

Guidance

Age discrimination: key points for the workplace

February 2019



About Acas – What we do

Acas provides information, advice, training, conciliation and other services for employers and employees to help prevent or resolve workplace problems. Go to www.acas.org.uk for more details.

'Must' and 'should'

Throughout this guide, a legal requirement is indicated by the word 'must' - for example, an employer must not ignore an employee for promotion because of their age.

The word 'should' indicates what Acas considers to be good employment practice.

Understanding the term 'employee'

In discrimination matters such as age, the definition of 'employee' under the Equality Act 2010 includes:

- employees (those with a contract of employment)
- workers and agency workers (those with a contract to do work or provide services)
- apprentices (those with a contract of apprenticeship)
- some self-employed people (where they have to personally perform the work)
- specific groups such as police officers and partners in a business.

Job applicants are also protected.

Guidance on other parts of the Equality Act 2010

Guidance on the other protected characteristics under the Act, and other useful tools and materials can be found at www.acas.org.uk/equality. For an overview of how equality legislation applies generally at work, Acas provides the following guidance:

- Equality and discrimination: understand the basics
- Prevent discrimination: support equality
- Discrimination: what to do if it happens.

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Information in this guide has been revised up to the date of publication. For more information, go to the Acas website at www.acas.org.uk. Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law. The particular circumstances of an individual case will always need to be taken into account. It may, therefore, be wise to seek legal advice.

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About this guide

This guide offers employers, managers, HR professionals, employees, employee/trade union representatives and job applicants:

- steps to take to prevent age discrimination happening in the workplace
- examples of how age discrimination might still occur, and
- how age discrimination should be dealt with if it does happen.

The guide encourages employers and employees to make their workplaces inclusive. For example, so staff feel they belong, no matter what their age, and are not disadvantaged or under-valued because of age.

While employers and employees can be liable for their own acts of discrimination, an employer will also be liable for an employee's actions unless it can show it took all reasonable steps to try to prevent them.

What is age discrimination?

Age is one of nine features known as protected characteristics in the Equality Act 2010. Generally, an employee is protected against discrimination because of age. This includes protection against unfair treatment because a job applicant or employee is: a different age or in a different age group to another job applicant or employee; or thought to be a particular age; or associated with someone belonging to a particular age group.

What is a different age or age group?

Age discrimination is not always about an 'old person' being preferred over a 'young person' because of their age – or vice versa. The age difference might be small – for example, a few years between one person in their late 40s compared to another in their early 50s.

Or, for example, someone might feel they have been discriminated against because they are over 60. In another case, it might be because they are seen as middle-aged. Or, a 21-year-old might claim discrimination because they are being treated differently because of their age compared to their colleague who is 43.

No minimum length of employment by an employee, or any employment at all for a job applicant, is necessary to claim discrimination. It is unlawful from when a role is advertised through to the last day of employment and beyond, including job references. Whether a complaint amounts to unlawful age discrimination can ultimately rest with an employment tribunal or court.

Age discrimination, also commonly called ageism, is one of the most common forms of unfair treatment at work. The age gap at work can be 50 years or more.

The Equality Act does allow different treatment because of age in limited circumstances. See the section, **When different treatment because of age may be allowed**, further into this guide.

How age discrimination may happen

There are four main types of discrimination under the Equality Act:

- Direct discrimination
- Indirect discrimination
- Harassment
- Victimisation.

Employers should be aware that successfully dealing with a discrimination complaint should not always be seen as the end of the matter. It is useful to think how any future instances might be prevented. This can include consulting with trade unions or employee representatives, if they are in the workplace, and organising equality training for managers and all staff. To find out more, see Acas guide **Prevent discrimination: support equality**.

Direct discrimination

There are three different types. Direct discrimination is where someone is treated less favourably than others because of:

- their actual age – this is **ordinary direct discrimination**. This is the only type of direct discrimination which may be lawful in limited circumstances. For more information see **Where discrimination may be lawful**
- the age of someone else they are associated with, such as a member of their family or a colleague – this is **direct discrimination by association**
- the age they are thought to be, regardless of whether the perception is correct or not - this is **direct discrimination by perception**.

Direct discrimination in all three forms could, for example, involve a decision not to employ someone, make them redundant or turn them down for promotion because of age. In most circumstances it would be unlawful. Direct discrimination does not need to be intentional.

For example... ordinary direct discrimination

Manager Louise is looking to fill a role which will require the successful applicant to then complete difficult training. She instructs her HR manager to discount her team's younger members, presuming they will not want the hard work. She also tells HR to discount older members, thinking they will not adapt to the change. Instead she shortlists Bruce and Mikel, believing people in their mid-thirties are more likely to have the necessary blend of ambition and sense of responsibility. Her actions are likely to be discriminatory.

For example... direct discrimination by association

Senior manager Jurgen decides not to invite employee Sarah and her partner Claude to a business party because Claude is much older than her. Jurgen feels Claude would not fit in with the party mood. This is likely to be discriminatory.

For example... direct discrimination by perception

Siobhan is turned down for a supervisor's job because her bosses decide she does not look mature enough for the role. They think she looks about 20. In fact, she is 30. Her bosses' decision is likely to be discriminatory.

Indirect discrimination

What is indirect discrimination?

It is usually less obvious than direct discrimination and is normally unintended. In law, it is where a 'provision, criterion or practice' involves all these four things:

1. the 'provision, criterion or practice' is applied equally to a group of employees/job applicants, only some of whom share the protected characteristic – in this case, the same age or age group
2. it has (or will have) the effect of putting those who share the protected characteristic at a particular disadvantage when compared to others of a different age or age group
3. it puts, or would put, an employee/job applicant at that disadvantage, and
4. the employer is unable to objectively justify it -what the law calls showing it to be a proportionate means of achieving a legitimate aim.

The Equality Act does not define a 'provision, criterion or practice'. However, the term is most likely to include an employer's policies, procedures, requirements, rules and arrangements, even if informal, and whether written down or not.

What an employee or job applicant must prove

If they are claiming indirect discrimination, they must show that the 'provision, criterion or practice' puts, or would put, other employees/job applicants of the same age or age group at a disproportionate disadvantage when compared to employees/job applicants not of that age or age group. The individual employee or job applicant must then show that they have been disadvantaged by the application of the provision, criterion or practice.

For example... indirect discrimination

City centre gym manager Esme tells employees she needs two more staff to work on reception. She adds that anyone interested needs to look 'fit and enthusiastic' as the gym is trying to encourage more young people to join. Her requirement may indirectly discriminate against older staff unless it can be objectively justified.

When is indirect discrimination allowed?

Unless the employer can show the provision, criterion or practice is proportionate, appropriate and necessary (this is objective justification and usually involves a business need) there will be indirect discrimination. What is 'proportionate' will vary from case to case. It can also depend on the size and resources of the business – for example, a large employer with many staff may find it easier to approve flexible working requests, which may come mostly from older staff, than a small firm with few staff. See the section, **Flexible working**, further into this guide.

If the employer can show objective justification, there is no indirect discrimination. See **Where discrimination may be lawful** in the section, When different treatment because of age may be allowed, further into this guide.

Employers should check their policies, practices and rules to see whether they may have a disproportionately adverse effect on job applicants and/or employees because of their age. Otherwise, they may inadvertently indirectly discriminate. Policies, practices and rules which were not discriminatory when introduced may become discriminatory over time, perhaps because of a change in the make-up of the workforce, law or work arrangements.

Harassment

Harassment is defined as 'unwanted conduct' and must be related to a relevant protected characteristic – in this case, age. This might be because:

- of the employee's age, or
- the age they are thought to be, or
- the age of someone else they are associated with – for example, a partner who is much older than them - or
- ageism is common in their workplace.

The harassment must have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

This can include bullying, nicknames, threats, intrusive or inappropriate questions and comments, excluding them (ignoring, not inviting them to meetings or events etc) or insults. It can be verbal, written or physical. Also, unwanted jokes and/or gossip which they find offensive can be harassment. To say the behaviour was not meant to be harassment or that the comments were 'banter' is no defence.

In cases of harassment, how the victim sees the unwanted conduct is more important than how the harasser sees it and their intent. Whether it is reasonable for the victim to feel the way they do is also taken into account.

Also, an employee can make a complaint of harassment where they are not on the receiving end of the conduct, but witness it and it has a negative impact on their dignity at work or working environment. The employee making a complaint of harassment in this situation would not need to be the same age, or in the same age group, as the colleague being harassed.

Managers should be careful not to let their own views influence a situation or dismiss a concern because they do not deem the behaviour offensive themselves. It is important to remember that if an employee feels strongly enough to raise a concern or make a complaint, the employer should take it seriously, and deal with it correctly.

For more general information on harassment, including protecting employees from harassment from customers and clients, see the companion guide, **Equality and discrimination: understand the basics**.

For example... harassment

Sixty-year-old Margaret feels humiliated and undermined at the store where she works because of her age. Despite her extensive experience in retailing and recently gaining a qualification as a visual merchandiser, her manager Darren regularly tells her in front of other staff that she is 'out of touch' and that the store needs 'fresh blood'. Darren's behaviour is likely to be harassment.

Victimisation

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm or loss because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or
- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act, such as bringing an employment tribunal claim of discrimination.

Victimisation may also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so. A 'detriment', for example, might include the employee being labelled a 'troublemaker', being left out and ignored, being denied training or promotion, or being made redundant because they supported an age discrimination claim.

For example... victimisation

Manager Alan tells apprentice Reyansh he is happy with his progress and performance. Reyansh then feels confident enough to tell Alan that some of the older employees regularly make fun of him because of his age and play pranks such as leaving toys where he's working. Reyansh wants this to stop. Alan tells Reyansh to toughen up and that the firm has no time for complainers. Some weeks later Alan punishes Reyansh for complaining by cancelling his training course. This is likely to be victimisation.

An employee is protected under the Equality Act from victimisation if they make, or support, or are suspected of supporting, an allegation of discrimination in good faith – even if the information or evidence they give proves to be inaccurate. However, an employee is not protected if they give, or support, information or evidence maliciously.

Where age discrimination may happen

Areas of employment where age discrimination may be most likely to occur include:

- recruitment
- training
- promotion
- pay and terms and conditions of employment

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- performance management
- redundancy
- retirement
- dismissal
- flexible working.

Recruitment

To avoid discrimination, employers when recruiting **should not** allow any bias or stereotypical thinking about age to influence their assessment or decision-making at any stage of the recruitment process. They **should** take these steps when -

Writing the essential documents

- be careful when writing an advertisement, job description and person specification for a vacancy. Generally avoid any suggestion that applicants should be in a particular age group. This includes wording and illustrations which could suggest bias – for example, a photograph showing a group of only young people.

Advertising the role

- generally, do not use wording suggesting that an applicant of a particular age would be best suited to the job. For example, do not ask for 'mature' applicants, as this suggests young applicants are not wanted
- use at least two different channels so as not to end up with applicants from too narrow an audience. So, generally, avoid solely using one kind of place or media - for example, advertising only on a website targeted at the young. An advert aimed at one age group suggests a discriminatory mind-set
- be careful, if spreading word of vacancies through existing staff. Relying only on 'word of mouth' is likely to extend any imbalance in the make-up of the workforce, particularly where it is mainly made up of people of the same age group. And it is likely to produce only a small pool of applicants.

Pinpointing skills, experience and qualifications for the job

- be clear on exactly what **skills** are needed for the post so managers are objective in assessing and selecting applicants. This should reduce the chances of ruling out an applicant because of their age
- be careful when saying what **experience** is needed for the role. Usually, it is better to set out the type or types of experience needed rather than ask for a number of years' experience
- only ask applicants for **qualifications** necessary for the role. Also, allow them the option to demonstrate in another way the knowledge and aptitudes required – for example, through equivalent qualifications, or skills and knowledge from work experience
- so don't insist on a specific qualification if not needed. The employer may need to be able to objectively justify asking for a specific qualification, including a **degree**. This is because more people go to university now than, say, 30 years

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ago, so older people are less likely to have a degree. Also, avoid asking for 'recent graduates' – such a requirement is likely to be very difficult to objectively justify

- do not have an upper age limit for people to apply to be **apprentices** or **trainees**, as people are working for longer and now more likely to change their line of work. In law, apprentices must be aged 16 or over, but there must not be any other age limit for applicants. Neither must there be an age limit for management trainees. Also, see the section, *Employing young people*, further into this guide
- be careful making assessments or saying an applicant is overqualified for the job. This can indicate an opinion that they have too much experience or been working too long and that the employer is looking for someone younger. Also see the section, **Ageist language**, further into this guide.

Drafting the application form

- avoid asking for the applicant's **age or date of birth** on the form. Although it is not discriminatory to ask their age, if they do not get the job they may claim that the fact that the employer did ask is evidence of discrimination. On a separate **equality and diversity monitoring form**, the employer can ask for the applicant's age group. The monitoring form should be anonymous, confidential and not seen by anyone sifting applications, interviewing applicants or deciding who gets hired
- in very limited circumstances, an employer can specify that applicants must be a particular age. See '**Occupational requirements**' under the section, *When different treatment because of age may be allowed*, further into this guide
- ask for **details of education and training**, but only ask for dates if they are relevant to skills, knowledge and capabilities necessary for the role. Otherwise, asking for dates can be seen as a way to find out the applicant's age
- be careful in asking for **details of relevant skills, knowledge, capabilities and experience in previous employment**. Asking for dates on the form may suggest a way to find out the applicant's age. The employer would be better asking for recent information – say, details of relevant jobs, experience, skills and periods of unemployment in the last two years.

Using social media

- be aware that **checking an applicant's background** on social media, including their age, risks being discriminatory and may breach the General Data Protection Regulation (GDPR)
- **filtering tools** on websites to only target applicants based on their age are likely to be discriminatory
- be aware that while one social media network may be popular with one age group, it may be little used by another.

Interviewing

- generally, interviewers or others in the selection process should not be influenced by **an applicant's age if they give it**

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- make sure **personal information** requested, either on the application form or in interview, is relevant to the job and/or administration of the recruitment
- interviewers should be trained to know how to **avoid asking discriminatory questions and making discriminatory assumptions, and how to ask questions correctly**. For example, interviewers should ask applicants about their management experience, not how they manage people older than themselves. And they should ask applicants to explain an example of when they adapted, rather than what they know about, for instance, a new piece of technology
- get interviewers on a panel to agree to constructively and subtly **'call each other out'** if one or more of them stereotypes an applicant. See the section, **Risks of age stereotyping**, further into this guide
- those on the interview panel, and/or any other managers or staff involved, should take care when discussing which applicants should go on the shortlist. Talking informally and unguardedly is where discrimination may happen.

Seeking job references

- an employer should be aware that an applicant's referees should not give them a negative job reference because of the applicant's age, and the employer must not discriminate based on that information.

Offering the job

- select and appoint the best applicant – generally, an employer must not rule out the best applicant because of their age, how young or old they look, or the age of someone they are associated with. And it would be discriminatory to offer less attractive terms – for example, six months' probation instead of the usual three - because it is feared they would not fit in because of age.

Using a recruitment agency

- tell the agency it must comply with the Equality Act. Apart from in very limited circumstances of what the law calls an 'occupational requirement' or where the decision can be objectively justified, an employer must not suggest to the agency that it only wants applicants of a particular age. And apart from in these very limited circumstances, an agency must not follow such an instruction or, for example, decide itself to only put forward young applicants. Neither should it pass on the applicant's age to the employer. Both the agency and the employer can be liable for discriminatory acts. See the sections **Occupational requirements** and **Where discrimination may be lawful**, further into this guide

Also, an employer should tell an agency it prefers applicants of a range of ages where possible.

For example... recruitment discrimination

A firm advertises for graduates who have achieved their degree in the last five years. This is likely to be discriminatory, as proving the business need for such a condition is likely to be difficult in most cases.

Training

An employer **must not**:

- deny an employee training or development because of their age, perceived age, or because of the age of someone they are associated with. For more information regarding training, see the section, **Positive action**, further into this guide
- allow any bias, stereotypical thinking or assumptions about age to creep into decisions about who gets trained
- make assumptions about an employee's needs or ambitions based on their age, length of experience in a job, or length of time with the employer, or assume there is more value in training younger staff and no or little value in training older employees
- focus training for older workers only on their current role, or overlook older workers for opportunities for overall development, work experience, shadowing in other roles, or to move into a new or different role.

An employer **should not**:

- deny training to young employees because they do not have enough experience or are in low-paid roles.

An employer **should**:

- make sure all its employees, no matter what their age, are made aware of opportunities for training and personal development
- be aware that training should make under-performance less likely
- give support and encouragement to any older employees who are reluctant to discuss their training needs for fear they will be seen as underperformers or 'behind the times'
- use constructive and regular career/work-life discussions with all employees to identify training needs that benefit employees and the organisation
- be reasonable, flexible and considerate about when and where training takes place. For example, insisting on training outside of normal working hours, or that requires staying away from home for a few days or week, or long hours of travel, may discriminate against older employees if they are more likely to have caring responsibilities outside of work.

For example... training discrimination

In carrying out job performance reviews with employees, manager Aleksander discusses career ambitions and opportunities for training with most staff. But he doesn't discuss them with staff over 55, as he thinks this a waste of time. His reasoning is that the over 55s are past their best and merely want to coast towards retirement. Aleksander's age-biased actions are likely to be discriminatory.

Promotion

An employer **must not** deny an employee promotion because of their age, perceived age, or because of the age of someone they are associated with. For example, it is likely to be discriminatory to:

- rule out a capable employee to take on extra responsibilities because they are considered to be too young for the new role
- discourage an employee with the necessary skills, knowledge and experience from applying for a more challenging job because of their age
- overlook inviting a colleague of a different age group to the rest of the team to regular socials – the gatherings are affecting decisions back at work about who gets development opportunities and promotion
- allow any bias or stereotypical thinking or assumptions about age to creep into decisions about who gets development opportunities or promotion.

An employer **should**:

- make sure job vacancies and promotion opportunities are mentioned to all relevant staff, no matter what their age.

For example... promotion discrimination

Justine is excelling at her job, so applies for promotion. Her application is turned down because her employer is aware that away from work Justine has elderly parents. Her employer feels the promotion, on top of her responsibilities for her parents, would be too much for Justine. The employer made the decision without talking to her about its concerns or looking at and discussing any possible options, such as flexible working, that might have suggested a way forward for Justine. The employer's decision is likely to be discriminatory.

Pay and terms and conditions of employment

An employer **must not**:

- generally, have different terms and conditions of employment because of an employee's age, perceived age, or the age of someone they are associated with. This might, for example, include a bonus

However, there are circumstances where different treatment because of age can or may be lawful. Examples include the National Minimum Wage and National Living Wage, redundancy pay, pay and job benefits linked to up to five years' length of service and, where the employer can objectively justify it, for more than five years' service. To find out more, see the section, **When different treatment because of age may be allowed**

- generally, allocate different work times, shift patterns or number of hours of work because of a job applicant or employee's age. There can be exceptions because of employee's flexible working requests approved by the employer. See the Flexible working section further into this guide.

For example... potential pay discrimination

Sam, aged 50, and Mark, aged 35, work at the same firm and in the same role. While Sam is paid more than Mark based on his extra years of experience – 13 compared to Mark's five – Mark brings in more business. The firm would need to be able to objectively justify the difference in their pay, otherwise it is likely to be discriminatory.

Performance management

The appraisal

The manager doing an employee's appraisal **must**:

- make sure the appraisal is fair
- approach and conduct it without preconceptions or bias concerning age
- avoid raising or prompting a discussion about when the employee might retire, asking 'when are you planning to retire?', suggesting they retire or putting pressure on them to retire.

They **should**:

- treat relevant employees consistently when assessing their performance and setting future goals, no matter what their age. But they must make reasonable adjustments for employees with a disability. More information can be found at www.acas.org.uk/performance and in the **Impact of other protected characteristics** section further into this guide
- ask the employee, no matter what their age, about their work plans in the short-, medium- and long-terms, explaining the reason for asking is to help plan the workforce in shaping the business's future needs
- outline the employer's plans for the future.

They **should not**:

- ignore or overlook performance matters because the employee is younger or older than other staff.

What a manager should do if the employee asks about retirement

Employees sometimes use an appraisal to say they've been thinking about options like full or partial retirement, a change in role or a development opportunity.

When an employee volunteers this information without being asked or prompted, managers can then start to discuss these future plans as part of the appraisal. Follow-up meetings will be needed to discuss and agree changes. But whatever the employee says about their future plans, employer and manager must not respond with discriminatory remarks or actions.

Some employers offer mid-career discussions with employees who request them. These, sometimes called 'mid-life MOTs', can help work out the best options for both employee and employer. To find out more, see the **Retirement** section in this guide or go to www.ageing-better.org.uk, www.unionlearn.org.uk/publications, www.acas.org.uk/retirement and www.youtube.com/watch?v=DgTq5NTKIHU

The employee **should**:

- approach their appraisal without preconceptions concerning age.

Managing under-performance

An employer **must**, regardless of the employee's age:

- ensure any dismissal of an employee for under-performance is based on relevant facts
- give an employee an adequate chance to reach and maintain an acceptable standard. Only if the employee fails to improve after reasonable steps have been taken to help them, can the employer consider dismissing them for under-performance
- use non-discriminatory language. Instead of saying 'I suppose there's no point in training you in the new system now you are nearing 60', say 'We are giving all staff the chance to learn the new system – would you like the training?'
- be consistent in the performance standards set for staff
- be consistent in managing absence from work because of illness. Do not assume older staff are more likely to be off work ill. See the **Age discrimination: top ten myths factsheet**.

An employer **should**, regardless of the employee's age:

- raise any performance problems with the employee as soon as possible, and **not** delay or wait until the employee's appraisal. This includes having a constructive conversation to explore reasons for the under-performance and finding out what the manager can do to help
- help the employee to try to improve through options such as coaching and/or training, making an agreed change to their role, or seeking the help of an occupational health adviser if the employee's health is affecting performance
- agree a way forward with the employee, setting clear targets for improvement and giving the employee a fair chance to improve
- give regular feedback to the employee, praising achievements and explaining how they can get better in any areas where they still need to improve.

Taking consistent action to manage performance

Like employees of all ages, each older worker has a different mix of physical and mental abilities, skills and experience. It's important to handle any under-performance by employees consistently no matter what their age. This includes giving them the same opportunities to improve and develop. Steps in managing an employee's under-performance should be in a workplace policy agreed between employer and any trade union/s or employee representatives. More information can be found at www.acas.org.uk/performance. Also see the section, **Retirement**, further into this guide.

For example... performance management discrimination

In a round of performance management reviews, Luciana sets targets for 29-year-old Haruki to improve in his role after poor results. Meanwhile, 63-year-old Joe in the same role has had similar poor results. However, Luciana decides to let that pass with Joe because she assumes he will be retiring soon. Haruki could claim discrimination because of his age.

Redundancy

An employer **must**:

- make sure the need for redundancies is genuine and that the process for deciding who is made redundant fair. Decisions should be based on factors such as skills, work performance and abilities needed in the re-structured organisation.

An employer **must not**:

- base a decision on the age of an employee. However, there can be circumstances where what may appear a potentially discriminatory decision could be allowed. To find out more, see the section, **When different treatment because of age may be allowed**, further into this guide
- select staff for redundancy because they are part-time, as this is likely to involve discrimination, including against older employees
- pressurise older employees to opt for redundancy and/or retirement to help reduce the organisation's headcount
- select younger staff for redundancy instead of older, longer-serving staff to avoid higher redundancy pay-outs and maybe early pension pay-outs too, or because it thinks younger staff will find it easier to get another job.

An employer **should not**:

- select staff for redundancy solely or mainly based on 'last in, first out' because this is likely to discriminate against younger employees. However, there are circumstances where an employer may be able to objectively justify 'last in, first out' as part of redundancy selection criteria.

For example... redundancy discrimination

Namono was made redundant after 18 years as an IT lecturer because she did not have recent experience working in a business. Before becoming a lecturer, Namono worked in computing in the private sector for 12 years, but this was not counted as 'recent' by her employer. This factor in selecting lecturers for redundancy is likely to have put the lecturers in Namono's age group at an unfair disadvantage and be discriminatory.

Deciding redundancy payments

Redundancy payments based on age are allowed under the statutory redundancy payments scheme and are capped at a maximum of 20 complete years of service with that employer. Alternatively, an employer may have its own redundancy payments scheme offering more money. Employers should be aware that a

scheme not proportionately in line with the statutory scheme risks being discriminatory.

However, an employer's totally different scheme may be lawful if it can be objectively justified and pays all age groups more than the statutory scheme. Employers should also be aware that a scheme may be discriminatory if payments are capped for employees who are older employees. See **When different treatment because of age may be allowed**.

To find out about redundancy generally go to <https://beta.acas.org.uk/manage-staff-redundancies>

Retirement

An employer **must not**:

- treat an employee detrimentally because they are thinking about retiring or could already take their work pension or State pension
- make the mistake of thinking it has the right to change an employee's employment contract once they take any pension.

The employee's right to decide when to retire

Most employees now have the right to decide at what age they will retire. There is no legal 'standard' or 'default' retirement age. This ended in 2011. Also, an employee does not need to retire when they reach the State pension age. An employer can still set a retirement age if it meets legal requirements. This decision must meet the wider needs of society, such as giving young people the chance of employment or creating a workforce with a mix of age groups, as well as the organisation's business needs. However, the need to set a retirement age can be very difficult to prove. So, few employers do this apart from for some roles which are physically-demanding and/or involve public safety. To find out more, go to the section, **Where discrimination may be lawful**, further into this guide.

Whether or not an employee can take some or all of their pension when they retire will be determined by the pension scheme and Equality Act rules.

For example... retirement discrimination

Clive, aged 66, has been clear with his employer that he would like to carry on working and developing at the firm where he's successfully built a new career in the last 15 years. However, the mood has changed with the arrival of a new manager, Michelle. He's now under the strong impression that she is trying to force him to retire. She regularly chips in remarks such as 'There's no point in training you to use the new software, Clive, you're 66 for goodness sake'. And 'You won't want a new role at your age, will you?' and 'You'll be retiring soon, I expect'. Michelle's behaviour is likely to be discriminatory.

Dismissal

An employer **must**:

- only ever dismiss an employee for a genuine reason and after a fair process.

An employer **must not**:

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- apart from in very limited circumstances, dismiss an employee because of their age, including because they are thought to be too young or too old, or because of an ageist culture in the workplace. Neither must they be dismissed because of the age of someone they are associated with
- suggest that the employee should retire before or during a dismissal process
- use ageist language during a dismissal process
- base a dismissal on age, other than where lawful.

For example... dismissal discrimination

Helen takes over the ownership and running of a hair and beauty salon. She then regularly picks on employee Ginette, aged 58, with comments such as 'she looks too old for the salon', 'she's putting off customers' and 'we need younger, prettier staff'. Finally, she dismisses Ginette claiming she's no longer the right kind of employee for the salon. This is likely to be discriminatory.

Flexible working

An employer **must**:

- consider a flexible working request from an employee who has worked for it continuously for 26 weeks. It must agree to flexible working where it can accommodate the request, but can turn it down on business grounds defined in flexible working regulations. However, it must make sure it does not discriminate. To find out more, go to www.acas.org.uk/flexibleworking
- remember that changing or reducing work hours, going part-time, taking partial retirement or working from home can all be part of a flexible working request.

An employer **must not**:

- refuse a flexible working request from one employee because they feel another employee is more deserving because they are older, younger or have family care commitments. One way to manage requests is to consider them in the order they have been made.

An employer **should**:

- consider dropping the '26 weeks of service' eligibility requirement and allow job applicants and employees to request flexible working from day one of employment.

For example... flexible working discrimination

Sixty-year-old Liang asks manager Pablo if he could reduce his hours from full-time to four days a week in a year's time, so he can look after his grandson on the other day. Liang is hopeful because he knows some of the other staff, particularly the young mums, have flexible working arrangements such as jobshares and working from home. However, Liang's request is turned down without any discussion, with Pablo telling him: 'If you want to carry on working here, you've got to do a five-day week - final'. Liang believes Pablo is discriminating against him because of his age.

Other considerations for everyone

Employers, managers, HR personnel, employees and their employee or trade union representatives should make sure they also understand:

- age discrimination and where different treatment because of age may be allowed
- the risks of age stereotyping
- the importance of not using ageist language and not being biased in favour of or against particular age groups
- how the protected characteristic of age can interact with other protected characteristics, particularly sex and disability.

When different treatment because of age may be allowed

There are exceptions where different treatment because of age can or may be lawful including:

- where discrimination may be lawful
- occupational requirements
- positive action
- pay and extra job benefits linked to time with the employer
- National Minimum Wage and National Living Wage
- redundancy and redundancy pay
- pensions
- the Armed Forces
- employing people under 18.

Where discrimination may be lawful

Discrimination because of age is allowed where objectively justified:

- with ordinary direct discrimination, the employer must prove its action concerning the employee is 'a proportionate means of achieving a legitimate aim'
- with indirect discrimination, the employer must prove its 'provision, criterion or practice' affecting the employee and group of employees of that age or age group is 'a proportionate means of achieving a legitimate aim'.

What is a proportionate means of achieving a legitimate aim?

An employer must show both that:

- there is a **legitimate aim** such as a good business reason, but should note that cost alone is unlikely to be considered sufficient, and
- the actions are **proportionate, appropriate** and **necessary**.

To justify this sort of action, an employer must balance its business need against the discriminatory effect on affected employees. The more discriminatory the

effect, the more difficult it will be to justify. Employers should explore ways to achieve their aims without discriminating, or without discriminating as much. If there are less discriminatory alternatives, they should be taken.

Proving a legitimate aim to an employment tribunal can be difficult.

If a claim of direct age discrimination goes before a tribunal, the employer would also have to show its legitimate aim would assist society in some way – for example, by helping young people get jobs or older people stay in work. However, in a case of indirect discrimination, an employer would not have to show any such wider benefit.

Occupational requirements

In very limited circumstances, it may be lawful for an employer to insist that employees or job applicants must be, or not be, a particular age or in a particular age group.

In law, this is known as an 'occupational requirement' and can provide the employer with a defence to a direct discrimination claim. But it is not enough for an employer to simply decide they would prefer, for example, not to employ someone because of their age.

An occupational requirement must be all of the following:

- crucial to the post, and not just one of several important factors, **and**
- relate to the nature of the job, **and**
- be 'a proportionate means of achieving a legitimate aim'. If there is any reasonable and less discriminatory way of achieving the same aim, it is unlikely the employer could claim an occupational requirement.

Occupational requirements should be reassessed every time a job is advertised because circumstances and needs can change.

Also, an employer should think carefully, and consider seeking legal advice, before claiming an occupational requirement because some can be **difficult to prove** to an employment tribunal.

Examples of occupational requirements

- to be 18 or over to serve alcohol
- to be between 18 and 60 to be a police officer because of the physical demands of the job
- to be between 18 and 60 to be a firefighter because of the physical demands of the job.

Positive action

An employer can take what the law calls 'positive action' if it can show reasonable evidence that job applicants and/or employees belonging to an age group:

- are at a disadvantage, and/or
- are in low numbers in the organisation, and/or
- have other needs because of their age.

Positive action must be proportionate and not discriminate against others. It does not mean giving applicants jobs or promotion solely because of their age. Actions may include training aimed at an age group or offering opportunities to use new skills to help them develop.

However, positive action can be used in a certain circumstance to decide who gets a vacancy where applicants are rated equally capable of doing the job. In this situation, the employer can select the applicant from the age group which it can show is under-represented in the organisation. An employer can only do this as a tie-breaker in deciding an individual vacancy. It would be discriminatory to give all applicants of an age group jobs, promotion or better terms and conditions because of their age.

For more on positive action, see the Acas guide, **Equality and discrimination: understand the basics**.

Pay and extra job benefits linked to time with the employer

An employer should usually base an employee's pay and any extra perks and benefits, such as private health insurance and additional holiday, on their job and skills, not how old they are. However:

- **For up to five years' service**, the law allows an employer to improve pay, perks and benefits because of length of service with the employer or working at a certain level with the employer (and may include any previous employment before transferring under the [TUPE regulations](#))
- **For more than five years' service**, it may be discriminatory to increase pay and/or add perks and benefits as younger employees are more likely to have been with the employer for less time. However, an employer may be able to objectively justify rewarding more than five years' service if the business need is genuinely more important than any discriminatory effect it might have. There is more on 'objective justification' in the section, **Where discrimination may be lawful**, earlier in this guide
- **Insurance benefits** such as life insurance or health insurance can be stopped once an employee reaches the State pension age.

For example... lawful pay rise linked to time

Jen's employer gives all employees a pay increase after each year with the employer for up to five years on the basis that their growing experience enables them to do their job better.

National Minimum Wage and National Living Wage

The law allows different rates of minimum pay based on age up to 25 and applies even if people on different rates are doing the same job. The Government decided on this approach to make it easier for younger people to get work.

An employer can increase the amounts in each of the National Minimum Wage and National Living Wage pay scales, but the increases must go up using the same age bands.

For the current NMW and NLW rates, go to <https://beta.acas.org.uk/national-minimum-wage-entitlement>

Redundancy and redundancy pay

Redundancy: As mentioned in the earlier Redundancy section in this guide, there can be circumstances where a potentially discriminatory decision in selecting staff for redundancy could be allowed. For example, deciding to keep staff who have been with the company for longer, and making redundant staff with less time with the firm, is likely to discriminate against younger employees. However, the company could be allowed to do this if it can prove a good business reason. For instance, it might be that it is essential that the restructured company keeps its most experienced staff who are fully trained and skilled. To find out more about how to prove a good business reason, go to the earlier section, **Where discrimination may be lawful**.

Enhancing redundancy pay: As mentioned in the earlier Redundancy section in this guide, there can be circumstances where a potentially discriminatory decision in improving redundancy pay could be allowed. For example, basing the amount of redundancy pay on an employee's number of years with the employer is likely to encourage older employees to opt for redundancy and younger employees to stay with the employer. An employer could do this if it can prove a good business reason or reasons – maybe to reward long service and open up opportunities for new talent. Or, maybe, to encourage voluntary redundancies, avoid compulsory redundancies and give the restructuring of the organisation a positive feeling in moving forward. To find out more, go to the earlier section, **Where discrimination may be lawful**.

Capping redundancy pay: Usually, an employer should avoid a scheme which looks to cap redundancy pay for employees who it thinks might be nearing retirement. Before the ending of the standard retirement age of 65 in 2011, some employers had caps so long-serving older staff would only get a redundancy payout which matched what they would have earned had they stayed in work. But, with the end of the standard retirement age, it is now more difficult for an employer to justify fixed retirement ages, apart from in a few limited circumstances. Now, a long-serving employee is likely to argue that a cap on their redundancy pay because of their age is unlawful as they may well work long after what was once thought of as retirement age.

Pensions

An employer can offer an employee who has been part of its pension scheme since before October, 2006, an enhanced pension if they are being made redundant.

The law around age discrimination and pensions is extensive and complex. Employers and employees should seek legal advice and/or expert and independent financial guidance such as from the Pensions Advisory Service at www.pensionsadvisoryservice.org.uk/ or a regulated independent financial adviser – to find out more, go to the Financial Conduct Authority at www.fca.org.uk/

Armed Forces

Age discrimination law does not apply to the military in the army, navy and air force in the UK.

Employing people under 18

There are legal restrictions on employers offering work to young people, and taking them on, until they are 18. Find out more at www.acas.org.uk/employingyoungpeople

Risks of age stereotyping

Employers and employees should avoid making assumptions about job applicants' and employees' capabilities and likely behaviours because of their age. Such guesswork can often be done without realising – this is known as unconscious bias. Whether intended or not, stereotyping can often lead to poor decision-making when recruiting, de-motivate existing staff, lead to reduced job performance and reduce trust among colleagues. Also, assumptions and uninformed decisions about job applicants or employees could lead to discrimination claims.

Myths about younger employees can include:

- they lack people skills because they are always on a mobile phone
- they are not team players.

Myths about older employees can include:

- their job performance will decline as they get older
- they will resist change.

How employers and employees can avoid age stereotyping

- Judge people on their job performance – not assumptions about them
- Where possible, have different age groups in a team or project – shared goals can bring people together
- Seek out and value different outlooks – they can come together to result in good ideas
- Encourage the different age groups to swap ideas, knowledge and skills.

To find out more about unconscious bias, go to www.acas.org.uk/unconsciousbias

Ageist language

Derogatory and abusive terms, and comments about an employee or job applicant are likely to be discriminatory if they are because of their:

- age
- perceived age (whether the perception is correct or not), and/or
- association with someone belonging to a particular age group.

They might include for example: a younger employee calling an older colleague 'Gramps' or 'old timer'; an older employee telling a young employee they are 'still wet behind the ears'; or an employer telling a job applicant 'you're not a good fit for our culture' or 'you're over-qualified' meaning 'you're too old' – here, the job applicant should challenge the employer to spell out what it means to see if the reasoning is justified or discriminatory.

In discrimination, how the recipient perceives words and actions matters more than the intention of the person delivering them.

The term 'banter' is often used when there is disparity between what was intended by one person and how it has been perceived by another. Employers should manage these situations with care. Sometimes a situation, where a 'joke', 'banter' or remark has caused offence or upset, can be dealt with by a manager having an informal discussion with an employee and explaining that they have caused offence, and to make sure they do not do it again. And in a situation where someone has used a word by mistake, or there has been a misunderstanding, or a comment has been made without thought, a manager may be able to handle it informally.

In other situations, where a term has been used on purpose and maliciously, or to embarrass and humiliate, the employer should look into the matter formally. There is more information about handling complaints in the companion guide, **Discrimination: what to do if it happens**, at www.acas.org.uk/equality

Impact of other protected characteristics

The protected characteristic of age can be affected by or interact with other protected characteristics. For example:

Sex: For a certain role, an employer may say the successful applicant will have to regularly work late and/or at weekends and/or travel abroad, and/or socialise after working hours. Unless the employer can give a good business reason or reasons, which are proportionate, appropriate and necessary, such requirements may be discriminatory because of age and/or sex. For example, this might be because older women are more likely to have family caring commitments outside of work and find it difficult to meet such demands.

Employers should be aware that older women are more likely to be treated unfairly because of their age than older men. As well as being overlooked for promotion and training, and full-time work because of a lack of flexible working, some older women are also being treated unfairly because of the **menopause**.

Managing the menopause at work

The menopause is part of the natural ageing process for women, usually in their late forties or fifties. Employers should be aware of effects of the menopause including:

- insomnia, fatigue, mood swings and surges of feeling hot
- struggling to remember things, concentrate and focus at work
- taking longer to recover from illness.

Such effects can lead to an employee losing her confidence, and suffering from stress and anxiety. Many women who take time off work because of these effects do not tell their employers the real reasons for their absence.

Employers and employees may find the menopause a difficult topic to discuss as it is a sensitive and personal matter. An employer should train managers and/or develop a policy to ensure an understanding in the organisation of how the menopause can affect women at work and what support might be appropriate. Such an approach may give an employee confidence to talk to their employer

about any issues they have or support they feel they need. And it may prevent discrimination claims from female employees going through the menopause.

There are more than three million women over 50 working in Britain. The impact of the menopause can vary from woman to woman.

For guidance for union reps on supporting working women through the menopause, go to www.tuc.org.uk

For advice on sex discrimination, go to www.acas.org.uk/sexdiscrim

Disability: The risk of an employee developing a disability increases with age, particularly once over 50. A job applicant or employee must not be discriminated against:

- because they have a disability, and/or
- because of something linked to their disability – for example, it might be to do with being off work ill or difficulty coping with a certain task - and/or
- because they need ‘reasonable adjustments’ to remove or minimise their disadvantage at work caused by their disability – for example, this might be in applying for a job or to stay in work - or
- because they are thought to have a disability, or
- because they are associated with someone with a disability.

For advice on disability discrimination, go to www.acas.org.uk/disability

Raising and handling complaints

How an employee should raise a complaint of alleged discrimination, including the option of raising the matter with a trade union representative, and how the employer should handle it, are explained in companion guide **Discrimination: what to do if it happens**. Also, employers should be aware that after dealing successfully with a complaint of discrimination, there can be further steps. For example, it is useful to think of how any future instances might be prevented. Find out more in the companion guide, **Prevent discrimination: support equality**. Both guides are at www.acas.org.uk/equality

Further information

Acas learning online

Acas offers free e-learning. The Equality and diversity course gives: an overview of what equality and diversity mean; why they are important; putting the principles into practice in an organisation; and a test to gauge understanding of the key points. Go to www.acas.org.uk/elearning

Acas training

Our Equality and diversity training is carried out by experienced Acas staff who work with businesses every day. Training can be specially designed for smaller companies. Go to www.acas.org.uk/training for up-to-date information about our training and booking places on face-to-face courses. Also, Acas specialists can

Age discrimination: key points for the workplace

visit an organisation, diagnose issues in its workplace, and tailor training and support to address the challenges it faces. Find out more at www.acas.org.uk/businesssolutions

Acas guidance

Equality and discrimination: understand the basics, which includes the public sector equality duty

Prevent discrimination: support equality

Discrimination: what to do if it happens

Bullying and harassment at work

Flexible working

Recruiting staff

Redundancy

Age UK

Charity campaigning against ageism at work, at www.ageuk.org.uk/information-advice/work-learning/discrimination-rights/

Guidance on age-friendly recruitment at

www.rec.uk.com/_data/assets/pdf_file/0013/215221/Age-Opportunity-4-page-A4-pledge-WEB.pdf

Business in the Community

Charity promoting responsible business, at

<https://age.bitc.org.uk/BusinessChampion>

Centre for Ageing Better

Charitable foundation campaigning for more age-friendly workplaces, at

www.ageing-better.org.uk/our-work/being-fulfilling-work

Equality Advisory Support Service

Government-funded service offering support to people with discrimination concerns, at the EASS helpline on 0808 800 0082 (Text phone: 0808 800 0084) or go to www.equalityadvisoryservice.com/

Equality and Human Rights Commission

Guidance on age discrimination in the workplace on

www.equalityhumanrights.com/en/advice-and-guidance/age-discrimination

Employment Statutory Code of Practice on www.equalityhumanrights.com/codes

Government's Department for Work and Pensions

Report on managing a workforce when there will be more older staff, at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/587654/fuller-working-lives-a-partnership-approach.pdf

Having a mid-life career conversation video, at

www.youtube.com/watch?v=DgTq5NTKIHU

Trades Union Congress

To find out how a trade union representative should carry out a mid-life career conversation with an employee to help the employee make a case to their

employer, go to www.unionlearn.org.uk/publications/valuing-skills-older-workers-how-do-mid-life-development-review

Additional help

Employers may be able to seek assistance from groups where they are members. For example, if an employer is a member of the Confederation of British Industry or the Federation of Small Businesses, it could seek its help and guidance. If an employee is a trade union member, they can seek help and guidance from their trade union representative or trade union equality representative.

Keep up-to-date and stay informed

Visit www.acas.org.uk for:

- free employment relations and employment law guidance
- tools and resources including free-to-download templates, forms and checklists
- an introduction to other Acas services including mediation, conciliation, training, arbitration and the Acas Early Conciliation service
- research and discussion papers on the UK workplace
- details of Acas training courses, conferences and events.

Sign up for the free Acas e-newsletter. The Acas email newsletter is a great way of keeping up to date with changes to employment law and to hear about events in your area. Find out more at: www.acas.org.uk/subscribe

Acas Helpline Online. Have a question? We have a database of frequently-asked employment queries that has been developed to help both employees and employers. It is an automated system designed to give you a straightforward answer to your employment questions, and also gives links to further advice and guidance on our website: www.acas.org.uk/helplineonline

Acas Helpline. Call the helpline for free and impartial advice on 0300 123 1100. We can provide employers and employees with clear and confidential guidance about any kind of dispute or relationship issue in the workplace. You may want to know about employment rights and rules, best practice or may need advice about a dispute. Whatever it is, our team are on hand. Find out more: www.acas.org.uk/helpline

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