

# **MANCHES**

## **THE COMING OF AGE FOR EMPLOYERS**

### **An Employment Law Seminar**

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## INDEX

	<b>Page</b>
<b>ROLE PLAY ONE</b>	4
<b>A. INTRODUCTION</b>	5
The Regulations	5
European Directive	5
Other Factors	
<b>B. WHO IS PROTECTED?</b>	6
<b>C. WHAT IS OUTLAWED?</b>	7
Direct Discrimination	7
Indirect Discrimination	8
Defences	9
Harassment	13
Discrimination by Way of Victimisation	14
Instructions to Discriminate	14
<b>C. GETTING IT WRONG</b>	15
Burden of Proof	15
Procedure	15
Compensation	15
Time Limits	15
Questionnaires and Compromise Agreements	15
<b>ADA ON THE SPOT</b>	16
<b>D. WHAT TO DO IN PRACTICE</b>	17
Profiling	17
Recruitment	17
Job Specifications	17
Advertising	19
Recruitment Agents	20
Graduate Recruitment	20
Informal Methods of Recruitment	20
Application Forms	21
Selection for Interview	21
Interview Questioning	21
Successful Candidate	22
Health Checks	23
<b>ROLE PLAY TWO</b>	24
<b>E. TERMS OF EMPLOYMENT</b>	25
Salary and the National Minimum Wage	25
Benefits Generally	25
Service-Related Benefits	27
Occupational Pensions	29
<b>F. OTHER ISSUES</b>	30
Promotion and Progression	30
Training and Development	31
Career Breaks and Sabbatical Leave	31
<b>G. STATUTORY REDUNDANCY PAY</b>	31

	<b>ROLE PLAY THREE</b>	33
<b>H.</b>	<b>RETIREMENT</b>	34
	Retirement Age	34
	Duty to Consider Working Beyond Retirement	35
	Retirement by Mutual Agreement	40
<b>I.</b>	<b>UNFAIR DISMISSAL RULES</b>	40
<b>J.</b>	<b>CONCLUSION</b>	41
<b>APPX.</b>	<b>LIST OF DEPARTMENT MEMBERS AND CONTACT DETAILS</b>	43

## ROLE PLAY ONE

It is November 2006. Golden Age Holidays is a family firm which has been established for one hundred years. Britney Bennett has applied for the position of sales assistant at the Company. She is attending an interview with Ada Atkins, the Company's H.R. Manager.

**Ada:** Sit down, Britney, dear. Britney... now, that's a trendy name. I expected you to be a bit younger than you look. With a name like that, I wouldn't normally have bothered interviewing you at all, but we were a bit short of applicants.

As you probably know, our holidays are aimed at the older end of the market; those in their "twilight" years. So we like to employ people who represent our business – the over fifty-fives. We take the more mature candidates who can relate more to our clients.

**Britney:** I don't know what to say. Have you read my application form? Aren't you more interested in my career history and experience in the travel industry than my age? You didn't ask about my age on the application form.

**Ada:** Well, of course not, dear. I've read a bit about this new age discrimination law. Obviously, we didn't ask for your age on our application form – no flies on us when it comes to keeping up with the latest employment law! But I can see that you're a young slip of a thing so I can't imagine that you can have much experience under your belt. We really do need someone with at least five years' experience.

**Britney:** Actually, I'm thirty-four. I did a degree in travel management and since then I have spent nearly thirteen years working in travel, focussing specifically on holidays for older customers.

**Ada:** Oh.... well, how lovely, dear. But the problem is that your face just wouldn't fit in. Our customers wouldn't feel that you could understand their needs.

**Britney:** I'm really confused. Have you read my references? They're outstanding. I really think that you should reconsider my application.

**Ada:** Now, now – don't get upset. Perhaps we could make an exception for you and let you start. To tell you the truth, dear, you were the only person who applied for the job. We don't usually bother with trial periods but, given my concerns about your age, we'll have you on probation for eighteen months.

## **A. INTRODUCTION**

### **1. The Regulations**

It's fairly obvious that Ada had decided, from the outset, that Britney was too young for the job. Ada was looking for a mature candidate that represented Golden Age Holidays' target market.

By next year, Ada's attitude will be unlawful. This is because on 1<sup>st</sup> October 2006, the Employment Equality (Age) Regulations 2006 ("the Regulations") come into force and they will outlaw discrimination on the grounds of age. The Regulations are going to have a massive impact on the workplace because discriminatory language, policies and attitudes are so ingrained.

Many people assume that it is only older workers that experience age discrimination, but younger people also experience discrimination because of their youth. According to a recent survey carried out by the University of Kent, ageism (against both the young and old) is the most commonly experienced prejudice in the UK – exceeding sexism and racism. The study found that the only group not to experience ageism are people aged between thirty-five and forty-four who are too old for negative youth stereotyping and too young for prejudice based on advancing years ("The Independent", 7 September 2005). Of the 43% of those interviewed in the University of Kent's survey who said they had experienced prejudice of some sort, 65% said that they had first-hand experience of age discrimination.

The Regulations will protect the young, the old and everyone in between. They outlaw age discrimination in employment and vocational training. These notes focus on the employment implications of the Regulations only. The final version of the Regulations has not been published yet and this seminar is based on the draft Regulations published in July this year. A Department of Trade and Industry ("DTI") consultation paper on the Regulations has also been published. The consultation period closed on 17<sup>th</sup> October 2005. Changes may be made to the draft Regulations on which this seminar is based as a result of the consultation process. This should be kept in mind when considering these notes.

### **2. European Directive**

There are a number of reasons why the Regulations are being introduced. First of all, they are necessary to comply with European Employment Directive 2000/78/EC. However, there are other social, economic and demographic factors behind them.

### **3. Other Factors**

Over recent years, older workers have been encouraged to take early retirement. In 1975, 95% of fifty-five to sixty-five year old men were working. By 1999 this figure had dropped to around 60%. Currently, only 30% of people are in employment by the age of sixty-five. Meanwhile, better living and healthcare standards mean that average life expectancy has increased.

At the same time, there are fewer younger workers available to replace retiring staff, partly because of the falling birth rate and the increased numbers in further education.

The trend is for fewer workers to be supporting older people for longer than ever before. In order to address the problems of an ageing population and pension shortfalls, more people need to work on for longer. A lot of us will have to retire later than our parents, many of whom have benefited from the trend towards earlier retirements.

However, current attitudes to older workers lead some of the most experienced, skilled and valuable members of the workforce to be "cast on the scrapheap" on the basis of their age.

These issues are already creating skills shortages for some employers who are experiencing chronic recruitment difficulties. If they are not doing so already, your competitors will tackle their mounting recruitment problems by headhunting your staff. Increasingly, employers will have to follow the lead of Asda and B&Q by tapping the resources offered by older workers.

Even if you don't buy into the economic or demographic theories behind the new legislation, you still need to be aware of the law when you are managing employment issues. Otherwise, you will be faced with costly Tribunal claims. We have all heard of multi-million pound sex and race discrimination claims. The age legislation gives every member of your workforce the possibility of uncapped compensation.

Other countries which have already introduced age discrimination laws, such as Ireland and the United States, have seen a steady rise in age claims. In the United States, where legislation protects those over forty, 20% of all discrimination claims are based on age. The figures could be even greater here where all ages will be protected.

Ultimately, what we are talking about today will be important for you as this could all threaten your business' bottom line.

## **B. WHO IS PROTECTED?**

The horrible truth for employers is that pretty much anyone will be able to claim under the Regulations. The Regulations cover all those in work or seeking work (or training), whatever their age.

The Regulations give rights not just to job applicants and employees, but also to self-employed people, contract workers (such as those hired by employment agencies and contracted out to clients), office-holders (including company directors), partners, members of trade organisations, anyone in vocational training and anyone receiving or holding a professional or trade qualification.

Unpaid volunteers will not be covered, although unpaid work will be covered if it forms part of a paid employment or vocational training relationship. For example, if a trainee teacher is harassed due to her age during unpaid teaching experience in school, the Regulations will protect her.

Job applicants, employees and workers are protected in a broad range of situations from: the arrangements made to determine who should be offered work; through terms and benefits, promotions; training and transfer; to dismissal.

Post-termination discrimination and harassment is outlawed where the discrimination or harassment arises out of and is closely connected to the terminated relationship (Regulation 23). For example, if you refused to provide a reference to an eighteen year old ex-employee on the basis that you do not give references to anyone under twenty because they do not have the length of service to allow any meaningful assessment, this would be unlawful discrimination under the Regulations. Similarly, providing outplacement assistance to some redundant staff but not others following a round of redundancies could lead to post-termination age discrimination.

The Regulations will protect those who work wholly or partly in Great Britain. Even someone who works wholly outside Great Britain can claim, provided that the "employer"

has a place of business at an establishment in Great Britain, the work is for the purposes of that business and the employee/contract worker is ordinarily resident in Great Britain at the time of recruitment or at any time during the course of the employment/contract work (Regulation 10). Multi-national businesses may face a high risk of claims from those posted to countries without equivalent age discrimination legislation. One way around this may be to ensure that those recruited to work overseas are engaged by an overseas-registered subsidiary company with no place of business in Great Britain.

The Regulations will not cover age discrimination in the supply of goods and services, such as giving reductions on theatre tickets to older people or providing home insurance exclusively to older people. This is different from race, sex and disability discrimination where protection does extend to the supply of goods and services. The supply of goods and services may be covered by age discrimination legislation in the future.

### **C. WHAT IS OUTLAWED?**

The draft Regulations cover direct discrimination, indirect discrimination, harassment and victimisation. To help you picture this more clearly, essentially the Regulations will mirror existing legislation outlawing race and sex discrimination.

Policy changes and training are going to be required as employers may be vicariously liable (responsible) for acts of discrimination, harassment or victimisation carried out by their employees in the course of their employment (Regulation 24). The employee concerned will be liable as well. Employers will have a defence if they can show that they took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his/her employment acts of that description.

At Golden Age Holidays, the Human Resources Director has not done the training very well. Ada is aware she should not ask applicants for their age, but that is not enough. She is clearly discriminating against Britney. Managers and staff should be aware that discrimination, harassment and victimisation on the basis of age are unacceptable and unlawful and will not be tolerated by your business.

Liability for unlawful action by others can extend beyond the employer-employee relationship. Anything done by a person as agent for another person with the authority (whether express or implied, and whether before or after the event) of that other person shall be treated for the purposes of the Regulations as done by that other person as well as by him. Therefore, principals will be liable for the acts of their agents (Regulation 24(2)).

Imagine that a temp. employed by an employment agency is supplied to your business and, whilst working in one of your offices, she is harassed on the grounds of her age by one of your managers. She could potentially bring complaints against your business and against the agency. It will be important for terms and conditions between employment agencies and clients to insist on compliance with equal opportunities policies which prohibit age discrimination.

#### **1. Direct Discrimination**

Direct discrimination will often be easy to spot. It happens when someone is treated less favourably than someone else is treated or would be treated on the grounds of their actual or apparent age and there is no objective justification for the less favourable treatment (Regulation 3(1)(a)). The relevant circumstances of those being compared must be the same or not materially different.

By applying a minimum age for recruitment, Ada will be directly discriminating against Britney on the grounds of her age, unless the age requirement can be objectively justified or an exemption applies. Similarly, by placing Britney on an eighteen month probationary period just because she is under fifty-five, Golden Age Holidays is guilty of direct age discrimination which, given Britney's experience, would be difficult to justify objectively.

Making stereotypical assumptions based on age is likely to be direct discrimination. Often assumptions are wrong. For example, people frequently assume that older workers are more likely to be off sick. Research has shown that the opposite is true.

In an Irish case, *Clifford v. Aosdana DEC/E – 2004 – 046*, Mr Clifford said that he had suffered direct age discrimination when he was informed by Aosdana, a body representing artists, that he must be thirty years old to be eligible for membership. When challenged, Aosdana said that one of the conditions of membership was that "an artist must have distinguished him/herself by the excellence of his/her art" and it was presumed that artists younger than thirty would not have done this. This was an assumption which amounted to direct age discrimination and compensation was awarded to Mr Clifford.

Direct discrimination can also include discrimination based on the perception of someone's age, even if that perception is wrong. So, if you wrongly assume that someone is over sixty and do not give them the job because they are too old, this will still be unlawful direct discrimination.

## **2. Indirect Discrimination**

For employers, indirect discrimination can be more difficult to deal with as it is easier to discriminate indirectly without realising it.

Indirect discrimination happens where a blanket policy or practice disadvantages a certain category of person because of their age, even if this effect was not intended.

Under Regulation 3(1)(b), indirect discrimination occurs where a provision, criterion or practice, is applied (or would be applied) equally to persons not of the same age group as the complainant, which puts or would put people of the same age group as the complainant at a particular disadvantage compared to others and which puts the complainant at that disadvantage and the discriminator cannot show the provision criterion or practice is objectively justified. The relevant circumstances of those being compared must be the same or not materially different.

For example, imagine a business advertises for courier jobs requiring applicants to have held a driving licence for five years. This is not direct discrimination. The requirement does not mention age, but a higher proportion of those aged over twenty-two will be able to fulfil this requirement than younger people because of the minimum age for taking a driving test. This would therefore amount to indirect discrimination as it excludes applicants aged between seventeen and twenty-two.

A further example is where an employer has a holiday leave scheme which awards five extra days' holiday after ten years' service. This could amount to indirect discrimination against younger workers who are less likely to be able to fulfil the service requirement than older members of staff.

### **3. Defences**

#### **3.1. Objective Justification**

Having heard all that gloom and doom there is a light at the end of the tunnel.

In some situations you will be able to discriminate against someone because of his/her age. If an employer can show that the discrimination is "objectively justified" or that one of the exemptions set out in the Regulations applies, the discrimination will be lawful.

The justification defence covers both direct and indirect discrimination. This is unusual as most other types of discrimination, such as race and sex, do not allow employers to justify direct discrimination. However, the test of objective justification will be a difficult one to satisfy.

When deciding whether discrimination is justified, a Tribunal will look at whether it is a proportionate means of achieving a legitimate aim. We will break this down, starting with what is a legitimate aim.

##### **3.1.1. Legitimate aim**

The DTI's consultation paper on the Regulations has suggested that economic factors, such as business needs and efficiency, may be legitimate aims. But it says that discrimination will not be justified simply because it may be less expensive to discriminate.

This suggestion seems rather flawed. Business needs and efficiency often boil down to a cost issue. It is still unclear how far an employer can rely on cost or profitability as a legitimate aim for discrimination. Employers may be able to justify discrimination if cost-saving is an aim of the discrimination, but not the only aim. Unless the final version of the Regulations clarifies this issue, Tribunals are going to have to decide the point.

An aim cannot be legitimate if it is related to age discrimination itself. The consultation paper gives the example of a trendy girls' clothes shop which wants to employ young shop assistants because it believes that this would contribute to its aim of targeting young buyers. The consultation paper says that trying to attract a young target group will not be a legitimate aim because this has an age-discriminatory aspect.

This is very similar to the scenario at Golden Age Holidays, where Ada wants to recruit over fifty-fives to sell holidays to the Company's older target market.

If this were a race case and Britney were black, it would be obvious that Ada could not reject Britney just because Ada thought the Company's predominantly white clients would be prejudiced against a black sales assistant.

The difference with age legislation is that direct age discrimination can be objectively justified. So, if Ada could demonstrate that profits would be significantly affected if the Company did not recruit older sales staff, it is certainly arguable that it would have a legitimate aim in recruiting older people.

However, this is not the approach taken by the DTI's consultation document. Until there are some cases on the Regulations, it will certainly be safest for Ada to drop the over fifty-five age limit.

The Regulations include specific examples where direct discrimination may be justified.

The list is not exhaustive and the practices used as examples are not exemptions. This means that, if challenged, employers will still need to show that, in the circumstances, the practice pursues a legitimate aim and is a proportionate means of achieving that aim.

The first example given in the Regulations of where direct discrimination may be justified is where age requirements are set to ensure the protection or to promote the vocational integration of people in a particular age group.

This is as clear as mud. No one seems sure about what "vocational integration" means. However, employers may be able to rely on this example to justify paying younger workers less than others in order to encourage their recruitment so that more young people are brought into the workforce.

The second example given in the Regulations of where direct discrimination may be justified is where minimum ages to qualify for certain advantages linked to employment or occupation (benefits) are fixed in order to recruit or retain older people.

This suggests you can positively discriminate to attract older people, for example, by paying them more. However, this does not seem right: the consultation paper makes it clear that positive discrimination in favour of older workers will not be allowed. Only positive action in specific circumstances is lawful (see C3.3 below).

The third example given in the Regulations of where direct discrimination may be justified is where a maximum age for recruitment or promotion is fixed based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

For example, air traffic controllers have to undergo extensive theoretical and practical training at the College of Air Traffic Control, followed by further on-the-job training. Rejecting someone who is sixty-nine and half years old when the retirement age is seventy on the grounds that he/she would retire before the training was completed would probably be justified.

The key issue for Tribunals will be deciding what a "reasonable period of employment before retirement" will be. The consultation paper says that employers will not be able to justify discrimination on cost alone. So, from October next year, an accountancy firm is unlikely to be able to justify refusing to employ a sixty year old trainee accountant just because it would be too expensive to train him/her. Tribunals are likely to consider all the circumstances, including cost, the size of the employer and the discriminatory effect in deciding whether discrimination is justified.

Other potential justifications for direct or indirect discrimination will include, for example:-

- protecting health, safety and welfare;
- encouraging and rewarding loyalty; and
- facilitation of employment planning.

In the earlier example concerning couriers required to have held a driving licence for five years, the requirement may be justified in the event that all insurance policies require couriers to have held their driving licences for a minimum period of five years.

### **3.1.2. Proportionality**

Even if an employer is pursuing a legitimate aim, the aim still needs to be proportionate to avoid discrimination. So, the impact of the discrimination must be balanced against the employer's needs.

In our example about extra holidays after ten years' service, this may be justified on the grounds that it encourages and rewards loyalty. However, an employer would have to show that it genuinely believed that this was a reasonable way of rewarding loyalty and that it could not achieve the same result with other less discriminatory incentives. This could be difficult. A shorter service requirement could be easier to justify.

To be proportionate, the discrimination must actually contribute to the pursuit of the legitimate aim. For example, if an employer wants to award long service bonuses to encourage loyalty, he must be satisfied that the bonuses actually encourage loyalty. In practice, this may be difficult for employers to show.

The importance of the legitimate aim must also be weighed up against its discriminatory effects. For example, if the legitimate aim is the protection of people's lives and safety, it is likely that a bigger discriminatory effect will be allowed than where the legitimate aim is rewarding employees' loyalty.

In addition, an employer should not discriminate more than necessary. So, where the legitimate aim can be achieved just as well by a measure with a big discriminatory effect or a small or no discriminatory effect, then the less discriminatory measure should be used.

### **3.2. Genuine Occupational Requirements**

There is also a genuine occupational requirement defence under the Regulations.

Under Regulation 8, employers will be entitled to set an age requirement if, taking into account the nature of the employment or the context in which it is carried out, having "a characteristic related to age" is a genuine and determining occupational requirement ("GOR") and it is proportionate for the employer to apply the requirement in the particular case.

It is not clear what "a characteristic related to age" is; maybe wrinkles or an unbroken voice. The consultation paper says that age will only be a GOR in very few cases, such as acting jobs. So, a television company could limit their search for an actress to play Miss Marple to older-looking women. Other than acting, it is difficult to imagine in what other circumstances employers may be able to rely on this exception.

For example, a trendy girls' fashion label is likely to want to use a young model for its advertising campaign. If a sixty year-old model applied for the job, could the fashion label refuse to employ her, relying on a GOR?

The employer would have to argue that youth was a GOR and that simply looking good in the clothes (which a sixty year-old could do) was not enough. Unfortunately, the consultation document has not given any guidance on this. Discussions with the DTI about GORs did cover models. It seems that during the discussions it was felt that, at least where you are advertising age-specific products, such as children's clothes or holidays specifically for older people, using age-specific models is acceptable. However, the consultation document does not reflect this. In any event, this exception would not necessarily apply to trendy clothes which are often less age-specific. It will be for Tribunals to tackle these issues. If employing young shop assistants to target young

customers is not a legitimate aim, a Tribunal could very well take the same line with young models. This could be an issue for any business which uses models for advertising.

GORs can only be used in the context of direct and indirect age discrimination in recruitment, promotion, transfer, training and dismissal. A GOR cannot be applied to discriminatory terms of employment or benefits. Where there is no GOR, an employer may still be able to find an objective justification for the discrimination.

### **3.3. Positive Action**

Discrimination may also be lawful in certain cases of positive action.

Positive action includes encouraging people of a particular age to take advantage of employment opportunities. In practice, pursuing a policy of positive action can be dangerous as there is a very fine line between positive action and unlawful discrimination.

The positive action exemption covers taking action to give people of a particular age or age group access to vocational training or to encourage people of a particular age or age group to take advantage of employment opportunities. Such action will be lawful if it is reasonably expected to prevent or compensate for disadvantages suffered by such people (Regulation 28).

These are two quite narrow situations and positive action does not cover what is generally regarded as "positive discrimination", such as recruiting someone because they are in an under-represented age group.

If you are faced with a situation covered by the positive action provision, then its requirements are generally easier to fulfil than the test of objective justification for direct and indirect discrimination. A legitimate aim is already satisfied and, instead of the requirement of proportionality, it only requires that it reasonably appears that the measure pursues the aim of preventing or compensating for disadvantages suffered by persons because of their age.

An example of positive action is where an employer asks a headhunting business to search particularly for candidates in a certain age group because that age group is under-represented in its workforce. As long as applications from people in other age groups are not excluded, this is covered by the positive action provision and will be lawful if it reasonably appears to the employer that this helps to compensate for a disadvantage suffered by this age group. Again, this can be dangerous and employers should think very carefully about positive action initiatives.

Where the positive action provisions do not apply, you may still be able to satisfy the defence of objective justification.

### **3.4. The Statutory Authority Exemption**

If you are complying with age limits set by law, this will not be discrimination as there is a "statutory authority exemption" (Regulation 26).

For example, a pub will be able to insist that bar staff are eighteen or over as the law prohibits under eighteens from working behind the bar.

### 3.5 National Security

Acts done for the purposes of safeguarding national security, if justified by that purpose, will not be unlawful (Regulation 27).

### 4. Harassment

The Regulations also outlaw harassment on the grounds of age. This is going to be a minefield. I bet everyone here has heard comments at work about people being "past it" or "wet behind the ears". Such comments could amount to harassment.

A person suffers harassment where he is subject to unwanted conduct, on the grounds of his age, which has the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Conduct shall only be taken as having these effects if, having regard to all the circumstances, in particular the perception of the victim, it should reasonably be considered as having that effect (Regulation 6).

This sounds like a hard test to satisfy, but the threshold is not that high.

In a case brought in Ireland, ***A Named Female Complainant v. a Company DEC-E2002-014***, it was found that persistent criticism of a young female manager amounted to harassment. In this case, a newly recruited and much younger female manager had been systematically belittled and humiliated in front of other staff by a male manager in his sixties who could not accept her position there. The typical public comment he made was that she was "only a young fooling girl". Senior management failed to take any effective action, despite the Complainant's requests that it do so and she eventually resigned. The Equality Officer held that the behaviour constituted age-based harassment, as well as gender-based harassment, and awarded her €6,500 in compensation.

To be harassment, the conduct must be unwanted by the victim, but he/she does not have to make it explicit that the behaviour is unwanted. So, even if the employee does not complain at the time, employers could still face harassment claims.

Nor does harassment have to be intentional. If unwanted conduct has the effect of violating a person's dignity, it will amount to harassment even if this was unintended. However, the Regulations say that the conduct must be reasonably considered as violating someone's dignity. When deciding whether someone has been harassed, Tribunals will look at whether, in all the circumstances, including the perception of the complainant, the behaviour should reasonably be considered as harassment. Over-sensitive people who take offence unreasonably at perfectly innocent comments would probably not be seen as harassed.

According to the DTI, where a person makes light-hearted jokes about his own age and another person simply repeats those comments in the same context, it will not be harassment. However, in practice, it may be very difficult to draw the line between consensual banter and harassment. To be on the safe side, you should train your workforces that jokes and comments about age are best avoided. Training and policies on these issues will help you to avoid vicarious liability for harassment by your employees.

The risk of age-based harassment will make an informal working atmosphere even more dangerous. We are heading towards the situation where everyone will be too frightened to say anything to their colleagues of a vaguely personal nature.

## **5. Discrimination by Way of Victimisation**

The Regulations will also make age-related victimisation unlawful.

In summary, victimisation is basically a two-stage process. First, a person must take some kind of action, or make some sort of complaint or allegation under the Regulations (which could include helping someone else with their age discrimination claim). Second, that person must be treated less favourably because of that action, complaint or allegation.

For example, if an employee complains that he has been harassed on the grounds of his age and then receives a poor appraisal score in revenge, this will amount to victimisation.

To be protected, the victim must be acting in good faith. If a person knowingly makes false allegations or gives false information, he will not be protected.

Regulation 4(1) states that a person discriminates against another if he treats the victim less favourably than he treats or would treat other persons in the same circumstances and does so because the victim has:

- brought proceedings against the victimiser or any other person under the Regulations;
- given evidence or information in connection with proceedings brought by any person against the victimiser or any other person under the Regulations;
- otherwise done anything under or by reference to the Regulations in relation to the victimiser or any other person; or
- alleged that the victimiser or any other person has committed an act which (whether or not the allegations so states) would amount to a contravention of the Regulations,

or by reason that the victimiser knows that the victim intends to do any of those things, or suspects that the victim has done or intends to do any of them. The "victim" will not be victimised because of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

## **6. Instructions to Discriminate**

Imagine that Ada asked her assistant at Golden Age Holidays to bin all applications from those under fifty-five and her assistant refused to do this. If Ada then took disciplinary action against her assistant, this would be unlawful discrimination against her assistant.

This is because, under Regulation 5, it will be unlawful discrimination if one person treats another less favourably than he treats or would treat others in the same circumstances because that person has not carried out either in whole or in part an instruction to do an act which is unlawful under the Regulations or because that person complains to the person who gave him/her the instruction or to another about that instruction.

Under Regulation 5, it must be the discriminator who treats the victim less favourably, but the instruction could have been given by anyone. The act must be unlawful for Ada's assistant to receive protection under Regulation 5. So, her assistant will not be protected, even if she genuinely believed that an act was unlawful, if it turns out not to be.

## **C. GETTING IT WRONG**

### **1. Burden of Proof**

Under Regulation 40, if the Claimant can show that it is apparent from the facts of the case that there has been discrimination, harassment or victimisation, the burden of proof will shift to the employer to provide an adequate explanation for what has taken place. The Tribunal will uphold the complaint if the employer cannot provide such an explanation. Employers will have to produce supporting evidence of their case, if challenged; assertions will not be enough.

### **2. Procedure**

For an employee with an age discrimination, harassment or victimisation claim, other than simply dismissal, the employee will usually have to follow the statutory grievance procedure before issuing Tribunal proceedings.

### **3. Compensation**

We keep saying this but, if you get it wrong, it could cost you a lot of money.

Compensation, including injury to feelings awards, can be ordered for age discrimination, harassment or victimisation and there is no cap on the level of award that may be made. The Tribunal may also make a declaration or recommendation and award interest (Regulation 41).

There are also special rules on unfair dismissal compensation (see H2.1.1 and I below).

### **4. Time Limits**

Complaints of discrimination, harassment and victimisation will normally have to be made to the Tribunal within three months of when the act complained of was done, although Tribunals may hear a complaint out of time if they consider it just and equitable to do so (Regulation 45).

### **5. Questionnaires and Compromise Agreements**

Where someone believes he/she has suffered age discrimination or harassment, he/she can serve a questionnaire on his/her employer (Regulation 44). If the Tribunal believes that there has been a deliberate failure to reply without reasonable excuse within eight weeks of service of the questionnaire, or that a reply is evasive or equivocal, adverse inferences may be drawn. The Regulations set out time limits for the service of questionnaires.

As with other statutory claims, the only way validly to contract out (or settle) is by using a Compromise Agreement (or COT3 where ACAS is involved) (Schedule 5).

## **ADA ON THE SPOT**

**JCM:** I get a cameo role now.

Ada, you've heard what we've said so far. How do you think you can justify the way you've treated Britney?

**Ada:** Most of the people who buy holidays from Golden Age are in their fifties or above. We want sales assistants who can relate to our clients and understand their needs.

**JCM:** But couldn't younger people do that?

**Ada:** I don't see how. We want people who are steady, not flighty young things who'll be snorting drugs in the loo every five minutes.

**JCM:** That's a massive generalisation. A Tribunal would never accept that as a justification for age discrimination. Anyway, if your clients are in their fifties, what about fifty to fifty-five year-olds. How come you're looking for people over fifty-five?

**Ada:** I'm not sure. That's just what we've always done and we've never had trouble before.

**JCM:** You really need to challenge policies like this. You can't just assume that because things have always been done in a certain way, everything's fine. Do you only ever look for people over fifty-five?

**Ada:** Oh no, the Managing Director always insists that our secretaries are under thirty. He likes bright young things who are up to speed on the latest computer gadgetry. We don't discriminate overall – we take on all sorts of people.

**JCM:** Ada, that's still discrimination. You'll end up with an expensive Tribunal claim and it's going to be more and more difficult for you to recruit good staff as the population is getting older.

**Ada:** Well, if there are more over fifty-fives around, that will be great for our sales team.

**JCM:** You can't take that approach. You need to try and recruit people of all ages, unless you have a really good business reason not to.

**Ada:** We have a fantastic business reason: our clients won't buy holidays from whippersnappers.

**JCM:** Do you have any evidence to back that up?

**Ada:** It's common sense!

**JCM:** That just won't be good enough. You'll have to have watertight evidence to have any hope in a Tribunal claim. Even then, the argument might not work. I can't see how you will convince a Tribunal if you've not employed sales assistants of different ages and compared their performance. You're going to have to change.

## **D. WHAT TO DO IN PRACTICE**

I still don't think Ada quite gets it.

The new rules are going to affect how you run your business and, if you have not taken any action already, you do not have a great deal of time. Your businesses need to start preparing for the introduction of the new rules now.

### **1. Profiling**

One practical step to help address age discrimination is to start collecting information about the age profile of your workforce and those affected by your recruitment process.

The Regulations do not require employers to do this, but it is good practice as it makes it easier to check whether age discrimination is taking place. It is best to profile on an anonymous basis using equal opportunities monitoring forms. Otherwise, it may look as though you are drawing up some kind of "hit list" by asking people for their ages.

Keeping an up-to-date profile of the age of all workers in your organisation will help you monitor whether your anti-ageist policies are working and may also help if you have to answer an age discrimination questionnaire or fight a Tribunal claim.

### **2. Recruitment**

Recruitment is one area where age discrimination will have a big impact.

Now is the time to start updating recruitment policies and giving fresh equal opportunities training to those involved in the recruitment process.

If you want to be really proactive, you could find out what different age groups think about you as an employer and whether you have the right image and reputation with potential employees. If you do this now, it will give you some time to make changes before the Regulations come into force.

The bottom line is that, from next October, recruitment decisions should not normally be based on age. They should be based on the skills required for the job.

However, there is a special recruitment exception. The provisions regarding discrimination in the arrangements made for determining to whom employment should be offered and refusing to offer, or deliberately not offering, someone employment do not apply in relation to a person who has already reached the age of sixty-five and who, if recruited, would be an employee (Regulation 7(4)).

So, there are limited rights to discriminate against those aged sixty-five or over. Apart from this, there will be no other special exemptions for recruitment and discrimination in this area will only be lawful if it satisfies the test of objective justification or falls under one of the exemptions.

### **3. Job Specifications**

When preparing a job specification, think carefully about any age-related requirement you include and why it is necessary. If requirements are unjustified, they may discriminate against some applicants.

### 3.1. Age Requirements

Placing an upper or lower age limit for recruitment will be direct discrimination, unless it can be objectively justified (or an exemption applies).

### 3.2. Experience

Demands for specific levels of experience can discriminate indirectly. Think carefully about what experience is genuinely required and take a flexible approach.

This is illustrated by a recent Irish case, **Noonan v. Accountancy Connections EE-2003-254**. Accountancy Connections had advertised for two posts requiring a minimum of two to three years' post-qualification experience. Mr Noonan was in his fifties and had around twenty years' post-qualification experience. He was told by the Company that he was too senior for both of the positions.

Mr Noonan argued that the requirement for only two to three years' post-qualification experience automatically excluded people aged thirty and over and that he had been discriminated against on the grounds of age.

The Company told Mr Noonan that, for one of the posts, he would have been more senior than the person to whom he would have to report. Mr Noonan claimed that excluding someone who would be older than the person to whom the position would report was discriminatory and believed that too senior had meant too old.

The Company also argued that Mr Noonan had approximately twenty years' post-qualification experience and that it had been a genuine requirement for both positions that the candidate had two to three years' post-qualification experience. Whilst Mr Noonan was able to do the job, the Company said that an over-qualified candidate would not fit in and would find the work unsatisfying. Mr Noonan accepted that an over-qualified candidate might lack motivation, but argued that this was a factor which should be tested at interview.

The Equality Officer considered whether the condition was objectively justified and found that the Company's arguments were generalisations unsupported by any objective evidence. The requirement to be qualified no more than three years was not reasonably justified and indirectly discriminated against Mr Noonan on the grounds of age. The Company was ordered to pay him €10,000 as compensation.

So, if one of your managers says that he cannot possibly employ a middle-aged former area manager for a sales assistant role, he should give you specific reasons why and, if you are not convinced by them, you should challenge him on them. You must avoid making assumptions. If your manager is concerned that an over-qualified candidate would lack motivation, it would be safer to invite the candidate to an interview to ask what impact he/she felt the level of work would have on his/her motivation. After all, the former area manager applied for the role and, if it was clear what the job involved, he/she presumably believed it was suitable.

Demands for experience should be clearly related to the requirements of the role. Imagine that a computer games company asks for work experience in the computer games industry. This requirement could indirectly discriminate against older people as they may be less likely to fulfil the requirement than younger people. If this experience is actually necessary for the post, for example, a games software developer role, it will be objectively justified to ask for it. However, if the employer was to put this requirement into all job advertisements simply because the company wanted staff to "fit in", it probably would not be objectively justified. For example, a secretary with work

experience in a different industry may well be able to do the job just as well as someone with experience in the games industry.

### **3.3. Qualifications**

Requirements for specific educational qualifications may put certain age groups at a disadvantage.

For example, if you specified that all applicants must have five GCSEs and you are not prepared to be flexible about the qualifications required, this may amount to indirect age discrimination against older applicants (as they may not have sat those exams, but may have equivalent qualifications). Instead, you could say five GCSEs or equivalent.

Similarly, a demand for a degree level education or a specific degree may have an adverse impact on older applicants as statistically more younger people will have been to university due to changes in the education system. You would need objectively to justify such a requirement and consider whether other experience could be considered just as relevant.

## **4. Advertising**

The way jobs are advertised is really going to have to change in this country.

### **4.1. Content of Advertisements**

Advertisements are littered with words like "young" and "mature". These will clearly have to be removed, but less obvious descriptions like "energetic" or "fit" could also suggest discrimination against older applicants. If you used these words, you would need to show that being energetic or fit was relevant and important to the job.

Even words like "senior" and "junior" will need to be avoided as they suggest age bias. The fact that your business has a particular type of client or customer is unlikely to justify selecting staff on age.

In the Irish case of ***Equality Authority v. Ryanair DEC-E-2000-19***, the Equality Authority brought proceedings against Ryanair in relation to an advertisement it placed in "The Irish Times" seeking a "young and dynamic professional", claiming that it breached age discrimination law.

Ryanair argued that the use of the word "young" was meaningless in an age context and that it was intended to convey enthusiasm, passion and ambition from someone who was "dynamic". This cut no ice with the Equality Officer who found that the use of the word "young" clearly indicated, or might reasonably be understood as indicating, an intention to exclude applicants who were not "young". It was also noted that out of the thirty applicants who had indicated their age, none was over forty. It was therefore held that the use of the word "young" as a requirement in this employment advertisement constituted discrimination on the grounds of age.

Ryanair was ordered to pay £8,000 compensation, to carry out a comprehensive review of its equal opportunities policies, inform all of its employees of the decision and publish a statement making clear its commitment to equal opportunities in an advertisement in "The Irish Times".

It is good practice for employers to include a statement in their advertisements that they are an equal opportunities employer and that applications from all are welcome. Obviously, you have to follow through on this statement; the statement alone will not protect you.

#### **4.2. Where to Advertise**

Advertisements need to be targeted to make sure they are accessible to a diverse section of the public, otherwise you may face age discrimination claims.

If you only advertise internally, this may, for example, lead to the continued employment of a particular age group.

If you are going to use newspapers or magazines, consider the likely readership. For example, if you advertise solely in "J17" (which is aimed at teenage girls), you are likely to discriminate indirectly against older women (and men).

You may want to consider experimenting with different advertising channels either to reach a wider audience or target specific under-represented groups.

#### **5. Recruitment Agents**

Employers cannot avoid liability simply by instructing agents to discriminate on grounds of age. So you cannot get away with asking a head-hunter to find someone under forty, unless this can be objectively justified.

Employment agencies will have to comply with the Regulations in relation to: their own employees (like any other employer); their employees whom they send to their clients as contract workers; and individuals who use their services (i.e. those who find jobs with their help and those who receive careers advice or guidance).

Where an employer looking for staff wants an employment agency to apply age-based selection criteria, the agency will be able to do so if it relied reasonably on a statement by the employer that those criteria were justified.

#### **6. Graduate Recruitment**

Employers may face difficulties with graduate recruitment schemes.

A requirement for graduates may indirectly discriminate against older people as they are less likely to have a degree.

Although there are increasing numbers of new graduates who are in their thirties and over, the majority of new graduates continue to be in their early twenties. In the consultation paper, it states that it will be easier for employers to justify indirect discrimination in the form of recruitment drives at universities ("milk rounds"), provided that employers do not exclude applications from other sources. Employers should not rely solely on milk rounds.

Setting an upper age limit for a graduate recruitment scheme will be direct discrimination which would be hard to justify. Students could be of any age and it may be difficult to show why older students should be excluded from applying.

#### **7. Informal Methods of Recruitment**

Employers need to beware of informal methods of recruitment, such as word of mouth, as they may increase the risk of claims due to lack of diversity.

In ***Coker and Osamor v. Lord Chancellor and Lord Chancellor's Department (2001)***, the Court of Appeal found that the practice of making appointments from a circle of family, friends and acquaintances could infringe the principle of equal

opportunities and may be likely to result in the successful candidate being of a particular gender or racial group. This could apply equally to age. The Court of Appeal made it clear that it is possible that a recruitment exercise conducted by word of mouth, by personal recommendation or by other informal recruitment methods would constitute indirect discrimination.

## **8. Application Forms**

Application forms can be a minefield.

For example, requiring a birth date or age on application forms could lead to discriminatory decisions and may be taken as evidence that you intended to discriminate on the grounds of age. You will need to ask yourself whether knowing an applicant's date of birth is strictly necessary. It is preferable to remove sections regarding age and include them on a diversity monitoring form, which would not be given to those taking the recruitment decisions.

If age details are needed, for example, for pension reasons, it would be better to ask the successful candidate at a later stage in the recruitment process.

The contents of application forms should be checked for age-related questions. A competency and skills based approach should be considered.

For example, do you need to rely on chronological employment histories? If not, consider removing all chronological information such as career history or school leaving date, the aim being to focus on skills alone. Having said this, in practice most employers will want some information to check on how recent experience is and whether there are any unexplained gaps in employment.

A separate equal opportunities monitoring form can be issued with application forms. Ideally, these forms should be anonymous and kept separately from the application forms. Keeping records of all job applicants, short-listed candidates and interviewees can help you check whether your recruitment and selection processes are age-biased.

## **9. Selection for Interview**

Selecting candidates for interview could involve age discrimination.

You can help reduce the risks by arranging proper training for those responsible for short-listing, ensuring that they have an awareness of the requirements of the role, together with clear and objective criteria for selection (which are applied consistently).

Under the Regulations, job applicants will be able to serve discrimination questionnaires if they believe that there has been age discrimination in the recruitment process. Britney could serve Golden Age Holidays with an age discrimination questionnaire asking what the criteria for selection for interview were and for copies of any supporting notes.

## **10. Interview Questioning**

Interviews have always been fertile ground for discrimination claims and age issues are likely to be no different.

Questions which could be construed as discriminatory should be avoided. Only age-related questions which can be objectively justified should be asked. If questions about age and experience can be justified, it is important to ask them to all candidates.

This is easier said than done as age creeps into so many areas of life. Using an interview panel made up of people of different ages is a practical approach as this creates the impression that there will be no age bias. Obviously, having a diverse interview panel is not always possible due to lack of available resources.

To defend age discrimination claims, employers will have to show clear and objective reasons for not appointing a candidate which are not based on age. Allegations of age discrimination may be difficult to defend unless you keep clear interview notes recording reasons why a candidate was unsuccessful.

In an Irish case, ***Carroll v. County Monaghan Vocational Education Committee DEC-E-2003-060***, Ms Carroll argued that she was discriminated against when her application for a teaching position was unsuccessful whilst less qualified candidates, who were substantially younger, were appointed.

The marks awarded to the different candidates showed that the four with the longest service were all marked the lowest on the criterion of "experience and involvement in the school" category. The fact that the less-qualified appointees were younger than Ms Carroll by eight to twenty-four years also created an inference of age discrimination.

In this case, no interview notes were retained and this meant that the Education Committee was unable to back up its argument that selection was on merit. The Equality Officer concluded that selection was discriminatory and directed that Ms Carroll be appointed to the post of special needs teacher, backdated to the date of the appointment of the other candidates.

However, interviewers do need to be extremely careful about what they "jot down" in notes. Under the Data Protection Act 1998 (depending on how the papers are stored), interviewees may request copies of documents, including an interviewer's manuscript notes taken during the interview process. If Tribunal proceedings are issued, the notes would normally also have to be disclosed. Potentially discriminatory comments, such as "mature" and "fresh-faced" should be avoided.

## **11. Successful Candidate**

When selecting a candidate for a role, employers should remember to ensure that the justification for selection is valid and open to scrutiny. Those involved in the recruitment process should record assessment and selection decisions promptly and accurately, in case they are challenged by an unsuccessful applicant at a later date. Assumptions based on an applicant's age, such as their ability to fit in or learn new skills, must be avoided.

Tribunals are likely to give claimants a fair amount of leeway when bringing a claim of age discrimination because it is recognised that such claims can be difficult to prove.

In the Australian case of ***Rochas v. The University of Sydney (2004) NSWADT 14***, a fifty-two year old student adviser brought claims of age and sex discrimination against the University.

Mr Rochas applied unsuccessfully for the position of student adviser in May 2002. He had made four other job applications to the University that year which had also been unsuccessful. He alleged that, in each case, the successful applicant had been a younger female, but for each job he was better qualified and that he had suffered unlawful discrimination on the grounds of sex and age.

The University tried to have the complaint dismissed on the grounds that it was misconceived and lacking in substance. It argued that Mr Rochas would never be able to

substantiate his complaint, that there was material to show that the appropriate candidates were selected and there was no real likelihood that Mr Rochas could establish that the selections were made on the grounds of sex and age.

Mr Rochas accepted that he could not produce direct evidence that the University had discriminated. He intended to rely on inferences drawn from a comparison of his qualifications and experience and those of the successful candidates.

Statistics supplied by the University showed that there had been one hundred and three female and sixty-two male applicants for five positions. Twenty-six females and seven males had been selected for interview and all positions had been filled by females.

The Tribunal decided to allow Mr Rochas to pursue his complaint. The Tribunal recognised that there were difficulties attached to establishing a case of unlawful discrimination in the absence of direct evidence. Often the material from which inferences could be drawn to prove an individual's case was in the possession of the respondent. Therefore, the Tribunal allowed the claim to proceed.

## **12. Health Checks**

Requiring applicants for a post to pass a health or fitness test might be indirect age discrimination if people of certain ages are less likely to pass the test than other age groups. If this is the case, the employer would have to justify objectively using the test. If it were set at a level necessary to indicate whether someone was capable of doing the job, this would be justification.

## **ROLE PLAY TWO**

Now, back to Golden Age Holidays.

Dorothy, a "Senior" Sales Manager at Golden Age Holidays, has arranged a meeting with the H.R. Manager, Ada Atkins, to ask about her entitlement to certain Company benefits. Dorothy is about to turn sixty-four.

**Dorothy:** Ada, I wanted to ask you about a couple of things. First, the five days' holiday bonus I'm due this year, now that I've done my forty years' service. I presume I can take my five extra days at any time? Oh, and I'd like to take one of those Company sabbaticals. I want to visit my grandchildren in Australia.

**Ada:** The five days you can take whenever you like, but the sabbatical... Well, you need to work for the Company for at least two years after the sabbatical, and you'll be sixty-five next year, so you can't take one, I'm afraid.

**Dorothy:** That sounds rather unfair. After all, I've done my time for the Company.

**Ada:** Those are the rules, Dorothy, and that's that. No sabbatical for you at your age. As you're here, Dorothy, there's something else I need to discuss with you. You are sixty-four next week and, once you hit sixty-four, the Company can no longer provide you with all of your benefits. We're stopping your life assurance, p.h.i. and medical insurance. The premiums go sky-high when someone gets to your age and I'm afraid the Company just can't foot the bill. If you want to keep them, you'll just have to pay for them yourself.

**Dorothy:** But that's so mean! I've put forty years into this Company and I've earned those perks.

**Ada:** Calm down! At least you'll get the extra five days' holiday. That should help make up for it and then next year, at sixty-five, you'll be able to take an extended sabbatical – when you retire!

## **E. TERMS OF EMPLOYMENT**

Poor Dorothy. What a raw deal.

Terms of employment are going to cause employers a headache when the Regulations come into force.

Terms of employment which discriminate on the grounds of age will only be lawful if they can be objectively justified or qualify for one of the exemptions under the Regulations.

### **1. Salary and The National Minimum Wage**

Fixing employees' salaries according to their age will normally amount to discrimination under the Regulations. But there is going to be an exception to this.

Under Regulation 31, there are special rules relating to the national minimum wage. The different age bands (sixteen and seventeen, eighteen to twenty-one, twenty-two and over) under the national minimum wage legislation will continue to be lawful. As long as employers pay at least the national minimum wage, some exemptions will apply and will allow employers to pay:

- employees aged twenty-two and over more than those under twenty-two even where they are doing the same job, where those under twenty-two are paid less than the adult rate of £5.05; and
- employees aged between eighteen and twenty-one more than those under eighteen even where they are doing the same job, where those under eighteen are paid less than the adult rate of £5.05.

However, an employer will not be able to pay different rates to those in the same age category under this exemption. Therefore, an employer will not be able to pay a nineteen-year-old less than a twenty-year-old doing the same job, unless it can objectively justify this.

Where employees in the lower age groups are paid at or above the adult rate of the national minimum wage, the exemption is no longer available and the normal rules of objective justification will apply. For example, an employer pays those aged sixteen and seventeen £8.00 an hour, those aged eighteen to twenty-one £10.00 an hour and those aged twenty-two and above, £15.00 an hour. In this situation, the exemption will not apply and the different rates would have to be objectively justified.

The Government believes that the minimum wage exemption will encourage employers to recruit younger workers.

### **2. Benefits Generally**

One of the biggest concerns for employers is the impact of the Regulations on the benefits they provide to staff.

#### **2.1 Insurance**

Depriving older workers, like Dorothy, of benefits when they hit a certain age is likely to be direct age discrimination.

Insurance companies are not prevented from applying age-based criteria to their policies because the Regulations do not cover the supply of goods and services. So, for example, a car insurance policy could exclude under twenty-ones from cover.

However, employers are not protected by the same "supply" loophole when providing benefits to their employees. If you are unable to obtain insurance that is legally required for employees (such as liability insurance or motor insurance for drivers) or you offer free private medical insurance to employees, but exclude those of a certain age because the premium is higher, this could amount to unlawful age discrimination.

This would have to be objectively justified or be covered by an exemption under the Regulations.

Research suggests that many group insurance schemes do not have age criteria (see ***Equality and Diversity: Age Matters***, July 2003). The study found that where age was used as a criterion in relation to group insurance schemes, it did not prevent acceptance to the insurance scheme, but it could affect premium costs or the level of benefits.

You should start reviewing the terms on which benefits are provided now to check whether entitlements are linked to age or service.

For example, if you do not provide medical insurance for those over sixty because the premiums are more expensive, try and negotiate better terms with your insurer or another insurance company. It could be difficult to justify excluding older staff from the insurance scheme or forcing them to contribute to the premium as the justification is likely to relate to cost. You should keep records of your investigations to support your justification argument in case it is challenged.

## **2.2 Work-related Invalidation Benefits**

The Regulations include an exemption in relation to "work-related invalidity benefit schemes" (Regulation 30). It will be lawful to fix an age for admission to such a scheme or fix an age for entitlement to invalidity benefits under such a scheme. This includes fixing different ages for different workers or for different groups or categories of workers.

Under Regulation 30(3), an "invalidity benefit" is a benefit payable in money or money's worth in respect of:

- any interruption or cessation of work by reason of sickness or invalidity; or
- accidents, injuries or diseases connected with work.

This definition will probably cover permanent health insurance, sick pay and ill-health retirement schemes.

At Golden Age Holidays, Ada is stopping Dorothy's permanent health insurance, life assurance and private medical insurance. Regulation 30 may mean that withdrawing Dorothy's permanent health insurance is lawful. However, this exception will not cover her life assurance and private medical insurance so stopping these benefits would need to be objectively justified.

A "work-related invalidity benefit scheme" is defined under the Regulations as any scheme or arrangement which is comprised in one or more instruments or agreements insofar as it has, or is capable of having, effect in relation to one or more descriptions or categories of work so as to provide invalidity benefits, to or in respect of workers.

### **3. Service-related Benefits**

Service-related benefits could also land employers in trouble.

Providing benefits based on length of service could be indirect age discrimination as some age groups are more likely to have longer service than others.

The Regulations include two specific exemptions and a general exemption which cover using length of service as a criterion in awarding or increasing certain benefits. If an exemption applies, the discrimination will be lawful and will not have to be justified. The exemptions cover pay and non-pay benefits.

#### **3.1 The Five-Year Exemption**

The first specific exemption is the "five year exemption" (Regulation 32). This allows benefits to be awarded based on a criterion of five years' service or less, provided the benefits are awarded to all workers who meet the length of service criterion and whose circumstances are not otherwise materially different.

So, for example, if you provide company cars to your managers on condition that they have two years' service and a maximum age of sixty, the two year service qualification will be covered by the five-year exemption. However, the use of a maximum age will only be lawful if you can objectively justify it.

Say an employer offers a pay scale where the employee is given a pay increase at the end of each year up to four years of service. Beyond the fourth year, further pay rises depend on the performance appraisal of the employee. The rises related to length of service will be covered by the five-year exemption. The use of performance as a criterion for pay rises after the fourth year is outside the scope of the Regulations as long as it is applied fairly and consistently. Using performance as a criterion is not age discrimination in itself.

In relation to the award of any particular benefit, the employer must elect to treat length of service as meaning either the length of time a worker has served the employer in a post or in posts carrying out work of like nature or the length of time that the worker has worked for the employer.

For the purposes of Regulation 32, workers will be treated as carrying out work of like nature where they are doing work of the same or a broadly similar nature (and where any differences in that work are not of practical importance in relation to their contract or terms of service) or work of equal value in terms of the demands made on them (for example, in terms of effort, skill and decision-making). Expert evidence may be needed to decide what work of a like nature is.

The five-year exemption only applies if the length of service criterion is applied to all staff doing similar work.

For example, say a law firm uses a two-year pay scale for trainees, a five-year pay scale for junior assistants and a three-year pay scale for senior assistants. The question is whether they should be seen as a single pay scale of ten years (in which case the last five years would not be covered by the five-year exemption). In order to use the five-year exemption for all three scales, the employer would have to show that all three apply to sufficiently different kinds of work. The employer could argue that the responsibility of trainees, junior assistants and senior assistants are different.

In calculating whether a worker satisfies a length of service criterion, the employer must take into account all of the worker's length of service up to a maximum of five years, but

may (subject to any provision to the contrary in the worker's contract or terms of service) ignore any period of time during which the worker was absent from work.

You must count continuous and non-continuous service when totting up the numbers for the exemption to apply.

For example, after two years' service, a retailer allows staff a store discount card. Store policy states that staff who work for two years, take a career break and then come back have to start accruing service from zero again to qualify for a card. This qualifying period would not be covered by the five-year exemption, but the retailer may be able to rely on the general exemption.

The need to count continuous and non-continuous employment means that employers need to keep very good records of their employees and former employees. You should also consider asking in your application forms/at interview whether the candidate has worked for you before.

### **3.2 Statutory Benefits Exemption**

The second specific exemption is where the length of service criterion mirrors a statutory benefit.

Under Regulation 34, employers will not discriminate on the grounds of age where benefits are awarded to some employees and not others because the employer is required to provide the benefit under legislation and those not receiving it do not satisfy the statutory qualifying period for receipt of the benefit. Providing maternity pay in accordance with statutory rules would be covered by this exemption.

Under Regulation 35, employers will be allowed to provide service-related benefits in place of statutory benefits if they are more generous than the statutory benefits. To be exempt, the employer must provide the benefit to all of its workers who meet the service criterion and whose circumstances are not otherwise materially different. This would cover, for example, enhanced maternity and paternity pay and leave schemes.

Imagine an employer's contractual redundancy scheme provides employees with over one year's continuous service with an enhanced redundancy payment which increases for each year of service up to a maximum of twenty years. As this mirrors and is more generous than the statutory redundancy pay scheme, both the qualifying period and the length of service provisions are exempted.

### **3.3 The General Exemption**

If benefits are based on more than five years' service or do not mirror a statutory scheme, employers may be able to rely on the general exemption under Regulation 33.

This allows the use of length of service as a criterion for awarding benefits if:

- it reasonably appears to the employer that there will be an advantage to him from rewarding the loyalty, encouraging the motivation or recognising the experience of workers by awarding benefits on the basis of length of service; and
- the benefit is awarded to all of the employer's workers who meet the length of service criterion and whose circumstances are not otherwise materially different.

Under the general exemption, the employer can elect to treat length of service as meaning either the length of time a worker has served the employer in a post or in posts carrying out work of like nature or the length of time that the worker has worked for the

employer. Workers will be treated as carrying out work of like nature where they are doing work of the same or a broadly similar nature (and where any differences in that work are not of practical importance in relation to their contract or terms of service) or work of equal value in terms of the demands made on them (for example, in terms of effort, skill and decision-making). Again, you must count continuous and non-continuous service.

Employers relying on the general exemption will need to ensure that they have sound evidence of the aim of awarding the benefit and the business advantage gained from any service-related benefits. Employers should keep records of the basis for setting service-related criteria.

For example, linking pay to years of service could indirectly discriminate against younger workers. This may be lawful under the general provision on the grounds of encouraging and rewarding loyalty.

If neither the general provision nor one of the specific exemptions applies, an employer may still be able objectively to justify the discriminatory provision of a benefit, such as using a minimum or maximum age to qualify for the benefit.

#### **4. Occupational Pensions**

The Regulations will effectively exempt most age-related rules and practices under occupational pension schemes (including defined benefit and defined contribution schemes, but not personal pensions). For example, employers will still be able to:

- close pension schemes/parts of schemes to new members;
- provide different pension schemes to employees of different ages or with different lengths of service;
- use minimum and maximum ages for admission to pension schemes;
- set different ages of admission to a pension scheme for different groups of employees;
- have a normal pension age in a pension scheme;
- use age criteria in actuarial calculations;
- set the level of pension benefits by reference to years of service; and
- set age limits on payments of pensions to dependant children.

The Regulations do not cover personal pension schemes, save for any employer contributions into such schemes, or state pensions.

The Regulations will also make it unlawful for trustees or managers of an occupational pension scheme, when carrying out their functions, to harass or discriminate against members or prospective members on grounds of age (Regulation 11). Every occupational pension scheme will be treated as including a non-discrimination rule (Schedule 2, paragraph 4).

The Government expects pension schemes to be able to operate largely as they do now. The Government is proposing to abolish the rules which prevent employees from drawing an occupational pension and continuing to be employed by the same employer. This could significantly increase the number of employees who want to work beyond retirement age.

## **F. OTHER ISSUES**

### **1. Promotion and Progression**

Opportunities for promotion and career progression can be affected by age discrimination.

In other jurisdictions where age legislation is already in force, promotion is one of three main areas for age discrimination claims. (Recruitment and dismissal are the other two key areas with dismissal being the most dominant.)

Older workers can be overlooked as some employers do not see them as “ambitious” and this can affect career progression. One way forward is to be more flexible and creative about how career progression is viewed. However, there is a balancing act to be performed here.

Promotion should be based solely on ability and performance and, as far as possible, not on any age or length of service criteria. If you can, the whole process should be as transparent as possible by making the factors to be taken into account on promotion decisions available to staff. Promotion guidelines can be introduced to ensure that decisions are fair and are applied consistently throughout the business.

If a discrimination claim is brought, Tribunals are likely to scrutinise employers’ actions very carefully. This is reflected in a Canadian case, ***Morris v. Canadian Armed Forces, Canadian Human Rights Tribunal, TD 17/01, 2001-12-20.***

Mr Morris claimed in September 1996 that he had not been promoted from the rank of Warrant Officer to the rank of Master Warrant Officer because of his age. The Canadian Forces argued that he had not been promoted because his placing on the National Merits List, which measured him against his peers in his regiment, had been too low and vacancies had been filled by those at the top of the List. They also argued that age was not a factor in the Merits List.

The Canadian Human Rights Commission looked carefully at Mr Morris’ performance evaluation reports. They showed that his ratings had been extremely good and that he was recommended for promotion, but the ratings dropped dramatically when he reached the age of fifty-one. The Commission considered that there was direct and circumstantial evidence that age was a factor in Mr Morris’ failure to be promoted. The burden then shifted to the Canadian Forces to provide a reasonable explanation for its actions.

The Forces’ explanation was that each year the number of qualified applicants ahead of Mr Morris on the Merits List exceeded the number of promotions available. However, this assumed that Mr Morris’ List ranking each year was fair. The Tribunal had decided that there was a case that age had been a factor in Mr Morris being given low scores. Although the Canadian Forces tried to explain that age was not a factor, the Tribunal found that there was no reasonable explanation for the discrimination against Mr Morris.

The Canadian Forces were ordered to promote Mr Morris to the rank of Master Warrant Officer as of September 1993 and to pay him the difference between the salary he actually received and what he would have received as Master Warrant Officer from 1993 to his retirement in 1999. His retirement severance compensation, pension and other benefits were adjusted to reflect his higher rank. Amongst other things, the Canadian Forces also had to pay him additional compensation of Can.\$5,000 for suffering and special compensation of Can. \$3,000.

## **2. Training and Development**

Research suggests that older workers are less likely to be offered job-related training and education. The Employers Forum on Age website ([www.efa.org.uk/age](http://www.efa.org.uk/age)) suggests that nine out of ten people aged fifty and over receive no training from their employer at all.

This is partly due to stereotypical assumptions that older workers will not adapt to change, particularly new technology, and will not react well to training. There is little consistent evidence to support these generalisations. Individuals vary based on their personalities/abilities, not necessarily their age. You should offer training (where appropriate) to all staff, regardless of age, and use appraisals or discussions as a way to identify training requirements. Handbooks can be used to inform everyone in your organisation about the training that is available and emphasise that it is available to all members of staff.

## **3. Career Breaks and Sabbatical Leave**

Career breaks and sabbatical leave could also lead to discrimination.

Some schemes provide that, in order to qualify, employees must have a certain length of service and/or when they return, they must be able to work for a certain number of years. Provisions like Golden Age Holidays' requirement that Dorothy work for the Company for two years after her sabbatical could be challenged as indirectly discriminatory by older or younger people.

Some employers have introduced a phased reduced working week for older employees leading up to retirement. Obviously, forcing this on an older worker would be direct age discrimination, unless justified, but younger workers could challenge this as being discriminatory, for example, on the basis that they want a reduced working week before a major lifestyle change such as becoming a part-time student. Again, employers will need to be flexible and think laterally.

## **G. STATUTORY REDUNDANCY PAY**

The Regulations will affect statutory redundancy pay.

The Regulations propose changes to the way that statutory redundancy payments are calculated. Currently, you must be eighteen or over and under sixty-five or the normal retirement age to qualify for a statutory redundancy payment. Both the lower and upper age limits will disappear under the Regulations. The Regulations also propose removing the tapering down rule which reduces the redundancy payment to zero gradually for those within one year of the upper age limit.

Statutory redundancy payments are calculated based on weekly pay, length of service and a multiplier based on the employee's age ( $\frac{1}{2}$  for employees aged between eighteen and twenty-one, one for employees between twenty-two and forty and  $1\frac{1}{2}$  for employees of forty-one and above). The Government originally proposed that the multiplier would be one for all employees, regardless of age. However, the Government now says it will remove the multiplier based on wide age brackets. The final multiplier has not yet been decided.

Even though they may be indirectly discriminatory, the two-year qualifying period for statutory redundancy pay and the length of service factor (capped at twenty years) will be retained.

The Government is considering altering the statutory limit on a week's pay (currently £280), although nothing has yet been decided and this figure may remain the same, subject to index-linking.

If you have your own redundancy scheme which mirrors the current statutory one, you should consider revising it so that it is in line with the new statutory rules. If you do not do this, any age discriminatory provisions would have to be justified objectively. Contractual benefits that mirror statutory benefits may fall under the specific exemptions for length of service criteria referred to above.

Where redundancies are being made, the exemptions related to service-related benefits would not cover "last in, first out" and other length of service criteria. They would have to be objectively justified.

### ROLE PLAY THREE

A year has passed at Golden Age Holidays. Britney has now complained to Ada that the Senior Sales Manager, Dorothy, has been taunting her about her age. Ada has called Dorothy to a meeting to discuss this.

**Ada:** Dorothy, thanks for coming to see me. Take a seat. You must be exhausted. Being on your feet all day at your age can't be easy.

**Dorothy:** I'm fine thanks Ada. Just a bit stiff after the marathon I ran last week. What do you want to speak to me about? I assume you want to talk to me about my promotion. The M.D. mentioned it to me last week.

**Ada:** Not quite. There's been a change of plan. I had Britney in here yesterday telling me that you've been making her life hell.

She says you've been freezing her out, constantly criticising her work and "lack of experience" - all because of her age. She also says you won't let her join the Company bingo sessions because she's too young.

**Dorothy:** Well, she's only a young slip of a thing, a baby. I was only having a laugh.

**Ada:** Dorothy, Britney's thirty-five and has four kids of her own!

Anyway, it can't continue. I understand that you're only as young as you feel, but I've checked and I see that you're sixty-five tomorrow. We've decided it would be best for everyone if you took your carriage clock early and retired tomorrow.

**Dorothy:** But the Board told me they would let me stay on as long as I wanted. What about my promotion? This is terrible. It's just like last year when you wouldn't let me have my sabbatical. Surely you can't do this.

**Ada:** Dorothy, I've made my position clear and, following my discussion with Britney yesterday, I won't be changing my mind. I've organised your retirement party. There's no going back now. Tomorrow's your last day.

**Dorothy:** But this is such a shock. Surely I should be entitled to some warning? I thought I had a right to keep working beyond retirement age. My husband's still working and he's seventy. He says that, if I ask to keep working, you have to consider it.

**Ada:** I have considered it and I've decided retirement is the only solution. I can't allow this situation with Britney to continue. We take our equal opportunities obligations seriously you know! I'd start writing your retirement speech if I were you.

## **H. RETIREMENT**

### **1. Retirement Age**

It's good to see that Ada has taken Britney's allegations of harassment seriously. However, as you may have guessed, her approach to Dorothy's retirement is likely to fall foul of the Regulations.

Retirement is one of the headline issues connected to age discrimination. From October next year, compulsory retirement will be direct age discrimination.

#### **1.1 Retirement at Sixty-five or Over**

However, the Regulations set a default retirement age of sixty-five (not seventy, which was the earlier proposal). This means it will not be age discrimination if employers have retirement ages at or above the age of sixty-five. So, Golden Age Holidays' retirement age is not in itself unlawful. Note that the default retirement age provisions only cover employees not, for example, office-holders and partners; retirement ages for office-holders and partners will need to be objectively justified.

#### **1.2 Retirement Below Sixty-five**

If you set your retirement age below sixty-five, you will have to justify it objectively, change it or remove it. This is something that should be reviewed now. It will be very difficult for most employers to justify a retirement age below sixty-five.

A small number of employers may be able to justify a retirement age under sixty-five on health and safety grounds. For example, where the work requires swift reactions which can be shown to deteriorate after a certain age. However, such employers would need to be able to produce evidence to support this, which would be hard as most age-related distinctions are fairly arbitrary. It will be safest for the vast majority of employers to adopt a retirement age of at least sixty-five.

#### **1.3 No Retirement Age**

The national default retirement age is not an obligatory retirement age. The Government's long-term aim is to move to a position where businesses do not need to rely on a default age. In 2011 the Government intends to review whether all retirement ages which are not objectively justified should be outlawed and this may lead to the abolition of the default retirement age.

Employers who have a retirement age should start thinking about whether this should be retained, altered or removed. Some employers, such as Tesco, B&Q, BT and BUPA, have already starting planning their workforce without fixed retirement ages whilst others have arrangements in place that give staff options to continue working longer.

However, many employers will feel more comfortable keeping a retirement age of sixty-five or over for as long as possible. This could make life easier for them. If there is no retirement age, trying to retire employees without breaching the Regulations is likely to be more difficult. If you decide that one employee should retire at one age and another employee at a different age, you increase the risk of discrimination and claims that retirement is not the true reason for dismissal. It could also make employment planning more difficult.

## **2. Duty to Consider Working Beyond Retirement**

One of the most startling changes under the Regulations is the new duty to consider requests to continue working beyond retirement age (Schedule 7). This procedure will have to be used for any compulsory retirement (there is no qualifying period of service).

The duty is to consider requests to continue working beyond retirement age. The new procedure is going to increase your workload. You will have to have good diary systems in place for retirement-related dates and you will have to jump through a number of hoops in order to avoid expensive Tribunal claims.

### **2.1 Employer Notification**

The first hoop for an employer that wants an employee to retire requires the employer to give the employee written notice of both the date the employer intends the employee to retire and the employee's right to request working beyond the intended retirement date (Schedule 7, paragraph 2). The notice must be given at least six months (but no more than twelve months) before the intended retirement date.

If the employer does not inform the employee of these rights at least six months in advance, the employer will have an ongoing duty (until two weeks before dismissal) to inform the employee of the intended retirement date and the right to request working longer (Schedule 7, paragraph 3).

#### **2.1.1 Failing to notify**

If the employer fails to notify the employee of the intended retirement date and right to request working beyond that date less than six months but more than two weeks before dismissal, the employee may be awarded compensation of up to eight weeks' pay. Pay is capped and, at current rates, the maximum award would be £2,240 (Schedule 7, paragraph 8). However, the dismissal will not be automatically unfair.

If the employer fails to notify at least two weeks in advance of dismissal, the employee will not be entitled to the eight weeks' compensation, but the dismissal will be automatically unfair.

Ada has given Dorothy one day's notice of her retirement and has not told her about her right to ask to keep working. She has therefore handed Dorothy an automatically unfair dismissal claim and probably an age discrimination claim. Ada may have cost the Company thousands of pounds. Depending on her salary and benefits package and her chances of finding an alternative role elsewhere, Golden Age Holidays could be ordered to pay Dorothy fairly substantial compensation for her unfair dismissal claim (although the cap, currently £56,800, applies to the compensatory award) and possibly discrimination damages under the Regulations, including an award for injury to feelings.

### **2.2 Employee Request**

Under the Regulations, employees have a new right to make a request not to be retired on the intended retirement date (Schedule 7, paragraph 4). An employee can only make one formal request in relation to each intended retirement date. A request must be in writing and state that it is such a request. If a request is made, the employer will normally have to consider it in good faith if it is made not more than one year before the intended retirement date and more than six weeks before the intended retirement.

The six week deadline does not apply if the employer failed properly to inform the employee about the right to request and of the date on which it intends the employee to

retire. So, in that situation, the employee request can be made at any time up to retirement, subject to the one year rule (Schedule 7, paragraph 5).

### **2.3 Right to a Meeting and Appeal**

Where the employer is under a duty to consider a request, the employer also has a duty not to retire the employee until a proper meeting has been held to discuss it. There is also a right of appeal. The procedure is similar to the procedure you have to follow when a formal flexible working request is made and is summarised below.

- The employer has a duty to consider the employee's request (in good faith) where the employee has complied with the relevant deadlines.
- The employer must hold a meeting to discuss the request with the employee and both employer and employee must take all reasonable steps to attend. Where a meeting is held to discuss the request, the employer must give the employee written and dated notice of its decision within fourteen days after the meeting.
- There is no need to hold a meeting where:
  - the employer agrees to the request and notifies the employee; or
  - it is not reasonably practicable to hold the meeting within two months from the date of the request, this is not due to a failure by the employer, the employer considers any representations made by the employee and notifies the employee in writing of its decision on the request as soon as is reasonably practicable.
- If the decision is to refuse the request, the notice must confirm the employer wishes to retire the employee and the date on which the dismissal will happen, set out the appeal procedure and be dated (Schedule 7, paragraph 6).
- Any appeal by the employee must be in writing, dated, set out the grounds of his/her appeal and be made within fourteen days after the date on which notice of the decision was given. (If it is not reasonably practicable for the employee to appeal within fourteen days, then he/she must notify the employer within a further reasonable period not exceeding three months.)
- The employer must hold an appeal meeting with the employee within fourteen days after the appeal notice is given. (If this timescale is not reasonably practicable, the appeal meeting must be held within a further reasonable period not exceeding three months.)
- The employer and employee must take all reasonable steps to attend the appeal meeting.
- Where a meeting is held to discuss the appeal, the employer must inform the employee in writing (by dated notice) of its decision within fourteen days after the meeting (or, if this is not reasonably practicable, within a further reasonable period not exceeding three months).
- There is no need to hold an appeal meeting where:
  - within fourteen days after the date the employee's appeal notice is given, the employer upholds the appeal and notifies the employee in writing of its decision; or

- it is not reasonably practicable to hold the meeting within two months from the date of the appeal, this is not due to a failure by the employer, the employer considers any representations made by the employee and notifies the employee in writing (by dated notice) of its decision as soon as is reasonably practicable.
- If the decision is to refuse the request, the notice must confirm that the employer wishes the employee to retire and the date on which the dismissal will take (or took) effect and be dated.
- The appeal meeting (or consideration of the appeal) does not need to take place before the dismissal takes effect (Schedule 7, paragraph 7).

The existing statutory dismissal procedure will no longer apply to retirement dismissals; the duty to consider procedure will apply instead.

## **2.4 New Retirement Date**

If a new retirement date is set following the duty to consider procedure, the duty to consider procedure will apply again to the new date in the same way. It will apply irrespective of whether the intended retirement date is also the moment when a fixed-term contract expires. The procedure will always apply to retirements, unless the retirement is by mutual agreement.

For example, say Golden Age Holidays decides to retire Dorothy at sixty-five on 31 December. On 31 May, seven months before the retirement date, it notifies her of the retirement date and her right to request to work beyond this. Dorothy puts in a request to continue working on 1 November, two months before the retirement date. She proposes to keep working until the project she is working on has been completed. Golden Age Holidays agrees to this. In order to retire Dorothy at the end of the project, Golden Age Holidays will still need to notify Dorothy of the exact retirement date at least six months before. At that point, Dorothy will again be able to put in a request to continue working.

## **2.5 Terms**

The statutory employee request is to continue working under the same terms and conditions as applied up to the retirement date. However, the employee or employer can propose a different working pattern. Neither party will be obliged to accept proposed changes.

## **2.6 Effect of Duty to Consider**

Under the Regulations, the duty is only "to consider" the employee's request in good faith. There is no obligation to comply with it. The Regulations do not give a list of reasons for refusing the request (unlike the flexible working rules) nor do they specify that the employee should be given a reason. So it seems employers will be relatively free to turn a request down, provided that they consider each request fairly and consistently in good faith. The risk is that, if you do turn everyone down, you may have difficulty showing good faith. However, if you allow some employees to stay on, you will in practice need to explain why you are not granting the same thing to others.

In reality, many employers may be put off agreeing to requests to continue working. This is because granting a request could make it more difficult to justify turning other requests down. Unsuccessful "requesters" will be able to compare their circumstances with those of successful employees. It could be very hard to justify why you are happy to keep one person on, but not another, without being dragged into arguments about

performance and redundancy which could lead to discrimination and unfair dismissal claims.

## **2.7 "Back Door" Dismissals**

Ada used retirement as a means of getting rid of Dorothy when she had concerns about her conduct; Dorothy was harassing Britney.

The duty to consider procedure is intended to prevent this kind of behaviour by ensuring that unplanned retirement is not used as a "back door" method for redundancy, misconduct and other dismissals.

If the retirement procedures are used to dismiss an employee, but the true reason for dismissal was, for example, redundancy, incompetence or conduct, the dismissal is likely to be unfair. So, even if Ada had complied with the duty to consider procedure, Dorothy's dismissal would still have been unfair because it was not a genuine retirement; it was a conduct dismissal.

Similarly, imagine that Golden Age Holidays agreed with Dorothy that she could continue working for four years beyond the default retirement age of sixty-five. However, in the second year of this period, it makes a number of staff under sixty-five redundant, but instead of making Dorothy redundant, Golden Age Holidays retires her. It fails to comply with the duty to consider procedure and so this will not qualify as a planned retirement. As a result, Dorothy may have claims for unfair dismissal, redundancy and age discrimination. Golden Age Holidays would have to satisfy the Tribunal that the dismissal was a retirement which would be difficult.

The Regulations include detailed provisions covering when a retirement will be seen as "planned". Where a retirement is "planned", the employee will have a heavy burden of proof to show that the dismissal was for a different reason. However, if the retirement does not take place on a planned retirement date, the burden is on the employer to show that it was genuinely a retirement dismissal. To do this, the employer will need to show that it did not contemplate dismissing the employee for any other reason in the six months before the retirement. This could be very difficult for employers to do. The rules work as follows.

### **2.7.1 Sixty-five and over**

Under Regulation 29, it will not be age discrimination to retire an employee aged sixty-five or over if it is a genuine retirement. Schedule 6 of the Regulations then amends unfair dismissal legislation, including new Sections 98ZA to 98ZC Employment Rights Act 1996 which set out when a dismissal is deemed a retirement.

Under Section 98ZA, retirement will be deemed to be the reason for dismissal if it takes effect on a "planned retirement date", unless the dismissal is unlawful age discrimination or the employee can show that the employer would not have dismissed him/her on the planned retirement date but for some reason other than retirement.

For those aged sixty-five or more, a planned retirement date is:

- an employee's sixty-fifth birthday; or
- the employee's normal retirement age; or
- where the employee has been given at least six months' written notice that he/she would be retired on a particular date, that date.

If the retirement does not take place on a planned retirement date and retirement is the only potentially fair reason for dismissal, the employer will have to prove that it is a

retirement dismissal under Section 98ZB. The employer will be seen as having failed to fill the requirements for a fair dismissal if the dismissal amounts to unlawful age discrimination or the employer contemplated dismissing the employee at some time in the period of six months that ends with the day of the dismissal for a reason other than retirement. The latter condition will be presumed to be met unless the employer shows that it is not.

If the retirement does not take place on a planned retirement date and retirement is one of two or more potentially fair reasons for the dismissal, under Section 98ZC, retirement of the employee will be disregarded in deciding which of the potentially fair reasons is the principal reason for the dismissal if the employer contemplated dismissing the employee at some time in the period of six months that ends with the day of the dismissal, for a reason other than retirement.

### **2.7.2 Under sixty-five**

Regulation 29 does not apply to retirement below sixty-five but, provided there is objective justification and it is a genuine retirement, retirement below sixty-five may still be lawful.

Sections 98ZA to 98ZC Employment Rights Act 1996 should apply. If the retirement happens on a planned retirement date, the burden of proving some other reason for dismissal will pass to the employee. For those aged under sixty-five, a planned retirement date is:

- the employee's normal retirement age; or
- where the employee has been given at least six months' written notice that he/she would be retired on a particular date, that date.

## **2.8 In Practice**

If you currently have a retirement age of sixty-five, or no retirement age, you will be able to retire employees from sixty-five onwards, but you will have to follow the duty to consider procedure. If your present retirement age is above sixty-five, you will not have to change or justify the retirement age, but will have to follow the duty to consider procedure. If your current retirement age is below sixty-five, you will have to justify it objectively, abolish it or raise it to at least sixty-five. Where a retirement age is retained, you will have to comply with the duty to consider procedure. In all cases, it will need to be a genuine retirement.

Staff should recognise that working beyond retirement is an option and you should review pension and insurance issues to ensure that these can accommodate or be amended to facilitate staff working beyond the normal retirement age.

One real difficulty for employers is that employees who work beyond sixty-five may experience a decline in their performance. This is going to be hard to address. Assuming that someone's abilities will be adversely affected by age is a stereotypical assumption which would amount to direct discrimination. However, some employers are going to have to deal with under-performance as a capability issue, which may lead to claims for unfair dismissal and age discrimination.

To make matters even more complicated, statistically, your chances of being disabled within the terms of the Disability Discrimination Act 1995 increase with age. Employers are likely to be faced with an ageing workforce protected by multiple discrimination legislation. This is going to be a bit of a nightmare to deal with.

### **3. Retirement by Mutual Agreement**

Where retirement takes place by mutual agreement between the employer and employee or the employee gives notice to leave work, there will not normally be an impact under the Regulations.

Whether or not a retirement is by mutual consent, it will be good practice for the employer to inform the employee of the right to request working beyond the intended retirement date. If you assume an employee will consent to retirement, you could fail to comply with the duty to consider procedure.

### **I. UNFAIR DISMISSAL RULES**

Unfair dismissal rules are changing under the Regulations.

Until now, employees have usually had no recourse against compulsory retirement because there has been no age discrimination legislation and the unfair dismissal rules include an upper age limit which restricts the rights of employees who have reached retirement age.

Retirement cases are going to be most affected by the new rules. Schedule 6 of the Regulations adds retirement to Section 98 Employment Rights Act 1996 as an additional potentially fair reason for dismissal.

Under the Regulations, the current upper age limit for unfair dismissal claims will be removed so employees aged sixty-five and over (or above normal retirement age for the business concerned) will have the same rights to claim unfair dismissal as younger employees. However, a retirement dismissal will not be unfair if:

- it is genuinely on grounds of retirement; and
- it takes place at or after sixty-five (or the employer's own lower retirement age, if this is objectively justified); and
- the employer has followed the duty to consider procedure.

A dismissal on grounds of retirement will be automatically unfair if:

- before the retirement, the employer has not informed the employee at all of the right to request to continue working and of the intended retirement date, or the employer has informed the employee less than two weeks before the retirement date; or
- the dismissal takes effect whilst a duty to consider procedure is still underway and the employer has not yet held the meeting with the employee or informed the employee of the decision; or
- the employer fails properly to comply with a duty to consider procedure, once it has started.

Employees will still need one year's continuous service to claim unfair dismissal in most cases.

The compensatory award for unfair dismissal will not be affected by the Regulations as it is not age-based. However, much the same changes are being made to the calculation of the basic award as to the calculation of statutory redundancy payments.

The Government is proposing to harmonise the age band multiplier and remove the tapering-down provision (which applies to those within one year of the upper age limit). Length of service (capped at twenty years) will be retained when calculating the basic award.

If an employee is dismissed for a discriminatory reason, he/she can claim both age discrimination and unfair dismissal. Claims based purely on unfair dismissal would arise on a compulsory retirement where the employer complies with the default retirement age or a retirement age below sixty-five that the employer has objectively justified (so there are no grounds for an age discrimination claim provided it is a genuine retirement), but fails to comply with the duty to consider procedure.

## **J. CONCLUSION**

We hope that you leave us tonight armed with plenty of ideas. Although the Regulations do not come into force until next October, most employers are going to have quite a lot of work to do before then.

Reviewing contracts, policies, practices and procedures, identifying where changes need to be made, consulting with staff and their representatives, where necessary, and providing training will all be time-consuming. Diary systems also need to be in place covering not only retirement dates, but key dates for compliance with the duty to consider procedure. This work should start now in order that things are in place ready for 1 October 2006.

Once in place, policies also need to be enforced and those acting in breach disciplined, if necessary, in a fair and consistent manner to ensure that they are taken seriously.

Some employers are already "clearing out" older staff before the Regulations come into force. There are certainly benefits to doing this.

For example, we anticipate that claims of age discrimination are going to be a growth area for ousted senior executives. Most organisations have dismissed a senior executive for no other reason than that his/her face no longer fits. The compensation available to such employees has been limited by the cap on unfair dismissal awards, unless they could take the cap off their damages by, for example, alleging sex discrimination or whistleblowing. From October 2006, these well-paid employees will be able to throw age discrimination into the pot. This is likely to have a significant impact on negotiations and settlement payments in these cases.

Before cutting a swathe through your senior management team, you should bear in mind that a trend of sacking older staff before the Regulations bite could be used in proceedings under the Regulations as background evidence of age bias. It may be hard to convince a Tribunal that your organisation's attitude suddenly changed in October 2006 if you have had a cull immediately beforehand. Getting things wrong will be expensive, not just in terms of Tribunal awards, but also management time and other expenses.

It will be more important than ever to monitor performance and deal with any problems fairly and consistently, once the new rules are in place.

Although the Regulations are going to create extra work for employers, there are many benefits to taking an age positive approach. Opening up opportunities to all ages can mean that you attract a wider pool of potential candidates. This is particularly helpful in areas of low unemployment or in sectors where some vacancies are hard to fill. Being

age positive can enhance your image and reputation both externally and internally. This has a positive impact on staff recruitment and retention.

Look on the bright side, we are all going to benefit sooner or later.

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**25<sup>th</sup> October 2005**  
**Reference: 5204074**

**THESE NOTES ARE A SUMMARY, ARE FOR GUIDANCE ONLY AND LEGAL ADVICE  
SHOULD BE SOUGHT FOR ANY SPECIFIC PROBLEMS.**

**APPENDIX****LIST OF DEPARTMENT MEMBERS AND THEIR CONTACT DETAILS**

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