

UCEA/ECU Age Discrimination Working Group Guidance

Age Discrimination Legislation 2006

Guidance Note 6: Retirement, Pensions and Redundancy – A UCEA Publication

Scope of guidance

This Guidance Note addresses the implications of the Employment (Age) Equality Regulations, which came into effect on 1 October 2006, for retirement, pension and redundancy arrangements in the Higher Education sector.

The regulatory framework

Earlier guidance notes in this series explain broadly the provisions of and exceptions to the Regulations. Further information about the Regulations is available from the DTI website at dti.gov.uk/employment/discrimination/index.html and on the ECU website www.ecu.ac.uk. For UCEA subscribers, Update 06/53 provides further details.

Retirement

Retirement age

The age regulations set a default retirement age of 65, making compulsory retirement below this age unlawful, unless a retirement age under 65 can be objectively justified. If an employer decides to set a retirement age below 65, they must be able to provide evidence that all or part of the workforce could not meet the requirements of the post above this age (e.g. because of health, welfare or safety). In practice, however, it may be difficult for employers to present an objective justification as competency tests could be devised which could establish the suitability of staff of all ages for particular posts. Employers can also have a contractual retirement age of over 65 or take the decision not to have a mandatory retirement age at all. The Government will review the default retirement age in 2011 to explore whether it is necessary in the long term.

Institutions may be aware of the judicial review of the Employment (Age) Equality Regulations granted to Heyday (a membership organisation supported by Age Concern. See www.heyday.org.uk). Heyday is challenging the Government's decision to permit mandatory retirement ages which it claims is incompatible with the European Equal Treatment Directive. Following a High Court hearing on 6 December, the case has been referred to the European Court of Justice (ECJ) to resolve. The implication of this case is that employees in public sector organisations ('emanations of the state') may be able to argue that a compulsory retirement age of 65 is unlawful direct age discrimination. In practice, this means that public sector organisations may face challenges from employees who have been required to retire at 65. However, it is currently not clear whether HEIs are 'emanations of the state' in this context, and a decision on the case is not expected for a number of years as once the ECJ has made its decision (which could take at least 2 years) the case will be referred back to the UK courts and could then be subject to further appeals. In the meantime, it is likely that any employment tribunal claims will be stayed pending the outcome of the Heyday challenge. It is important that HEIs

are aware that it is possible that mandatory retirement ages may become unlawful in the future, either as a result of the Heyday challenge or the Government's review in 2011.

Duty to consider working beyond retirement

All employees have the right to request to continue working beyond the retirement age set by the employer, and all employers have a duty to consider all such requests. Institutions are therefore advised to avoid policies which state that requests to work beyond the normal retirement age will only be considered in exceptional circumstances. However, employers are under no obligation to agree to any such requests and, although it would be good practice to do so, do not have to provide a reason for rejecting the request (legally, assuming the retirement procedure has been followed correctly, the reason will be retirement). If the institution chooses to give a reason, it is important to ensure that there is no suggestion of discrimination against the employee on the grounds of gender, race, disability, sexual orientation or religion or belief. HEIs may wish to consider developing clear criteria on which to base their decision in relation to requests to continue working beyond retirement age. ECU's Update 02/06: Employment Equality (Age) Regulations - Taking Action Now, contains some useful advice on developing such criteria. Any criteria developed should be communicated to staff and managers, applied consistently and decisions recorded and monitored to enable the institution to defend any challenges.

The age regulations provide a procedure that should be followed in the case of all retirements. The main elements of this are set out in Appendix A to this Guidance Note. Institutions are advised to develop their own procedures in line with the statutory procedure. Model letters, which can be modified to suit the institution, are given in the ACAS employer's guide, *Age and the Workplace* and also on the Age Positive website – see the Resources section at the end of this Guidance Note.

Transitional arrangements have also been put in place for retirements from 1 October 2006 to 31 March 2007. These are set out in Appendix B to this Guidance Note.

Retirement - unfair dismissal and age discrimination

On 1 October 2006, retirement became the sixth potentially fair reason for dismissal under the Employment Rights Act 1996 (in addition to conduct, capability, redundancy, contravention of an enactment and some other substantial reason) and the Act was amended to reflect the circumstances under which a retirement would be considered fair. The Regulations abolish the age limit of 65 for unfair dismissal claims, so that anyone of any age can bring a claim (subject to the usual eligibility criteria).

In order for a retirement to be fair, it must be effective on or after the employer's normal retirement age, and the employer must follow the statutory procedure regarding notification of the right to request to continue working (see Appendix A). If it is not followed, there is a serious risk that employees could succeed in claims for unfair dismissal and/or age discrimination as well as being entitled to additional compensation of up to 8 weeks pay (capped at £290 per week at present).

Employers who want to terminate an employee's service before the normal retirement age, must have another fair reason for doing this and follow the statutory dismissal procedures. In this instance, retirement will not be considered a fair reason for dismissal. If an employee who has been retired claims unfair dismissal, and it is established that the reason for the dismissal was not retirement, the dismissal is likely to be unfair and it may also be found to be discriminatory on the grounds of age.

As mentioned above, clear criteria and recording the decisions taken in relation to the duty to consider working beyond retirement may help institutions to defend potential challenges.

Flexible approaches to retirement

Institutions are encouraged to develop more flexible approaches to retirement to enable staff to retire in a gradual or phased way if they wish, and to support key business objectives. Guidance Note 4: Flexible Working for All Ages –provides further information, including a list of additional resources (see the Resources Section at the end of this Guidance Note).

Flexibility could be increased by:

- Considering requests to continue working beyond the intended retirement date in a positive way
- Accommodating requests to alter the nature of the employee's work and/or their terms and conditions in the lead up to final retirement (e.g. part-time working, job-sharing, downshifting i.e. reducing responsibilities over time or moving to a lower grade, secondments or sideways moves).

Changes to tax rules and pension schemes have been introduced to facilitate flexible retirement arrangements – see the section on 'Pensions and Flexible Retirement' below.

The benefits of introducing flexible approaches to retirement for the employer and employee include:

- The retention of experienced and skilled staff
- The sharing of knowledge and skills through the mentoring of other staff
- Easing the transition from work to retirement for the employee (thereby avoiding the perceived "cliff-edge" to retirement)
- Providing greater choice for employees, thereby improving morale in the workplace.

Institutions need to ensure that any policy they introduce in relation to flexible approaches to retirement is available to all staff nearing retirement and is applied consistently.

Pensions

Pension scheme rules

The Employment Equality (Age) (Amendment No 2) Regulations 2006, covering age discrimination in relation to pensions, came into force on 1 December 2006. The Regulations apply to pension benefits accruing after 1 December 2006. Pension schemes naturally discriminate between employees who are young enough to be in paid employment and those who are not, making it difficult to apply the principles of the Regulations. The government has therefore approached this issue by exempting a wide range of rules which typically exist in occupational pension schemes. The DTI/DWP has published guidance on the impact of the age regulations on pension schemes – see the Resources section at the end of this Guidance Note.

The main principles which apply to *occupational pension schemes* are summarised below:

- It is unlawful for trustees of occupational pension schemes to discriminate against members (or prospective members) of a scheme on the basis of age where members are in the same circumstances, or their circumstances are not materially different
- It is unlawful for employers to discriminate in relation to provision of pensions on the basis of age
- Discrimination (direct or indirect) will only be lawful if one of the specific exemptions applies or if it can be objectively justified (e.g. the rule encourages the loyalty or motivation of employees, or rewards experience)

- Trustees of pension schemes will be obliged to disapply any discriminatory rules under their scheme and are also given the power to objectively justify, change or remove any scheme rules which constitute unlawful discrimination.

The following are some of the most relevant age-related practices or rules for occupational pension schemes, which are exempted:

- Having a normal pension age in a scheme (e.g. age 65)
- Using minimum and maximum age limits, and minimum levels of pensionable pay for membership
- Using a minimum age for entitlement to benefits provided that benefits paid under a defined benefit scheme (such as USS, TPS or LGPS) before the early retirement 'pivot age' are actuarially reduced for early payment and the member is not credited with additional periods of pensionable service
- Using age criteria in actuarial calculations (e.g. calculation of early and late retirement benefits) and reductions (e.g. younger spouse reductions)
- Certain enhancements to ill-health early retirement pensions
- Setting the level of pension benefits by reference to years of service (e.g. setting a maximum number of years of membership)
- Closing all or part of a pension scheme to new entrants. This means that different pension arrangements can be offered to existing employees and new employees.

Pensions and flexible retirement

The Government has introduced new simplified rules around how pensions are taxed to enable members to take advantage of flexible retirement arrangements. These were introduced on 6 April 2006 (also known as Pensions A-Day). This change allows people in occupational pension schemes to continue working on a reduced salary in the lead up to their retirement (e.g. because of a reduction in hours or grade) while drawing their pension, where the scheme rules allow it. Both the TPS and LGPS scheme rules have been amended to facilitate flexible retirement, and USS has recently confirmed that the scheme will also be amended accordingly. Employees must have the institution's consent for the payment of pension benefits under flexible retirement arrangements. Policies regarding flexible retirement should advise employees considering flexible retirement to seek detailed information on their individual circumstances from the appropriate contact in the institution. Further information on changes to the schemes and flexible retirement is available on the TPS, LGPS and USS websites and UCEA subscribers will find details in recent Pensions Updates available on the UCEA website.

Redundancy

Calculating redundancy payments

No changes have been made to the age bands for calculating statutory redundancy payments. The maximum number of year's service that can be taken into account remains at 20, and the qualifying period remains at two years' service. The upper and lower age limits in the statutory redundancy payments scheme have, however, been removed with effect from 1 October 2006. This means that once individuals have completed the employer's minimum qualifying period, employees under 18 and over 64 will receive the same rights to statutory redundancy payments, subject to the two year qualifying period. In addition, the taper at the age of 64 has been removed, so employees aged 64 will no longer see their redundancy entitlement reduced by 1/12th every month until they are 65. All employees, regardless of their age, will be able to bring a claim for non-payment of a redundancy payment if they have been dismissed for redundancy.

Redundancy selection

Institutions need to ensure that their redundancy schemes are free from age discrimination, particularly with regards to the selection policy. For example, the use of length of service in any selection criteria may be discriminatory if it cannot be objectively justified. A policy of “last in first out” is potentially discriminatory against younger workers who are less likely to have built up a significant length of service. Decision regarding redundancies should be based on business reasons and criteria such as skills, experience and performance, and not directed solely at younger or older workers.

Voluntary redundancy

Institutions will also need to ensure that voluntary redundancy schemes are not age-biased and should consider extending them to all staff where this is not currently the case.

Actions

1. Develop a ‘right to request’ procedure to enable employees to request to continue working beyond their normal retirement date, and make sure all staff are aware of it. Consider developing criteria for considering requests to ensure consistency, and ensure decisions are properly recorded and monitored.
2. Check whether the institution has any employees who are approaching retirement age and set up a system to ensure that proper notice is given in line with the “right to request” procedures.
3. Review the institution’s flexible working policy. Where the institution has decided to extend the flexible working policy to all staff rather than those covered by the statutory obligation, consider how to deal with requests to work flexibly from staff approaching retirement.
4. Ensure that the institution has policies in place to deal with poor performance and health issues (you may find Guidance Note 3: Performance Management useful – see the Resources section at the end of this Guidance Note).
5. Check the institution’s redundancy policy to determine whether any selection criteria are discriminatory on the grounds of age, and review any voluntary redundancy scheme that is in place to ensure that it is not age-biased.
6. Ensure that managers are appraised of issues covered in this guidance note, particularly the right to request procedure, flexible working and redundancy selection.

Resources

Age and the workplace (a guide for employers), ACAS (available at www.acas.org.uk)

Age Legislation Fact Sheet 7: Retirement, DTI (available at <http://www.dti.gov.uk/files/file29246.pdf>)

Age Legislation Fact Sheet 3: Transitional Arrangements, DTI (available at <http://www.dti.gov.uk/files/file29241.pdf>)

Age Legislation Fact Sheet 6: Redundancy, DTI (available at: <http://www.dti.gov.uk/files/file29245.pdf>)

The impact of the age regulations on pension schemes, DTI/DWP (available at: <http://www.dti.gov.uk/files/file35877.pdf>)

UCEA/ECU Age Discrimination Working Group Guidance – Guidance Note 3: Performance Management (available at www.ucea.ac.uk and www.ecu.ac.uk)

UCEA/ECU Age Discrimination Working Group Guidance – Guidance Note 4: Flexible Working for All Ages (available at www.ucea.ac.uk and www.ecu.ac.uk)

ECU Update 02/06: Employment Equality (Age) Regulations - Taking Action Now (available at www.ecu.ac.uk)

In addition, examples of letters that can be used for the retirement procedure can be found in the ACAS guide for employers, as above, and on the Age Positive website at http://www.agepositive.gov.uk/good_practice/retirement.asp.

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Appendix A: Procedure for dealing with requests to continue working beyond the normal retirement age

The following is a summary of the statutory procedure and ACAS guidance:

- i) The institution must give the employee written notice of the date of their intended retirement and inform him/her of the right to request to continue working at least **6 months in advance** (but not more than 12 months in advance). At the same time, in order to manage expectations, the employee should be informed that the institution is entitled to refuse the request.
- ii) The employee should submit a written request to continue working beyond the normal retirement date at least **3 months in advance** (but no more than 6 months in advance). However, if the institution does not give the correct notification on time (as above), the employee can make a request to stay at any time before the proposed retirement date. The request should state the period for which he or she wishes to continue working (i.e. indefinitely, for a stated period or until a stated date).
- iii) The institution must give serious consideration to any request made by the employee.
- iv) The institution should normally hold a meeting with the employee to discuss the request within a reasonable period of receiving it, unless the request can be agreed without a meeting. The employee has a right to be accompanied by another employee or a trade union representative at the meeting. If it is not possible to hold a meeting within a reasonable period, you can inform the employee of the institution's decision in writing, taking into account any representations they have made.
- v) The institution must notify the employee of the decision as soon as possible. The employment relationship will continue until the day after the employee is notified of the decision.
- vi) The institution may decide to agree to the request, to agree to a compromise solution (e.g. an extension of employment for a shorter period of time), or to refuse the request.
- vii) If the decision is to agree to the request or to an extension of employment for a different period, the institution must write to the employee to confirm the decision and inform them of the new retirement date. If the decision is to refuse the request, you should confirm the date that the employee is to retire.
- viii) If the request cannot be agreed, the employee should be informed of the date on which he or she is required to retire and of his or her right of appeal.
- ix) The institution will need to repeat the procedure when nearing the new retirement date unless the new date is less than 6 months from the original retirement date.
- x) The employee can appeal against a decision to refuse their request or to offer an alternative retirement date that is earlier than the original request. The appeal must be made as soon as is reasonably practicable after receiving the decision. The employee's notice of appeal must set out the grounds of appeal in writing. If the employee appeals, the appeal meeting should be held within a reasonable period of receiving the appeal, and can take place after the retirement has taken effect. The employee should be informed of the institution's decision following the appeal as soon as is reasonably possible. If the institution decides to accept their request, you should write to them to confirm their new retirement date. Where the appeal is rejected, you should again confirm their retirement date in writing. The institution does not have to give a reason why the appeal has been rejected, but this would be considered good practice.

Appendix B

Transitional arrangements for dealing with requests to continue working beyond the normal retirement age for employees due to retire between 1 October and 31 March 2006.

(Extract from Age Legislation Fact Sheet No. 3 – Transitional Arrangements, DTI)

If an employer gives an employee notice **after 1 October 2006** that they are to be retired **before 1 April 2007**:

- the employer must write to the employee notifying them of the intended retirement date – giving the longer of either contractual or statutory notice; and
- must tell them in writing that they have a right to request not to be retired.

An employee who wants to exercise this right should make a written request:

- where possible, four weeks before the intended retirement date; or
- as soon as reasonably possible after being notified of the 'right to request'.

The request can be made after the employee's contract has been terminated, but not more than four weeks after termination. The same appeal procedures apply as before.

Anyone retiring **on or after 1 April 2007** will be subject to the full retirement procedure as given in Appendix A above.