

Key Points

- The overriding principle under the Equality Act 2010 is that it is unlawful to discriminate against an individual based on their age unless the treatment can be objectively justified.
- In relation to pension schemes, a number of important exceptions apply to the general principle that it is unlawful to discriminate on the basis of age. These are contained in the Equality Act (Age Exceptions for Pension Schemes) Order 2010 (SI 2010/2133).
- Where a particular practice does not fall within one of the exceptions, for that practice to be lawful it must be shown to be 'objectively justified' – that is, a proportionate means of achieving a legitimate aim.
- 'Cost' alone is not sufficient to objectively justify a discriminatory practice, although the case of *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330 did call into question how much additional evidence from an employer is needed for the practice to be objectively justified.

Main sources

- The EC Equal Treatment Framework Directive 2000/78
- The Equality Act 2010
- The Equality Act (Age Exceptions for Pension Schemes) Order 2010 (SI 2010/2133)
- *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330

General Principle

Under the Equality Act 2010, a person is prohibited from directly discriminating, indirectly discriminating, harassing or victimising another because of age. The Equality Act consolidated and added to various pieces of discrimination legislation that had previously been contained in different strands of primary and secondary legislation. Age discrimination provisions had previously been set out in the Employment Equality (Age) Regulations 2006.

The Equality Act 2010 applies to both employers participating in occupational pension schemes, as well as the trustees of those schemes. It also applies to third party providers of services so would apply to administrators, or providers of group personal pension schemes, for example.

The Equality Act 2010 inserts an overriding non-discrimination rule into occupational pension schemes where they do not already contain such a provision.

Exceptions

As the administration and payment of benefits under a pension scheme are inherently connected to an individual's age, there are a number of important exemptions from the general prohibition on age discrimination. Most of these are contained in the Equality Act (Age Exceptions for Pension Schemes) Order 2010 (SI 2010/2133). The exemptions are too numerous to list in full here, but include:

- Minimum or maximum ages for admission to a scheme;
- Different member or employer contribution rates for different members where this is because of a difference in the pensionable pay or different accrual rates of those members;
- Early or late retirement pivot ages;

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- A minimum age for enhanced redundancy benefits or ill health benefits; and
- The closure of a scheme from a particular date to workers who have not already joined it.

Insured Benefits

Paragraph 14 of schedule 9 of the Equality Act 2010 provides that it is not age discrimination for an employer to make arrangements or allow access to the provision of insurance or a related financial service where the employee reaches the higher of state pension age, and age 65. This important benefit exemption applies to insured benefits such as life assurance, income protection and medical insurance.

Objective justification

Where a particular practice in relation to a pension scheme does not fall within one of the statutory exemptions, it may still be lawful if it can be objectively justified. This means that a practice will not be age discrimination if a party can show that the act being complained on was "a proportionate means" of them "achieving a legitimate aim".

Unlike the other characteristics protected by the Equality Act 2010, objective justification can apply to both indirect and direct age discrimination.

There are a number of cases dealing with what might constitute a proportionate means of achieving a legitimate aim. Cost alone is insufficient justification, although the case of Woodcock did call into question how much evidence an employer actually has to present in addition to cost-based arguments in order to succeed with objective justification. This area of law continues to develop and employers would be well advised to monitor the latest position.

Ceasing accrual at Normal Retirement Age

An example of a potentially direct discriminatory practice would be a scheme rule that members cease accrual and stop building up any further benefits when they reach age 65.

The age discrimination exceptions do not allow a maximum age for pension accrual/termination of active membership or a maximum age for drawing benefits. Therefore attempts to achieve either of these outcomes would need to be objectively justified i.e. potentially discriminatory provisions included in a scheme's rules should be a proportionate means of achieving a legitimate aim.

The statutory default retirement age was abolished with effect from 6 April 2011.

Prior to the abolition of the default retirement age, the normal retirement age of 65 included in most pension schemes tended to coincide with the default retirement age. However, employers may find that their retirement policies and pension provisions come under greater scrutiny from both employees and trustees now that the default retirement age has been abolished.

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