

Objective Justification

Direct and Indirect Age Discrimination will be lawful provided the difference in treatment can be objectively justified. This is the first time that direct discrimination can be justified.

The test of objective justification consists of two elements:

- Pursuing a legitimate aim; and
- Proportionality.

Where an employer treats an employee less favourably than other persons on the basis of his/her age or his/her apparent age, unless that treatment can be objectively justified.

Legitimate aim

For an aim to be legitimate it must correspond with a real need on the part of the employer. Employers will need to provide evidence of the legitimate aim and not merely make assertions about it.

According to the DTI Consultation on the draft Employment Equality (Age) Regulations 2006 a legitimate aim can encompass:

- Health, welfare and safety (including protection of young or older people)
- Facilitation of employment planning
- Particular training requirements
- Encouraging and rewarding loyalty
- The need for a reasonable period of employment before retirement
- Recruiting or retaining older people.

Proportionality

If the discriminatory treatment, provision, criteria or practice pursues a legitimate aim, it still needs to be proportionate. Although in general terms "proportionate" means that the method of pursuing the aim must be "appropriate and necessary" this is not an absolute test but involves balancing the discriminatory effects of a measure with the importance of the aim pursued.

The discriminatory treatment, provision, criterion or practice must actively contribute to the pursuit of the legitimate aim. For example if the stated aim is to encourage loyalty then the employer must be satisfied that using an age related provision will actually encourage loyalty.

There must always be a balance between the importance of the legitimate aim and the adverse impact of the discriminatory practice. For example if the legitimate aim is to protect health and safety then a more significant adverse discriminatory impact may be acceptable than when the legitimate aim is less important, for example it is simply rewarding loyalty.

Employers must always consider whether the legitimate aim can be achieved by other measures which do not have such a discriminatory effect. Evidence that an employer has considered other alternatives is key if the discrimination is to be justified.

Cost

Employers are bound to ask whether cost can ever objectively justify discriminatory treatment. The DTI states that although economic factors (such as business needs and considerations of efficiency) may be legitimate aims, discrimination will not be justified merely because it may be more expensive not to discriminate. Until there is established case law on this, a practical interpretation is that although cost may amount to a legitimate aim it can only be taken into account along with other legitimate aims in determining whether or not a particular treatment is proportionate.