AGE DISCRIMINATION, RETIREMENT AND PENSIONS: CHANGING PATTERNS AT WORK?

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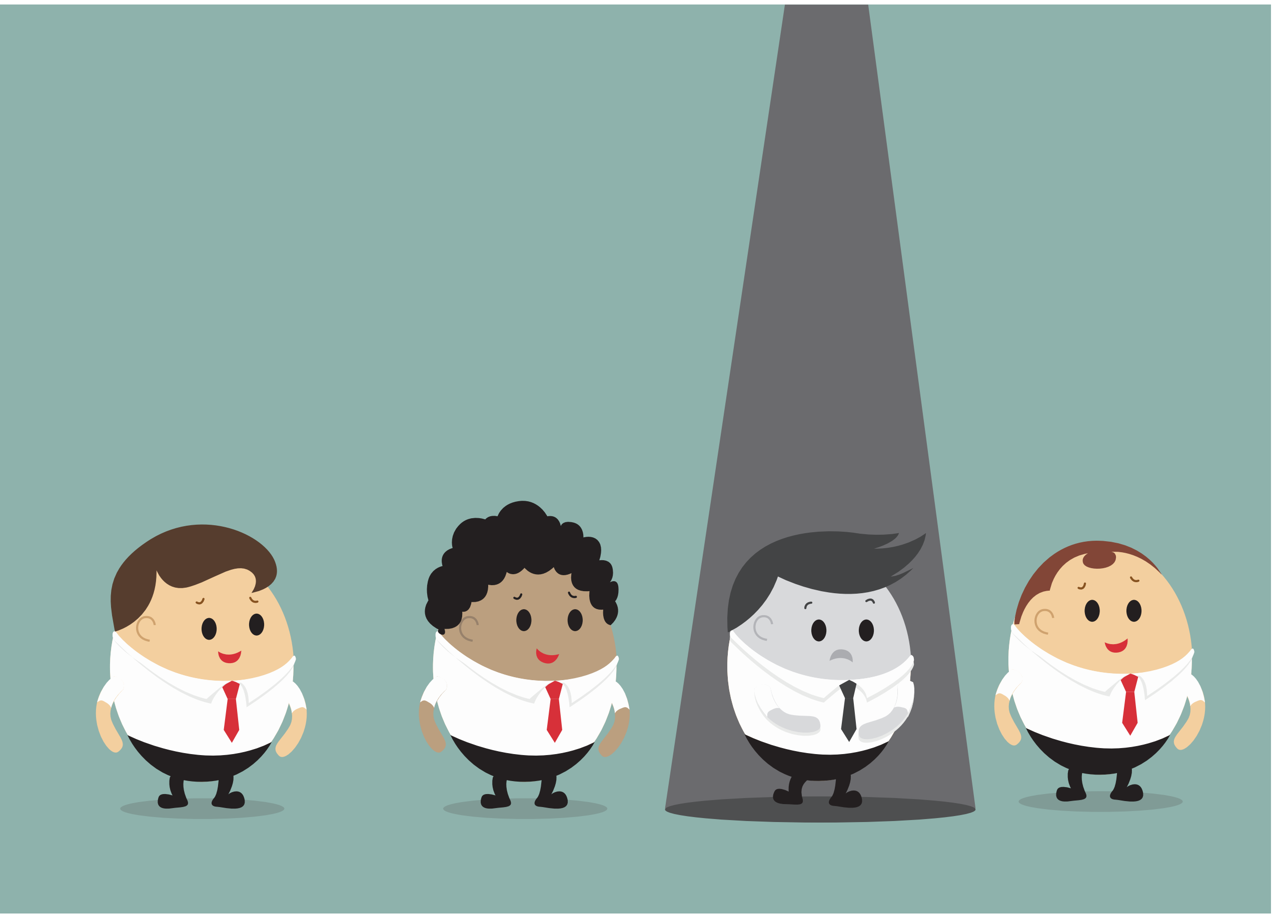
A look at key aspects of age discrimination legislation applying to retirement ages and workplace pension provision.

This article includes:

- a summary overview of age discrimination legislation;
- a review of the age discrimination provisions of the Equality Act 2010 which apply to retirement ages and pension provision, particularly group personal pensions;
- discussion pointers on possible effects of the Freedom and Choice reforms.



EQUALITY ACT 2010

The Equality Act 2010 replaced a wide range of existing discrimination law. This included the age discrimination legislation relating to pensions that had been in place since 1 December 2006. Under the Equality Act it's unlawful to discriminate against employees, job seekers and trainees because of their age, and there are no upper age limits on unfair dismissal and redundancy. The age discrimination provisions don't apply to state pension arrangements, pension sharing on divorce, or National Insurance rebates paid to contracted out schemes.

There are four types of age discrimination:

- direct discrimination – treating someone less favourably because of their age;
- indirect discrimination – for example, requiring 10 years' industry experience may disadvantage younger job applicants;
- harassment – related to someone's age;
- victimisation – unfair treatment of an employee who has made or supported a complaint about age discrimination.

The direct and indirect discrimination provisions still offer some scope for employers to treat employees differently on the grounds of age. The test is whether any direct or indirect discrimination is objectively justified as a proportionate means of achieving a legitimate aim, which can include business needs and efficiency. Essentially, the employer has to consider if there's a less discriminatory way to achieve the same outcome. There are no objective justification provisions in respect of harassment or victimisation.

ABOLITION OF DEFAULT RETIREMENT AGE

The default retirement age (DRA) was abolished with effect from 1 October 2011 by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011. Before that, it was lawful for employers to set a DRA, so long as it was at least age 65. Employers can still set their own Employer Justified Retirement Age (EJRA), but this has to be objectively justified. For example, an EJRA might apply to posts in the emergency services that require a significant level of physical fitness. As this won't be relevant to most occupations, in general older workers can now retire when they choose.

The regulations abolishing the DRA also made age limits lawful where employers provide insurance or related financial services to employees. For example, an employer providing life cover or critical illness cover can impose an upper age limit of the older of age 65 or state pension age. This reflects that fact that it becomes ever more expensive to provide insured benefits to older age groups.

GROUP PERSONAL PENSIONS

Under schedule 3, paragraph 20 of Equality Act 2010, where an employer offers a group personal pension (GPP), it's responsible for ensuring that the benefits meet the provisions in 'Part 5: Work' of the Act. That is, it has to ensure that it has considered all the discrimination legislation, not just the age related provisions.

In respect of employer contributions to personal pensions, under schedule 2 of the Equality Act 2010 (Age Exceptions for Pension Schemes) Order 2010 it's permissible:

- to pay different rates of contribution based on age, provided the aim is to equalise (or make more equal) the age related outcomes for members in comparable situations;
- to pay different rates of contribution linked to remuneration levels;
- to cap pensionable pay;
- to set a minimum eligibility age for an employer contribution and for different minimum eligibility ages to apply to different groups of workers;
- for the employer to pay the same rate of contribution for all workers.

There's no specific exemption permitting an age cap for employer contributions to personal pensions. As, on the face of it, this is age discrimination, an employer who wants to do this will have to show that it's objectively justified.

Within limits, it's permissible to base entitlement to an employer pension contribution on length of service criteria. The relevant provisions are in the Equality Act 2010 (Age Exceptions for Pension Schemes) (Amendment) Order 2010. For example, the employer could pay lower contributions for workers with less than five years' service than for those who've worked for it for at least 5 years. If the employer wants to set a length of service requirement of more than 5 years, it must show there's a reasonable business justification. For example, rewarding loyalty or motivation.

OCCUPATIONAL PENSION SCHEMES

The age discrimination provisions in the Equality Act 2010 cover all types of occupational pension schemes (OPSs), including defined benefits, money purchase and hybrid arrangements. The age discrimination provisions don't apply to OPS pension rights accrued, or to benefits payable, in respect of service before 1 December 2006. This is confirmed in the Equality Act 2010 (Age Exceptions for Pension Schemes) (Amendment) Order 2010. The Equality Act treats every OPS as incorporating a non-discrimination rule, although this doesn't apply to pension credit members. The Equality Act also gives trustees and managers of OPSs the statutory power to make non-discrimination alterations by resolution, if the scheme lacks suitable means to make such changes. If the rules or operation of an OPS give the trustees or employer concern about possible discrimination claims under the Equality Act 2010, they should seek specialist professional advice before taking any action.

There are extensive age-related exemptions in schedule 1 of the Equality Act 2010 (Age Exceptions for Pension Schemes) Order 2010. Given the complexity of the issues, the following list covers only a limited number of the key exemptions relevant to money purchase OPSs.

In occupational pension schemes, it's permissible:

- to have minimum and maximum ages for admission to a scheme, which can vary for different groups of workers;

- to have a minimum level of pensionable pay before permitting admission to the scheme (subject to restrictions);
- to make age related contributions to a money purchase scheme, provided the aim is to equalise (or make more equal) the age related outcomes for members in comparable situations;
- to have earnings related contributions in a money purchase scheme;
- to have equal contributions irrespective of age in a money purchase scheme;
- to cap pensionable pay in a money purchase scheme.

Under the Equality Act 2010 (Age Exceptions for Pension Schemes) (Amendment) Order 2010, a length of service exemption covers any rule, practice, action or decision by the scheme trustees or managers regarding accrual, admission or eligibility or of an employer regarding admission or benefit where one employee is disadvantaged compared with another because they have less service with the employer. For a money purchase scheme, it's permissible to base entitlement to an employer pension contribution on length of service criteria. Where the length of service requirement is more than 5 years, the employer must show there's a reasonable business justification.

AUTOMATIC ENROLMENT

Some employers aim to limit their automatic enrolment costs by segmenting their workforce and offering different pension arrangements to various groups of workers. They need to ensure they don't breach any of the direct or indirect discrimination provisions in the Equality Act 2010 by doing so.

Employers that have reached their staging date have to automatically enrol eligible jobholders and offer opt in rights to non-eligible jobholders who are not in a qualifying workplace pension scheme. They must offer access to a workplace pension scheme to entitled workers. They can't use length of service criteria to avoid these legal duties. However, there is scope to use the age discrimination length of service exemptions. An employer could pay the minimum employer contributions required under the automatic enrolment legislation for new starters, but a higher level of employer contributions after, say, 2 or 5 years' service.

CHANGING RETIREMENT PATTERNS

The Freedom and Choice pension reforms have fully broken the traditional link between ceasing paid employment and starting to take pension benefits. Extensive publicity means pension scheme members are more aware that it's possible to start taking pension benefits before stopping paid work. If this becomes more common in practice, it will have indirect effects on employers and workplace pension planning.

Many workers nearing or over age 55 have built up a large enough pension pot to consider turning a hobby into part time work, using their skills on a consultancy basis, or realising an entrepreneurial dream. So it's possible the Freedom and Choice reforms will prompt experienced workers to retire earlier than the former expected age for their sector. This could result in problems in highly skilled sectors, where there's a lengthy training requirement before new entrants become fully competent. If employers haven't engaged with their skilled workers about their goals and plans, they may struggle to maintain the pipeline of replacements.

In addition, some workers will be accessing their pension funds at age 55 to pay off debts or to help their children onto the property ladder. If they plan poorly, they may find themselves unable to afford to stop paid work at the age they'd expected. As a result, employers could be coping with workers who really want to retire before state pension age, but don't have sufficient private pension provision to do so. Without a default retirement age to fall back on, employers may find themselves with morale and performance management problems.

Employers who are concerned about these issues need an approach which doesn't fall into direct or indirect age discrimination.

If a worker of any age is performing poorly, the employer should address this in the same way, offering the same opportunities to address any training and development needs. Expecting that an older worker who's performing poorly will simply retire soon may be discriminatory. An employer who follows the normal performance management procedure can dismiss a worker on capability grounds if performance levels don't improve.

Employers can have discussions using open questions with all workers about their future aims, no matter what their age. This can help an employer identify training and development needs across all age groups. It also provides the opportunity for older workers to raise their retirement plans at a time of their choosing. This can help employers to plan recruitment early enough to replace experienced workers who've indicated they want to retire in a few years' time.

There's also a potential role for workplace based financial planning advice. Basic financial education might help workers manage their finances, avoid or repay debts, and make realistic levels of pension contribution. More affluent workers may be prepared to pay for personalised advice on investing their pension funds outside the default option and then feel encouraged to move on to more holistic planning. If these approaches result in workers successfully achieving their retirement goals, both they and their employer are likely to benefit from their greater engagement in the workplace.

FURTHER INFORMATION

This article can only provide a high level summary of the key aspects of age discrimination legislation as it relates to pensions. In many cases, trustees of occupational pension schemes and employers will need to seek specialist professional advice. For further general information see:

The Gov.uk website:
https://www.gov.uk/equality-act-2010-guidance

The ACAS website:
http://www.acas.org.uk/index.aspx?articleid=1841