

# SOUTHWARK DIOCESAN BOARD OF EDUCATION

## BRIEFING SHEET

**SUBJECT:** Employment Equality (Age) Regulations 2006

**RECIPIENT(S):** Headteachers and Chairs of Governors of all C of E Schools

**COPIED TO:** Headteacher: Bacon's CTC for information

**ACTION REQUIRED BY:**

Headteacher

Governing Body

**DEADLINE:** September

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**DATE:** 10<sup>th</sup> August 2006

### I. BACKGROUND

- 1.1 In response to the EU's Framework Directive (200/78) ("establishing a general framework for equal treatment in employment and occupation") the Government has introduced the Employment Equality (Age) Regulations 2006. The regulations come into force as from 1<sup>st</sup> October 2006.

### 2. GENERAL PRINCIPLES

#### 2.1 What do the regulations cover?

The Regulations apply to employment and vocational training. The law will prohibit direct and indirect discrimination, harassment and victimisation – in this case on the basis of age, whether young or old.

*Direct discrimination* will occur where someone treats a person less favourably on the grounds of his/her age than he/she treats or would treat other persons in a comparable situation.

*Indirect discrimination* will occur when provisions, criteria or practices which apply to all employees cause particular disadvantage to those within a certain age group (such as younger or older people).

*Harassment* will occur where, on grounds of age, a person engages in unwanted conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person of a particular age.

*Victimisation* will occur when an employer treats a person less favourably as a consequence of that person threatening to bring proceedings or to give evidence or information or to make any allegation concerning the employer with reference to discrimination or harassment under the age Regulations.

#### 2.2 Lawful discrimination

There are limited circumstances when it will be lawful to treat people differently because of age – e.g.

- there is an **objective justification** for doing so – for example setting a maximum age for the recruitment or promotion of employees, which might reflect the training requirements of the post or the need for a reasonable period of employment before retirement
- a person is older than, or within six months of, the employer's normal retirement age, or 65 if one has not been set: there is a specific exemption allowing employers to refuse to recruit that person.
- the discrimination is covered by one of the **exceptions** or **exemptions** given in the regulations – for example paying someone the age related rate in respect of the National Minimum Wage
- there is a **genuine occupational requirement** (GOR) that a person must be of a certain age – for example, if you are producing a play which has parts for older or younger characters (It is unlikely that a GOR would apply in a school setting so this briefing note will comment on justifications, exemptions and exceptions, as appropriate)

## 2.3 Objective Justification

The new regulations recognise that differences of treatment on the grounds of age can sometimes be justified. However, this does not mean that unfair discrimination will be allowed to continue. Employers will not be able to make arbitrary decisions, which are not supported by evidence.

The objective justification test, for either direct or indirect discrimination, should be a “proportionate way of achieving a legitimate aim”.

*Proportionate* - The discriminatory effect should be significantly outweighed by the importance and benefits of its legitimate aim, and the employer should have no reasonable alternative. If the legitimate aim can be achieved by less, or non-discriminatory means, then these must take precedence.

*Legitimate Aim* - A wide variety of aims may be considered legitimate, but they must correspond with a reasonable need on the part of the employer. Economic factors such as business needs and efficiency may be legitimate aims, but arguing that it could be more expensive not to discriminate will not in itself be a valid justification.

For example a deliberate policy of replacing expensive staff with NQTs when posts become vacant because they are cheaper, may be discriminatory. However an example of a legitimate aim might be the need for a reasonable period of employment before retirement because of the particular training requirements of the job.

The legitimate aim cannot be related to age discrimination itself. For example, a high street fashion store who wishes to employ younger staff in order to complement their brand image will not be able objectively justify this, because it is not regarded as a valid aim.

## 2.4 Exemptions

One of the major exemptions relates to benefits linked to length of service. For example, employers may require a certain length of service before increasing or awarding a benefit such as holiday entitlement. Without such exemptions this could amount to indirect age discrimination because some age groups are more likely to have completed the length of service than others. Any benefit earned by five years service or less will be exempt.

The use of length of service of more than five years for all types of employment benefits is lawful if:

- awarding or increasing the benefit is meant to reflect a higher level of experience of the employee, or to reward loyalty, or to increase or maintain the motivation of the employee;
- the employer has reasonable grounds for concluding that using length of service in this way fulfils a business need of his undertaking.

## 3. WHAT WILL THE REGULATIONS MEAN FOR SCHOOLS?

### 3.1 Recruitment

When recruiting new staff, you should be careful not to discriminate against an applicant either directly or indirectly on the grounds of age. You should consider whether the criteria in the person specification are really necessary and justifiable in each case, making sure not to apply stereotypical assumptions about a potential employee's suitability based purely on their age.

Unless it can be justified (see below), setting a minimum or maximum age limit for a job will amount to direct discrimination.

Indirect discrimination is more difficult to identify but when recruiting schools should ask themselves questions such as:

- Do job applicants need to have held qualifications for a specified number of years (e.g. requiring a head of department to have at least ten years' teaching experience)?
- Do job applicants need to have a degree, or a particular type of degree (such as IT), which could indirectly discriminate against older applicants?
- Is language such as "mature", "young and dynamic" or "young graduates" being used in advertisements?
- Do you advertise only through publications targeted at certain age groups (e.g. student magazines)?
- Do you only allow certain types of application (e.g. only accepting applications online)?

All of the above are likely to be indirectly discriminatory – and could give rise to a successful Tribunal claim unless objectively justified. For example, provided that you do so in conjunction with normal advertising methods, you could target advertising to reach a certain age group currently under represented in the school (see *Positive Action*).

For the purposes of safer recruitment, schools must now follow specific recruitment guidelines including CRB checks where appropriate. These require you to obtain a detailed chronological work history as well as the applicant's date of birth. This is justifiable given the need for safer recruitment. Nevertheless, you should still ensure that age related information is only requested where it is strictly necessary and that age or date of birth information is kept separate from the main body of the application form, to avoid accusations that age has consciously or subconsciously affected the recruitment process.

#### *Justification*

Although there are no specific exemptions relating to recruitment, if you can show that any discrimination in the recruitment process was a proportionate means of achieving a legitimate aim then a tribunal claim would fail. An example of justifiable discrimination might be where a position requires the completion of three years' training. In that scenario, it may be legitimate to have a maximum age to reflect the time this training would take and to ensure a reasonable period of employment before retirement.

#### *Positive Action*

You can take 'positive action' to prevent or compensate for disadvantages linked to age. For example, in addition to your normal advertising, you might place advertisements where they are more likely to be seen by people in a disadvantaged group. Alternatively, you may indicate that you particularly welcome applications from younger or older people because they are underrepresented in the school.

### **3.2 Pay and Benefits**

Schools will be used to the concept of linking pay and benefits to length of service. In the education sector incremental pay scales, long-service awards and holiday and sick pay entitlements that increase over time are widespread.

Under the Regulations schools will still be able to do this, provided that the 'length of service' requirement is five years or less or they can be justified (see 2.4 above).

It will be legitimate, for example, to allow a new support staff member 20 days' holiday per year rising to 25 days at the end of five years. Similarly, denying employees access to a benefit such as health insurance until they have 1, 2, 3, 4 or 5 years' service will also be legitimate. Thereafter, justification will be required.

Benefits based on length of service over 5 years may also be lawful if:

- the aim of the award is to reflect an employee's higher level of experience, reward the employee's loyalty or to increase or maintain their motivation;
- the employer has concluded that there will be a business benefit resulting from the higher level of experience of staff or from rewarding staff loyalty or motivation; and
- the employer applies the length-of-service criterion similarly to staff in similar situations.

Current national pay and conditions for teachers and support staff - STPCD, Burgundy Book and Green Book - do not contravene the regulations as the period before maximum benefits accrue e.g. sick pay, annual leave etc does not exceed 5 years.

However any local and/or discretionary payments or benefits in kind made by governing bodies should be checked for compliance. In reviewing such benefits, you should consider whether the five-year exemption applies or the policy is justified. If not, serious thought should be given to removing or remodelling the benefit.

### 3.3 Pensions

The age discrimination regulations aim to disrupt occupational pension arrangements as little as possible, and to avoid the risk of pension provisions being reduced. The regulations apply to occupational pension schemes and employer contributions to personal pensions. They do not apply to state pensions, which will be completely unaffected. In addition, pension rights accrued before 1<sup>st</sup> October 2006 will not be affected.

At this stage it is not thought that the provisions will impact on the normal retirement pension arrangements for either teachers or support staff, with the possible exception of premature retirement arrangements – see 3.4 Redundancy below. (You should note that changes to the teachers' pension scheme are being proposed which will link pensions for new staff to age 65. The proposals are currently being consulted upon, but if approved, will come into being as from 1<sup>st</sup> January 2007).

### 3.4 Redundancy

The rules relating to statutory redundancy entitlement will be changed. Both the lower (18) and upper (65) age limits will be removed so that all employees will be able to receive redundancy compensation and can take a claim to tribunal. However, the two year qualifying period and the method for calculating redundancy payments will be retained including the 20 year cap on service and the multiplier linked to the age of staff when they are made redundant.

The Regulations allows exemptions whereby enhanced redundancy payments over and above the statutory limits can be made, subject to certain conditions being met. So, for instance, calculating redundancy compensation for school staff on the basis of an actual week's salary can continue. However, some discretionary age-based enhanced severance arrangements are being reviewed to ensure that they comply with the regulations. Further advice on this is awaited.

On a practical note, redundancy criteria will need to be checked to make sure that they are not discriminatory. For instance, simply using length of service rather than skills or experience gained, might be discriminatory.

### 3.5 Retirement

The normal expectation is that teachers and support staff would retire no later than age 65, though it is possible for staff to take their pension before then should they so wish. The regulations do not change this, as they set a 'default' retirement age of 65 (to be reviewed in 2011). Employers may therefore retire employees or set retirement ages at or above 65. If an employer's normal retirement age is below the age of 65, it must be objectively justified.

Employees will however now have a statutory right to request to continue working beyond their retirement date and you will have a duty to give consideration to a request to work on. You are under no obligation to agree to such requests.

At least six months in advance but no more than 12 months before the intended retirement, you will need to have informed the member of staff in writing of the date of their retirement and of their right to request to go on working beyond their retirement date. In order not to raise the expectations of the employee, it should be explained that the school is entitled to refuse the request.

There is no requirement to give a reason for the decision to retire an individual but by doing so, and providing a more detailed explanation of your retirement policy, it may enable the employee to leave with dignity and respect and help the school maintain good workplace relationships with other employees. If you choose to give reasons, care must be taken not to give the member of staff the impression that the school might be discriminating against them on the grounds of race, gender, disability, sexual orientation or religion or belief.

If you have properly notified the member of staff and they wish to continue working, they must request to do so more than three months before the intended retirement date. However, if you fail to inform them of their intended retirement date and of their right to request to continue working, they will still be able to make a request not to retire at any stage until dismissal. If they make a request the employment must continue until the day after you notify them of the decision on the request.

Even if you notify the member of staff, but fail to do so six months in advance of retirement, the school may be liable for compensation and you will have an ongoing duty (up until two weeks before the retirement dismissal) to inform the employee of both the intended date and their right to request working longer. Failure to do this will make the dismissal automatically unfair.

#### ***Dealing with the request***

A request in writing not to be retired must be considered before the employee is retired. Failure to do so will make the dismissal automatically unfair. A meeting must be held with the member of staff to discuss their request within a reasonable period of receiving it (unless agreeing to the request or it is not practicable to hold a meeting) and they must be informed in writing of the decision as soon as is reasonably practicable. If a decision is not made by the intended retirement date, the member of staff will continue to be employed by the school until they have duly been informed of the decision.

At the meeting the employee has a right to be accompanied by a colleague. There is the same right in relation to any subsequent appeal meeting. The individual accompanying the employee must be:

- chosen by the employee
- a worker or trade union representative employed by the same employer as the employee
- permitted to address the meeting but not answer questions on behalf of the employee; and
- permitted to confer with the employee during the meeting.

The employee may appeal against the decision as soon as is reasonably practicable after receiving notification of it. If the employee does appeal, the appeal meeting should be held as soon as is reasonable. The employee may appeal the decision if the request is refused in its entirety or if it is accepted but it is decided to continue employing the employee for a shorter period than the employee requested. The appeal meeting can be held after the retirement has taken effect.

This procedure must be repeated each time an individual nears an extended point for retirement.

### ***Transitional arrangements***

There are transitional arrangements for staff who are retiring between 1<sup>st</sup> October 2006 and 31<sup>st</sup> March 2007. These arrangements may be summarised as follows:

#### *Notice given before 1<sup>st</sup> October 2006*

If you give a member of staff notice before 1<sup>st</sup> October that they are to be retired on or after 1<sup>st</sup> October 2006, but before 1<sup>st</sup> April 2007:

- notice given must be at least the period required by the contract of employment; or
- where the contractual period is longer than four weeks, at least four weeks.

On 1<sup>st</sup> October, or as soon as possible afterwards, you will have to:

- write to the employee telling them of their right to request working longer.

The employee can make a request not to be retired after their contract has been terminated, but not more than four weeks afterwards.

A meeting to discuss the request, and any subsequent appeal meeting, must be held within a reasonable period and the employee can ask to be accompanied by a companion.

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#### *Notice given between 1<sup>st</sup> October 2006 and 31<sup>st</sup> March 2007*

If you give notice on or after 1 October 2006 that a member of staff is to be retired before 1 April 2007:

- you must write to them notifying them of the intended retirement date - giving the longer of either contractual or statutory notice; and
- tell them in writing that they have a right to request not to be retired.

An employee who wants to exercise this right should make a written request:

- where possible, four weeks before the intended retirement date; or
- as soon as reasonably possible after being notified of the 'right to request'.

The request can be made after the employee's contract has been terminated, but not more than four weeks after termination. The same appeal procedures apply as before.

#### **4. ACTION REQUIRED**

- 4.1 Update your Equal Opportunities/Diversity Policy to ensure that it includes reference to non-discrimination on the grounds of age.
- 4.2 Make sure all employees are aware that it is not only unacceptable to discriminate, harass or victimise someone on the grounds of age, it is also unlawful. Make it clear that you will not tolerate such behaviour. Individuals should know what to do if they believe they have been discriminated against or harassed, or if they believe someone else is being discriminated against or harassed. They should be made aware of the grievance procedure.
- 4.3 Check that local discretions on pay and other benefits are compliant with the regulations and revise as necessary.
- 4.4 Ensure that mechanisms are in place for early identification of staff that are approaching retirement age so that where a decision is taken to retire them notification of such action and their right to request to carry on working is taken within the time frame imposed by the regulations. Special note should be taken of the transitional arrangements for staff due to retire between 1<sup>st</sup> October 2006 and 31<sup>st</sup> March 2007.

#### **5. FURTHER READING AND INFORMATION SOURCES**

- 5.1 The DTI have produced a number of fact sheets on age discrimination which can be downloaded from <http://www.dti.gov.uk/employment/discrimination/age-discrimination/age-legislation/page29258.html>
- 5.2 ACAS have also produced helpful advice in *Guidance on Age and the Workplace*, downloadable from: [http://www.acas.org.uk/media/pdf/s/3/Age\\_and\\_the\\_Workplace.pdf](http://www.acas.org.uk/media/pdf/s/3/Age_and_the_Workplace.pdf)