

EUROPEAN UNION'S AGE DIRECTIVE: IMPLEMENTATION IN UNITED KINGDOM

By: Robert B. Fitzpatrick¹

In 2000, the European Union issued its employment directive on equal treatment. Council Directive 2000/78/EC, OJ 2000 (L 303/16). The directive requires all member states to introduce age discrimination laws implementing the directive by December 2006. *Id* at 21. Until now there has been no legislation dealing with age discrimination in Great Britain.² On October 1, 2006, the Employment Equality (Age) regulations come into force and effect in Great Britain. (Available on the internet at: http://www.dti.gov.uk/er/equality/draftregulation_2006.pdf).³ The regulations will apply in Great Britain, Scotland, and Wales, but not in Northern Ireland.

Space does not permit a description of all the key provisions of these new age discrimination regulations. Accordingly, this paper will address some of the more interesting provisions.

1. No Age Limits

The regulations prohibit age discrimination against everyone regardless of his or her age. Thus, unlike the United States' federal Age Discrimination in Employment Act which is limited to discrimination against individuals over the age of forty, (29 U.S.C. § 630 (2000); See also *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (holding that the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, prohibits discriminatory preference of the young over the old, but does not prohibit discriminatory preference of the old over the young), the U.K. age regulations prohibit discrimination against those under and over forty.

2. Genuine Occupational Requirement Exception

The regulations provide that in very limited circumstances age may be regarded as a genuine occupational requirement ("GOR"). The only circumstances that are generally agreed to satisfy the GOR exception would be an actor playing a young character in the theater. For comparative purposes, see Section 623 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(f)(1); *Western Air Lines v. Criswell*,

¹ Robert B. Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick, PLLC where he represents clients in employment law and employee benefits matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than thirty-five years and has been described by the National Law Journal as being among the top employment lawyers in the country. He serves on numerous bar association committees related to employment law. In addition to an active employment practice, he serves as a mediator of employment disputes as well as testifying as an expert witness in employment cases. A nationally known lecturer, Mr. Fitzpatrick chairs a number of ALI-ABA employment law courses.

² In contrast, such legislation has existed in Ireland since 1998 (See Employment Equality Act, 1998.); the Finnish and Portuguese Constitutions protected employees from age discrimination even prior to the 2000 directive (The Constitution of Finland (731/1999); Port. Const. Art. 13); Luxemburg has drafted age discrimination laws; and Belgium, Czech Republic, and Germany have some age discrimination laws in force.

³ See also Employment Equality (Religion or Belief) Regulations 2003 (S.I. 2003/1660) and Employment Equality (Sexual Orientation) Regulations 2003 (S.I. 2003/1661).

472 U.S. 400, 412 (1985) (holding that the bona fide occupational qualification defense, which "meant to be an extremely narrow exception to the general prohibition").

3. Harassment

Harassment on the basis of age is unlawful under the new regulations. Harassment includes unwanted conduct on account of age, which violates the employee's dignity, or creates an intimidating, hostile, degrading, humiliating or offensive environment. Compare *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

4. Positive Action

Positive Action (e.g. encouraging people of a particular age to use employment opportunities) will be lawful if it is reasonably expected to prevent or compensate for disadvantages people suffered because of their age.

5. Compulsory Retirement – the “Duty to Consider”

In the case of compulsory retirement of an employee, there will be a “duty to consider” procedure which will allow the affected employee to request working beyond the compulsory retirement date. If an employee makes such a request, the employer will have to consider it seriously.

6. Removal of age limit on unfair dismissals

Henceforth, the upper age limit of 65 for unfair dismissals is to be removed, and thus older employees will get the same right to claim unfair dismissal as younger employees.

7. Victimization

The regulations prohibit victimization, which in the United States would be called retaliation. Examples of victimization include adverse action because an employee brought a proceeding, gave evidence or information in connection with a proceeding, or alleged a violation of the regulations. The comparable anti-retaliation provision in the 1964 Civil Rights Act, as amended, is Section 704(a), 42 U.S.C. 2000e-3. There has been substantial litigation in the United States as to what constitutes an “adverse employment action,” and whether an adverse employment action is an element of a retaliation claim. See e.g., *Baker v. Am. Airlines*, 2005 U.S. App. LEXIS 24328 (5th Cir. 2005); *Fogleman v. Greater Hazleton Health Alliance*, 122 Fed. Appx. 581 (3rd Cir. 2004). There has also been considerable dispute in the United States regarding the coverage of internal corporate complaints. See e.g., *Lambert v. Ackerly*, 180 F.3d 997 (9th Cir. 1999). For a collection of material on protected activity, see The U.S. Department of Labor Office of Administrative Law Judges Nuclear and Environmental Whistleblower Digest, Division XII – Protected Activity, <http://www.oalj.dol.gov/Public/WBLOWER/REFRNC/edig12.htm>.

8. Extraterritoriality

The regulations apply to employment at an establishment in Great Britain even if the employee works wholly outside British territory, so long as the employer has a place of business in Great Britain, the work is for the purposes of the business carried on in Great Britain, and the employee is ordinarily a resident of Great Britain. In the United States, before the 1991 amendments to the 1964 Civil Rights Act, the Supreme Court had declined to apply the statute extraterritorially. See *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). Title VII was amended to provide for limited extraterritorial application in 1991. See Section 109 of Title VII, 42 U.S.C. 2000e-2(a).

9. Partnerships

The regulations specifically apply to partnerships and prohibit age discrimination in entry into partnership or expulsion from partnership. In the United States, the issue of coverage in a partnership circumstance has been addressed by the Supreme Court in *Hishon v. King & Spaulding*, 467 U.S. 69 (1984) and *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440 (2003).

10. Enforcement – employment tribunals and the courts

Complaints of age discrimination may be presented to an employment tribunal within three months after the discrimination occurred. Similarly, complaints of age discrimination may be filed in the courts within six months of the occurrence. The burden of proof is upon the employee to establish facts upon which one could conclude that the employer engaged in age discrimination, and the burden then shifts to the employer to prove that it did not commit age discrimination.

11. Application to staff of the houses of commons and lords

The regulations, like the United States' Congressional Accountability Act, 2 U.S.C. 1301, specifically apply to the staff of both the House of Commons and the House of Lords.

The regulations are revolutionary. They have gone through several consultations to elicit the views of the public and employers. Great Britain will enter into a new era of the development of employment discrimination law, and it will be interesting to see to what extent the age discrimination jurisprudence developed in the United States will be transported overseas.