



## **The Employment Equality (Age) Regulations 2006**

### **“Age Discrimination”**

The following material represents an informed opinion on the likely impact and interpretation of the Regulations. It is not meant to be an authoritative interpretation of the law, nor should it be taken as such. In addition, until there have been precedents set in the appellate courts then the law may be interpreted differently by the Employment Tribunals.

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## Age Discrimination

59% of respondents report they have been disadvantaged by age discrimination at work  
*"Tackling age discrimination in the workplace", CIPD, October 2005*

Nearly one third of the labour force will be aged over 50 by 2020  
*Office for National Statistics*

"By 2012, there will be more people aged 40 to 65 than people aged 16 to 39"  
*"The Economic Contribution of Older People", Age Concern England, January 2004*

"By 2014 there will be more people over the age of 65 in the UK than under 16"  
*Taken from a motion by the UCU at the TUC conference on 14<sup>th</sup> September 2006*



## Legal Overview

This is a completely new area of law. The Employment Equality (Age) Regulations 2006 (EER(A)R 2006) come into force on 1<sup>st</sup> October 2006 (although the parts relating to pension schemes will be delayed until at least 1<sup>st</sup> December 2006). The Regulations expressly prohibit discrimination on the grounds of Age in the provision of and during Employment or Vocational Training. This includes the real or perceived age of the individual, but unlike the other Employment Equality Regulations (covering Sexual Orientation and Religion or Belief) it does not cover association with people of a perceived age.

The concepts of age and an age group are not clearly defined in the Act, and it will be open to Tribunals to determine as a question of fact whether or not "age" was the reason for the detriment suffered. This means that employers could be face with a situation where age is claimed as the factor in a scenario between two people of very close age, as has already happened in countries which already have this type of protection.

It is also worth noting that it is not necessary for all of the individuals in a perceived 'age group' to actually be of the same age – the majority should be within a few years of each other.

## Types of Discrimination

In line with the other types of discrimination already legislated for, the EE(A)R 2006 covers:

### Direct Discrimination (Reg 3 (1)(a))

This is where someone treats a person less favourably on the grounds of his/her age than they would treat another person in a comparable situation; and there is no **objective justification** for doing so

### Indirect Discrimination (Reg 3 (1)(b))

This can occur where:

- an employer has an apparently neutral provision, criterion or practice which puts persons of a certain age group at a particular disadvantage compared with others; and
- a person of that certain age group suffers disadvantage; and
- there is no **objective justification** for the provision, criterion or practice

In this context, **age group** means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages. This can include apparent ages (Reg 3(3)).

### Objective Justification

In order to justify either directly or indirectly discriminating on the grounds of age and employer must show that the discriminatory effect of any age based practice is **a proportionate means of achieving a legitimate aim**.

In this context, **proportionate** means that the discriminatory effect of any age-based practice should be significantly outweighed by the importance and benefits of its legitimate aim, and the employer should have no reasonable alternative.

The **legitimate aim** must correspond with a reasonable need on the part of the employer, and must in itself be valid (i.e. the aim cannot be to only recruit young white women).

### Victimisation (Reg 4)

This is usually a two-stage process:

- A complaint/allegation is made under age discrimination regulations **or** assistance has been given to another person in connection with a complaint/allegation under age discrimination regulations; and
- That person is treated less favourably because of that action or assistance.

### Instructions to Discriminate (Reg 5)

Protection is provided for an individual subject to less favourable treatment either

- because of a refusal to carry out instructions to discriminate; or
- because the individual has complained they have been given those instructions

Under those circumstances, that less favourable treatment will constitute discrimination on grounds of age.

### Harassment (Reg 6)

Harassment is unwanted conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment for them having regard to all the circumstances including the perception of the victim.

It is determined by how the behaviour is received by the individual, not by how it was intended by the perpetrator.

Harassment should be taken particularly seriously by employers in light of the decisions of the Court of Appeal in the case of *Majrowski v Guy's & St Thomas's NHS Trust* (2005 IRLR 340) where it was established that employers **could** be held vicariously liable for the harassment of employees by their colleagues.

The Majrowski case was particularly important as it gives employees the right to sue the employer for damages in the civil courts where awards are uncapped and based on a similar scale to Personal Injury Claims. In addition, the losing side will be expected to meet the costs of the other party, so it could become very expensive for employers.

It is also worth noting here that claims brought under Majrowski leave the employer defenceless if the courts find that the harassment actually took place. Employers are not able to use the statutory defence outlined below.

### Statutory Defence

In line with other discrimination legislation there is a statutory defence for employers facing action due to the acts of their employees. There is a 'get out' for an employer if they can "*prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.*" (Reg 25 (3) *EE(A)R* 2006).

This will entail the employer demonstrating that there are policies in place which are pro-actively promoted, reviewed regularly and rigorously enforced and that all staff have received appropriate training. In our experience if an employer cannot show **all** of these things then they will fail to convince a tribunal they satisfied Reg 25 (3).

## Who is Covered

The legislation covers all workers (not just employees), which includes the following:

- **People applying for work**

It is unlawful to discriminate against applicants for employment

- In arrangements made to determine who is offered employment; or
- In terms on which employment is offered; or
- By refusing or deliberately not offering employment.

- **Self-employed people**

The self-employed will receive the same protection as employees in similar circumstances.

- **Contract workers**

This includes those people working for employment agencies that are contracted out to clients. An agency can apply age-based criteria if it has reasonably relied on a statement by the employer that such criteria are justified.

- **Office-holders**

This can include company directors (where they have no contract of employment), judges, tribunal members and ministers of religion.

- **Members of trade organisations**

This includes Trades Unions and other bodies like the Federation of Small Businesses.

- **Training providers**

This includes all forms of training and retraining courses including practical work experience provided by employers, further and higher education institutions and Adult Education programmes (but not schools). Employment agencies and career guidance providers are also covered.

- **Police officers**

Crown forces (i.e. naval, air & military personnel) are **not** covered, although civilian MOD staff **are**.

Additionally, unpaid volunteers and job applicants who are 65 or within 6 months of their 65th birthday are **not** covered.

## Exceptions

There are specific exceptions contained within the Regulations which are outlined below: They are supported by explanation where necessary. A look at the wider impact they might have in the workplace can be found further on.

- **Genuine Occupational Requirements (GOR) (Reg 8)**

In order to claim that there is a GOR then an employer must show that:

- There is a genuine and determining occupational requirement; and
- It must be proportionate for the employer to apply the requirement; and
- It can only be relied upon in defence against claims of direct/indirect discrimination. It provides no defence against other claims.

In reality, the employer must show that a GOR is necessary and that it is proportionate in the particular case; they must also show that either the person did not meet it or that the employer was not satisfied and in all the circumstances, it was reasonable for the employer not to be satisfied, that the person met it.

The DTI has stated that few age-based GORs will apply. It is presumed that employers will instead rely on the objective justification rules.

- **Statutory Authority (Reg 27)**

This is where statute expressly demands that action is taken which could be deemed to be discriminatory on the grounds of age.

Examples include:

- The Licensing Act 1964 prohibits the employment of persons under 18 in any bar while it is open for the sale of alcohol;
- The Care Standards Act 2000 prohibits under 18s from providing personal care and under 21s cannot be left in charge of a Care Home.

- **Positive Action (Reg 29)**

This is a similar provision to the one that exists in current discrimination legislation. It allows employers to take action that “prevents or compensates for disadvantages linked to age suffered by persons of that age or age group doing that work or likely to take up that work.” *Michael Rubenstein (Equal Opportunities Review 153 June 06)*.

It is worth noting that the action should be linked to under-representation in particular posts, not in the organisation as a whole. There is a very fine line between positive action and positive discrimination and employers need to be careful when trying to redress any imbalances in the make-up of the workplace.

- **Life Assurance Cover (Reg 34)**

Employers who provide life assurance cover to workers who have had to retire early on ill health grounds will be able to discontinue that cover when the worker reaches the normal retirement age, if there is one, or 65 if there is not.

- **National Minimum Wage (Reg 31)**

Despite being calculated on an age basis and therefore falling foul of the new law, there is an explicit exemption for the National Minimum Wage. This exemption also allows the differentials in hourly rates according to current age bands as defined in the national Minimum Wage Regulations 1999 to be retained.

However, to rely on this exemption, the employer must either pay at the published NMW rates, or base their pay structure on NMW legislation. This would only work if those under 18 were not paid the same or more than the published NMW rate for adults.

i.e. An employer can pay adult workers £8 per hour and younger workers £5 per hour based on their age. It cannot pay the younger workers £6 per hour, however, as this exceeds the current adult NMW rate. Again, somewhat ironically this will have the effect of depressing the wage rates of younger workers – the opposite of the intention of the Regulations.

- **Length of Service Benefits (Reg 32)**

This provides an exception for any benefits based on length of service if that service is less than 5 years.

The 5 years is calculated according to work done at or above a particular level or total length of service.

It is up to the employer how they calculate the length of service in order to award benefits under the 5 year rule but it must be calculated by number of weeks, not hours, so that part time staff are not disadvantaged.

An employer can discount periods of absence or periods preceding absence, if reasonable. There would be a need to look at the reasons for absence as employers clearly must take into account pregnancy, disability, etc and not fall foul of discrimination laws.

Employers can choose to provide benefits for staff based on a longer length of service, but they would need to be objectively justified.

- **Enhanced Redundancy Payments (Reg 33)**

This allows employers to pay enhanced rates of redundancy pay to staff based on age and length of service, provided that they stick to the statutory framework (which is somewhat ironic given that the calculations are based around age and length of service).

In practice, this means an employer can:

- Ignore the limit of a week's pay (currently £330); and/or
- Reduce the 2 year qualifying rule; and/or
- Use more generous multipliers; and/or
- Enhance the final lump sum.

- **Retirement (Reg 30)**

65 has been set as the default retirement age. Retirements below this age must be objectively justified. After 2011 the default retirement age of 65 could be abolished.

Dismissal on grounds of retirement will be fair when:

- it is genuinely a dismissal on retirement grounds
- it takes place in accordance with requirements for compulsory retirement set out in Schedule 6 of the Regulations (duty to inform and consider)

If an employer does not follow the duty to inform procedure then the dismissal will be automatically unfair.

Although an employer can technically try and objectively justify a contractually lower retirement age the Minister for Pension Reform, Stephen Timms M.P. expressed the view that objective justification will be difficult and will only be justifiable in exceptional circumstances, such as statutory requirements. It will be necessary to provide evidence if challenged as assertions will not be enough (11<sup>th</sup> May 2006). Only case law will, in the fullness of time, provide examples of how the Tribunal are going to interpret this.

## The Potential Impact

### Recruitment

“55% of workers would anticipate applying for jobs where previously they might have ruled themselves out because of their age”

*“Old Age/New Thinking”, Manpower, September 2006*

74% of organisations in the UK actively try to recruit 16-24 year olds

*“Recruiting Older Workers could be Ageist”, Wolters Kluwer, June 2006*

- **Advertising Vacancies**

Employers will have to ensure that vacancies are advertised in journals or publications that are likely to be read by a wide spectrum of the population, to ensure that the ad is likely to be seen by all age groups.

Specialist or niche publications should be avoided where possible. Employers also have the potential headache that whilst internet recruitment is the fastest growing medium at present, it is also likely to be used less by older applicants.

Advertisements would need to be worded carefully - using descriptive terms such as “young”, “dynamic”, “mature”, etc are likely to cause problems, as is staging an advertisement towards a particular age range.

- **Application Forms & Job Specification Criteria**

This is potentially one of the trickiest areas for employers to deal with. Most employers have application forms or requirements that ask for dates of school attendance, dates and types of qualifications, etc. All of these could lend ammunition to claims of age discrimination in recruitment.

It's not age discriminatory in itself to include a date of birth question but why have it? It could lead to discriminatory questions and decisions. Employers could choose instead to include it as part of a diversity monitoring form which interviewers do not see.

Examples of where employers may trip up include rejecting a candidate as ‘over-qualified’ without a valid justification. This could amount to indirect discrimination against an older worker. Whilst an employer may have legitimate concerns that an older worker with extensive experience may lack motivation for the job, that can be determined on a case-by-case basis at interview and dealt with, if necessary, through effective performance management.

Similarly, requiring applicants to be recent graduates could be a problem. As the majority of such graduates tend to be in their twenties, this criterion is likely to indirectly discriminate against older workers.

Specifying a particularly recent qualification might also be caught. For example, requiring candidates to have a degree in media studies, a course that has only come to be widely offered in the last 20 years or so would be likely to discriminate against older candidates. The same would apply to other recent innovations such as NVQs.

Employers looking for particular skills should consider whether these can be assessed individually, rather than by reference to particular qualifications

Asking for a specific length of experience needs to be objectively justified. Employers should ask themselves whether it is really necessary to have, for example, 4 years experience rather than 2 years. It may be better to set requirements as to the type or breadth of experience needed. However, the DTI recognises that age may genuinely be a relevant factor for certain aspects of employment so the scope for justifying discrimination on grounds of age is wider than that for other discrimination strands. The crucial question will be where the Employment Tribunals decide to set the benchmark when assessing justification.

It is worth noting that in the Republic of Ireland an accountancy company advertised for staff with “2-3 years post qualification experience”. A candidate with 20 years experience applied on two occasions and was rejected for being “too senior”. He argued that the 2-3 year requirement ruled out older people. The Republic of Ireland Equality Officer decided that it amounted to indirect discrimination and awarded 10,000 euros compensation.

However, it **will** be lawful to refuse to recruit individuals who are within 6 months of their 65<sup>th</sup> birthday. This is specifically allowed for in the Regulations and so asking that question on an application form will be acceptable.

Employers who use agencies will have to ensure that agency they use adheres to age neutral policies and procedures in the choosing of candidates for shortlisting, etc. As with the laws concerning the Prevention of Illegal Working we would advise that employers are pro-active in checking what the agency’s practices are.

- **Shortlisting**

Employers need to ensure that any sifting of candidates is done objectively & without any perceived bias towards age. This sounds straightforward, but unless there is some monitoring of candidates, etc, employers may unwittingly find that they have indirectly discriminated against individuals on the grounds of age (e.g. all the over 40 candidates were rejected). Without detailed objective evidence to the contrary a tribunal will draw an inference of discrimination.

- **Interviewing**

As with the other forms of discrimination employers will have to be very careful about the types of question they ask applicants.

For example, in another case before the Republic of Ireland Equality Officer, Aer Lingus were told that asking an older applicant how she would react to younger employees directing her was discriminatory on the grounds of age. They avoided losing that particular case because they could prove that their overall selection procedure was fair - they had detailed statistics gained from their monitoring information.

Companies will be held vicariously liable if interviewers get it wrong (unless they can rely upon the statutory defence).

## Promotion

Employers will need to ensure that selection for promotion opportunities is based on ability and free from potential bias towards longer serving employees (promotion based on time spent in employment or in the role will be problematic for employers). In addition they must ensure that the opportunity for promotion is available to all, regardless of age.

## Performance Management

There is enormous scope for age discriminatory preconceptions to creep into performance reviews, and employers will have to be vigilant to ensure that employees are judged solely on their individual merits, regardless of age.

Employers should ensure that their managers steer well clear of comments such as 'shows remarkable maturity for their age' and 'remains capable and enthusiastic despite many years with the company', as they betray underlying discriminatory attitudes towards certain age groups.

Having an objective performance management system in place is going to become more critical than ever. Traditionally employers have allowed those close to retirement to coast along in their final years and have dealt with younger workers doing the same thing by disciplining or dismissing them. This is discriminatory. Line managers will have to apply the system consistently to all staff, ensuring that no particular age group can identify a difference in treatment.

Although the new age discrimination rules only come into force from 1<sup>st</sup> October, they could still affect performance appraisals and progress reviews conducted before then. For example, employers may use old reviews and reports going back a number of years as factors influencing the award of benefits or promotion. Where a disadvantageous pre-October review discloses an element of age discrimination, and is then used after October to refuse a promotion or offer a reduced level of benefits, that decision will be tainted by age discrimination and will need to be justified.

## Banter

The Regulations will have a major impact on how people interact. Socially it is currently very acceptable to make jokes about age as compared to making jokes about race, sex or disability - for example the greetings card industry makes a fortune out of birthday cards with an ageist slant.

However, individuals who are offended by this type of banter may be able to present valid claims for Harassment. If it is allowed to continue then employers are exposed to potential claims under the Employment Equality (Age) Regulations 2006 or under the Protection from Harassment Act 1997. If the alleged harassment took place then the employer is left defenceless.

This will be the hardest area for employers to deal with, balancing the legislation against what goes on in every workplace. However, if it is not balanced correctly then the employer will be faced with more problems than just a few staff who think political correctness has gone mad.

## Training

Vocational training is specifically covered by the Regulations, but there will also be an impact in an employer's internal training. Employers need to avoid making judgments based on age stereotypes, e.g. teaching old dogs new tricks, or else they may come unstuck at Tribunal.

## Redundancy

“Age has been a discerning factor in selection for redundancy, but it will soon be a ‘no-go’ area”  
*Jim Fitzpatrick, Employment Relations Minister, August 2006*

Traditionally criteria such as length of service and LIFO (Last In, First Out) have served employers well when facing redundancy selection issues. It has allowed employers to lose those staff without the hassle and time involved in constructing and applying an objective selection matrix.

These Regulations will effectively kill them off as options for employers. Length of service will only benefit long standing members of staff, who will invariably be older than shorter serving staff (no-one aged 18 can legally have 10 years' service). LIFO has suffered from attack at Tribunals in recent years due to the potential discrimination against women. In terms of age, the last person into the workplace is unlikely to be the oldest member of staff. It would be easy for younger workers to lodge claims that these criteria were inherently discriminatory.

Any redundancy selection criteria will have to be objective and free from potential age bias.

Schedule 8 of the Regulations also changes the statutory redundancy pay calculator in order to:

- Remove the exemption for service under the age of 18
- Remove the age 65 cut off for redundancy; and
- Remove the tapering down effect for staff aged 64 and above;

## Wages, Salary & Benefits

Benefits and salary scales which rely on length of service as a criteria will be objectively justifiable where the length of service in question does not exceed 5 years. Thus a pay scale with 5 annual increments from bottom to top will be ‘safe’ within the law.

One with 6 will not, unless employers can objectively justify it. In such cases the legitimate aim which justifies keeping service related benefits is employment planning in the sense of being able to attract, reward and retain experienced staff.

If the employer thinks it through and concludes that there is a business benefit, he will be able to justify using service in excess of 5 years. It must **reasonably appear to him** that his use of length of service “fulfils a business need of his undertaking” (a very low hurdle).

In practice an employer will need to:

- Establish the aim of awarding the benefit, e.g. to reward loyalty; and
- Conclude that overall the aim pursued by awarding the benefit will bring business benefits' e.g. rewarding staff loyalty reduces staff turnover; and
- Apply the length of service criterion similarly to staff in similar situations.

For clarity, length of service does not necessarily mean the whole of an employee's continuous service. It can mean service at a particular level. For example, an employee with 4 years service who is promoted to a more senior position can be placed on a new pay scale with 5 annual increments.

## Unfair Dismissal

The upper age limit for claiming unfair dismissal will be removed.

As with most other jurisdictions, any claims made to the Employment Tribunal must be lodged within 3 months of the act complained of (subject to any extensions of time granted by the Tribunal, for example due to exercising the Statutory Grievance Procedure).

In order to succeed in a claim for Age Discrimination the complainant must show that the difference in treatment causes disadvantage to his/her age group **AND** that it does **not** cause that disadvantage for a relevant different age group (known as the "comparator pool" ). The comparator pool can be actual or hypothetical - just as in the other strands of discrimination it can be a group of people working for the same employer or in the labour market as a whole.

The burden of proof for age discrimination is the same as that now used in all other strands of discrimination. This means that once the Claimant has established a prima facie case the burden shifts to the Respondent to prove that their actions were not tainted with discrimination. In the absence of an adequate explanation the Tribunal has the power to find that the Respondent has committed an act of discrimination.

## Retirement

"The right to request extending retirement age is a non-right really. There is nothing in the regulations that forces employers to give a reason, even under the right to appeal."

*Jane Amphlett, Partner, Addleshaw Goddard*

"The fear for HR practitioners is that we have been here before, our worry is that tribunal chairs will interpret the rules in a different way"

*Arnold Wagner, HR Director, Smiths Group*

Mr Wagner is right to worry. The right to request to work beyond retirement age has been likened to the Flexible Working rights currently enshrined in law. They began the same way, with employers not having to justify their decisions. However, the recent case of *Commotion Ltd v Ruddy* saw that change. In that case the EAT gave Tribunals license to challenge decisions made by employer to ensure that they were not just paying lip service to the legislation.

There is currently no reason to believe that they will not adopt the same approach with the EE(A)R 2006 rights. For this reason we would advise employers to establish sound business reasons that will stand up to scrutiny for turning down requests to work beyond retirement. This is not only good practice, but it will afford employers a better level of long term protection against discrimination claims.

## The Retirement Procedure

Where an employer is genuinely planning a retirement based on the employee reaching retirement age, and where the procedure set out in Schedule 6 of the Regulations is followed, then it will be considered a **planned retirement**.

The duty to inform and consider is effectively a measure to prevent some employers using unplanned retirements as cover for dismissals, redundancies, etc

Employers who wish to retire an employee must:

- Notify the employee, in writing, not more than 12 months and not less than 6 months beforehand of intended retirement date; and
- The employer must also inform the employee of their right to request to work beyond the intended retirement date

There is a continuing duty to inform of the right to request to continue working right up to the 14th day before the operative date of termination. If the employer fails to inform the employee of the right to request the Tribunal can impose a penalty of 8 weeks pay (capped at the statutory amount) (Schedule 6 (11) (3)). Similarly,

Employees wishing to remain in employment must:

- Put their request in writing;
- State that it is a request not to retire;
- State that they want to work either
  - Indefinitely; or
  - For a stated period; or
  - Until a certain date.
- If they have not yet been notified the employee must give date on they believe they will be required to retire

There can only be one request for each intended retirement. This means that if they are successful then they can make another request when the employer next intends to retire them.

If the employee makes a request, the employer will be obliged to consider it if it was made at the earliest, 6 months before intended retirement date and at the latest, 3 months before the intended retirement date. However, the 3 month deadline does not apply if the employer did not inform the employee about the right to request.

Good practice suggests that employers should make employees aware generally of the right to request to work longer by including it in the written statement of employment particulars, employee handbook, etc. However, they must also communicate with each employee individually within the time scales.

A meeting must be held with the employee to discuss the request and a decision made within a **reasonable period**. Although this has not been defined, employment will continue until the employee has been informed of the decision, even if this is after the intended retirement date. If the employer agrees to the request, he does not have to hold a meeting although it would be good practice to do so.

The employee has a right to be accompanied at this meeting. The companion, including a trade union rep, must work for the same employer (this right is not the same as the one conferred by

S10 of the Employment Relations Act 1999). Refusing the employee the right to be accompanied can result in a Tribunal making an award of 2 weeks pay (subject to the statutory cap) (Schedule 6 (12) (3)).

After the meeting or the employer's consideration of the request, the employer must give a written decision to the employee stating, if the request is accepted, whether the employment will continue indefinitely or for a stated period. If the request is refused, the employer's decision must confirm that the employee is to be retired and the date on which that retirement will take effect. There is currently no statutory need to explain or justify the refusal.

The lack of any need to provide fully reasoned refusals has been criticised heavily by some as excusing an employer who decides to treat the process of considering the employee's request as a charade. The lack of specific reasons will also make it difficult for the employee to mount an effective appeal against the employer's decision.

There is a right to appeal and **the statutory dismissal procedure will NOT apply**. This is because the duty to inform and consider procedure mirrors the requirements of the DDP, so there is no need to go through the process twice!

The right to appeal can be exercised because the employer has rejected the request entirely or because he has only agreed to carry on employing the employee for a shorter period than requested. The employer does not necessarily need to hold a meeting to consider the appeal.

A copy of the flowchart from the Acas guidance on Age Discrimination is attached to the end of these notes.

## Employment Tribunal Remedies

As mentioned above, aggrieved individuals can raise claims against those who committed the act of discrimination and the company itself.

If an Employment Tribunal upholds a claim of age discrimination against an employer it can:

- Make a declaration that there has been unlawful discrimination;
- Award compensation (compensation is uncapped);
- Recommend that an employer take steps to avoid the particular form of discrimination reoccurring.

If it upholds a claim against named individuals then it will only award compensation.

If the employer has failed to follow the duty to inform and consider procedure then any resulting dismissal may be deemed automatically unfair.

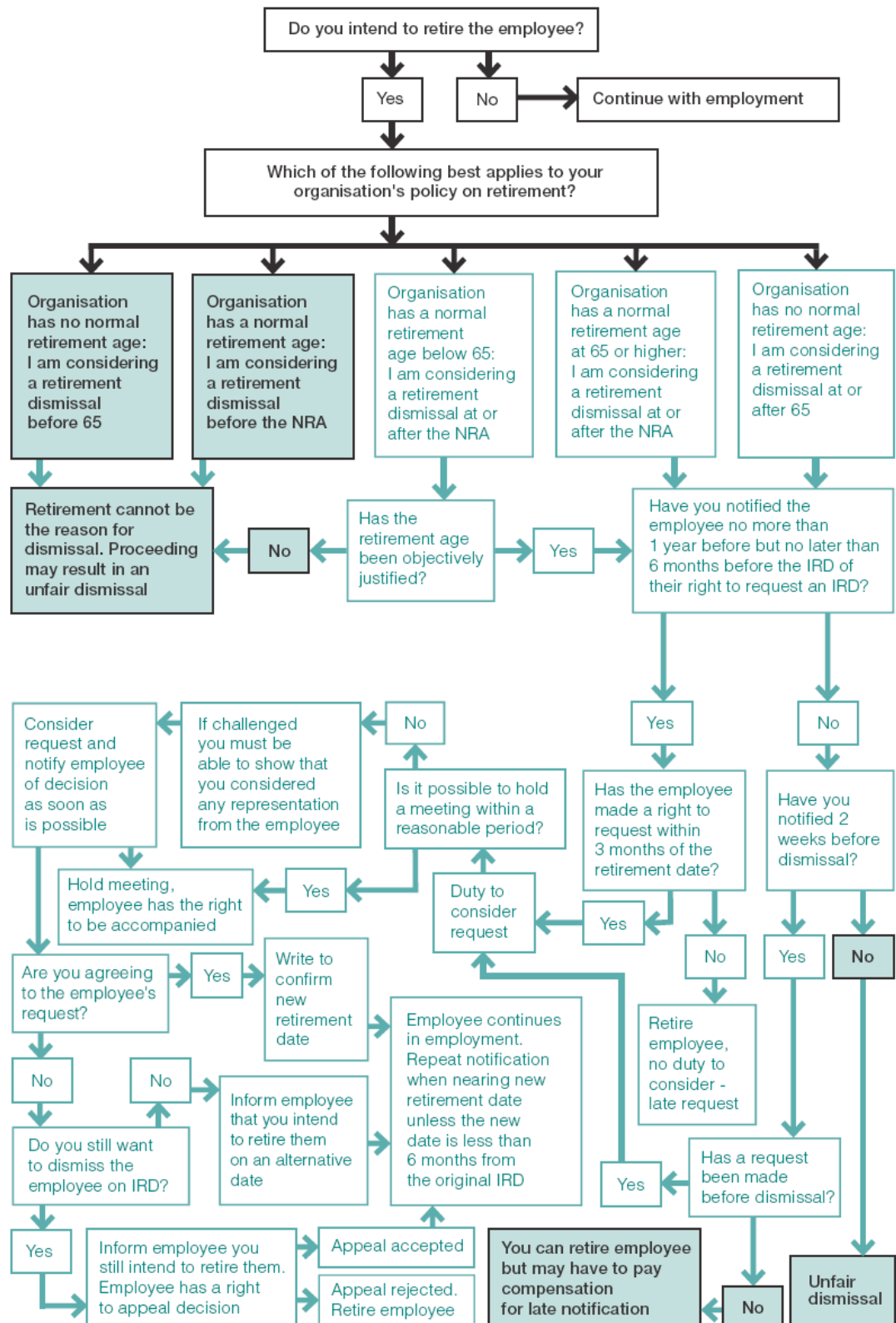
The amount of compensation awarded is guided by the principles laid out in the case of *Vento vs. Chief Constable of West Yorkshire (CA 2003, IRLR 102)* where the Court of Appeal established (for the first time) an official banding system for injury to feelings (not to be confused with psychiatric or personal injury) awards which were to be used by the lesser courts:

- The top band should normally be between £15,000 and £25,000 and should apply only to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000;
- The middle band of £5,000 to £15,000 should be used for serious cases which do not merit an award in the highest band; and
- Awards in the lowest band of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

It is worth noting that the lowest band awarded in Birmingham Tribunals in recent years has been £750 (and is rising).

In addition, recent case law has shown that all of the guilty parties in a discrimination claim can, under certain circumstances, be held jointly and severally liable for the tribunal award. This means that individuals could be pursued for the whole amount of the award made.

In reality individuals will rarely be held jointly liable. However, tribunal awards towards those who perpetrate or encourage (including by inaction) acts of discrimination range between £500 and £1,000 on average. Any such award is enforceable through the County Court.

**Annex 5: Fair retirement flow chart**


Notes: NRA means normal retirement age IRD means intended retirement date

## Annex 6: Request to work beyond retirement flow chart

### Employer – Pre-Retirement

If you intend to retire the employee you must inform the employee of the retirement date, in writing, no more than one year but no later than six months before the intended retirement and that they have a right to request to work beyond the retirement age.

### Employee – Responding to your employer's notification

When your employer has notified you of your intended retirement date and your right to request, if you want to request working beyond retirement age you must inform your employer no less than three months before the intended retirement date. Your request to your employer must be in writing and state whether you wish to continue work:

- indefinitely
- for a stated period
- or until a certain date.

You may only make one request in relation to each intended retirement date. If your employer has failed to notify you of your intended retirement date six months before that date, you may still make a request not to retire at any time before you retire.

### Employer – Responding to your employee's request

When you receive your employee's request you must normally hold a meeting with your employee to discuss the request. If you accept there is no need to hold a meeting; simply amend the employee's contract of employment to reflect the new intended retirement date, and if required, the new employment pattern.

If after considering the request, you decide that you do wish to continue with the retirement you should hold a meeting with the employee. This will enable the employee to put their case to you. The employee has a right to be accompanied at the meeting.

The companion can be:

- chosen by the employee
- a worker or trade union representative employed by you or the organisation.

The companion can:

- address the meeting but not answer questions on behalf of the employee
- confer with the employee during the meeting.

The meeting must be held within a reasonable period after the request has been received from the employee. If the meeting cannot be held within a reasonable period, you may inform the employee of your decision in writing as long as you have considered any representation made by the employee.

### Employee – The meeting to consider your request

If your employer does not accept your request, they must still offer you a meeting to discuss it. This is your opportunity to put your case before your employer. You have a right to be accompanied at the meeting.

The companion can be:

- chosen by you; but must be
- a worker or trade union representative employed by the same employer.

The companion can:

- address the meeting but not answer questions on your behalf
- confer with you during the meeting.

It is important to remember that your companion cannot answer questions on your behalf. You must take all reasonable steps to attend the meeting, although if it is not possible to hold the meeting within a reasonable period your employer may inform you of their decision in writing.

(continued)

## Annex 6: Request to work beyond retirement flow chart (continued)

### The meeting

The meeting is an opportunity for the employee to put their case before the employer. At the end of the meeting the employer may decide that whilst they cannot accept the employee's stated request, there may be a compromise solution. It is perfectly acceptable for the employer to propose alternative working patterns and retirement dates, other than those proposed by the employee, if the employer is persuaded by the employee's case not to be retired.

### Employer – Post-meeting action

If, after the meeting, you decide to accept the employee's request you should inform them that you have accepted the request and state the new employment pattern and when the new intended retirement date will be.

Where the decision is to refuse the request you should confirm with them that you still wish to retire them – either on the original intended retirement date or an alternative later date.

Any decision should be given in writing and should be dated. The employee has a right to appeal the employer's decision, or a decision on a new intended retirement date if it is shorter than the intended retirement proposed by the employee in the employee's initial request.

### Employee – Post-meeting

The employer will inform you as soon as is reasonable after the meeting of their decision. If the employer rejects your request or proposes a new intended retirement date that is less than that in your original request, you may ask for an appeal meeting.

### Appeal meeting

The appeal meeting is the final opportunity for the employee to put their case before the employer. At the end of the meeting the employer may decide that whilst they cannot accept the employee's stated request, there may be a compromise solution. It is perfectly acceptable for the employer to propose alternative working patterns and retirement dates, other than those proposed by the employee, if the employer is persuaded by the employee's case not to be retired.

### Employer – Post-appeal meeting action

If, after the meeting you decide to accept the employee's request, you should inform them that you have accepted the appeal and state the new employment pattern and when the new intended retirement date will be.

Where the decision is to reject the appeal you should confirm with them that you still wish to retire them and the date that the dismissal is to take effect.

Any decision should be given in writing and should be dated.

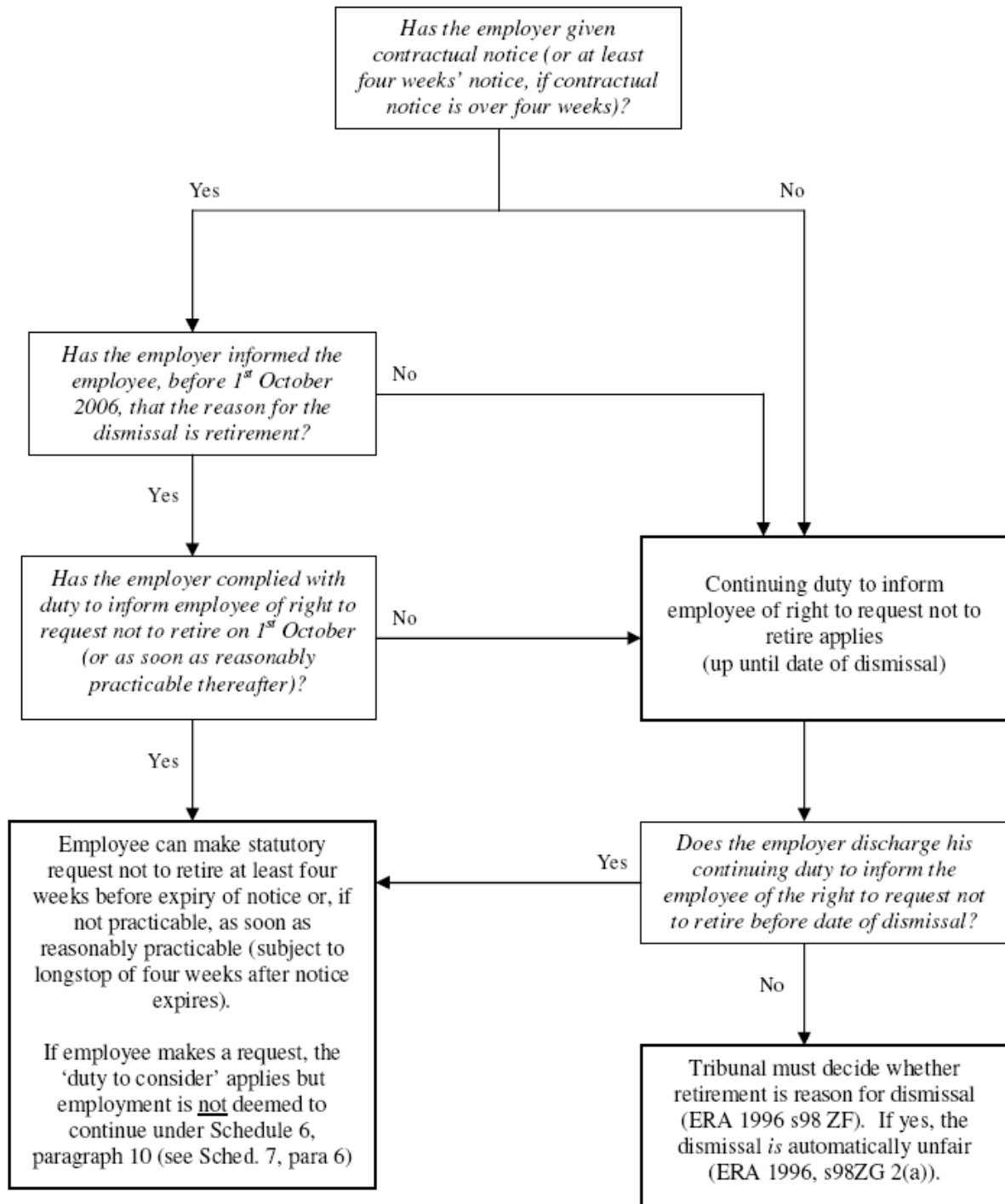
### Employee – Post-appeal meeting

The employer will inform you as soon as is reasonable after the appeal meeting of their decision. If your request is accepted, or a compromise solution is reached, the employer should inform you in writing of that decision.

If your appeal is rejected the employer is obliged to inform you of this in writing and of the date of your retirement. The employer does not need to give a reason why your application has been rejected.

## Transitional Arrangement Flowchart

Dismissals where notice is given *before* 1st October 2006  
with an expiry date *before* 1st April 2007



### Transitional Arrangement Flowchart

Dismissals where notice is given *after* 1st October 2006  
with an expiry date *before* 1st April 2007

