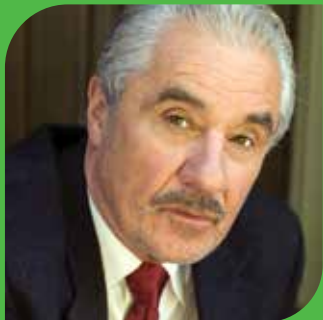


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age

discrimination

law in Northern Ireland



a short guide

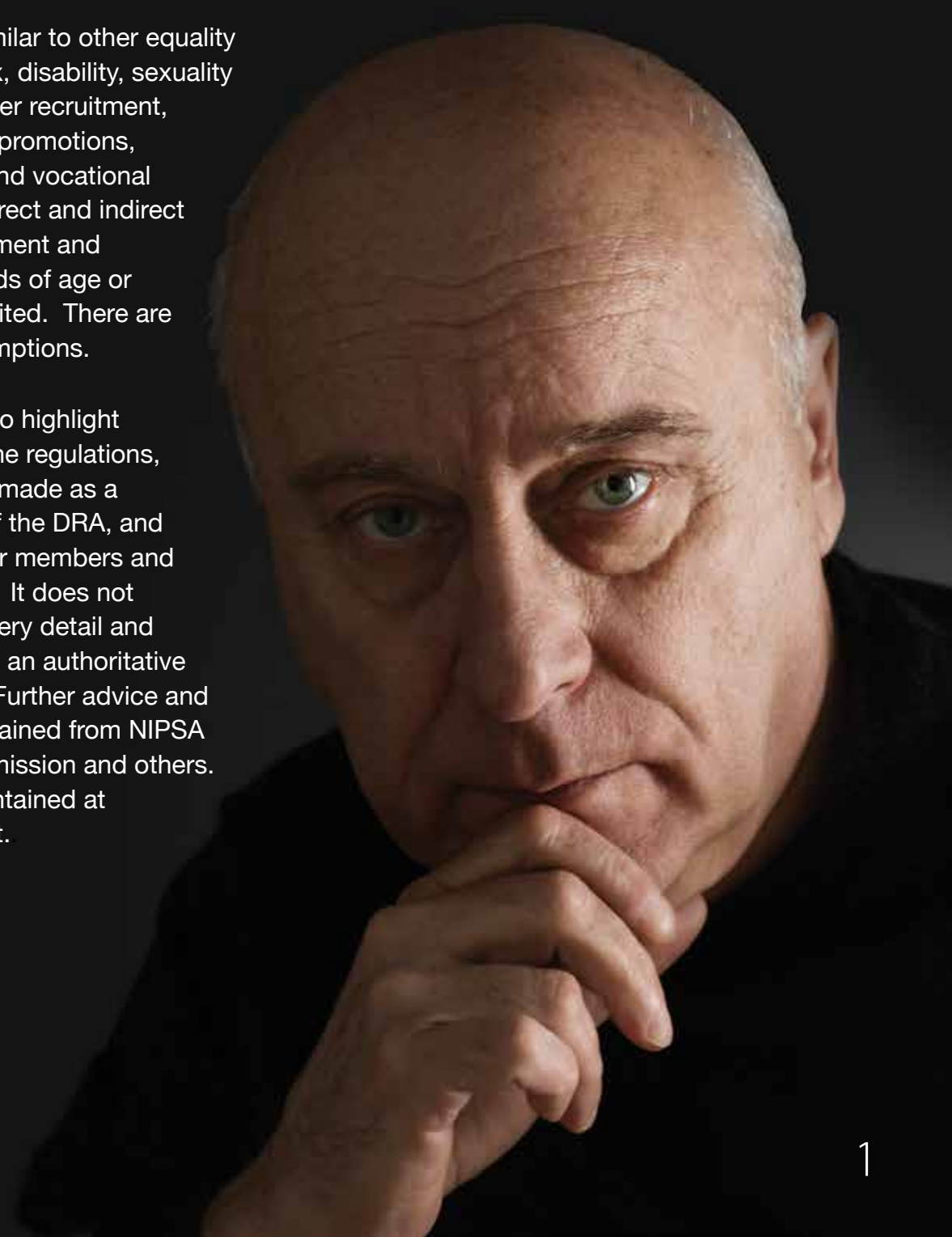
introduction

The Employment Equality (Age) Regulations (Northern Ireland) 2006 came into force on 1st October 2006 and prohibit discrimination and harassment on the grounds of age in the areas of employment and occupation including vocational training and further and higher education.

On 24th March 2011 these regulations were amended to remove the Default Retirement Age (DRA) of 65 and so the Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011 (S.R. No. 168) were laid and the phasing out of the DRA began from 6th April 2011.

The regulations are similar to other equality legislation on race, sex, disability, sexuality and religion. They cover recruitment, terms and conditions, promotions, transfers, dismissals and vocational training. Unjustified direct and indirect discrimination, harassment and victimisation on grounds of age or apparent age is prohibited. There are also some limited exemptions.

This short guide aims to highlight the key provisions of the regulations, including the changes made as a result of the removal of the DRA, and the likely impact for our members and collective agreements. It does not attempt to describe every detail and should not be taken as an authoritative statement of the law. Further advice and information can be obtained from NIPSA HQ, the Equality Commission and others. Contact details are contained at the back of the booklet.



what is age discrimination and key provisions of the

Age discrimination is a type of discrimination that can take several forms. Firstly, it can occur when people are treated less favourably than others on the grounds of their age. Secondly, it can occur where the impacts of certain actions or policies cause people in one age group to suffer particular disadvantages compared to persons in other age groups. Thirdly, it can occur when people are subjected to age-related harassment. Fourthly, it can occur when people are victimised in retaliation for taking action to assert their rights under the Age Regulations, or for helping other persons to do so.

Age discrimination in employment is not necessarily unlawful. However, often it will be and the Age Regulations specify the situations in which this will be so. It will be unlawful when certain conditions are met. These conditions will be met when the discrimination takes the following forms: direct discrimination, indirect discrimination, harassment and victimisation. These terms are explained in further detail below.

Direct Discrimination

The regulations define **direct** age discrimination as occurring where:

“on the grounds of a person’s age (or perceived age), an employer, without objective justification, treats that person less favourably than he treats, or would treat, other persons in circumstances that are the same, or not materially different.”

So for example, an instance of direct age discrimination would be where an employer, without objective justification, applies an age limit for recruitment or promotion – “Only applicants aged under 60 need apply”

Another example of direct discrimination would be where an employer, without objective justification, forcibly “retires” (i.e. dismisses) an employee because he or she has reached the age of 65 years.

Indirect Discrimination

The regulations define **indirect** age discrimination as occurring where:

“an individual is put at a particular disadvantage compared to other persons because an employer, without objective justification, applies a provision, criterion or practice which, although it was applied to all persons equally, puts persons of the same age group as the individual at a particular disadvantage compared to other persons.”

So for example, there is potential for indirect discrimination to occur where an employer requires all successful job applicants to pass a health and fitness test before their appointments to their posts will be confirmed. If the health and fitness standards set in the tests are such that it is more

nation

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likely that persons aged over 50 years will fail than persons aged under 50 years, then the standards are potentially indirectly discriminatory against persons in the older age group. In such a situation the employer will have to objectively justify the standards in question.

Objective justification of age discrimination

The Regulations provide that direct and indirect age discrimination will not be unlawful if the employer can show that the treatment in question is objectively justified: ie that the treatment is **“a proportionate means of achieving a legitimate aim.”**

The Regulations provide some examples of potential **legitimate aims**:

- (a) encouraging the loyalty or motivation of staff;
- (b) rewarding the experience of workers.

Also, in various legal cases the industrial tribunals and courts have held the following aims to be legitimate in certain circumstances:

- (a) ensuring that employees are physically or intellectually competent to perform their duties;
- (b) to safeguard against declining performance;
- (c) to protect the health and safety of service users;
- (d) to improve the employment opportunities of other groups (e.g. younger people or unemployed people).

Lastly, to successfully establish an objective justification defence, it is not enough for an employer to merely show that it has a legitimate aim(s) for its age discriminatory act. The employer must also prove that the act is a proportionate means of achieving that aim(s). Usually, this means that the employer must show that there are no non-discriminatory, or less discriminatory, alternative courses of action open to them that will also achieve that aim(s).

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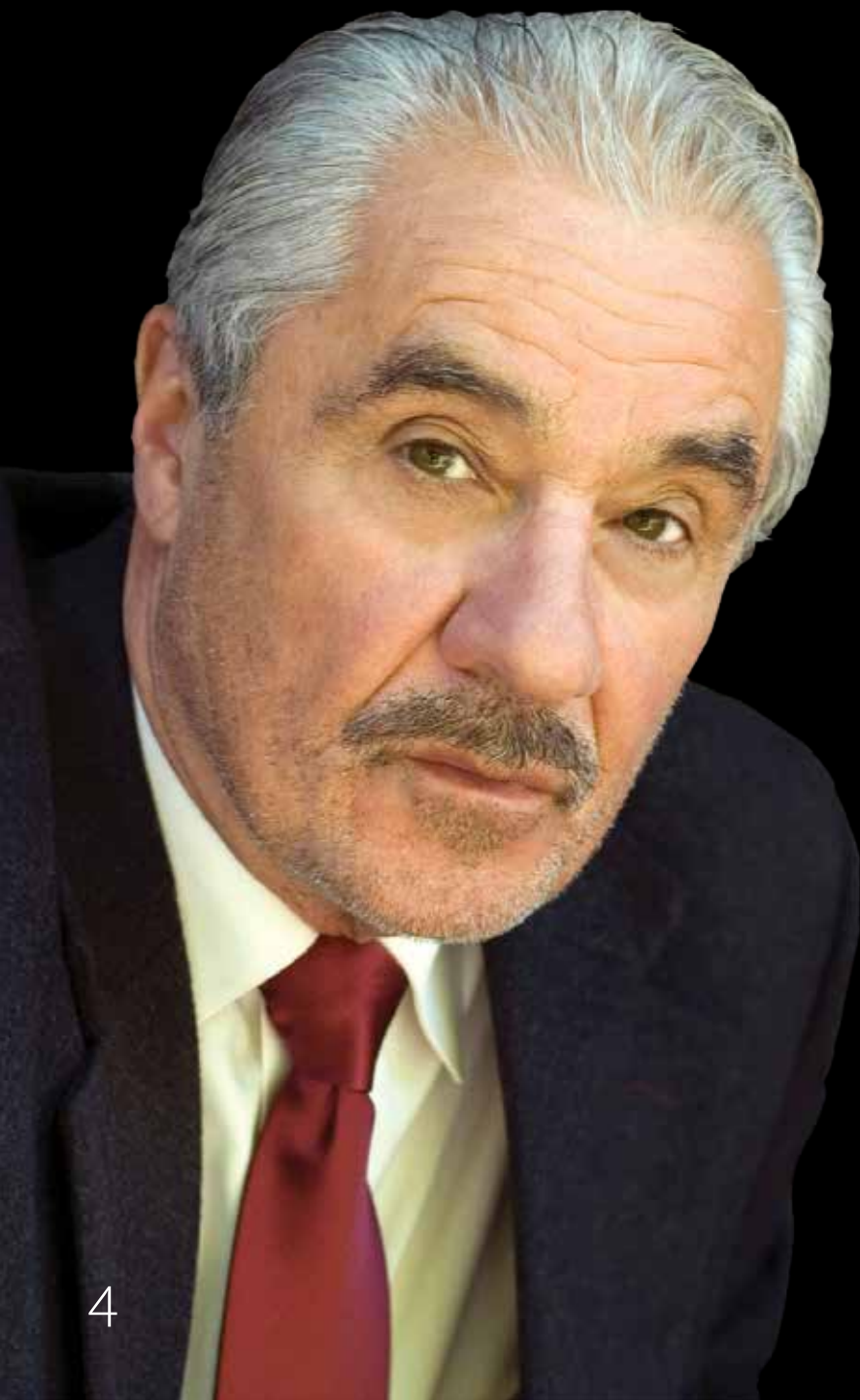
Harassment and Victimization

Age related harassment and victimisation are also prohibited. Harassment and victimisation takes the same definition as that applies to all other equality law which is:

“harassment occurs where a person is subjected to unwanted conduct related to age which has the purpose or effect of violating his or her dignity, or which creates an intimidating, hostile, degrading, humiliating, or offensive environment for him or her.”

“victimisation occurs where an employer treats a person less favourably than he treats, or would treat, other persons and does so by reason that the person has, in good faith, made (or, intends to make) a complaint or allegation under the Age Regulations, or has assisted (or, intends to assist) another person to make such a complaint or allegation. It is not necessary for the victim to have previously made a complaint to an industrial tribunal: for example, he or she is protected if the complaint or allegation was made in the course of an internal grievance.”

If treatment or behaviour amounts to harassment or victimisation it will be immediately unlawful as there is no objective justification defence for these forms of age discrimination.



nation

regulations

Removal of the Default Retirement Age (DRA)

The main legal effect of the DRA was that it protected employers from claims of age discrimination and unfair dismissal by aggrieved individuals who were forcibly dismissed after they had reached the age of 65, so long as the employer properly followed a prescribed statutory retirement procedure (ie “the duty to consider working beyond retirement” procedure).

The Age Regulations which came into force on 6th April 2011 no longer set “a national default age” of 65. Therefore if an employer wishes to retire an employee at a set age they will have to objectively justify their decision as being a proportionate means of achieving a legitimate aim, otherwise enforced retirements could be open to a challenge of unlawful age discrimination.

Operating without a fixed retirement age

Operating without a fixed retirement age will require a substantial change in attitude towards how older workers are viewed and how the issue of retirement is approached. It is therefore important that NIPSA representatives engage with employers to ensure that positive age policies and procedures are developed.

Dismissal

Unfair dismissal law has also been amended by the Regulations that removed the DRA. This means that “age retirement” is no longer deemed to be an automatically fair reason for dismissal per se. But, an age retirement that is objectively justified could still be a potentially fair reason for dismissal on the basis that it might fall within the category of “some other substantial reason of a kind such as to justify dismissal” as permitted by the Employment Rights (NI) Order 1996. In addition, a decision to dismiss an employee on grounds of age must also be procedurally fair and must adhere to the statutory dismissal and disciplinary procedures laid down in the Employment (NI) Order 2003. The best source of guidance about this is the Labour Relations Agency’s Code of Practice on Grievance, Discipline and Dismissal [2011].

what is age discrimination and key provisions of the

Pensions

The regulations exempt a wide range of rules that occupational pension schemes use, to avoid the risk of reducing pensions that people receive.

Age-based contributions to pension schemes can continue if they are aimed at producing an equal outcome in pension benefits. Employers can also continue to apply minimum and maximum age limits for membership to pension schemes. Employers will not be able to set a maximum age for contributions to a pension scheme, but will be able to set a maximum number of years of pensionable service.

Length of Service Benefits

Benefits based on service of up to five years are exempt – as no discrimination complaint can be made over service-based benefits except by employees who have more than five years service.

In the case of benefits based on service beyond five years, service-based discrimination will not be unlawful if it “*reasonably appears*” to the employer that it fulfils a “*business need*”. For example, many employers reward long service to ensure they have experienced employees in the business.

Redundancy

Statutory Redundancy Payments

The 2006 Regulations resulted in minor changes being made to the statutory redundancy payment scheme. The age bands have been maintained, as has the 20 year cap on the maximum number of years to be taken into account and the cap on the maximum amount of a week’s pay. The changes are:

- The lower age limit of 18 has been removed.
- The upper age limit of 65 has been removed.
- The tapering rule between the ages of 64 and 65 has been removed.

nation

regulations

The statutory redundancy scheme is as follows:

- Age under 22 – half a week's pay for each complete year worked under this age;
- Age 22 to 40 – one week's pay for each complete year worked between these ages;
- Age 41 to 65 – one and a half weeks' pay for each complete year worked between these ages.

An employer whose redundancy payment scheme strictly adheres to the statutory scheme will have a statutory defence in the event that any employee makes a complaint of age discrimination about the payments he or she has received under the scheme (ie in other words: although the statutory scheme is clearly age discriminatory, it is not unlawfully so).

Contractual Redundancy Payments

Regulation 35 states that any contractual scheme that follows, or is based on, the statutory scheme is automatically exempt from being discriminatory. The point about Regulation 35 is that the exempted schemes are not merely contractual but that they provide enhanced benefits compared to the statutory scheme. Therefore if an employer amends the statutory scheme in any of the following ways, its redundancy scheme will not amount to age discrimination:-

- Increasing or removing the maximum amount of a week's pay. For example, an employer could base the payments on a week's actual pay rather than the statutory maximum and/or multiply the value of weekly pay by some fixed amount as the basis for calculating payments.
- The amount used for each age band can be increased proportionally. For example, the union negotiate that the multiplier used in the statutory calculation is doubled. Those aged up to 21 would receive one week's pay, those aged between 22 and 40 would receive two weeks pay and those aged 41 and over would receive three weeks pay.

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Employers are also allowed to amend the scheme by:

- Abolishing or reducing the two year continuous service rule.
- Making an enhanced redundancy payment to an employee who takes voluntary redundancy.

An employer may make different adjustments to each band but they would be required to objectively justify this if challenged.

This relates to situations in which employers do not follow either the statutory redundancy payment scheme, nor the enhanced redundancy payment schemes permitted by Regulation 35.

In these situations, if the employers' schemes are likely to give rise to potential acts of direct or indirect discrimination then they will have to be objectively justified.

Redundancy Selection Criteria

Using service as a selection criteria for redundancy will have to be considered, in conjunction with other selection criteria, to ensure it is not discriminatory or can be objectively justified.

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Pay for Young Workers

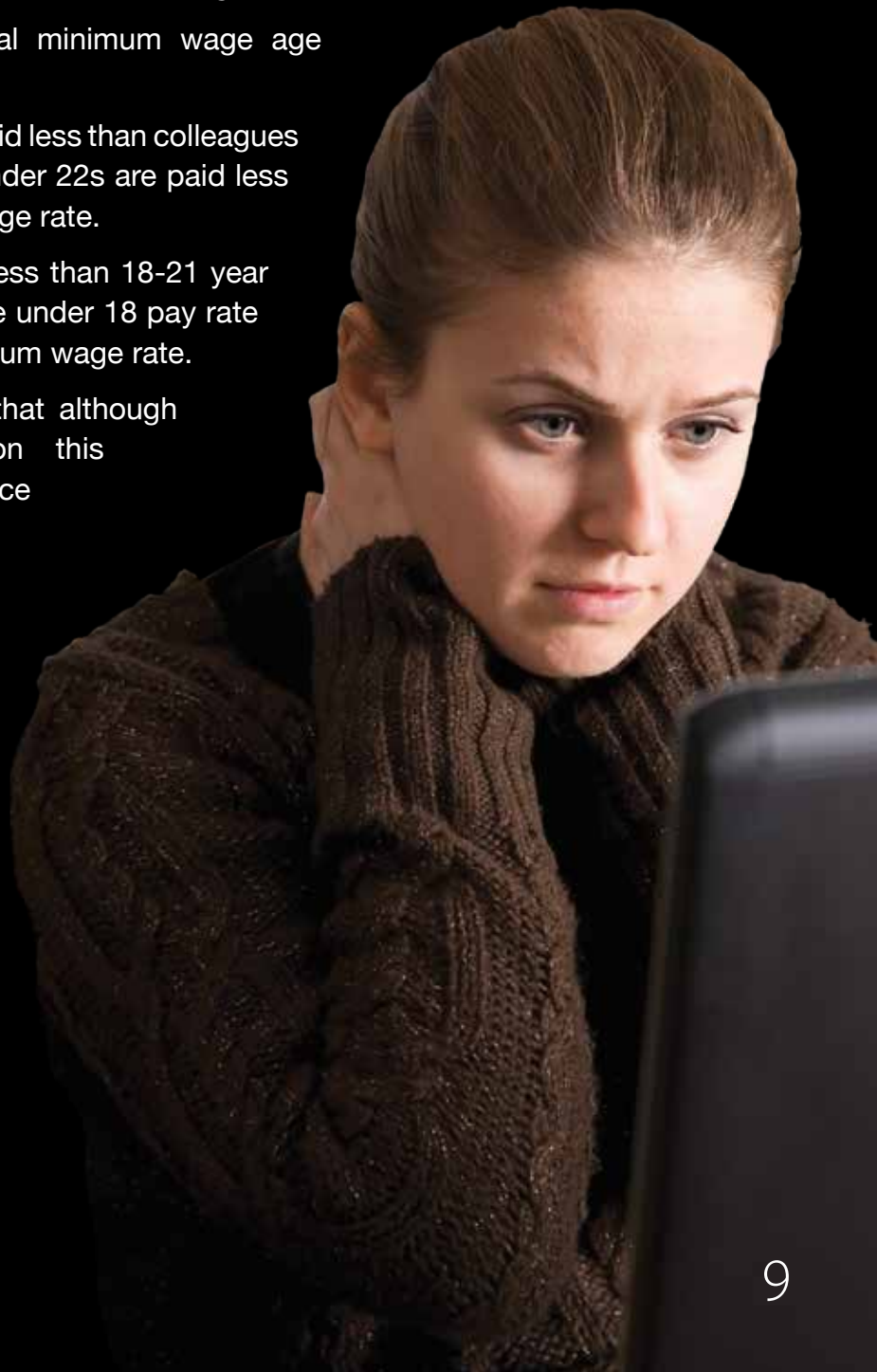
The Age Discrimination Regulations make having different pay rates based on age unlawful except where the youth rates are paid below the national adult minimum wage.

The Regulations allow the national minimum wage age bands to be maintained.

Employees aged under 22 can be paid less than colleagues aged 22 and over as long as the under 22s are paid less than the adult national minimum wage rate.

Under 18 employees can be paid less than 18-21 year old colleagues, again as long as the under 18 pay rate is less than the adult national minimum wage rate.

NIPSA's position on this issue is that although employers may lawfully rely on this exemption it would be a better practice if they did not do so. In NIPSA's view, employers should pay all employees, regardless of their ages, the same salary or wage for doing the same work. This view is also supported by the Equality Commission.



frequently ask

Q. I agree that age discrimination is wrong. What arguments can I use to persuade my employer?

A. It is now unlawful for employers to discriminate against and harass job seekers and employees on the grounds of age; that aggrieved individuals have a right to complain to an industrial tribunal; that in the event of a complaint the employer may be required to pay compensation and is likely to incur costs, and together these may be substantial.

Q. Who is covered by the regulations?

A. The law will cover all workers including contract workers, self employed, office holders, the police and members of trade organisations. The only people not covered by the regulations are members of the armed forces and volunteers.

The regulations cover both the private and public sectors and every other organisation. It applies to both big and small employers – whether they employ 1 or 1,000 employees.

People in work, job applicants and in some instances people who have left work are all covered by the law. People applying for or taking part in employment related vocational training including all courses at further and higher educational institutions.

Q. I've heard that employers can continue to make age related decisions and retain age related rules and practices as long as they can justify them. Is this true?

A. Less favourable treatment on the grounds of age is potentially unlawful. However, having said this, there may be circumstances when it is lawful. The regulations allow employers to discriminate but only where they can “objectively justify” that discrimination. Section 3 of this booklet considers in more detail the “objective justification” rule.

Q. At my workplace, pay and benefits vary according to length of service. Can this continue?

A. Yes. Benefits based on a length of service requirement of five years or less (known as the five year exemption) are exempt and will be able to continue.

Employers will have to have a legitimate reason for providing any pay or service related benefits that extend beyond this five years. However, the threshold of proof here is very low and the employer doesn't have to prove by evidence that service based benefits actually achieve any business advantage. Linking the benefit to rewarding loyalty, encouraging motivation or recognising the experience of workers should be enough to avoid any legal challenge.

However, an employer will still have to demonstrate how it reasonably appears to him or her that the criterion would fulfil a business need.

Keyed questions

Q. Is it unlawful to require a date of birth or age on job application forms?

A. This is not age discriminatory in itself. However, an employer could use this information to make age discriminatory decisions. To avoid any doubt we would advise employers to move questions regarding age to a diversity monitoring form. This means that those who take recruitment decisions would not see this information.

If an employer can objectively justify having a “date of birth” question on the application form then it will certainly be lawful to include the question.

Q. Is it unlawful for employers to require a certain length of experience when recruiting for a job or promotion?

A. Possibly. This would be an example of indirect discrimination – a rule that applies to all but one that young people in particular may be less likely to meet. An employer would have to objectively justify such a rule. They would be likely to succeed in this justification if there is a real need to have a certain amount of experience in order to carry out the work of the post properly.

Q. Does the law mean that the national minimum wage age bands for younger workers will be abolished?

A. No. The national minimum wage is specifically exempt from the regulations. The age bands for younger employers will be allowed to continue and employers will be allowed to follow these age bands and minimum wage levels.

Q. I’m 63 and was hoping to retire in a couple of years’ time and draw my occupational pension. Does the removal of the Default Retirement Age affect my right to this?

A. A distinction needs to be made between pension age (the age at which an employee can start to draw from their pension fund), normal retirement age (the age at which most people in an organisation choose to stop working full-time) and DRA or an employer-justified compulsory retirement age (the age at which an employer can force someone to retire). The removal of the DRA prevents people from being forced to retire against their wishes without legal challenge. However it will not affect your right to retire when you choose and draw any pension which you are entitled to under the rules of your occupational pension scheme.

It should be noted that the Coalition Government, as well as removing the DRA, plans to increase to 66 the age at which people – both men and women – can draw the state pension by April 2020. For women approaching retirement now, particularly those that will be dependent upon the state pension, this will affect their retirement choices as they may find they can’t draw the state pension until later than they previously thought. The increase in the state pension age for women will rise at a more rapid pace than for men – it will rise from 60 to 66 in a series of stages up to April 2020, whereas for men the rise will be from 65 to 66 between December 2018 and April 2020.

faq contd

Q. Does the removal of the DRA mean an employer can never dismiss an older person and has to wait for them to choose to retire?

A. A decision to forcibly retire an employee on grounds of age must be objectively justified or else will be unlawful.

Q. I wish to persuade my employer about the benefits to be gained by adopting positive age policies. What arguments can I use?

A. There is now a well established body of evidence showing that businesses that are positive about age report:

- Improved staff retention rates.
- Higher staff morale.
- Fewer short term staff absences.
- Higher productivity.
- A better public image.
- Access to a wider customer base.
- A wider range of skills and experience.

Q. I'm a NIPSA rep. What will the regulations mean for members?

A. The age regulations give important rights to members. As with all rights the important point here is for the Union to negotiate with employers to make sure:

- Our agreements are in line with the regulations.
- Terms and conditions are free from age discrimination wherever possible.
- Where agreements need changing, benefits are levelled up and not down.

The regulations are likely to have the biggest impact on our members at or around retirement age rather than discrimination in pay or conditions. If you want to find out more about the regulations you can contact your Seconded Officer or HQ Official about courses for reps on tackling age discrimination. Information can also be obtained from the organisations set out in Useful Contacts.

useful contacts

The Equality Commission for NI

Equality House
7-9 Shaftesbury Square
BELFAST
BT2 7DP

Telephone: 028 9089 0890 (enquiry line)

Reception: 028 9050 0600

Textphone: 028 9050 0589

Fax: 028 9024 8687

Email: information@equalityni.org

Website: www.equalityni.org

Labour Relations Agency

2-8 Gordon Street
BELFAST
BT1 2LG

Telephone: 028 9032 1442

Fax: 028 9033 0827

Email: info@lra.org.uk

Website: www.lra.org.uk

Age NI

3 Lower Crescent
BELFAST
BT7 1NR

Telephone: 028 9024 5729

Fax: 028 9023 5497

Email: info@ageni.org

Website: www.ageuk.org.uk/northern-ireland/



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