

(update of an article first published on 28 December 2006)

The overriding principle of the Equality Act (EA 2010) is that discrimination, harassment and victimisation of an individual on account of any of the "protected characteristics" listed in s4 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation) are prohibited, but the prohibition is not absolute. For instance, A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others, but, if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim (EA 2010, s13(1),(2)). Formerly different characteristics were dealt with by separate legislation, in the case of age, the Employment Equality (Age) Regulations 2006.

Pensions are inherently age-discriminatory. Instead of a blanket exemption for pensions, the EA 2010 deals with age in Part 5 (work) Chapter 2 (occupational pensions) sections 61 to 63 and schedule 7 part 2, paragraphs 3 to 6. The EA 2010 enacts in s61 that an occupational pension scheme must be taken to include a non-discrimination rule. The detail however is in the Equality Act (Age Exceptions for Pension Schemes) Order 2010, SI 2010/2133, providing specific exceptions from the general principle of non-discrimination.

A main legislative provisions

retirement (from work)

Compulsory retirement at any age is age discriminatory, unless it is a proportionate means of achieving a legitimate aim.

admission and membership

Schemes may set minimum and maximum ages for joining and different ages for different classes of workers: SI 2010/2133, sch 1, para 1.

contributions – money purchase

Schemes may have flat rates for all ages, different rates if attributable to differences in pensionable pay, different rates for different age groups if to make benefits equal or more nearly equal (whatever that means!) and limit contributions by reference to maximum level of pay (ib, sch 1 para 4.

contributions – defined benefits

Schemes may provide for flat rates for all ages, different rates to reflect increasing cost of providing benefits as members get older and a limit of contributions by reference to maximum level of pay: ib sch 1, para 5.

actuarial factors

The use of age criteria in actuarial calculations is permitted: ib, sch 1, para 2.

accrual of benefits

Differences in the fraction of pay at which benefits accrue or of the amounts of death benefits are permitted if the aim is to provide the same levels of benefit for members in comparable situations: ib sch 1, para 18.

length of service

Differences in the amounts of pension or death benefits for members with different lengths of service is permissible: ib sch 1, para 7. Schemes may set a maximum length of pensionable service: ib, sch 1, para 21(2).

Roderick Ramage

BSc(Econ) solicitor regulated by the Law Society

Copenhale Coppenhall Stafford ST18 9BW www.law-office.co.uk

tel 01785-223030, fax 01785-228281, e-mail roderick.ramage@law-office.co.uk

death benefits and life assurance etc,

It is not an age contravention for an employer to make arrangements for or afford access to the provision of insurance for a period ending on the employee attaining age 65 or, if greater, the state pension age or to limit such a benefit to employees who have not attained that age: EA 2010, sch 9, para 14. Insurance can include death in service benefits, income protection, medical fees and permanent health. Also exempt are provisions for differences, for example, in the amount of death benefits with the aim of providing a fixed proportion or multiple of pensionable pay regardless of the length of service: SI 2010/2133, sch 1, para 18. There is however no express upper age limit in respect of death benefits corresponding to the upper age limit for insurance, where, for instance, a pension scheme provides an uninsured death benefit, but the SI 2010/2133, sch 1 para 32 (see below) fixes it, if the scheme is registered, eg, at age 75 in the case of case an uncrystallised funds lump sum death benefit, as defined in the Finance Act 2004, sch 29, para 15.

retirement age (pension scheme)

Schemes may set any age, but a scheme would be discriminatory if the payment of a pension below age NRA is conditional on retirement from work or if a member's retirement from work is deferred but he or she cannot continue to accrue benefits. A "pivot age" for early retirement reduction is permitted, eg no actuarial reduction for early retirement from age 60: SI 2010/2133, sch 1, para 7.

closure of sections of schemes

Sections of schemes of schemes may be closed to workers who have not already joined it: ib sch 1, para 26.

registered pension schemes

Any rule etc compliance with which is necessary to obtain a tax relief or exemption is permitted: ib sch 1, para 32.

B litigation

compulsory retirement

Seldon v Clarkson Wright & Jakes [2012] UKSC 16. The employment tribunal was entitled to conclude that compulsory retirement at age 65 is a proportionate means of achieving the legitimate aims of retention and workforce planning.

changes to public sector schemes

Lord Chancellor v McCloud, SoS for the Home Department v Sergeant [2018] EWCA Civ 2744. Changes to public sector pension schemes were intended to reduce their cost required members to transfer to new schemes with lower benefits. The CA decided, in cases about the judges and separately the firefighters' pension schemes, that the transitional arrangements to protect the benefits for older members were discriminatory and were not a proportionate means of achieving a legitimate aim.

cap on Pension Protection Fund compensation

The compensation paid by the PPF to members, who have not reached the scheme's NRD immediately before the scheme's assessment date, is, by the Pensions Act 2004, sch 7, limited in two ways. Members will be paid 90% of the benefits they would have received from the scheme (even if they had taken early retirement), added to which is that the 90% is subject to an annual cap (for 2020/21 it is £41,461 pa for a 65 year-old). Members who had reached the NRD receive 100% compensation for their benefits with no cap. Each member must be guaranteed 50% compensation for their scheme benefits: Hampshire v the PPF [2018] Case-17/17, CJEU. Hughes v the PPP [2020] EWHC 1598 decided that the statutory cap is an unlawful discrimination on account of age and must be disapplied.

END