

UPDATE

Age discrimination and Jersey pension schemes

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The Discrimination (Age) (Jersey) Regulations 2016 (the Age Regulations) will, once implemented, amend the existing Discrimination (Jersey) Law 2013 (the Law) to help to protect people in Jersey against discrimination on the grounds of age.

However, the implementation of the Age Regulations poses a number of questions for the trustees and contributing employers of Jersey pension schemes given that a person's age is a material factor in the operation of pension schemes and the determination of their benefits.

This update highlights some of the key points that trustees and employers may wish to consider in respect of their pension schemes on the forthcoming introduction of the Age Regulations.

Helpfully, specific carve outs relating to the administration of pension schemes are included in the Age Regulations. Yet, even with these carve outs in place, careful consideration will need to be given to the administration of schemes in light of the changes.

This update highlights some of the key points that trustees and employers may wish to consider in respect of their pension schemes on the forthcoming introduction of the Age Regulations.

What is age discrimination?

Age discrimination is treating a person less favourably because of his or her age.

When will the Age Regulations come into effect?

The Age Regulations will take effect from 1 September 2016. The Law will therefore be amended on and from this date to incorporate age discrimination within its remit.

Who does the Law apply to?

Employers are responsible under the Law for ensuring compliance with it. This will include the provisions of the Age Regulations, once implemented.

Trustees of pension schemes may also be caught by a general provision of the Law which provides that a person who knowingly aids another person in an act prohibited by the Law shall be treated as having done the act.

What will be the effect of the Age Regulations on the Law?

The Age Regulations will amend the Law to include age as a 'protected characteristic' alongside race, sex, sexual orientation, gender reassignment, pregnancy and maternity. As a protected characteristic, it will be contrary to the Law to discriminate against a person because of their age in relation to certain areas, including employment, education and service provision amongst others.

The Law provides that there are two forms of discrimination: (1) direct discrimination; and (2) indirect discrimination as well as victimisation and harassment.

What is the difference between direct and indirect discrimination?

The Law states that a person directly discriminates against another person if, because of a protected characteristic, the person treats the subject less favourably than the person treats or would treat others.

In comparison, a person indirectly discriminates against another person under the Law if a provision, criterion or practice is applied which is discriminatory in relation to the other person's protected characteristic.

What does this mean in practice?

Direct age discrimination is easier to recognise as it is the negative treatment of a person on the grounds of their age. Indirect discrimination may prove trickier to spot as it may not necessarily refer to a person's age, but some other aspect of their working lives (such as their year of graduation or length of service).

Are there any exceptions to this rule?

It is possible, in certain circumstances, to authorise age discriminatory acts. This is referred to as 'objective justification'.

What is objective justification?

To objectively justify an age discriminatory act, it must be shown that the act was a proportionate means of achieving a legitimate aim.

For the other protected characteristics, it is only possible to objectively justify indirect discrimination. However, age is unique as a protected characteristic as the Age Regulations provide that both direct and indirect discrimination may be objectively justified.

Objective justification can be a difficult test to apply in practice. Employers and trustees should seek legal advice as to whether their decision may be considered objectively justified if attempting to implement a change or strategy which would otherwise be considered contrary to the Law.

How will the Age Regulations affect the administration of pension schemes?

The exception for pension schemes is much wider under the Law than in comparison to the UK. The Age Regulations provide that the provision and the terms of an occupational pension scheme, or any personal or group personal pension scheme, will not contravene the Law in relation to the protected characteristic of age.

It follows that any rules of a pension scheme which may otherwise be considered age discriminatory could escape the reaches of the Law, although employers and trustees are advised to review their arrangements and seek legal advice should they wish to rely on a rule which may conflict with the Law.

Additionally, employers and trustees will still need to be careful in the administration of their pension arrangements in respect of any elements which may not fall into the 'provision and terms' exemption. This will most notably include any exercise of discretion under the rules of a scheme. Employers and trustees should therefore seek legal advice prior to an exercise of discretion to ensure that the decision-making process is compliant with the Law.

Can employers continue to have a default retirement age?

The Age Regulations contain a transitional provision permitting schemes and employers to continue to operate a 'default retirement age' for a limited period. This will permit employers to continue to require employees to retire at, or after, pensionable age (as defined in the Social Security (Jersey) Law 1974) or, if higher, the retirement age set by the employer. However, this exception can only be relied on where an employer has a policy of requiring employees to retire at such an age. Interestingly, a survey conducted by Mourant Ozannes shows that whilst 81 per cent of employers do currently operate a 'normal' retirement age, 80 per cent of employers engage employees beyond retirement age and this does call into question whether those employers really do have a policy requiring employees to retire at such an age and therefore, whether this exception will in fact be available to them even during the transitional period.

In any event, the transitional provision will terminate on 31 August 2018, meaning that compulsory retirement after this date may constitute age discrimination unless it can be objectively justified.

Employers will therefore have to justify their need for employees, of any age, to retire. Employers will also need to show that the compulsory retirement age is a proportionate means of achieving that aim. This might be, for example, workforce planning (and the need for business to recruit, retain and provide promotion opportunities and effectively manage succession) or the health and safety of individual employees, their colleagues and the general public. These are only examples, however, and objective justification is very case and business specific. Case-law from the UK suggests that, whilst default retirement ages can be objectively justified, it is a difficult threshold to reach and the courts see such an approach as a last resort. Legal advice should always be taken before such a decision is taken.

What are the penalties for non-compliance?

Compensation of up to £10,000 may be payable where a tribunal finds in favour of a complainant. The tribunal may also order that the actions complained of are changed.

What should employers and trustees do now?

Whilst the exemption for pension schemes under the Age Regulations is drawn widely, employers and trustees may wish to take this opportunity to conduct an audit of their scheme's provisions to flag potential areas of risk. It may also be helpful for employers and trustees to seek advice on the implications of the Age Regulations for them and consider whether any decision-making processes and record keeping measures should be updated in light of the Law.

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[Document Reference]