
Social Inclusion Working Group

17th January 2007

Report of the Head of Human Resources

AGE DISCRIMINATION

Summary

1. This report summarises for Social Inclusion Working Group the forthcoming Employment (Age) Regulations 2006 and outlines the amendments made to the Council's HR processes in order to comply.

Background

2. Prior to 1 October 2006 there was no specific domestic legislation in force that covers discrimination on the grounds of age. However, the *General Framework for Equal Treatment Directive* which prohibits discrimination on the basis of religion or belief, disability, sexual orientation and age in employment or occupation, required the Government to introduce legislation implementing the age provisions of the Directive by the 2nd December 2006. To this end, on 28 April 2006 the Government published the Employment Equality (Age) Regulations 2006. Subsequent to the publication of the Regulations, ACAS have published a guide called "Age and the workplace: Putting the Employment (Age) Regulations 2006 into practice".
3. In summary the Regulations:
 - Set a default retirement age of 65;
 - Allow employers to have a retirement age below 65 as long as they can demonstrate that it is appropriate and necessary;
 - Give employees the right to request to work beyond their retirement age;
 - Make it compulsory for employers to consider any such request.
4. The regulations apply to all employers, private and public sector vocational training providers, trade unions, professional organisations, employer organisations and trustees and managers of occupational pension schemes. The regulations cover recruitment, terms and conditions, promotions, transfers, dismissals and training but they do not cover the provision of goods and services.
5. The regulations make it unlawful on the grounds of age to:
 - discriminate directly against anyone, unless objectively justified;
 - discriminate indirectly against anyone unless objectively justified;

- subject someone to harassment;
 - 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 on grounds of age;
 - discriminate against someone after the working relationship has ended.
6. There are limited circumstances when it is lawful to treat people differently because of their age where it can be shown there is an objective justification for doing so. An objective justification allows employers to set requirements that are directly and indirectly age discriminatory in certain circumstances. These will need to be supported by real evidence to support any such claim of objective justification. Each case must be considered on its merits and any such direct and indirect discrimination will need to be justified as a proportionate means of achieving a legitimate aim.
 7. A legitimate aim might include economic factors such as business needs and efficiency, the health, welfare and safety of the individual or the particular training requirements of the job. A legitimate aim must correspond with a real need of the employer – economic efficiency may be a real aim but saving money because discrimination is cheaper than non-discrimination is not legitimate. The legitimate aim cannot be related to age discrimination itself. The test of objective justification is not an easy one and it will be necessary to provide evidence if challenged.
 8. There are also exceptions to or exemptions from the age regulations in the following areas:
 - pay and other employment benefits based on length of service (any benefit earned by five years service or less will be exempt);
 - pay related to the National Minimum Wage;
 - acts under statutory authority;
 - enhanced redundancy;
 - life assurance;
 - retirement;
 - occupational pension systems.
 9. In very limited circumstances, it will be lawful for an employer to treat people differently if it is a genuine occupational requirement (GOR) that the job holder must be of a particular age. When deciding if this applies, it is necessary to consider the nature of the work and the context in which it is carried out.
 10. Prior to the introduction of the regulations the Council's Comprehensive Equalities Policy already included an aim:

“to ensure that no one who deals with the Council receives less favourable treatment on the grounds of age.”
 11. As a consequence guidance on how to avoid age discrimination was included in the relevant HR process from September 2006, for instance the Recruitment and Selection Policy, Bullying, Harassment and Discrimination Policy etc. As such the Regulations do not require alterations to many of the Council's current

HR processes although, having undertaken an impact assessment, the Regulations did require the Council to amend its HR processes to give employees the right to request to work beyond their retirement age and have such a request considered. Additionally the Regulations required the Council to revise its redundancy selection criteria as previously a high scoring element of the selection criteria was length of service, which is age discriminatory and therefore unlawful under the Regulations. This is reinforced by the ACAS guide which states that “using length of service in any selection criteria” is “likely to be discriminatory”.

12. Changes were also required in other policies and practices elsewhere in the Council, for instance the Council’s redundancy payment calculation table will need to be revised and the manner in which the Council exercises its pension discretions will also need to be amended. These amendments are being led by the Resources directorate.

Consultation

13. The proposed changes to the Council’s redundancy selection criteria and the proposed procedure to give employees the right to request to work beyond their retirement age and have such a request considered (Guidelines on the Employment of People over 65) were subject to consultation with the trade unions recognised by the Council.

Options

14. This report briefs the Social Inclusion Working Group on amendments to Council policy approved in September 2006 as a consequence of statutory requirements. As a result, there are no options to consider.

Analysis

15. Introducing revised redundancy selection criteria and a mechanism to give employees the right to request to work beyond their retirement age and have such a request considered have enabled the Council to comply with the age Regulations.
16. The revised redundancy selection criteria can be found in Annex 1. As can be seen the performance based criteria are designed to retain better performing employees and those who have the skills and experience required by the organisation, with weighting given to various criteria accordingly.
17. The revised guidelines on the employment of people over 65 can be found in Annex 2. The guidelines replaced the Council’s previous policy on the employment of over 65s and differ from the previous guidelines in a number of important ways.

Previous Provision	Revised Provision	Reason for change
Emphasis on employees to approach CYC to request to work beyond 65	Employees notified in writing of their impending retirement and notified of their right to request to work beyond their retirement age	Statutory obligation
Requests to work beyond 65 only granted in exceptional circumstances	Requests will be agreed unless there is a genuine and non-discriminatory reason not to do so	Current provision directly discriminatory
Extensions for a maximum period of 12 months	Extensions will be indefinite unless the employee has requested an extension for a stated period	Current provision directly discriminatory
Extensions subject to medical examination	Employees will be subject to the Council's existing performance management systems and not treated differently due to their age	Current provision directly discriminatory
No right of appeal	Right of appeal	Statutory obligation

Corporate Priorities

18. There is no direct relationship to the Councils corporate priorities as a result of this report, but it underpins them all indirectly.

Implications

Financial

19. Removing length of service as the primary criteria in redundancy selection may increase the cost of enacting redundancies in the Council as previously those selected for redundancy were those with less service and, as redundancy pay is calculated by reference to length of service, such employee's therefore received lower severance payments.
20. As redundancy exercises are managed on a case by case basis, it is not possible to determine the precise financial impact of the change. However the cost of redundancy payments are met by a centrally held budget which is monitored in accordance with established systems.
21. Increasing the number of employees working beyond age 65 will reduce the Council's recruitment advertising costs. Such a reduction is difficult to quantify although it is not expected to be a significant saving.

Human Resources (HR)

22. The HR implications are covered in the main body of the report.

Equalities

23. The proposals contained in this report comply with the principles of the Council's Comprehensive Equalities Policy and the age Regulations and are therefore supported.

Legal

24. The Employment Equality (Age) Regulations 2006 allow employers to treat people differently on the grounds of their age if there is an objective justification to do so. However discrimination on the grounds of age will only be justified if it is a proportionate means of achieving a legitimate aim. A legitimate aim must correspond with a real need of the employer the aim cannot be discriminatory in itself. For instance economic efficiency may be a real aim, although saving money because discrimination is cheaper than non-discrimination is not legitimate. ACAS state that "the test of objective justification is not an easy one" and it will be necessary to provide evidence, assertions alone will not be enough. It was therefore theoretically possible for the Council to objectively justify continuing to use its previous redundancy selection criteria but given the test of objective justification, it was considered to be unwise to attempt to do so.
25. Equally it may have been possible for the Council to objectively justify only granting permission to work beyond 65 for a limited period on a blanket basis and to make such permission subject to a medical examination. However, again, both of these provisions are directly discriminatory and it is therefore unlikely that the Council would have been able to justify or evidence these provisions.
26. It is important to note that the Regulations make "retirement" a dismissal in law. Such dismissals will be automatically fair provided the correct procedure to enact the dismissal is followed. However, equally, all such dismissals will be automatically unfair should the correct procedure not be followed. Consequently, there will be no legal obligation to agree a request to work beyond 65 even where there is no reason for refusing. This aspect of the Regulations is the subject of a judicial review application backed by Age Concern and must therefore be kept under review if such a policy or practice is adopted.

Additional Considerations

27. In addition to the legal implications of the Regulations described above, work has been undertaken through the Council's Equality in Employment Improvement Plan (EEIP) to analyse the Council's age profile and to consider what, if any, action needs to be taken in this area. The Council's current age profile, broken down by directorate, can be found in Annex 3.

28. The Council's policies and procedures relating to Bullying, Harassment and Discrimination, Recruitment and Selection and the Employment of People over 65 have built in mechanisms to monitor their application and the Council's age profile will be monitored through both the corporate and directorate EEIPs.

Risk Management

29. The provisions in this report help to protect the Council from financial and representational risk associated with potential age discrimination claims.

Recommendations

30. Social Inclusion Working Group are asked to note the action taken by the Council in respect of the Employment Equality (Age) Regulations 2006.

Reason: To comply with statutory requirements, to protect the Council from risk and to further support the Council's approach to equalities and social cohesion and inclusion.

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Wards Affected:

All

For further information please contact the author of the report

Background Papers:

ACAS Guide, Age and the workplace: Putting the Employment (Age) Regulations 2006 into practice

Annexes

Annex 1 – Revised redundancy selection criteria
Annex 2 – Guidelines on the employment of people over 65
Annex 3 – Age Profile of Council December 2006/Age Profile Breakdown Graph