

UCEA/ECU Age Discrimination Working Group Guidance

Age Discrimination Legislation 2006

Guidance Note 1: Pay and Benefits – A UCEA Publication

Scope of guidance

This guidance note addresses the implications of the Employment Equality (Age) Regulations 2006, due to be implemented on 1 October 2006, for pay and benefits arrangements in the higher education sector.

The regulatory framework

As with most areas of discrimination law, there are two potential types of discrimination on the grounds of age:

- *Direct discrimination* occurs where one person (the employer) treats another less favourably on the grounds of age. This is lawful only where the employer can objectively justify age related treatment or practices.
- *Indirect discrimination* occurs where a provision, criterion or practice is applied generally but which disadvantages people of a particular age group, whether “young” or “old”. This can occur anywhere in the employment cycle from recruitment, through an individual’s working life, to retirement practices.

The Regulations provide that both direct and indirect age discrimination may be justified objectively. Objective justification means that the employer will have to show that the age discriminatory treatment, policy or practice is a “proportionate means of achieving a legitimate aim”. The DTI’s consultation paper states that the test of objective justification “will not be an easy one to satisfy”. Therefore to seek, systematically, to rely on this statutory defence would be potentially hazardous. Higher education employers are advised to seek to comply with the spirit, as well as the letter, of the legislative requirements.

There are exceptions within the Regulations to the discrimination provisions, as follows:

- Where there is a genuine occupational requirement for a person of a particular age.
- On the grounds of positive action (i.e. encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work where it reasonably appears to the employer that this prevents or compensates for disadvantages linked to age).
- The provision of enhanced redundancy payments.
- Salaries covered by age related statutory minimum wage and statutory apprenticeship rates.
- Specific length of service provisions (see below).

Specific length of service provisions relating to pay and benefits

There is a general provision in the Regulations that it will be lawful to base differences in pay and benefits on length of service, for a period of up to five years in all cases, and for longer periods where the employer can justify that the arrangement fulfils a “business need” such as encouraging the loyalty or motivation, or rewarding the experience of some or all workers. In order to meet these requirements, employers would need evidence from which they can conclude there is a benefit to the organisation such as information gathered through monitoring, staff attitude surveys or focus groups. Where this is the case it will be necessary to apply the arrangement equally to all staff doing similar work.

Implications for pay policies & practices

Job evaluation

The advice given by your job evaluation scheme provider should address areas of potential discrimination and cover two areas of risk. The first is in the design of the scheme itself. This means ensuring that the factor definitions and supporting guidance on how to interpret the factors should not contain any potentially discriminatory elements – either explicitly or implicitly - in respect of length of service or age. This applies both to the scheme factors and to any descriptions of grades or levels that are based upon or supplement the job evaluation scheme, for example job family grade descriptions. In particular you will want to check criteria relating to experience to ensure that these are not effectively length of service related criteria.

The second area of risk is in the job evaluation process. In this respect the risks are similar to other areas of potential discrimination and normal equality guidelines and safeguards should apply, for example by ensuring that job analysts and panels are properly trained. It is not expected that the job analysts and panels need to be representative across all age ranges, but there should be sufficient safeguards to ensure that roles are evaluated purely in respect of the relevant factors or elements, and not personal characteristics such as the role holder’s age or length of service. In particular, a job analyst or panel should avoid taking into account supplementary age or service related criteria to inform the evaluation of a job, for example if ‘normal’ progression paths assume that individuals in a particular career family will have reached a certain level by a certain age or within a set period of service. Similarly, the use of words such as “senior” should relate to specific job requirements described in terms of required skills and competencies, rather than to age or length of service.

Whilst the guidance issued by your job evaluation scheme provider should be sufficient to enable you to ensure the scheme is non-discriminatory, it is important to ensure that such guidance is followed in practice.

Pay structures

The main issue with respect to the design of a grade structure is the extent to which progression is based on length of service or age.

Age related pay scales: from August 2006 there will be no age related pay scales in the national agreements. In the small number of cases where institutions still have locally agreed age related scales, these should be reviewed to ensure that they meet the test of being a proportionate means of achieving a legitimate aim. As mentioned earlier this may be a difficult test to pass. The alternative is to convert age related scales into length of service related scales so that they will be covered by the length of service justification described below.

Length of service related progression: Under the Regulations, pay structures that are based on automatic length of service entitlements up to five years are exempt from the

legislation. This applies to all grades with six pay points where pay progression is annual (i.e. a minimum point and five additional points paid annually). Beyond five years' service, additional annual pay points are justifiable where the test of fulfilling a business need is met. Case law will test what is legally justifiable in practice.

Where progression from one grade to the next is in practice "automatic" on length of service grounds, the same test will apply. Length of service entitlement that across the two grades together accounts for more than six pay points, awarded annually, will need to be justified by reference to the business needs of the institution.

Possible alternatives to annual progression through scales of more than six points include:

- Design the grade structure so that no grade has more than six pay points.
- Incorporate progression criteria within grades to take into account objective criteria other than length of service, for example a combination of skills, competencies, or output. Alternatives could include:
 - Apply contribution criteria to progression through all pay points in a grade
 - Apply length of service for the first six points in a grade, thereafter apply contribution criteria in relation to further progression through the grade
 - Introduce progression thresholds within the grade, that have the effect of breaking the grade down into groups of six or fewer pay points, with passage over the threshold determined by criteria other than length of service.
- Where there is the potential for progression between grades that has the effect of extending the number of pay points beyond six, build in progression gateways that confirm an individual's suitability to move through to the next grade, based on their ability to meet the role requirements for the grade above and the responsibilities they are actually undertaking.

Consideration should also be given to progression criteria that relate to specific job family career paths. Where annual progression is possible for periods of five years or more on service grounds, it may be that this is justifiable for the specific job family, even if it does not apply elsewhere in the institution.

Starting salaries

Policy and practice relating to starting salaries should be reviewed. If age is used it must be capable of being justified under the previously described "demanding" test as a proportionate means of meeting a legitimate aim. Where length of service of more than five years is taken into account the test of fulfilling a business need needs to be met. An alternative approach is to relate starting salaries to criteria that can be identified through the selection process, such as demonstrated competence or skill level.

Benefits

All benefits should be reviewed to check whether they include reference to age related or length of service related entitlement. Where age or length of service related criteria are used these should be reviewed and revised where necessary. It is important to be mindful not just of the need to avoid unjustified direct discrimination, but also the potential for indirect discrimination.

Age related benefits: age related benefits need to meet the test of being a proportionate means of reaching a legitimate aim.

There are some potential areas of risk that are likely to be of common concern across the sector. The most common of these are highlighted below, but this should not be considered an exhaustive list of all the policies and practices that should be reviewed:

Examples of age related benefits include:

- Access to age related medicals.
- Age related pre-retirement arrangements. Age related provisions that fall within the terms of a pension scheme are excluded from the Regulations. However, this exclusion does not apply to arrangements that are related to retirement, but which are not part of the formal scheme provisions.

Note: Issues relating to pension schemes and early retirement will be covered in a separate Guidance Note.

Length of service related benefits: length of service related benefits for the first five years of service are lawful under the Regulations. Additional benefits from service beyond five years need to be reviewed to confirm that the institution can meet the test of fulfilling a business need. **Examples** of benefits that may include service related eligibility criteria include:

- Sick pay
- Holidays
- Other leave provisions such as maternity, paternity or parental leave
- Length of service awards: it is anticipated that this benefit can readily be justified on the grounds of rewarding loyalty
- Sabbaticals
- Access to workplace nurseries
- Historical pay protection arrangements that provide different levels of entitlement linked to length of service.

As well as benefits that apply under collective agreements (local and national), institutions should also satisfy themselves that individual arrangements for senior staff do not give rise to direct or indirect age discrimination risks.

Recommended Actions

Institutions should:

- Scrutinise all pay and benefit practices, policies and procedures to establish whether they contain age related or length of service criteria. If so, these should be reviewed to check whether the criteria used can be justified. If they can, any evidence from which it can be concluded there is a benefit to the institution should be identified and documented. If they cannot be justified, they should be revised, in consultation with relevant stakeholders.
- Set in place the monitoring systems that will support review by age and length of service, as well as the other monitoring criteria referred to in the 2002 JNCHES guidance on equal pay reviews i.e. gender, race and disability.

- Consider whether it would be helpful to include age in any wider equality impact assessment framework or process that is being developed.
- Provide information and training to appropriate staff to ensure that no age or service related criteria are used to determine pay or benefits entitlements except where specified in institutional policies and procedures.
- Integrate age related policies and good practices into a broader approach to equality and diversity; communicate this policy to all managers and employees, and offer training where necessary.

Resources

Equal Pay Reviews: Guidance for Higher Education Institutions. JNCHES, March 2002 (available at www.ucea.ac.uk).

Briefing Paper 2: The draft Employment Equality (Age) Regulations - your chance to comment. ECU, September 2005 (available at www.ecu.ac.uk).

Age and the workplace. A guide for employers. ACAS. (available at www.acas.org.uk)

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