COLLAS CRILL

One for the ages? Jersey's new age discrimination law

AUGUST 2016

"Age", the actress Helen Hayes once quipped, "is not important unless you're a cheese." Or – one might be tempted to add – unless you are an employer in Jersey.

On 1st September 2016, new regulations come into force in the island outlawing discrimination against employees on the grounds of age. Bringing our legislation on discrimination in the workplace further in line with English law, from that date it will be unlawful to treat an employee less favourably on the grounds of their age. A step in the right direction for Jersey's equality provisions, certainly. But where does it leave employers? And what steps should an employer take to ensure they don't fall foul of the new regulations?

The Discrimination (Jersey) Law 2013 outlaws workplace discrimination on the grounds of several different 'protected characteristics' such as race, sex and pregnancy. The 2016 regulations will add age to that list, making it unlawful to discriminate – directly or indirectly – on grounds of a worker's age.

Both types of discrimination are defined in the law:

- Direct discrimination is where an employer treats an employee less favourably because of their protected characteristic
- Indirect discrimination is where an employer applies a provision, criteria or practice which has the effect of putting those with a protected characteristic at a disadvantage

A simple example of direct discrimination might be refusing to employ someone because an employer feels that the candidate is "too old", whereas an example of indirect discrimination might be an employer selecting employees for redundancy on the basis of time served (which may well disadvantage younger employees).

The law also prohibits harassment (creating a hostile and degrading work environment) and victimisation (treating an employee negatively because they make a complaint). Also bear in mind that, as an employer, you may be liable for any discriminatory acts committed by your employees.

The Discrimination law, which the 2016 regulations amend, helpfully provides a list of discriminatory acts in relation to different categories of worker. An employer must not discriminate against any applicants when deciding to whom to offer employment, in affording that employee opportunities for employment-related benefits (such as promotion, transfer or training), or when selecting employees for dismissal or redundancy. Examples of such discrimination could include:

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- Not employing someone because the employer, without justification, feels they are too old or too young
- Not letting an older employee go on a training course because the employer feels they will not get a long-term benefit out of it
- Dismissing an employee because they are older and likely to retire soon
- Calculating redundancy payments differently for individual employees based on their respective ages alone

As well as employees, the 2016 regulations also prohibit discrimination against other types of workers including contract staff and volunteers. Other entities are also included, such as professional and trade organisations, as well as partnerships and employment agencies. Even non-employers may have to make themselves aware of the law, as those who provide goods, services or premises (including clubs) to the general public also have a duty to not discriminate against any of their clientele.

There are, of course, exclusions. The regulations provide that an employer does not directly discriminate on the grounds of age if the decision they make is a "proportionate means of achieving a legitimate aim." In other words, it depends on why the employee has discriminated. If the employee was treated less favourably for a genuine reason (such as capability to the job), and that treatment was no more than was necessary, the treatment may well be entirely lawful. If a construction firm chooses to not employ an elderly candidate because it is obvious that they cannot cope with the physical demands of the job, then that may be justified. If a sporting goods company rejects an elderly candidate for, say, a product tester position (which would entail lots of strenuous physical activity) that could be justified. However, if that same company rejects an elderly applicant because they do not 'fit in' with a youthful, sporty image, that would almost certainly be discriminatory. Similarly, the regulations make it clear that the provision of benefits to employees based on their length of service is not discriminatory.

An exclusion specifically listed in the regulations is for persons who are "nearing retirement age", which is defined as being within six months of either pensionable age (which currently ranges from 65 to 67 years of age, depending on your date of birth) or any higher retirement age as set by an employer. If this is the case, an employer may lawfully take that person's age into account when deciding whether to recruit, promote, transfer or provide training to them.

A big question raised by the introduction of the regulations is, of course, retirement. Specifically, is it lawful for an employer to impose a mandatory retirement age? According to the regulations: yes, for now, but only if certain criteria are met. Under the regulations, an employer does *not* commit an act of direct discrimination if they dismiss an employee who has reached pensionable age or higher (if the employer has a higher set retirement age) *if* the employer has a policy of requiring employees to retire at such an age.

For an employer, there are several points to note here. Firstly, the employee must have reached at least pensionable age. Dismissing an employee who has not yet reached pensionable age could still leave you open to charges of direct discrimination on the grounds of age. Furthermore, even if an employee has reached pensionable age, but the company operates a higher retirement age which the employee has not yet reached, then dismissing them could still be unlawful. Secondly, the employer must have a policy of requiring employees

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to retire at a set age. While no guidelines are given as to the creation of such a policy, it seems sensible for employees to have any such age written down in an employment handbook or other document, which is accessible by all employees at any time and which is drawn to the employee's attention at key moments (for example, when that employee starts work with their employer).

Similarly, the regulations also amend the Employment (Jersey) Law 2003 to clarify that age discrimination will not have occurred if, on dismissal, the employee has reached pensionable age *and* there is a "common retiring age" for employees undertaking that particular job and holding that particular position (or different retiring ages for male and female employees). Employers should therefore make themselves aware of any 'conventional' retirement ages in their particular industries and for the particular positions their employees may hold, and draft their retirement policies accordingly.

All the provisions regarding retirement described above only apply to dismissals occurring before 1 September 2018. On that date, new legislation will come into force. Under these new 2018 regulations, employers will no longer be able to rely on a default retirement age at which they can dismiss employees, but will have to justify their requirement for any employee – of any age – to retire.

Anti-discrimination legislation in Jersey is a moving target, always changing to keep up with developments in society and in the workplace. By making themselves aware of the current and future state of this legislation, and taking legal advice where necessary, employers can not only protect their businesses against discrimination claims but also create lawful, inclusive and fair places in which to work.

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