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Subject: Age consultation response

30/11/2005 10:12

Please find attached the NASUWT response to the consultation on Employment Equality (Age) Regulations (Northern Ireland) 2006.

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**Office of the First Minister and Deputy Minister  
Employment Equality (Age) Regulations (Northern Ireland)  
2006  
30 November 2005**

1. NASUWT welcomes the opportunity to comment on the Employment Equality (Age) Regulations (Northern Ireland) 2006. This is a significant piece of legislation which will affect most employment areas.
2. NASUWT is the largest union representing teachers and headteachers in Northern Ireland and throughout the UK.

## **GENERAL COMMENTS**

3. NASUWT envisages practical difficulties for employers and workers to introduce these Regulations in the short timescale there will be between the enabling of the Regulations and the implementation date of October 2006. These Regulations have been in preparation for many years and the intention was that there would be plenty of time for employers and workers to fully understand and apply any necessary changes prior to the implementation date.
4. Many employers will be waiting until they see the detail of the new Regulations before taking any action and the guidance from the Equality Commission will not be available until after the Regulations have been approved by Parliament. This is likely to cause problems. For example, if a worker is to retire in October 2006, the notification of retirement should be given by employers between October 2005 and April 2006. The

Government will now need to promote intensely this legislation in order to avoid non-compliance.

5. The Regulations are unnecessarily complicated and in many ways substantially weaker than had previously been proposed by the Office of the First Minister and Deputy First Minister. In 'Promoting Equality of Opportunity' the Government stated clearly that direct age discrimination should only be justified in 'exceptional circumstances' and a list of legitimate aims would be set out in the Regulations. The Government has now decided not to provide a general test of justification and this lack of a closed list makes the Regulations less transparent and far more difficult to regulate.
6. NASUWT welcomes the decision to set the default retirement age at 65 rather than age 70 as was previously suggested. NASUWT believes that, although no default age would be ideal, at this stage a default retirement age is helpful for practical purposes and to limit the potential for confusion and disagreement. This legislation is only the start of a culture change which is needed to eradicate ageist attitudes in all workplaces.
7. NASUWT welcomes the fact that the Age Regulations will effectively exempt most age-related rules and practices in occupational pension schemes. The legislation should not be used by employers to downgrade entitlement to pensions or to put any compulsion on individuals to work to an extended age.
8. NASUWT is surprised that the calculation for the redundancy payment scheme is still undecided and expects to be further consulted on this issue at a later date. The level of statutory redundancy benefit remains unrealistically low and the statutory limit on one week's pay has failed to keep pace with increases in earnings since inception.

9. Effective trade union consultative structures provide the basis for the determination of fair retirement and agreed redundancy policies and allow for effective resolution of disputes. These Regulations will adversely impact on good collective agreements between employers and trade unions if, due to no action being taken, specific terms become void and benefits are reduced. The Age Equality Regulations should prohibit employers from unilaterally removing or levelling down employment benefits because of the implementation of the Regulations. Regulations must state that any requirement to change workplace employment benefits must be subject to full consultation and agreement with the recognised unions.

**NASUWT recommends that:**

- *there should be intense promotion of this legislation to raise awareness and to avoid non-compliance;*
- *steps should be taken to ensure that this legislation is not used by employers to downgrade entitlement to pensions or put any compulsion on individuals to work to an extended age;*
- *there should be further consultation with NASUWT and other trade unions when the Government has decided on the changes to be made to the statutory redundancy scheme;*
- *the Regulations should state that there must be no reduction or removal of any protection or employment-related benefits for a worker or group of workers in consequence of compliance with the Age Regulations;*
- *the Regulations should state that any changes that need to be made to workplace employment benefits must be subject to full consultation and agreement with the recognised unions;*
- *there should be full consultation with NASUWT and other trade unions on the Equality Commission guidance.*

## SPECIFIC COMMENTS

### Chapter 3 Prohibiting age discrimination

10. NASUWT welcomes the Government's application of Articles 1 to 3 of the EU Employment Directive to prohibit discrimination, harassment and victimisation on the grounds of age in relation to employment and vocational training.
11. The consultation document explains who will have rights and responsibilities under the Age Regulations. However, the term 'employment' has a very broad meaning and includes jobseekers, employees, the self-employed, contract workers, former employees, office holders, members of trade organisations and others. The guidance will need to expand on this to show clearly those who are not employed in the strict sense but who are contracted personally to do a piece of work and are also included.
12. NASUWT welcomes the commitment to the general review of discrimination law, which should help provide greater consistency in the level of protection for individuals and groups in the workplace and the wider civil arena. The Union believes that a Single Equality Act is preferable to numerous strands of discrimination legislation, and should provide greater coherence and improved redress for victims of discrimination.
13. NASUWT considers age discrimination should be removed from all aspects of life and the extension of protection from age discrimination in the areas of goods and services, although difficult, should be progressed as soon as possible.

14. The Regulations refer to age or 'apparent age' but the consultation document does not mention 'apparent age'. Section 3.33 does refer to discrimination based on the perception of someone's age, whether the perception is right or wrong. The guidance will need to clarify this further.
15. NASUWT acknowledges the Government's consistency in treating harassment and victimisation in line with other discrimination regulations and UK case law.

#### **Chapter 4 Justifying age discrimination**

16. In the Age Matters consultation NASUWT urged the Government to remove justifications for employment discrimination. The Union is disappointed that the current consultation document has retained a list of examples of legitimate exemptions. These are not in the Regulations and should not be included in explanatory notes or guidance as they will cause confusion.
17. Should the Government insist upon allowing employers to fix a maximum age for recruitment or promotion because of the need for a reasonable period of employment before retirement, the guidance will need to give examples of what would be considered to be a reasonable period. NASUWT considers that a maximum of one year would be appropriate.
18. NASUWT accepts that there should be a provision for genuine occupational requirements in the Age Regulations. The consultation document explains that this could only be used on very few occasions and the Union agrees that there cannot be many circumstances when it can be held to be justified. However, NASUWT considers that many employers will use the provision when it is not applicable and are concerned that it will be difficult to police to ensure that the rights of redress for individuals are secured. There will therefore probably be a number of test cases.

## Chapter 5 Exemptions

19. NASUWT accepts that the Regulations need to allow the use of length of service for some pay and non-pay employment benefits. For example, in the teaching profession full occupational sickness benefit is not attained until the fourth year of service. The Union therefore accepts the two exemptions, five years or less service and any length of service requirement that mirrors a similar requirement in a statutory benefit, as the most appropriate maximum lengths of time to avoid both unnecessary bureaucracy and the possibility of levelling down of benefits.
20. The guidance will need to emphasise to employers that they will need to consider carefully whether using length-of-service criteria could discriminate against women workers, carers and disabled persons who are more likely to experience breaks in service for family and other reasons.
21. Length-of-service-based exemptions for reasons of loyalty, motivation or experience in respect of pay and benefits is extremely complex and the guidance will need to show a number of practical examples of acceptable age discriminatory uses to assist both employers and employees in understanding their rights.
22. NASUWT has some concerns with the use of 'loyalty' in the legislation. The guidance will need to give very specific information and examples about issues such as rewarding staff loyalty, otherwise this could be open to abuse.
23. The ABC of the general provision to be fulfilled in order to use length-of-service criteria – aim, business benefit, consistency for all staff – is clearly stated. The guidance should clearly show that unions must be consulted fully in considering whether all existing length-of-service benefits meet the provisions. NASUWT would expect that most existing benefits in relation to length of service will be maintained. The Union will oppose employers

removing or levelling down any benefits without full consultation and negotiation.

**NASUWT recommends that:**

- *there must be full and effective consultation and negotiation with NASUWT and other trade unions by employers with regard to the implementation of any changes to employment benefits as a consequence of the Age Regulations;*
- *the Regulations should prohibit employers from removing or levelling down employment benefits on the basis of implementing the Regulations.*

## **Chapter 6 Retirement**

24. NASUWT strongly recommends that all guidance must state very clearly that retirement age and normal pension age are completely separate. The legislation must not be used in any way to downgrade entitlement to pension.

25. More than half of the population will be 45 or over by the next decade and employers will need to have retirement policies that give genuine employee choice and flexibility. This will encourage workers to continue in employment for longer by giving them the opportunity to move into an easy transition to full retirement, perhaps via part-time work.

26. NASUWT considers the definition of planned retirement, which states that the employer has informed the employee of the retirement date at least six months in advance, is unfair and complicated and should be omitted or amended. Retirement at the employer's normal retirement age or at the default age is understandably 'planned'. However, the employer only

having to give six months' notice of a retirement date cannot be treated as a 'planned' retirement. An organisation could currently have a retirement age of 63 and because of the legislation decide to remove it and not have a set retirement age. They could then under this section of the Regulations give staff of 60 and over six months' notice of 'planned' retirement. This would completely undermine the whole purpose of implementing age discrimination legislation.

27. In the circumstances, the consultation proposes that the burden of proof in challenging the decision would be with the employee; this cannot be accepted. The fact that the employer has given six months' notice of the date should not absolve the employer against claims from an employee under the age of 65.

28. This section of the legislation needs to be reconsidered and NASUWT suggests that if the third criteria for 'planned' retirement is retained it should clearly state that it will only apply if the worker is over the age of 65.

**NASUWT recommends that:**

- ***guidance should clearly state that retirement age and normal pension age are completely separate;***
- ***planned retirement only refers to an agreed, objectively justified retirement age or retirement at age 65 or older.***

29. NASUWT welcomes the employer's duty-to-consider procedure whereby the worker when notified of the date of retirement can request not to retire. Unfortunately, the procedure proposed is extremely limited as there is no adequate redress for the employee. The employer only has to complete the following procedure:

- listen to the worker's request at a meeting;
- inform the worker there is no change to the retirement date;
- read an appeal submission;
- again state that the retirement will proceed.

Under these circumstances, a planned retirement would go ahead without the employer needing to give any reason for refusing the request. The employer should have to give, in writing, reasons for refusing a request and have a transparent decision-making process.

**NASUWT recommends that:**

- *the Regulations should require the employer to identify in writing reasons why a request not to retire is rejected.*

30. The maximum compensation of eight weeks' pay for failure to inform the worker of the retirement date and duty-to-consider procedure is inadequate and undermines the idea of a fair consideration of retirement-based claims.

31. Schedule 6(3) of the Regulations states that the employer can comply with the notice of dismissal on retirement until the 14th day before dismissal. This cannot be considered as fair employment practice for giving notice of dismissal. The minimum notice should be normal contractual or statutory notice, whichever is the greater. This will give the employee a reasonable period to consider whether to make a request not to retire on the intended date and give the employer time for the meeting, decision and, if necessary, appeal.

**NASUWT recommends that:**

- ***the 14th day before dismissal should be amended to contractual or statutory notice, whichever is the greater.***

32. Regulation 7(9) of Schedule 6 states that the appeal need not take place before the dismissal takes effect. In practical terms, this would mean the worker had retired, possibly with a retirement party and gifts, and then the employer decides whether the appeal following the right to request not to retire should be accepted. However, once the worker has retired, the appeal process would become meaningless and prejudiced, as the employer is almost certainly not going to agree to a return.

33. NASUWT considers the appeal should take place before the retirement date and only in exceptional circumstances when in practical terms the appeal cannot be completed before the retirement date and the Regulations should then be allowed.

**NASUWT recommends that:**

- ***the Regulations should be amended to ensure that, in all but exceptional circumstances, the appeal process should be completed before the retirement date.***

## Chapter 7 Occupational pensions

34. NASUWT welcomes the Government's intention not to undermine the provision of occupational pensions by exempting most age-related rules in schemes.

## Chapter 8 Changes to employment legislation

35. NASUWT is disappointed that the two-year period of qualifying service has been retained in the statutory redundancy payment scheme.

36. NASUWT welcomes the removal of the upper and lower age ranges, and removal of the tapering-down rule in the redundancy scheme.

37. The level of statutory redundancy benefits remains unrealistically low. The statutory limit of the week's pay has failed to keep pace with increases in earnings since inception and this should now be improved.

38. NASUWT is surprised that the Government has yet to identify the preferred method of calculating compensation based on service criteria. NASUWT expects to have a further opportunity to comment on the Government's proposals at the appropriate time.

39. NASUWT recommends a significant increase in the statutory week's pay and that redundancy payments are based on a multiplier of at least one and a half weeks' pay for each year of continuous service.

### **NASUWT recommends that:**

- ***there is a significant increase in the statutory week's pay and annual increases reflect at least the average earnings increase;***

- ***redundancy payments are based on a multiplier of at least one and a half weeks' pay for each year of continuous service.***

40. NASUWT welcomes the amendments to unfair dismissal compensation in respect of the removal of the upper age limit.

Chris Keates

**General Secretary**

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