

The Employment Equality (Age) Regulations 2006

General Guidance Note
on Age and Student Issues

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Introduction

This note has been prepared by Eversheds LLP for the Equality Challenge Unit (ECU) in response to specific questions put to us by ECU on behalf of the higher education (HE) sector in respect of minimum and maximum ages on entry. Our comments are intended as a general guide only to the legal context of the specific areas covered in ECU's questions.

This guidance will be of interest to a wide range of staff in higher education including heads of Higher Education Institutions (HEIs); admissions and registry staff; student services staff; equality and diversity practitioners and student officers and representatives. It may also be of interest to further education (FE) colleges.

We would encourage institutions to be proactive in taking steps to ensure that their approach to the management of student issues is not affected by ageist assumptions and practices. We consider that taking such a positive approach is likely to reduce the chance of claims being made under the Regulations. However, this note indicates where what we are suggesting is a matter of good practice as opposed to a strict legal requirement.

Whilst the information contained below is believed to be correct, it is not a substitute for institutions taking their own appropriate legal advice. Neither Eversheds LLP nor ECU can take responsibility for actions taken based on the information contained in this general guidance note.

Context

What the Regulations prohibit

In common with other equality legislation, the Employment Equality (Age) Regulations 2006 (SI 2006 No. 1031) (“the Regulations”) prohibit direct and indirect discrimination, and harassment and victimisation, on the grounds of age. **Direct** discrimination can occur where an individual or group is treated less favourably than others because of their age. **Indirect** discrimination can occur where an institution applies a criterion, provision or practice which disadvantages people of a particular age.

Jurisdiction

The Regulations extend only to England, Wales and Scotland and not to Northern Ireland (or, of course, Eire). However, an act of discrimination (e.g. refusal of a place on age grounds) by an institution in England, Wales or Scotland will be caught wherever the applicant or student is based.

It is not possible to be more definite in offering guidance on how different courts and tribunals in different jurisdictions will interpret the Regulations until they have dealt with actual cases.

1. Minimum and maximum ages on entry

Entry to an institution / entry to a course

In considering this issue it should be remembered that Regulation 23 makes unlawful discrimination:

- (a) in the terms on which it offers to admit a person to the *establishment as a student*;
- (b) by refusing or deliberately not accepting an application *for his admission to the establishment as a student*; or
- (c) where he is a *student of the establishment*
 - (i) in the way it affords him access to any benefits,
 - (ii) by refusing or deliberately not affording him access to them, or
 - (iii) by excluding him from the establishment or subjecting him to any other detriment.

The Regulations therefore do not distinguish between admission to an institution and admission to a course. Even if an institution does not discriminate in relation to admission to the institution, were it then to discriminate in admission to a course the institution would still be caught by the Regulations.

Objective Justification

As a consequence of the Regulations, in most situations it will be unlawful to treat students (prospective or current) differently on the grounds of

age. However, institutions will be able to justify different treatment under Regulation 3 if they can show that it is a proportionate means of fulfilling a *legitimate aim* i.e. that it is “objectively justifiable”.

The Regulations do not provide a list of legitimate aims which could justify age discrimination. They are likely to be more limited than those applicable to employers, but ACAS guidance suggests they might include:

- the health, welfare or safety of the individual
- economic factors, including the need for a reasonable period of employment following qualification (but saving money because discrimination is cheaper is not legitimate)
- the professional requirements of a particular profession at which the course is aimed (provided these are also objectively justifiable).

The different treatment must also be *proportionate*, meaning that the discriminatory effect should be significantly outweighed by the importance and benefits of the legitimate aim. The different treatment is unlikely to be proportionate if there is a reasonable alternative which would achieve the legitimate aim in a less or non-discriminatory way.

Objective justification will not be an easy test to satisfy and institutions will have to be able to produce supporting evidence if challenged (see next section below).

Whether or not an institution can objectively justify an age-based approach to admissions will depend on the circumstances of each case. For example, in respect of a course where a certain level of physical fitness is a valid entry requirement, rather than setting a maximum age limit (based on an ageist assumption that age and fitness are connected), it may be more appropriate to introduce fitness tests for all applicants, regardless of age. This is a rather obvious example but institutions need to be careful that they are not making assumptions about persons of a particular age group.

There will be limited instances in which a refusal to accept applications from persons of a particular age may be objectively justifiable (for example, in the interests of the welfare of the public or of the applicants themselves) but it will otherwise be necessary for institutions to consider each applicant on his or her merits.

Evidence to support objective justifications

As will be seen from the above, the circumstances in which age based criteria for admissions will be objectively justified are likely to be quite limited. In the event that an institution decides that age based criteria are necessary to protect a legitimate aim, they will need to be based on evidence rather than an assumption that a particular age group is unsuitable for a particular course. In any claim of age discrimination by a student, the burden of proof will rest on the institution to show that the treatment was objectively justified.

Here are some examples of the types of evidence that might be relevant:

- practical requirements of a course, for example a work placement, which are or may be unlawful or unsuitable for applicants of a very young or very old age
- any interaction with members of the public during the course (for example, nursing) which might put persons below a certain age at risk or members of the public at risk
- requirements of the profession at which the course is aimed. Institutions which have in the past imposed minimum or maximum age requirements, in the belief that this is a requirement of the relevant professional or accrediting body, should check with the body concerned to establish whether this in fact is the case. It is highly likely that the professional or accrediting body is already reviewing its education and regulatory requirements since they will also be subject to the Regulations and therefore potential defendants to any claim of age discrimination.

If any institution is in doubt as to whether age related criteria on admissions to a course are objectively justifiable, or as to what evidence should be collated to support such a policy, we recommend that they take independent legal advice.

Positive Action exception

Age related criteria that would otherwise be discriminatory under the Regulations may not contravene the Regulations if they are aimed at assisting a group which it reasonably appears to the institution is disadvantaged in getting access to training for or actually doing a

particular type of work. This is the “positive action” exception under Regulation 29.

An institution may therefore be able to treat a particular age group more favourably in relation to access to relevant training if this is designed to compensate for the fact that the age group is disadvantaged in applying for or doing a particular type of work.

The positive action exception could apply to courses aimed at a particular profession but may also apply to a general access course which is a precursor to professional training.

If a course is not sufficiently linked to a particular type of work, the positive action exception is unlikely to apply. Institutions should consider the position carefully and take advice if unsure as to whether the exception may apply.

Minimum age limits on entry

If HEIs decide to impose minimum age limits for access to the institution or to particular courses, they need to ensure they are able to objectively justify such limits.

Until now, educational provision has been very substantially organised around assumptions that students will develop educationally generally in direct relationship with their age. For example, the Key Stages of compulsory education are broadly related to year of schooling. Where such segmentation is embedded in legislation, the Regulations will have no impact. However, where criteria for admission are related to age as a result solely of a decision made by an institution, they will be vulnerable to a claim under the Regulations.

Minimum ages are more commonly found in higher than in further education. A number of HEIs currently have a blanket minimum age for entry to the institution - either 18 or, in some cases, 17½ years or thereabouts. The objective is to ensure that applicants reach 18 as soon as possible within the first year of their courses. Minimum age limits may claim to be based on a variety of justifications, including assumptions made about educational and personal maturity, the view that higher education is to be provided in an “adult” environment, and child protection concerns.

Some HEIs may seek to justify a minimum age limit on the grounds that

they are adult institutions where it is expected that students will not need the amount of personal support which is to be found in a school or FE institution.

On occasion, such institutions may also suggest that they are not and could not reasonably be expected to resource themselves so as to comply with, for example, child protection and Criminal Records Bureau (CRB) requirements. These requirements are discussed in more detail below but institutions are unlikely to be able to rely on these alone to justify minimum age limits. Alternatively and more generally, institutions with a policy of a minimum entry age may emphasise the extent of personal maturity which they are expecting all students to possess when joining the institution.

While we think it would be accepted as lawful that all students in HEIs should be able to demonstrate the appropriate academic maturity in order to benefit from higher education, the requirement of demonstrating personal maturity is more contestable. In any event, personal maturity does not by itself justify a hard and fast minimum age requirement - every applicant should be considered on his or her merits in the light of information from existing teachers or others if appropriate and, if necessary, an interview. Long established institutions have on occasion accepted much younger students (although they have required such students to be chaperoned by a parent or guardian) and many institutions these days welcome much younger students onto campus, at least for summer schools and other special events.

Whilst questions of personal maturity clearly apply with more force in relation to very young students aged below 16, in relation to students aged 16 to 18 it will be much harder for institutions to justify a minimum age requirement. Possible justifications in particular situations include where a course is in preparation for, or contains a placement in employment, and the employer is entitled to require a certain minimum age as a genuine occupational requirement under Regulation 8. Also, under Regulation 29 (Exceptions for Positive Action), it might be possible to justify admitting only mature students above a certain age where the purpose of the training was to compensate persons above a certain age from disadvantage suffered by their peers in the particular occupation in question; for example, a return to practice course provided for people who have had time away from employment to bring up children.

HEIs may well receive a number of applications from under 18 year old students living in Scotland since the Scottish Higher qualification is often obtained at a slightly younger age than A levels. Such HEIs will still need

to ensure that any minimum age criteria are objectively justified and, as explained above, this will be difficult to establish in relation to students aged 17.

Overseas students applying to study in English, Welsh or Scottish institutions will also be caught by the Regulations. Again, it is conceivable that a higher proportion of applicants from some countries may be under 18 owing to differences in qualifications and periods of study in their home countries. Institutions will need to assess those applicants on their own merits, or ensure they can objectively justify a general age limit being applied to students regardless of their country of origin.

Child Protection Issues

Institutions will probably not be able to rely solely on child protection requirements for under 18s as a justification for age discrimination.

For these reasons it would be advisable for institutions to:

- have a child protection policy, incorporating appropriate procedures, approved by the governing body, disseminated to staff and students and regularly reviewed. This is not a legal requirement for HEIs but will not cause institutions substantial costs and therefore is unlikely to be an objective justification for not taking under 18 students
- ensure there is a suitably trained senior member of staff responsible for monitoring the policy and receiving indications of concern in relation to children within the institution. This will involve some cost but, again, cost is unlikely to be justification for non-compliance. (Some institutions will already have children on campus, for example as part of their provision of care for children of staff and students)
- Criminal Records Bureau (CRB) check staff having responsibility for children as part of their normal duties. The number of checks could grow if more under 18s attend classes. There is some cost associated with this, but some HEIs may want these checks to be carried out anyway and it is unlikely to be an objective justification for not taking on under 18 year old students
- remember section 52 of the Further and Higher Education Act 1992 prevents students aged under 19 being taught in classes

with older students unless a member of staff is present. This will only apply to HEIs if they provide secondary education to persons of compulsory school age under arrangements with an LEA or school; and

- finally, note that while the standards for accommodation for under 18s (made pursuant to the Care Standards Act 2000 and the duty under section 175 Education Act 2002 to promote and safeguard the welfare of children receiving education at the institution) do not apply to HEIs, the institution may decide to follow these rules as a matter of good practice.

Overall we consider it unlikely that an institution could successfully argue that child protection requirements are themselves an objective justification for age related criteria on admissions. Institutions will therefore need to consider the impact of the requirements in each individual case. Institutions would also be well advised to have, and regularly review, appropriate policies and procedures for dealing with child protection issues.

Separate admissions procedures

Some institutions provide that those individuals below or above certain ages should be subject to a separate admissions procedure. While such procedures may be introduced for laudable motives, for example child protection, they run the risk that a disappointed applicant may accuse an institution of using age related criteria in the admission decision. Accordingly, we suggest that there should be a common admissions procedure for all applicants, regardless of age. Applicants should continue to declare their age on application forms. Once the institution has provisionally decided to offer a place to a student, there should then be a policy and procedure for considering if there are particular issues which the institution should address in relation to the particular applicant, including any issues which may arise as a result of the applicant's age.

Maximum age limits on entry

We are not aware of any institutions which have maximum age limits for entry to the institution itself (as opposed to particular courses). Maximum ages are also less common in relation to admission to courses, but have in the past been taken into consideration as part of the admission process at some medical schools. Institutions may have particular concerns regarding

specific applicants, for example in relation to the length of time that may have elapsed since they last undertook serious study, or in relation to their robustness and other health considerations. Such issues will need to be explored with care by institutions to ensure that they are not making universal assumptions about age which may lead to complaints of age discrimination and potentially disability discrimination.

Examples of justifications often claimed for maximum age limits have included:

- the fact that students aged above, say, 40 may not be able to cope with the demands of the course, and
- for medicine in particular, that they are unlikely to spend long enough in practice after qualification sufficient to justify the public expenditure on their fees (and maintenance which would be provided through the NHS).

The first justification is likely to be discriminatory under the Regulations as it assumes a correlation between age and ability rather than assessing applicants on their own merits. The latter may have some force as a proportionate means of achieving a legitimate aim. However the Regulations differ from the draft Regulations in that they do not provide any examples of objective justification. Regulation 3(2) of the draft Regulations had given, as an example of a proportionate means of achieving a legitimate aim, the fixing of a maximum age for recruitment or promotion which is based on the training requirements of the post or the need for a reasonable period in post before retirement. It is unclear whether this would still apply under the Regulations as implemented.

Despite the above, there is a common belief within HEIs that they need to insist on certain minimum ages and, to a lesser extent, maximum ages, in relation to particular courses, specifically those training for various health professions. HEIs should contact the relevant regulatory or accrediting body in relation to its requirements having regard to the impact of the Regulations.

We consider that there are few statutory provisions preventing applicants of a certain age from being admitted to courses. We recommend that all institutions check the position carefully in respect of all courses for which they impose age restrictions.

Other age related criteria

Other age related criteria which need to be looked at carefully are those which refer to the amount of energy required to complete the course or the need for a certain level of experience. These might amount to indirect age discrimination.

2. Statements concerning admissions criteria

Statements made by institutions on their websites or in their prospectuses (or any other literature) which may discourage applications from persons of a particular age group are certainly at risk of leading to complaints of age discrimination. If someone were to apply for a place on that course and be refused, or offered a place on different terms, they may well be able to use the institution's statement as evidence in a claim of age discrimination.

For these reasons we recommend that institutions avoid making reference to age in their institution or course literature unless there is a statutory or other lawful requirement justifying specific age criteria (for example a concern to provide a course to meet the needs of a particular age group which has suffered disadvantage in obtaining access to a particular occupation, relying on the positive action exception). In all circumstances, candidates should be considered on their merits. However, institutions are free to give more general encouragement to applicants, short of indicating that age criteria will be applied in admissions decisions, for example "the institution welcomes applications from people of all ages".

We consider that it would be unrealistic and unreasonable to expect institutions to dispose of prospectuses already produced and replace them simply because, for example, they do not contain photographs of very young and very old students. In the future, institutions would be well advised to put out more encouraging literature, both in hard copy and web based form and should certainly take steps to disseminate information about any changes to admission requirements following the introduction of the Regulations.

3. Monitoring

HEIs should systematically monitor and review their applicants by age. This will help them to track the diversity of their student base and potentially help to respond to a complaint of discrimination. For example, if an institution can demonstrate that it has students with a range of ages on a particular course, this would be useful evidence to rebut an inference of discrimination against someone in a particular age group.

The question of whether “positive action” might be necessary to redress imbalances is more difficult. The Regulations do not impose a duty to take positive action to promote age equality, although it is quite likely that such a positive duty will be introduced once the Commission for Equality and Human Rights is in place (from October 2007) and steps are taken to produce a consistent approach to the various heads of anti-discrimination law. However, an institution will be able to rely on the positive action exception if it reasonably considers a particular age group to be disadvantaged in relation to entry to particular occupations and takes action to deal with that in the form of access to courses for persons of that age group. Monitoring applicants by age will help institutions to make these assessments.

Clearly, institutions need to collect information about applicants’ ages as part of the process of ensuring that no age discrimination is taking place. However, some institutions may be better equipped to open access to a wider range of ages than others.

The ECU website includes a number of FAQs on many of the above areas of guidance. See www.ecu.ac.uk/guidance/age

Disclaimer

The information provided in this publication is not intended to be either legally binding or contractual in nature. Should you require more specific advice regarding the application of equalities legislation, it is recommended that you consult an appropriate qualified legal professional.

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