



EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

EHRC Age Supplement to the Services, Public Functions and Associations Statutory Code of Practice

Response from the Employment Lawyers Association

2 May 2014

Employment Lawyers Association response to
EHRC Age Supplement to the Services, Public Functions and Associations

Statutory Code of Practice

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee ("the L&P Committee") and the working party set up to respond to this particular consultation are made up of both Barristers and Solicitors, working in private practice and in-house, who act for both Claimants and Respondents. The L&P Committee meets regularly for a number of purposes including to consider and respond to proposed new legislation.

Chapter 1: Introduction

The wording of this two page summary is practical and anodyne. There are no issues arising.

Chapter 2: The protected characteristic of age

- 2.1 Is it not more accurate to say that an age group includes people of the same age or people **within** a particular range of ages?
- 2.3 At the end of the first line this should read "people aged 50 and above".
- 2.7 It may be helpful at the outset to make clear what the significance of a comparator is. An additional sentence could be added to make clear that the circumstances of those in the comparator group should not be materially different from those of the person belonging to the particular age group, apart from the age differential.
- 2.10 Strictly speaking, this sentence would be better starting "As **with** prohibited conduct relating to other protected characteristics ..." rather than "As for prohibited conduct ..."
- 2.12 There is a word missing at the end of the first line. It should read "... individual employees may be held **to** be personally liable ..."
- 2.19 This sentence is not accurate. It would be more accurate to state: "Where a person considers that they have been discriminated against or harassed because of age and another protected characteristic, and wish to bring a claim in respect of both characteristics, they would need separately to specify their claim in respect of each characteristic (rather than seeking to combine them) when making their claim." As

currently worded it gives the impression that two separate claims would need to be issued, rather than needing to be pleaded as separate heads of claims in one action.

Chapter 3: Direct discrimination

- 3.13 Again, it would be helpful to make clear the nature of the comparator. Perhaps a sentence could be added after the sentence "This other person is referred to as a "comparator"" i.e. "The comparator's circumstances should not be materially different to the service user's, apart from the age characteristic."
- 3.16 Will the phrase "a real, objective consideration" be readily understood? (It is more than a mere consideration, in any event.) It would be better to describe the legitimate aim as 'one which represents a genuine objective'.
- 3.23 Although it is dealt with further below, it would be helpful in the second paragraph, here, to emphasise the importance of having evidence to back up the justification argument. Perhaps this sentence could include the wording "keep a record of their aim and justification for it (**including the supporting evidence**) at the time they adopt any rule or practice ..."

The example given below that paragraph is not a good one. If the aim is to "**maximise**" health protection in the population as a whole, that would suggest that everyone who could benefit from vaccination should receive it. The aim here is presumably making best use of limited resources.

- 3.25 The sentence "This may include considering the proposed age threshold" is not clear or meaningful. It would be preferable to replace it with the sentence "This will include considering the proposed age factor".

As noted above, the example given below is not a good one because excluding those over age 50 from the vaccination programme because of a slower and lower response to the vaccination would not meet the legitimate aim of **maximising** health protection (see 3.23 above).

Chapter 4: Indirect Discrimination

- 4.10 It may be worth including an example here of failure to objectively justify a PCP. It strikes us that the recent First-Tier Tribunal (Tax Chamber) ruling in *LH Bishop Electrical Co Ltd v HMRC* [2013] UKFTT 522 could form a good basis for this example, in which the Tribunal ruled that:

- an obligation to file tax returns online was indirectly discriminatory against those aged around 45 and over, who were unlikely to have learnt about computers at school; and

- the indirect discrimination could not be objectively justified.

4.11 The phrase "a real objective consideration" is used again here. It is suggested that this be replaced with the term "a genuine objective".

The last sentence does not accurately reflect the case law. It would be preferable to say that "It is not necessary for the aim or aims to be socially positive or in the public interest, provided that they reflect a genuine objective or objectives."

Chapter 5: Harassment, victimisation and other unlawful acts

5.2: This is incorrect. The service provider is only prohibited from acts of harassment **in relation to the provision of the service** (s.29(3) EA 2010).

5.3: We do not think this is a good example of age related harassment. Also, query whether the 'young carer' would be either: (a) a person requiring the service; or (b) a person to whom the service provider provides the services. If not, then he could not complain of age related harassment.

5.4: This is incorrect. There is no such thing as 'victimisation related to age'. It should refer to 'victimisation for raising or supporting a claim of age discrimination'.

5.5: This is not a good example. The 16 year old brother is unable to complain of age discrimination himself because he is under 18 (see s.28(1)(a) EA 2010), so he could only complain about discrimination suffered by his sister. Further, it is unclear from the example whether the 16 year old brother has actually done a protected act (within s.27) or not. It needs to say what he did to support his sister.

5.6: The margin note should also refer to s.112 EA 2010.

Chapter 6: Positive action

6.4: This mis-states s.158(1). It should be that a particular age group 'suffers a disadvantage connected to their age' (not *shares* a disadvantage).

6.7: This is incorrect. For less favourable treatment because of age to be justified the treatment must be a **proportionate means** of achieving a legitimate aim, not just be in pursuance of a legitimate aim. We also think it would be safest to keep with the wording of the legislation regarding the permitted legitimate aims i.e. to overcome or minimise disadvantage, meeting needs, or enabling or encouraging participation.

Chapter 7: Services and public functions

7.1-7.3: We think there needs to be some explanation of how Part 3 interacts with the other Parts of the EA 2010 - in particular that Part 3 does not apply to discrimination, harassment or

victimisation that is prohibited by Part 4, Part 5 or Part 6 (see s.28(2)(a) EA 2010).

- 7.3: It is right that age is not a protected characteristic for the purposes of Chapter 1 of Part 6 (Schools), but it is for Chapter 2 (Further and Higher Education) and Chapter 3 (General Qualifications Bodies), so we think this needs to be explained. Also, the exception only applies to acts prohibited by Chapter 1 of Part 6, and the exception would not apply to Part 4 or anything done by the school when acting as a service provider.
- 7.4: This is incorrect. Part 3 does not necessarily apply to anyone exercising a public function. Rather, Part 3 (in particular s.29(6)) extends the prohibition on discrimination, harassment and victimisation to a person exercising a public function.

Sometimes 'discrimination' appears to be used to describe discrimination, harassment and victimisation, however sometimes it is not.

Chapter 8: Associations

- 8.1: The definition of 'association' under Part 7, section 107(2) of the EqA 2010 is fairly cyclical ("an 'association' is an association of persons[...]"). The Code states it will explain what is meant by 'association' but it does not do this – more guidance would be helpful.
- 8.3: While the ban on age discrimination only applies to associations with at least 25 members, the Code should nevertheless discourage discrimination by any association, even where it has fewer than 25 members.
- 8.9 In light of the VAT case referred to in paragraph 4.10 which suggests that the age at which people may be affected by a measure requiring competent internet usage is significantly less than 75, it would be better not to refer to age 75 in this example but to refer to "older club members".
- 8.24: The example of concessions on invitations for people of a particular age group at 8.24 seems a little confused. The concession would appear to be that the member can invite two guests rather than one, with no explanation for how the age is relevant – does the dance club ordinarily impose age restrictions on members? A clearer example might be that a dance club only allows over 60s to join but it permits members to send out invitations for guests who are under 60. It may be helpful to tie this example in with that given in 8.25 so readers can understand more clearly the difference between Schedule 16 1A(3) and (4) EqA i.e. a concession on the invitation of a particular age group as guests, and a concession on access to benefits etc for guests of a particular age group.

Chapter 9: Application of general exceptions to the protected characteristic of age

- 9.3: It would be useful to see an example under 9.3 of ostensibly less favourable treatment related to age which is covered by the exception safeguarding national security in a

proportionate way.

- 9.6: More clarity is needed in 9.6 – it is assumed that the reference to selecting people to take part in a TV or radio programme does not relate to an employer’s decision (which would be covered by the provisions of the EqA) but rather to a decision made in a non-employment capacity e.g. an editorial decision about a guest invited to participate.

Chapter 10: Age specific exception: concessionary services

10.11/10.12: The chapter highlights at 10.2 that age based concessions do not apply to harassment and victimisation. However, it does not discuss victimisation further. Stating at 10.11 that ‘the exception does not apply to harassment’, without a similar provision relating to victimisation, may give the impression that the exception does apply to victimisation. Similarly the wording of 10.12 is misleading.

Chapter 11: Age exception: financial services

11.1/11.5: The financial services exception is very broad and was designed to permit market practices such as age banding and age limits. It might be worth making that point even more explicit in paragraphs 11.1 and 11.5. The use of age banding and age limits can still give rise to complaints in practice, particularly as the age bands for silver saver products can vary between providers even where the practice is covered by this exception and lawful. The summary of the exception should be aligned more closely with the wording in the Act so that it says, "in connection with the provision of a financial service."

At paragraphs 11.5 and 11.6, there should be a cross-reference to the way in which the risk assessment provision qualifies the main financial services exception. Financial service providers face a more onerous test where their age-related practices are based on risk assessments.

- 11.7: The relevant section of the Act, Schedule 3, Part 5, paragraph 20(2) should be cited in relation to the risk assessment sections (paragraphs 11.7 to 11.10).
- 11.8: At paragraph 11.8, it should be clear that the information is relevant "to the assessment of risk."
- 11.9: Paragraph 11.9 should be expanded to cover some of the examples in the Government Response to Consultation, page 17. The Government Response referred to estimates, forward looking projections, actuarial models and the outputs from those models. It also explained that information does not just include numerical data but qualitative assessments and reports on, and assessments of, future trends.

It is helpful to have guidance on what is meant by "information on which it is reasonable to rely" as this was not clarified in the Government Response. However, we are unsure

whether it is correct to say that information would have to be generally accepted by the scientific or actuarial community to be credible.

11.10: The examples given are fairly obvious ones. It would be useful to have an example about mortgage lending given that lenders will be required to exercise caution around lending into retirement following the Mortgage Market Review and this can create a tension between regulatory and equality obligations.

Chapter 12: Other age specific exceptions

12.2: The Government Response to consultation made it clear that the holiday exception was not confined to package holidays. It applies to group holidays targeted at a particular age group. We suggest changing the heading of paragraph 12.2 to refer to group holidays.

The section references (Schedule 3, Part 7, paragraph 30 (B)) should be included.

12.10: Paragraph 12.10 says that the holiday must have been designed in the light of the "needs or requirements" of the particular age group. The reference to needs or requirements is too strong and does not accord with the drafting of the relevant provision (Schedule 3, Part 7, paragraph 30 (B)(2)(d)). The example could be improved as the core elements of a holiday resort will be broadly the same but the exception is designed to ensure that services can be marketed/targeted at particular age groups. A more positive example of what would fall within the exception may be preferable.

12.11: At paragraph 12.11 it would be useful to have guidance on what is meant by a significant part of the service or its cost. The Government Response to Consultation had a better example about holiday rooms only being allocated to a particular age group and how this would fall outside the exception as a standalone arrangement (paragraph 5.11, page 25).

Age specific exception: age restricted services

12.17/12.18: At paragraph 12.17 and 12.18 there are additional requirements for the age warning to be readily and easily visible. This requirement is not covered in the relevant statutory provision which just refers to the warning being displayed at the premises (paragraph 30(C)(1)).

Age specific exception: sport and competitive activities

12.39: At paragraph 12.39 the guidance should bring out that this exception applies to intellectual games as well as sports (see paragraph 5.21, page 27 of the Government Response to Consultation).

2 May 2014

Members of the Working Party:

James Davies – Lewis Silkin LLP (Chair)

Claire Darwin – Matrix Chambers

Rachel Dineley – DAC Beachcroft LLP

Annabel Mackay – Addleshaw Goddard LLP

Lee Nair – Lewis Silkin LLP

Clare Primett – NWSSP