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12/12/2005 17:34

To: <agelegislation@ofmdfmi.gov.uk>
cc:
Subject: Age Legislation Consultation

To whom it may concern,
Please find attached our response to the consultation on the age regulations, apologies for the delay.

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Response Age Regulations.doc

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12 December 2005

To whom it may concern:

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ works on a broad range of human rights issues and its membership is drawn from across the community. CAJ's activities include - publishing reports, conducting research, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Over the years, CAJ has campaigned on a range of equality issues including fair employment, gender and race equality, children's rights issues and issues of disability discrimination. In addition, CAJ along with the trade union UNISON co-convenes the "Equality Coalition" a broad range of "Section 75" campaigning groups that aims to further the implementation of the equality provisions of the Northern Ireland Act.

Unfortunately we have not been able to provide you with detailed comments on the above consultation paper in time for the consultation deadline. We do however have some general points which we would wish to register with regard to this consultation. Our main concerns are listed below, and we hope that you find these comments useful.

Lack of Equality Impact Assessment

In general, CAJ is concerned that the proposals have not been subject to a full EQIA. Such a process would have examined the adverse impacts that are likely to result on younger workers experiencing the differential effects of the minimum wage, or the impact on older workers of the justifications allowed for direct discrimination. An EQIA would also have allowed for examination of the effects of the legislation on those experiencing multiple disadvantage, for example, such as older ethnic minority community members, younger women, etc.

Problems of Order in Council Approach

Given the importance of this legislation for the whole community in Northern Ireland it is regrettable that government chose to introduce the legislation by way of Order in Council, which allows no opportunity for debate or scrutiny of the proposals by the legislature.

Justifying Direct Age Discrimination

CAJ's main concern in relation to the current proposals is the fact that they allow for the justification of direct age discrimination. The consultation document offers mitigating measures by claiming that justification will only be "by reference to specific aims and only if it is appropriate and necessary in the particular circumstances". The consultation document also states that there will have to be supporting evidence produced if challenged, and that mere assertions will not be enough.

CAJ is of the view however that in practice this will mean that those wishing to ignore the legislation will be facilitated by this provision. We note, for example, that in relation to the explanations provided in the consultation document, examples state that (Page 20) "it would constitute direct age discrimination if an employer applied age limits for recruitment or promotion (without justification)".

The limitations in the legislation are also provided in the example on page 21 which states that

"if a job advert contains a maximum age limit for recruitment, there is clearly an age criterion, therefore this is direct age discrimination (whether it is unlawful age discrimination depends on whether the age limit can be objectively justified)".

Moving on to “objective justification”, the document states that making use of the test of objective justification in Articles 2 and 6 is not a requirement within the Directive, but an option for individual Member States implementing legislation. CAJ is of the view that this is not an appropriate way to proceed with the Regulations, and that the appropriate way to proceed with regard to this matter would be to restrict exceptions to either general occupational requirements or positive action measures.

CAJ also notes with concern the explanations provided in relation to the “objective justification” measure for direct discrimination. This states for example that in relation to “legitimate aim”, economic factors such as business needs and considerations of efficiency may also be “legitimate aims”. Indeed, throughout the consultation document, and by definition throughout the Regulations, the concept of justification of direct discrimination will serve to undermine these proposals.

Exemptions

The other problematic aspect of the legislation relates to the provisions surrounding exemptions. In particular, CAJ would be of the view that the exemptions proposed in the regulations are so broad as to dilute the principle of “non-discrimination” which the regulations were meant to address. We note with concern in particular the continued use of the discriminatory provisions around the national minimum wage which clearly discriminate directly against younger workers.

Retirement

CAJ has concerns about the concept of a default retirement age and is opposed to the fact that it will not constitute age discrimination if employers retire employees at or above the age of 65 “where there is a genuine retirement”. It should also be noted of course that under the proposals, employers will be entitled to retire anyone below the age of 65, provided that it can be “objectively justified”. The cumulative effect of the exemptions/justifications that have been worked into the legislation therefore is such that unscrupulous employers wishing to circumvent the legislation are likely to be able to do so with impunity. Furthermore, the complex system of justifications is likely to hinder and confuse complainants, limiting opportunities for redress on the part of those who have experienced age discrimination.

We also note that according to the consultation document (Page 62) the decision to have a default retirement age will be formally reviewed in 2011, and a decision on whether it is still necessary will be taken on a UK wide basis. CAJ is of the view that there should not be a delay until 2011 and that the option of the default

retirement age should be removed immediately. Where employees wish to work beyond the age of 65 they should have the option to do so. If however, employees chose to retire, again, that should be their choice. To force anyone who wishes to carry on working to retire, at least until 2011, is not an acceptable way to address the issue of age discrimination.

Occupational Pensions

Again, this is an area in which CAJ feels that exemptions/justifications allowed will severely impact on the ability of the legislation to address age discrimination.

Monitoring and Data

CAJ is also disappointed that the draft Regulations do not contain any obligation to collect information on the age profile of the workforce. We note that the document states that "it can be good practice to do so". However it would have been preferable had the Regulations introduced a requirement for employers to monitor the composition of their workforce, in the same way that this is required in relation to community background.

In summary, CAJ broadly welcomes these proposals as a positive contribution to the advancement of the rights of people across a range of age groups. However, given the extensive mechanisms for allowing continued discrimination where it may be "objectively justified," we are of the view that the proposals as drafted will have limited impact on the youngest and oldest workers, who are in fact those in most need of protection.

Yours sincerely,

Aideen Gilmore
Research and Policy Officer