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Summary of the law
on age discrimination

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We have more experience of winning personal injury and employment claims than any other firm – and we use that experience solely for the injured and mistreated.

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Remaining committed to the trade union movement, working closely with them and with professional associations for the benefit of working people everywhere

Thompsons pledge that we will:

Work solely for the injured or mistreated

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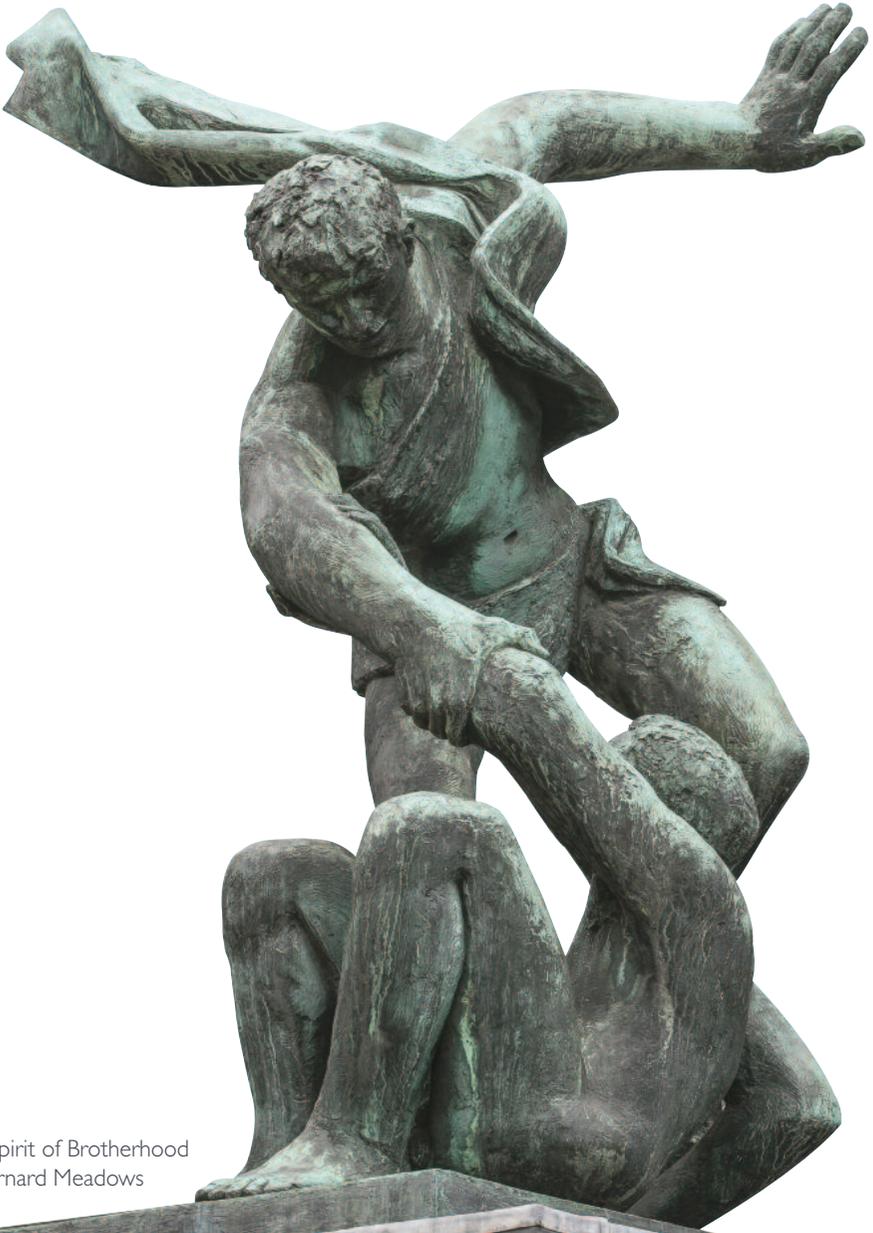
Invest our specialist expertise in each and every case

Fight for the maximum compensation in the shortest possible time

standing up for you

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

This booklet sets out the basic employment rights to which workers are entitled under the age discrimination provisions of the Equality Act 2010. These apply in England, Wales and Scotland (except where indicated) only.

- Protection and liability
- Discrimination
- Harassment
- Victimisation
- Exceptions
- Tribunal claims
- Remedies

What does the Equality Act cover?

The Act covers all forms of discrimination in the workplace including; recruitment, terms and conditions, promotions, transfers, dismissals and training or any other detrimental treatment because of age.

Who is protected?

The Act covers all forms of employment and applies to apprentices, those working under a contract of employment and the self-employed working under a contract personally to do the work.

Ex-employees can also make a claim against a former employer if they are complaining about something that was closely connected to their employment.

Who is liable?

The employer is generally liable for acts of discrimination, harassment and victimisation in the workplace. However, individual employees may also be liable, for example, if they have subjected a colleague to harassment related to age.



When can age discrimination arise?

Age discrimination can arise:

- When deciding who should be offered employment, such as shortlisting and interviews.
- Relating to the terms upon which employment is offered (although there are exceptions to some service-related benefits of five years or less).
- In relation to dismissal.
- When access to opportunities for promotion, transfer, training or other benefits, facilities or services are offered.

What is the public sector equality duty?

Public bodies such as local government, the NHS and those carrying out public functions are under a duty to consider equality when making day-to-day decisions, both in terms of service delivery and employment. This consists of a general duty and specific duties.

The general duty has three aims and requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people from different groups.
- Foster good relations between people from different groups.

The specific duties are designed to help public bodies comply with the general duty. The specific duties for devolved public authorities are different in England, Wales and Scotland. Trade unions should therefore check that the employer is complying with the relevant duties.

What is positive action?

The Act allows employers to treat someone with a protected characteristic more favourably during the recruitment or promotion process.

If they reasonably think that the person with a protected characteristic suffers disadvantage because of a particular characteristic (or there are fewer people with a particular protected characteristic employed), employers can choose a person with said protected characteristic over someone who does not have the characteristic provided that:

- The person with the protected characteristic is "as qualified" as the other candidate.
- The employer does not have a recruitment or promotion policy of treating people of the under-represented group more favourably.
- The more favourable treatment is a proportionate means of achieving a legitimate aim (the legitimate aim being encouraging participation and overcoming disadvantage).

These provisions are voluntary. An employee cannot bring a claim because the employer did not apply positive action during the recruitment or promotion process, although they may still be able to bring a claim if they were discriminated against during it.



What does the Act outlaw?

Direct discrimination

This means treating a person less favourably than someone else because of age.

Under the Act a person claiming discrimination because of the particular characteristic of age means a particular age group. In other words, someone bringing a claim on this ground can define the particular age group to which they belong. For example as “21-year-olds” or “the under-50s”.

In order to determine whether someone is directly discriminated against, a comparison has to be made with someone not of that particular age group, whose circumstances are the same or not materially different.

The definition is wide enough to cover those who are also discriminated against because they are perceived to be of a particular age group or because they are associated with someone of a particular age group.

Examples of direct discrimination include:

- Someone who is not promoted because they are under 25.
- Someone who is refused flexible working to look after their mother who is over 70 when other workers who do not have an elderly parent have been allowed flexible working.
- Someone who is prevented from attending a training session because they are thought to be over 50.

Unlike other forms of direct discrimination, employers can justify direct age discrimination if they can show it was “a proportionate means of achieving a legitimate aim”.

The legitimate aims in a direct age discrimination claim are different to those in an indirect age discrimination claim. The Supreme Court held in *Seldon v Clarkson Wright and Jakes* that direct age discrimination can only be justified if the legitimate aims are in the public interest. Examples include enabling young workers to gain access to employment and avoiding the need to dismiss older workers on grounds of performance.

Indirect discrimination

This arises if an employer applies a provision, criterion or practice (PCP) (whether formal or informal) which applies or would apply to everyone equally, but which puts or would put those of a particular age group at a disadvantage and the employer cannot justify it.

Employers can justify indirect age discrimination if they can show it was “a proportionate means of achieving a legitimate aim”, and unlike direct age discrimination, this includes employer’s business reasons.

Harassment

This occurs when one person subjects another to unwanted conduct related to age that has the purpose or effect of violating a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

The definition of harassment also applies to those subject to unwanted conduct because of another person's age. So, for example, an employee who is subject to offensive comments about their elderly parent will be protected under the Act.

Unwanted conduct covers overtly ageist behaviour such as verbal put downs or expressions or assumptions about the worker as a person, as well as bullying behaviour with no direct ageist content but which is only directed at that person because of their age. For instance, if an employer shouts at a younger worker when they would not have shouted at an older colleague.

In determining whether conduct amounts to harassment, a Tribunal will take into account the perception of that person and whether it was reasonable for them to consider the comments or behaviour to be offensive.

Victimisation

This occurs when an employer subjects a person to a detriment because they have done or may do a protected act.

A protected act includes:

- Bringing proceedings under the Act.
- Making allegations of a breach of the Act.
- Giving evidence or information in connection with proceedings under the Act that someone else has brought.
- Doing anything else in connection with the Act such as raising a grievance.

The person complaining of victimisation does not need to show they are of a particular age group in order to bring a claim. However, they do have to have acted in good faith when doing a protected act. A false allegation will not amount to a protected act.

Are there any exceptions?

Occupational requirement

The Act does not apply when the employer can show that there is an occupational requirement relating to the nature of the job which means they need to recruit someone of a certain age, as long as they can show it is a proportionate means of achieving a legitimate aim.

The requirement must be crucial to the post, and not merely one of several important factors. It also must not be a sham or pretext.

There are very few circumstances where age can be a valid occupational requirement for a job. One example would be where an acting part requires an actor of a particular age.

Statutory redundancy pay

The Act does not apply when calculating statutory redundancy pay (which is calculated by reference to age and length of service and which is only payable to employees who have two years' continuous service) or contractual redundancy pay schemes which are calculated on the same basis as statutory redundancy pay.

The minimum wage

The Act does not apply to the national minimum wage provisions, the amounts of which depend on age.

Service-related benefits

Any benefits (such as holiday entitlement or pay linked to length of service) that depend on less than five years' service are specifically exempted from the Act.

If the benefit requires more than five years' service, employers have to show that they reasonably believe that the benefit fulfils a business need, such as encouraging loyalty and motivation or rewarding experience.

Is there an age limit for claiming unfair dismissal?

No, employees of any age can claim unfair dismissal, provided they have two years service.

An employee with two years' continuous service may be able to claim a statutory redundancy payment if they have been dismissed for redundancy.

What is Early Conciliation?

Early Conciliation is the requirement to contact ACAS before lodging an employment tribunal claim. This can be done over the phone or by completing an Early Conciliation notification form on line on the ACAS website (www.acas.org.uk).

Early Conciliation usually lasts for four weeks, after which a conciliation certificate is issued. The Early Conciliation certificate number must be put on the employment tribunal claim form (ET1). If it is not, the claim form will be rejected and the claim may go out of time.

Is it easy to prove a claim?

Someone complaining of discrimination has to prove, on the balance of probabilities, that their employer discriminated against them.

Tribunals are aware that it can be difficult for claimants to provide clear evidence of discrimination so once an employee has established facts from which a Tribunal could conclude that there had been discrimination, then the burden may shift to the employer to show that they did not discriminate against them.

This is known as the reversal of the burden of proof.

How do workers gather information from their employer?

Workers can use the ACAS (Advisory, Conciliation and Arbitration Service) guidance, 'Asking and responding to questions of discrimination in the workplace', to request information from the employer which is relevant to a potential claim of discrimination.

Although the employer is not under a legal obligation to respond if the case proceeds to an employment tribunal hearing, an employment tribunal may draw an inference if the employer does not respond or its replies are evasive.

What time limits apply?

Claims must be brought within three months less one day of the act of discrimination that the person is complaining about. In exceptional circumstances the three month time limit may be extended if a Tribunal believes that it is just and equitable to do so.

Where the discrimination has occurred over a long period of time, this may amount to a continuing act extending over a period. A claim must then be brought within three months less one day of the last act in the series of acts.

What remedies are available?

There are three remedies available to a Tribunal.

- Declaration.
- Compensation.
- Recommendations.

Declaration

A declaration is a statement of the rights at the end of a claim, for instance that a worker has been subject to direct discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. This will vary from case to case and depends on the individual circumstances. There is no statutory limit to the amount of compensation, which can include; loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

Aggravated damages (not applicable in Scotland) can also be awarded if the Tribunal is satisfied that the employer has behaved in a high-handed, malicious or insulting way which has aggravated the injury to the claimant's feelings.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

Recommendations

The Tribunal can make recommendations for the purpose of preventing or reducing the effect of the discrimination on the claimant.

Examples of recommendations Tribunals can make include requiring an employer to:

- Remind the interviewer of the need to comply with equality legislation.
- Review its equality, disciplinary, grievance and recruitment policies and procedures.
- Circulate the tribunals liability and remedy judgment to the managing board.

A Tribunal cannot recommend that a person be given a job in a case where an employee successfully claimed they were discriminated against in a promotion exercise, for example.

If the employer fails without reasonable excuse to comply with a recommendation, then the Tribunal may order the compensation to be increased.



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