria must fulfil a business need

5. Pension

Pensions are largely outside of the new legislation, but it should be noted that the age from which APS staff can draw their pension, 60, is unchanged. This age should be distinguished from the retirement age of 65.

6. Redundancy

Age based criteria for redundancy selection are now illegal. Thus criteria such as 'Last In First Out', 'Age' or 'Length of Service' which may bias in favour of older employees are no longer permitted

Statutory redundancy payments (based on people's age) will remain unchanged however as older workers are statistically likely to be out of work for longer than younger workers

7. Unfair Dismissal

Prior to October, it was not possible to appeal to an employment tribunal for unfair dismissal if the applicant were over 65 years of age. This age cap has now been removed.

It will also be an automatically unfair dismissal if an employer fails to follow the duty to consider procedure (see 3.2 above) when an employee retires

8. Promotion & Pay

Pay scales cannot be linked to age or length of service. Promotion and training opportunities must be open for all, with no age related restrictions in place. It should not be assumed for instance that younger workers do not have the necessary experience or that older workers are unambitious

4. Compliance & Financial Implications

4.1 Were the Assembly to fail to comply with the legislation and a prospective or current, permanent or temporary employee to launch an employment tribunal claim, the Assembly could be liable to an award of unlimited damages, including claims for injury to feeling.

4.2 In response to the legislation, briefings have been conducted for all APS staff, and policies have been reviewed to ensure compliance. The retirement age of the senior civil service has also been raised from 60 to 65, although this does not change the age at which Senior Civil Servants are entitled to opt for retirement and draw pension, which remains at 60.