

## **AGE DISCRIMINATION** **GUIDANCE TO CHAMBERS**

Following the introduction of new regulations on 1 October 2006, it is unlawful for barristers in self-employed practice and barristers' clerks to discriminate on the grounds of a person's age. The law states that they cannot discriminate against a pupil or tenant in their chambers, an applicant for pupillage or tenancy, or an employee of chambers, on the grounds of that person's age, unless the action can be justified.

This law is set out in the Employment Equality (Age) Regulations 2006. Regulation 15 specifically covers the actions of barristers in self-employed practice and their clerks.

“(1) It is unlawful for a barrister or a barrister's clerk, in relation to any offer of a pupillage or tenancy, to discriminate against a person –

- (a) in the arrangements which are made for the purpose of determining to whom the pupillage or tenancy should be offered;
- (b) in respect of any terms on which it is offered; or
- (c) by refusing, or deliberately not offering, it to him.

(2) It is unlawful for a barrister or a barrister's clerk, in relation to a pupil or a tenant in the set of chambers in question, to discriminate against him –

- (a) in respect of any terms applicable to him as a pupil or a tenant;
- (b) in the opportunities or training, or gaining experience, which are afforded him or denied him;
- (c) in the benefits which are afforded or denied to him; or
- (d) by terminating his pupillage, or subjecting him to any pressure to leave the chambers or other detriment.

(3) It is unlawful for a barrister or barrister's clerk, in relation to a pupillage or tenancy in the set of chambers in question, to subject to harassment a person who is, or has applied to be, a pupil or tenant.

(4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to a barrister, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.”

Discrimination can occur in two different ways - directly and indirectly. Whether the discrimination is direct or indirect it will be capable of being objectively justified if it is a proportionate means of achieving a legitimate aim.

### **Direct discrimination**

Direct discrimination occurs simply where the decision-maker treats person A less favourably than he or she treats, or would treat, person B, on the grounds of A's age. Where A shows that he or she has been treated less favourably than B, and there is

reasonable evidence that this may be on the grounds of age, the alleged discriminator will be found to have committed an act of unlawful discrimination unless the decision-maker can show that age played **no part at all** in the treatment afforded to A (or if he or she can justify the part that age played in the treatment). A person's age includes their perceived age.

Examples of direct age discrimination include:

- The clerks deciding not to give a brief to a young member of chambers because he or she looks too young or lacks gravitas.
- refusing to interview or consider for pupillage a person over the age of 55. This is direct discrimination on the grounds of the applicant's age. This is a decision that may be difficult to justify.
- Refusing to give certain levels of work carried out in certain courts or tribunals to tenants over a certain age. This is direct discrimination if based on age (as opposed to experience). It is difficult to see why it is justifiable to give work to certain people based only on age, and such a policy is therefore unlikely to be justifiable.

Chambers may have, within its constitution, a provision that allows for the immediate termination of a person's tenancy once they reach a certain age. This is a term on which tenancy is offered. It may well be directly discriminatory (because although there are exceptions in the 2006 Regulations where employees' retirement ages are concerned these exceptions do not at present cover barristers). Although Chambers may seek to justify such a constitutional provision on the basis that Chambers wishes to use its space and resources to build up and encourage the practices of younger barristers, such direct discrimination is unlikely to be regarded as proportionate.

In cases of direct age discrimination the age (or age group) will be an explicit factor. This is not the case in cases of indirect age discrimination.

### **Indirect discrimination**

Indirect discrimination occurs where the decision-maker applies to person A a "provision, criterion or practice" which he would or does apply equally to people of a different age group to A, but which has the consequence of placing those in the same age group as A at a particular disadvantage, and A is personally disadvantaged because of it. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.

Examples of indirect age discrimination include:

- A clerk refusing to allow certain criminal cases to be dealt with by those of less than 10 years' experience. This will place younger members of chambers at a particular disadvantage (for

example those in their 20's). However, if the reason for the decision genuinely relates to the need for senior juniors because of their experience, it is highly likely that this would be justified.

- Similarly, if a solicitor requests a barrister of a particular call or within a range of years of call: this could be justified if the aim is to ensure the most appropriate representation (in terms of skills and ability) for the client.
- Clerks should be advised that they can refer to lengths of call where it is relevant, i.e. where it indicates that a barrister will have a greater degree of skill in a particular field or a greater variety of experience. This is unlikely to be the case where the difference between two barristers' years of call is very slight.
- Where call is justifiably used as an indicator of experience and as securing a balance of experience in chambers is a legitimate aim, it would probably be justifiable to have regard to year of call when selecting tenants (less relevant for pupils).
- A chambers has a range of rental rates applied to its barristers. Those who are between 1 and 7 years call pay a certain rent; and those above 7 years' call pay a higher rate of rent. Such a policy is likely to have an indirectly discriminatory effect on age grounds because it will place older people at a particular disadvantage. However, such a decision is likely to be justified if the policy is in place to allow those who generally earn less (or those who have had less time to build a reputation) to pay less rent.

## **Justification**

An act of direct or indirect age discrimination can be justified (and so will not be unlawful) if the decision-maker (whether barristers or clerks) can prove that the action taken, or the provision, criterion, or practice used, is a "proportionate means of achieving a legitimate aim." This means the barrister and/or clerks ("the decision-makers") would need to be able to show that there is a legitimate reason not tainted by age discrimination for the decision taken, and that the decision-makers' legitimate aim could not be achieved by treatment or a policy that has a smaller discriminatory effect. The decision-makers must balance the discriminatory effects of the treatment or policy against the importance of the aim pursued by them, and if the disadvantage to the pupil or tenant subject to discrimination is not outweighed by the aims of the decision-makers, the decision will not be justified.

It is difficult to give guidance on examples of where discrimination might be justified (as authoritative guidance will only come from the employment tribunals and courts). However as an example:

- The clerk decides not to put a barrister forward for a brief because that barrister lacks sufficient experience. The legitimate aim of seeking to ensure that the client’s interests are properly served and the barrister’s practice develops in accordance with his or her abilities will probably justify the disadvantage at which the “experience” criteria places the younger members of chambers (subject to whether it is proportionate to treat them in this way in relation to that aim in the particular case).

## **Harassment**

The 2006 Regulations prohibit barristers and clerks from harassing a person on the ground of their age. Age-based harassment is unlawful if it has the *purpose or effect* of violating the complainant’s dignity; or if it creates an intimidating, hostile, degrading, humiliating or offensive environment for the complainant (“the Effect.”)

The test applied in deciding whether or not such harassment has taken place is, having regard to all the circumstances (including in particular the perception of the alleged complainant) *could the action of the alleged discriminator reasonably be considered to have had the Effect?*

Examples of harassment on the grounds of age would include targeting a person in a bullying fashion because of prejudices the discriminator may have about the ailments/attitudes of older or younger people. It will also cover making jokes about a person’s age, by reference to appearance, or using age-related expressions such as “granny” or “baby”.

## **Victimisation**

The 2006 Regulations also prohibit victimisation. Unlawful victimisation on the grounds of age occurs when person A discriminates against person B by treating B less favourably than he treats or would treat others in the same circumstances, and does so by reason that:

- B has made a complaint or brought legal proceedings in the past about age discrimination; or
- B has given evidence or information in any age discrimination related legal proceedings; or
- B has otherwise done anything under or by reference to the Regulations – for example, pursued an internal grievance relating to age; or
- B has alleged that A or another person has committed an act which does or would amount to unlawful age discrimination; or
- A knows that B intends to do any of the above or suspects B may have done any of these things.

The victimisation provisions apply even where the allegations made by B are false provided that they are not made in bad faith.

Unlawful victimisation, as defined above, cannot, unlike other forms of age discrimination, be justified.

### Instructions to discriminate

It is unlawful to give instructions to a person to discriminate unjustifiably. It is also unlawful to penalise a person for refusing to carry out a discriminatory instruction or for complaining about the instruction. Such discrimination cannot be justified.

### **Other matters**

The 2006 Regulations prevent a solicitor discriminating against a pupil or tenant on the grounds of his or her age, where the solicitor is involved in giving or withholding instructions to the pupil or barrister. A solicitor who engages in unlawful discrimination will be in breach of the Law Society's professional conduct rules on equal treatment.

Further, it is not just the front line decision-maker who can unlawfully discriminate on the grounds of age – a barrister or clerk will also act unlawfully if they instruct someone else to treat a pupil or tenant less favourably on the grounds of his or her age.

### **Employees**

The definitions of direct and indirect age discrimination, harassment and victimisation given above, apply equally in relation to chambers' relationships with its employees, the clerks and other administrative and secretarial staff. Any direct or indirect age discrimination can be committed by an individual barrister or any group of barristers who make decisions or mete out treatment which affects staff. Such discrimination may be capable of being justified by proving that decisions or action taken, or the policy implemented, pursues a legitimate aim and is proportionate.

This guidance does not deal with the employment provisions (and Chambers are advised to seek advice where appropriate in respect of their staff responsibilities). However as employers, Chambers may make use of the exceptions set out in the Regulations in respect of their staff. The exceptions include those relating to differentials in benefits. For example a difference in a bonus based on length of service may or may not need justification. If the length of service of the member of staff claiming parity is less than 5 years, no justification is necessary. Where his or her length of service is over 5 years Chambers will have to justify the bonus differential by reference to its reasonable belief that the way in which length of service is used promotes a business objective.

There is an exception for retirement of employees. Provided the procedure set out in the Regulations is followed, there will be no need to justify the use of a mandatory retirement age for Chambers' employees. There are several other exceptions contained in the Regulations.

## **Practical Advice**

Advice relating to best practice in relation to age discrimination as it affects barristers is similar to that provided for sex, race, religion, sexual orientation and disability discrimination. It is important for Chambers to monitor the numbers of applicants for pupillage and tenancy, and this should now be done on the basis of age or age groups. Chambers should look at its criteria for pupillage and tenancy selection to see whether those criteria discriminate unlawfully on age grounds. Chambers should also train members of its pupillage and tenancy selection committees about the need to avoid unlawful age discrimination.

The law does not prevent Chambers asking an applicant's age, but Chambers may be required to justify why it did so if a complaint is raised. We recommend that Chambers do not ask for age or date of birth on application forms but obtain this information on separate monitoring forms not disclosed to selectors. Chambers who ask for age/date of birth on the application form are running the risk that they could be taken to an employment tribunal and required to justify why they have a real need to know the age of every applicant for pupillage or tenancy. Where a person is rejected for a pupillage or tenancy, and they are in an older age bracket it would be wise to keep good notes of the reasons for the rejection. And if one of the reasons for the rejection is age, then it is essential to note the reason why reliance on age is considered to be justified. If age is used as a criterion consideration should be given to why it is justifiable to use it. Chambers should keep documentary evidence that it has considered the way in which age is used by it so that it can demonstrate that consideration was given to whether it was proportionate to use it in pursuit of a particular legitimate aim. It is sensible to consider the use that is made of age in advance of any particular case arising. Why is it necessary to use age as a factor in the decision that is to be made? When a particular case arises the discriminatory impact of the use of age in the particular case can then be considered in the light of a clear understanding of the legitimate aim that is being pursued.

Where the clerks, secretaries, receptionists and administrative staff are concerned it may be necessary for Chambers to take advice on contracts of employment (as well as any Chamber's policies which apply to the staff) to ensure that there is no unlawful age discrimination since the age discrimination legislation relating to employment is different in some respects from that affecting barristers, and this guidance does not deal with employment provisions in any detail.

In essence therefore Chambers must carefully scrutinise the need for age related criteria and should be prepared to justify age related factors in their decision making. If Chambers reviews a selection or other decision making process and finds that there is no objectively justifiable reason for using an age related factor, such a factor should not be used at all.