

"Your staff are your most valuable resource..." Whether your company employs two people or two hundred, this key item should be at the top of every manager's priority list. Yet, keeping up to date with changing employment legislation - especially with added European Community Directives - becomes more complex and costly every day. In these Fact Sheets, we have tried to provide basic guidelines and ideas to help you adapt or improve your personnel procedures. Please remember the advice given is general and not intended to be legally definitive. The Fact Sheets on various employment and human resource matters can be accessed at www.aslrecruitment.co.uk/useful-resources

AGE DISCRIMINATION

More than seven years have now passed since discrimination on the grounds of age became unlawful in the UK. However, employers are still falling foul of the requirements of the legislation - but how?

Unlike some other forms of discrimination, discrimination based on age is capable of objective justification. In the right factual circumstances, an employer is permitted to treat an employee differently, either directly or indirectly, because of their age. The problem that arises is that an action or policy that an employer may consider entirely reasonable may be viewed differently by the courts.

Fixed retirement ages present particular difficulties. From 6 April 2011 the Government abolished the compulsory retirement age. Employers have to ensure that a fair procedure is followed under the ordinary unfair dismissal rules, as reaching retirement age will no longer be a potentially fair reason for dismissal. Having default retirement ages in contracts needs to be capable of objective justification. Many employers seem to be unaware of this.

So what is objective justification?

The policy must be a "proportionate means of achieving a legitimate aim." There is no exhaustive list of what constitutes a legitimate aim. However, possibilities include health and safety, workforce planning and training requirements.

Recent case law suggests that discrimination on grounds of age must also be capable of justification by reference to a social policy objective. Whilst being an apparently difficult hurdle to overcome, it is likely that the majority of employers' aims will fall within the social policy objectives of inter-generational fairness and/or dignity. In addition, the social policy aim relied on must be relevant to the employer in question. For instance, a policy biased towards recruiting young people would be discriminatory where the employer in practice faces no difficulty in attracting younger candidates.

An employer's actions or policies are unlikely to be seen as "proportionate" if there are less discriminatory ways of achieving the same aim. For example, stipulating that staff over 55 years of age cannot carry out certain manual work would be disproportionate. A more proportionate provision would be to provide for medical assessments for such staff before any decision on fitness to carry out work could be taken.

► Practical Tips

- Ensuring any age requirements in policies are capable of objective justification.
- Be wary of less obvious instances of age discrimination. For instance, avoid the habit of only asking older employees about their plans for the future during performance management reviews.
- Make some practices the norm for employees across the board in order to avoid being classed as discriminatory.
- Treat sensitively issues of performance and capability, so as to avoid allegations that older employees are being targeted.