These notes refer to the Equality Act 2010 (c.15) which received Royal Assent on 8 April 2010

EQUALITY ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 16: General and Miscellaneous

Schedule 9: Work: exceptions

Part 2: Exceptions relating to age

Retirement: paragraph 8

Effect

804. This paragraph allows employers to dismiss on the grounds of retirement employees at the age of 65 or over without this being regarded as age discrimination and/or unfair dismissal. However, where an employee has a normal retirement age which is applicable to him or her which exceeds the age of 65, if the employee is dismissed on the grounds of retirement before he or she has reached that normal retirement age, this is capable of amounting to age discrimination and/or unfair dismissal.

805. This exception applies only to employees within the meaning of section 230(1) of the Employment Rights Act 1996, those in Crown employment, and House of Lords and House of Commons staff. This paragraph needs to be read closely with the amendments to the unfair dismissals provisions of Part 10 of the Employment Rights Act 1996, which were amended by Schedule 8 to the Employment Equality (Age) Regulations 2006 (S.I. 2006/1031) ("the 2006 Regulations") and which amendments remain in place when this paragraph is commenced.

806. Under paragraph 8(3) retirement is a reason for dismissal only if it is a reason for dismissal by virtue of Part 10 of the Employment Rights Act 1996. Schedule 6 to the 2006 Regulations (which remains in place) sets out the procedures that need to be followed by an employer in order for the reason for the dismissal to be retirement under the sections inserted into Part 10 of the Employment Rights Act 1996 by Schedule 8 to the 2006 Regulations, and in order for the dismissal to be fair.

Background

807. Paragraph 8 preserves the exception for retirement previously provided for by regulation 30 of the 2006 Regulations, and accompanying provisions at Schedule 6 and Schedule 8 to the 2006 Regulations.

808. Before the coming into force of the 2006 Regulations, the concept of retirement was not legally defined. Where an employee was either over 65 or the employer's normal retirement age, the employee did not have the right to claim unfair dismissal. The employee could be compulsorily retired once he had reached the employer's normal retirement age, or 65. The removal of this age cap on the right to claim unfair dismissal was removed by the 2006 Regulations.

809. Compulsory retirement ages are a form of direct age discrimination. Where the retirement age is below the age of 65 (or the employer's normal retirement age if over the age 65) it needs to be objectively justified.

810. The Government considers this exception for retirement ages of 65 and over to be within the exemption contained in article 6(1) of the Council Directive 2000/78/EC ("the Directive") as being justified by reference to a legitimate aim of social policy.

811. This provision is being reviewed during 2010. It is intended that any changes resulting from the review will be implemented during 2011.

Examples

- An employee has reached the age of 65. His employer has followed the correct procedure for the reason for dismissal to be deemed retirement. He is dismissed by reason of retirement. This is not direct age discrimination.
- An employer dismisses an employee on her 65th birthday by giving her notice, but does not follow the correct procedure. This is direct age discrimination.

Applicants at or approaching retirement age: paragraph 9

Effect

812. As a result of this paragraph it is not unlawful discrimination for an employer to decide not to offer employment to a person where, at the time of the person's application to the employer, he or she is over the employer's normal retirement age or he or she is over the age of 65 if the employer has no normal retirement age.

813. It is also not unlawful to refuse to offer employment where the applicant will reach the employer's normal retirement age or the age of 65 (if the employer has no normal retirement age) within six months of the application for employment.

814. For these purposes, the employer's normal retirement age must be 65 or over and has the same meaning as is given in section 98ZH of the Employment Rights Act 1996 (as inserted by Schedule 8 to the 2006 Regulations).

815. The employees to which paragraph 9 applies are the same group of employees to which paragraph 8 (exception for retirement) applies: that is to say, employees within the meaning of section 230(1) of the Employment Rights Act 1996, Crown employees, House of Lords staff and House of Commons staff.

Background

816. Paragraph 9 preserves the exception previously provided for at regulation 7(4) of the 2006 Regulations.

817. The rationale for this exclusion from the requirement not to discriminate flows from the rationale for paragraph 8 (exception for retirement). There is little point in requiring an employer not to discriminate at the point of receiving an application from a prospective employee when, if he or she were to employ the person, that person could be retired (without it amounting to discrimination to do so) within six months of their appointment.

818. The appointment provisions are also being reviewed during 2010. It is intended that any changes resulting from the review will be implemented in 2011.

Examples

- An applicant is 66 years old at the time of applying for a job to work in an organisation where there is no normal retirement age. It is lawful for the employer to refuse her application simply on the basis of the applicant's age.

- An applicant is 69 years and 8 months old at the time of making an application to work in an organisation that has a normal retirement age of 70. Because the applicant will reach the age of 70 within 6 months, it is lawful for the employer to refuse his application.

Benefits based on length of service: paragraph 10

Effect

819. This paragraph ensures that an employer does not have to justify paying or providing fewer benefits to a worker with less service than a comparator, should such a practice constitute indirect discrimination because of age. The employer can rely on the exception as an absolute defence where the benefit in question was awarded in relation to service of five years or less.

820. If the length of service exceeds five years, the exception applies only if it reasonably appears to an employer that the way in which he uses length of service to award benefits will fulfil a business need of his undertaking. For example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers.

821. Sub-paragraph (6) contains provisions which ensure that in calculating an employee's length of service previous service is taken into account where that is the result of the operation of section 218 of the Employment Rights Act 1996 or any other enactment such as an Order made under section 155 of that Act.

822. Sub-paragraph (7) defines what a benefit is and expressly rules out benefits provided only by virtue of a person's ceasing to work.

Background

823. The intention is to replicate the effect of regulation 32 of the 2006 Regulations (as amended by the Employment Equality (Age) Regulations 2006 (Amendment) Regulations 2008).

824. This paragraph enables employers to continue to effect employment planning, in the sense of being able to attract, retain and reward experienced staff through service-related benefits. This exception cannot be used to justify the level of payments when a worker leaves as service- related termination payments are not a reward for experience from which the employer can benefit. Therefore, redundancy payment is dealt with separately.

Examples

- An employer's pay system includes an annual move up a pay spine, or a requirement that a certain amount of time must elapse before an employee is entitled to be a member of an employee benefits scheme. Provided that the pay spine or time it takes to get the benefit is no longer than five years or can be justified the exception will apply.

- An employer's terms and conditions relating to annual leave entitlement provide that employees are entitled to an additional five days' leave after ten years of service. Such an entitlement needs to be justified as reasonably fulfilling a business need.

The national minimum wage: young workers: paragraph 11

Effect

825. This paragraph allows employers to base their pay structures on the National Minimum Wage Act 1998 and the National Minimum Wage Regulations 1999 ("the 1999 Regulations"). Employers cannot rely on this exception, however, if they do not base their pay structure on the national minimum wage legislation.

826. This will allow employers to continue to use the development bands of the national minimum wage without the threat of legal challenge on the grounds of age discrimination.

Background

827. This paragraph is designed to replicate the effect of the exception in regulation 31 of the 2006 Regulations.

Examples

- It is lawful for an employer to pay 16 to 21 year olds a lower rate of minimum wage than that given to adults, when based on the development bands set out in 1999 Regulations. For example, based on the 2009/10 rates:

  — 16-17 a rate of £3.57 per hour

  — 18-21 a rate of £4.83 per hour

  whereas the national minimum wage for those 22 and over is £5.80.

- Rather than pay the amounts stated by the 1999 Regulations, this paragraph also permits an employer to base its pay scales on the development bands and so, for example, it may pay 16-17 year olds £4 per hour, 18-21 year olds £5 per hour and those over 22 £6 per hour.

The national minimum wage: apprentices: paragraph 12

Effect

828. This paragraph deals with apprentices. It enables an employer to pay an apprentice who is not entitled to the national minimum wage (any apprentice who is under 19 or in the first year of his apprenticeship) less than an apprentice who is entitled to the national minimum wage (any apprentice who is 19 or over and not in the first year of his apprenticeship). Employers cannot rely on this exception, however, if they do not base their pay structure on the national minimum wage legislation.

Background

829. This paragraph is designed to replicate the effect of the exception in regulation 31 of the 2006 Regulations.

Examples

- It is lawful for an employer to pay an apprentice who is under the age of 19 or in the first year of his apprenticeship at a lower rate than an apprentice who is 19 or over and not in the first year of his apprenticeship. For example, based on the 2009/10 rates:

  - an 18 year old apprentice is not entitled to the minimum wage;

  - a 19 year old apprentice in the first year of his apprenticeship is not entitled to the minimum wage;

  - a 19 year old apprentice in his 2nd year of apprenticeship is entitled to £4.83 per hour based on the National Minimum Wage Rate for 18-21 year olds.

- So it is lawful to pay an 18 year old apprentice and a 19 year old apprentice in the first year of her apprenticeship £5 per hour and to pay a 19 year old in the second year of his apprenticeship £5.50 per hour.

Redundancy: paragraph 13

Effect

830. This paragraph permits employers to provide redundancy schemes which mirror the statutory redundancy payments scheme contained in Part 11 of the Employment Rights Act 1996 but offer more generous terms.

831. The statutory redundancy scheme at Part 11 of the Employment Rights Act 1996 ("ERA 1996") requires an employer to make a payment upon redundancy, the amount of which is dependent upon the employee's age, length of service, and weekly pay (subject to a cap: see Schedule 227 to the ERA 1996). The statutory redundancy scheme is lawful under Directive 2000/78/EC as it is objectively justified under Article 6.1 of the Directive.

832. An employer who makes a redundancy payment to an employee in accordance with Part 11 ERA 1996 does not have to justify it. Both the statutory authority exemption (in Schedule 22) and this regulation make it clear that the employer is acting lawfully, even though the payment is calculated using age-related criteria.

833. But this paragraph is not aimed at such employers. The principal object of this provision is to assist those employers who base their redundancy schemes on the statutory scheme but who are more generous than the statutory scheme requires them to be.

Background

834. This exception is designed to replicate the effect of an existing exception in regulation 33 of the 2006 Regulations.

Examples

- An employer may pay qualifying employees an enhanced redundancy payment based on their actual week's pay rather than the maximum amount as specified in section 227 ERA 1996 (currently £380).
- So an employee (P) aged 45 with 18 years continuous employment earning £600 a week would receive one and a half weeks pay for each year of employment in which he was not below the age of 41 and one week's pay for each year of employment in which he was not below the age of 22 so P would receive the following: 3 x (1.5 x £600) + (15 x £600) = £11,700.
- An employer may pay qualifying employees an enhanced redundancy payment calculated in accordance with section 162 of ERA 1996 but after calculating the appropriate amount for each year of employment, the employer may apply a multiple of two rather than one. So the employer could pay P £23,400 rather than £11,700.
- Alternatively, the employer could apply the maximum amount of £380 to P's payment but apply a multiple of 2 and pay P the following: 2 x 3 x (1.5 x £380) + (15 x £380) = 2 x (£1710 + 5700) = £14820.

Life assurance: paragraph 14

Effect

835. This paragraph provides an exception for employers who provide life assurance cover to workers who have had to retire early because of ill health.

Background

836. This paragraph is designed to replicate the effect of the exception in regulation 34 of the 2006 Regulations.

837. Life assurance cover is usually provided in respect of people below the age of 65 (or the employer's normal retirement age if different). Such cover is not provided in respect of older people because, as the probability of death increases, it becomes more and more expensive to provide. If employers were no longer able to impose – or had to objectively justify – a "cut off" for the provision of such cover to those who have retired early, there is a real risk they would simply "level down": in other words, they would cease to offer it to anyone. This exception is intended to avoid that happening.

Examples

- An employer who has no normal retirement age provides life assurance cover for an employee who has retired early due to ill health. If the employer then ceases to provide such cover when the employee reaches the age of 65, this is lawful.
- An employer who operates a normal retirement age of 70 provides life assurance cover for an employee who has retired early due to ill health. If the employer then ceases to provide such cover when the employee reaches the age of 70, this is lawful.

Child care: paragraph 15

Effect

838. This paragraph creates an exception from the prohibition of age discrimination in employment and certain other work relationships for benefits which relate to the provision of child care, and to which access is restricted to children of a particular age group. The exception applies not only to natural parents, but also to others with parental responsibility for a child.

839. The exception covers benefits which relate to the provision of care for children aged up to and including 16.

Background

840. This is a new provision. Following the ruling of the European Court of Justice in *Coleman v Attridge Law and another (Case C-303/06) [2008] ECR I-5603)* it could potentially be direct discrimination for an employer to treat an employee less favourably because of the age of an employee's child. There is, therefore, a potential impact on the provision of facilities, such as child care, where access is limited by reference to the child's age.

841. The exception allows employers to continue to offer employees child care facilities based on the age of a child without being open to a challenge of direct discrimination from other employees.

Examples

- An employer may provide a crèche for employees' children aged two and under; or a holiday club open only to employees' children aged between 5 and 9. In each of these examples, the exception allows an employer to discriminate against employees because of their association with a child who does not fall within the specified age groups.
- The exception does not apply to employee benefits which do not have a close relationship with the provision of child care. For example, if an employer offers luncheon vouchers, gym membership or a company car only to those employees with children of a particular age group, the exception does not apply as none of these benefits involves child care.
- Neither does the exception apply to benefits conferred as a result of the employee's employment, but applying directly to the child, where child care is not involved. For example, an employer may offer private healthcare to employees' children up to a certain age, or use of the employer's services (e.g. free train tickets if the employer is a train company) by such children.

Contributions to personal pension schemes: paragraph 16

Effect

842. This paragraph gives a Minister of the Crown the power to specify practices, actions or decisions relating to age in respect of employer contributions to personal pension schemes that an employer can use without breaching a non-discrimination rule.

Background

843. Exceptions to the non-discrimination rule in relation to age in respect of employer contributions to personal pension schemes were previously set out at Schedule 2 to the Employment Equality (Age) Regulations 2006 (S.I. 2006/1031).

Part 3: Other exceptions

Non-contractual payments to women on maternity leave: paragraph 17

Effect

844. This paragraph sets out an exception to the prohibitions on pregnancy and maternity discrimination by employers which allows an employer not to offer an applicant or provide an employee who is on maternity leave the benefits of the non-contractual terms

and conditions of her employment. It also explains what is and is not covered by this exception.

Background

845. This paragraph is designed to replicate the effect of provisions in the Sex Discrimination Act 1975. It does for non-contractual terms and conditions of employment relating to pay what is done for contractual terms in section 74.

Examples

- An employer would not have to pay a woman on maternity leave a discretionary bonus if the only condition of eligibility for the bonus was that the employee must be in active employment at the time of payment.
- If a discretionary bonus amounted to retrospective payment for time worked over a specific period (such as the past year) during which a woman took maternity leave, the employer must include any part of that period the woman spent on compulsory maternity leave in calculating the bonus.

Benefits dependent on marital status: paragraph 18

Effect

846. This paragraph concerns a specific exception to the prohibition of discrimination because of sexual orientation in the field of work. The exception concerns the provision of benefits by reference to marital status in respect of periods of service before 5 December 2005 (the coming into force of the Civil Partnership Act 2004). It also concerns benefits restricted to married persons and civil partners.

Background

847. This exception is intended to preserve the effect of regulation 25 of the Employment Equality (Sexual Orientation) Regulations 2003.

Examples

- An example of an employment benefit provided by reference to marital status is an occupational pension scheme which pays benefits to an employee's spouse on the death of the employee, but does not similarly compensate an unmarried employee’s partner.
- A scheme which pays out only to surviving married and civil partners could be indirectly discriminatory because it might disadvantage gay couples, but it is permitted by the exception.
- A scheme which pays out to surviving married partners must also pay out to surviving civil partners in respect of any employee service since 5 December 2005 (when the Civil Partnership Act 2004 came into force). Provided the scheme does that, the exception allows it, even though it may (directly or indirectly) discriminate by paying out only to married partners for service before that date.

Provision of services, etc. to the public: paragraph 19

Effect

848. This paragraph provides that an employer who provides services to the public at large is not liable for claims of discrimination or victimisation by an employee under Part 5 of the Act in relation to those services. Rather, where individuals are discriminated against or victimised in relation to those services, they can make a claim in the county court under Part 3. If on the other hand the service differs from that provided to other employees, is provided under the terms and conditions of employment, or the service is to do with training, the individual can bring a claim in an employment tribunal for breach of the provisions in Part 5. These provisions are also applicable to services provided by principals, firms, limited liability partnerships and relevant persons (in respect of personal or public office-holders).

Background

849. This section is designed to replace similar provisions in previous legislation and has been extended to partnerships.

Examples

- If an employee of a car hire company is denied the hire of one of its cars (on the same terms available to the general public) because he is black, the employee must claim under the "services" section of the Act in the county court, rather than through an employment tribunal under the "work" provisions of the Act.
- If the same employee's employment contract provides that he is allowed to hire the company's cars at a discount (which members of the public would not get), but the employee is refused the discount when he goes to hire one of the firm's cars because he is a Muslim, then the employee would be able to make a discrimination claim under section 39.

Insurance contracts etc.: paragraph 20

Effect

850. This paragraph applies where annuities, life assurance policies, accident insurance policies or similar matters which involve the assessment of risk are provided in the field of employment. It allows for employers to provide for payment of premiums or benefits that differ for men and women, persons who are or are not married or in a civil partnership, pregnancy or maternity or gender reassignment so far as this is reasonable in the light of actuarial or other reliable data.

Background

851. This paragraph is designed to replace a similar exception in the Sex Discrimination Act 1975. It permits differences in treatment for insurance or risk-related matters where the difference is done by reference to reliable actuarial or other data and it is reasonable in all the circumstances.

Example

- An employer makes access to a group insurance policy available as a result of being employed by it. The employer, not the insurer, is responsible for ensuring that the provision of benefits under the policy complies with this Act – see paragraph 20 of Part 5 of Schedule 3. In providing access to these group policies the employer may take advantage of this exception.