

Human Resources Committee

17 November 2006



Age Discrimination Regulations Update

Report of Kim Jobson, Head of Human Resources

Purpose of the Report

- 1 To summarise the current situation with regard to implementation of the Age Discrimination Regulations including the current strategy for older workers within the County Council.

Background

- 2 The Age Discrimination Regulations applied from 1 October 2006. They stem from an earlier European Employment Directive aimed at producing a framework for anti-discrimination legislation¹ and embed a structure for equality in the workplace.
- 3 During the Government's last round of consultation, a report was submitted to the HR Committee in December 2005 highlighting potential issues facing the County Council. In response to the final Regulations, we issued a Planned Retirement Procedure² across the County Council in April. This process anticipated the new requirement that any employee approaching our normal retirement age of 65 must be given the opportunity to request an extension to their working life³. It is essential that managers follow this process before dismissing an employee on grounds of retirement⁴ – a failure to comply seriously risks claims for age discrimination as well as unfair dismissal.
- 4 More recently, we have issued Preliminary Guidance to managers to assist them in dealing with some of the workplace issues. A Flexible Retirement Policy is also under preparation – this will deal with the associated legislation that allows older workers, with the employer's consent, to take pension benefits whilst reducing their hours/grade and remaining in employment.

Areas of Potential Impact

- 5 Although guidance has been issued by bodies such as the DTI, the LGE⁵ and ACAS to accompany the legislation, most commentators agree that the full consequences will not become established until case law starts to appear. They also tend to agree this legislation has the potential to be one of the most

¹ Other legislation has previously been released covering religion or belief, sexual orientation & disability.

² The procedure can be located on the Intranet (Document Library – Staff Issues)

³ This process must be commenced no later than 6 months before the employee's 65th birthday.

⁴ 'Retirement' has become the 6th fair reason for dismissing an employee.

⁵ Department of Trade & Industry / Local Government Employers

influential factors in changing the employment environment. The law does make it possible to pursue direct and indirect discrimination⁶ actions in some instances. However, it will be necessary for any employer to provide strong objective and valid evidence that this action is fully justifiable.

- 6 The impact will be across the age spectrum, affecting younger and older people. Apart from retirement and pension issues, other areas that will be significantly affected include the recruitment process, workplace pay and benefits, the provision of training opportunities and redundancy measures. At both corporate and Service level, we must interrogate our existing policies and procedures to remove discriminatory practices that are not justifiable.

Retiring at 65

- 7 Our long-standing policy within the Council is that employees retire no later than the age of 65, unless they have specific skills or work in activities that prove difficult to replicate and recruit from the job market. A recent snapshot showed that over 3% of our workforce are aged at least 63. A wider review of our age profile in the summer⁷ identified 864 employees as being over 59 (4.9% of the workforce). The demographic trends of the nation are well documented as gradually generating an older population⁸ - a trend that will probably further affect our profile in future years.
- 8 The new legislation allows employers to set their normal retirement age at 65, fitting our traditional position. We have long committed to being an equal opportunities employer and welcome applications from all sections of the community. However, overall uncertainty as to how case law will ultimately shape the future has generated division amongst commentators as to the most pragmatic approach. Many employers are carefully considering the consequences before formalising a position⁹ on whether to allow employees to normally work beyond 65. This uncertainty is borne out by our ongoing research of how local authorities are responding to this question. As yet, there appears no definite trend with some policies being adopted that only allow an employee to work beyond 65 where there is a very clear business case. However, other Councils are being positive and letting any employee work as long as they want beyond 65, in some instances without any annual review process.
- 9 The Government are anticipating that ultimately many employers will be positive about this latest law. However, it is anticipated that various elements of the Regulations are open to legal challenge, most immediately in relation to this issue around the legality of any retirement date. In early December, a group called Heyday¹⁰ are challenging that the Government's insertion of a retirement age of 65 is inconsistent with the original European Directive and thus illegal – they argue that there should be not fixed retirement date. If they

⁶ An example of direct discrimination is the setting of specific age requirements in a job advertisement or literature. An example of indirect discrimination is where job applicants are required to have graduated in, say, the last 5 years – this could have an adverse impact on older candidates.

⁷ As of 31/7/2006.

⁸ DTI national statistics show that 30% of people are in some form of employment by the age of 65

⁹ A recent survey by employment law firm Eversheds across 151 public & private sector organisations showed that 59% have yet to decide their position over accepting/rejecting requests to work after 65.

¹⁰ Heyday is an organisation closely linked to Age Concern.

are successful, then a significant element of the legislation may have to be re-drafted.

- 10 In fulfilment of our commitment to equal opportunities, we would ultimately aim to be as age positive as possible, both benefiting Council services and workforce. However, bearing in mind the uncertain outcome of the 'Heyday' case and our ongoing evaluation of the preliminary direction of the legislation, it is initially intended to continue with our existing stance. This will further embed the Planned Retirement Procedure and maintain the position of normally retiring people at 65, unless there is a specific business case for allowing an extension.
- 11 On a related topic, we must also confirm our approach to applications for County Council jobs from individuals who are aged 65 or over. This has not previously been an issue with any specific local significance, but the advent of this legislation, the demographic trends and the future opportunities for individuals to pursue flexible retirement lifestyles may lead to increasing job applications from this sector of the community. However, the Regulations do provide that employers will not commit a discriminatory act when refusing to interview or appoint an applicant who is 65 or over¹¹.
- 12 Again, in the short-term, the intention is to use this legislative facility to normally refuse job applications from individuals who are 65 or over. This step aims to provide initial consistency for our responses to both our employees seeking extensions and external applications.
- 13 Our Planned Retirement Guidelines issued in April also had one process that still required clarification, namely the hosting of any appeal where an employee's request to work beyond 65 has been rejected. However, as any retirement is now deemed as a dismissal, it is necessary to bring this appeals process into line with our existing Dismissal Procedures¹². Thus, where any retirement involves an employee who has less than 6 months service, the appeal will be considered by a more senior officer. Where the service involved is more than 6 months, the appeal will be heard by the Appeals and Complaints Committee.
- 14 This strategy aims to bring some initial clarity to our position on these important questions and achieve more consistency of application across Services. Meanwhile, our additional exploration of the subject will lead to preparation of a further report in 2007 when we have more specific information and will seek to recommend a longer-term direction with regard to age diversity within the Council

Recommendations and reasons

- 15 This report has been included for information purposes with regard to our developing strategy on the subject of age discrimination. Further reports will be forthcoming on retirement and other issues linked to the Age Regulations.

Contact: Geoff Longstaff, Senior HR Adviser Tel: 0191 383 4198

¹¹ Or would reach 65 within 6 months of any job application.

¹² Approved at HR Committee on 2 March 2005.

Appendix 1: Implications

Finance – none specific at this stage.

Staffing – none specific at this stage, although on a longer term basis, the development of our age strategy may well influence the age profile of the Council's workforce, in conjunction with the onset of flexible retirement options.

Equality and Diversity – the developing age strategy will link in with our overall approach to equal opportunities within the County Council, including our progress in attaining the Equality Standard.

Accommodation – none specific

Crime and disorder – none specific

Sustainability – none specific

Human rights – infringement of the Age Regulations may also have the potential to be seen as a breach of the Human Rights Act, for example, in relation to Article 14 that relates to the prohibition of discrimination.

Localities & Rurality – none specific

Young people – the influence of the Regulations overall will also relate to young people as well as older members of the workforce.

Consultation – relevant consultation will take place with the trade unions.

Health – none specific