

decision in *Rowland v Divall* (1923) would appear to have been based on total failure of consideration (see Chapter 14).

### Payments made under a mistake

This is a further aspect of restitution by use of an implied promise in the recipient to repay the sum(s) involved.

#### *Payment under a mistake of fact*

A claim lies (derived from the old action for money had and received) where money has been paid under a mistake of fact. The error may arise from an error in calculation as where defective arithmetic causes a debtor to pay more than he owes the creditor or where there is duplication of an item again in the debtor's accounts so that he pays it twice.

#### *Payment under mistake of law*

Until recent times, there was no claim for money paid under mistake of law. However, the House of Lords overturned this old rule in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 where their Lordships ruled that money paid under a contract which was *ultra vires* or beyond the legal powers of the Council was nevertheless recoverable by the claimant who had made the payment.

## Limitation of actions

Contractual obligations are not enforceable for all time. After a certain period the law bars any remedy in the main because evidence becomes less reliable with the passage of time. Time is the greatest enemy of the truth! The Limitation Act 1980 lays down the general periods within which an action may be brought. They are as follows.

(a) An action on a simple contract may be brought within six years from the date when the cause of action accrued.

As we have already noted, where the parties are broadly of equal bargaining power the above period of six years can be reduced by a term of the contract, in the relevant case to nine months after the provision of a service (see *Granville Oil and Chemicals Ltd v Davis Turner & Co Ltd* (2003) (unreported), Chapter 9). The case is not on its facts applicable to deeds.

(b) An action upon a contract made by deed may be brought within 12 years from the date when the cause of action accrued.

Where the claimant's claims include a claim for damages in respect of personal injury, the period is three years.

A person may suffer personal injury the extent of which only comes to light more than three years after the breach of contract which caused it. For example, A is a passenger on B's coach and B's careless driving causes an accident as a result of which A suffers injury consisting of bruising of the face. Four years later A goes blind as a result of the accident. Under the Limitation Act 1980, A has three years from his knowledge of the blindness to sue B and the court's permission is not required. The court may extend this period at its discretion, though in this case application must be made to the court for the extension.

A right of action 'accrues' from the moment when breach occurs, not from the date when the contract was made. Thus, if money is lent today for four years, the creditor's right to recover it will not expire until 10 years from today.

If when the cause of action accrues the claimant is under a disability by reason of minority or unsoundness of mind, the period will not run until the disability is ended or until his death, whichever comes first. Once the period has started to run, subsequent insanity has no effect.

If the claimant is the victim of fraud or acts under a mistake or deliberate concealment, the limitation period will not begin to run until the true state of affairs is discovered or should with reasonable diligence have been discovered.

*Lynn v Bamber*, 1930 – Limitation of actions where there is fraud, etc. (248)



The Limitation Act does not truly discharge a contract, which is why it has been dealt with separately here. The Act merely makes the contract unenforceable in a court of law and if the defendant does not plead the statutes of limitation, the judge will enforce the contract. In addition, where the contractual claim is not for damages but for a debt or other liquidated (i.e. ascertained) demand, time for making a claim can be extended by a subsequent payment of money not appropriated by the debtor, because, as we have seen, the creditor can appropriate it, or by the debtor or his duly authorised agent making a written acknowledgement of the debt to the creditor or his agent. Time begins to run again from the date of the acknowledgement. However, once a debt is statute-barred, it cannot be revived by acknowledgement in this way (Limitation Act 1980, s 29). Electronic acknowledgement by telex was held valid by the Court of Appeal in *Good Challenger Navegante SA v MetalExportImport SA* [2004] 1 Lloyd's Rep 67.

Equitable remedies, i.e. specific performance or an injunction, are not covered by the ordinary limitation periods but will usually be barred much earlier under general equitable rules. An equitable remedy must be sought promptly and, according to the nature of the contract, a short delay of weeks or even days may bar the remedy.

Finally, the enforcement of a judgment debt does not become statute-barred by lapse of time under s 24 of the Limitation Act 1980 so that a judgment once obtained can be enforced, e.g. by a sale of the defendant's goods even though the relevant statutory period has elapsed. The amount of interest recoverable from the judgment until payment is similarly not limited to the relevant period but is limited to six years before the judgment is executed. Thus, if A obtains a judgment against B in 1998, he can still execute it to take the defendant's property for sale even though he leaves it until, say, 2005 to execute it. However, he can only recover interest on the judgment for six years prior to 2005 (*Lowsley v Forbes* (1996) *The Times*, 5 April).

## Reform

In 2001 the Law Commission issued a report entitled *Limitation of Actions*. The report recommends a single regime of periods of limitation to be applied to all claims. There would be:

- *A primary limitation period of three years* from the date on which the claimant knew or ought reasonably to have known the relevant facts with a long stop period of ten years starting from the date on which the relevant events occurred.
- *Exceptionally personal injury claims* would only be subject to the three-year limitation period and not the 10-year period. The court would then have a discretion to disapply the primary period in appropriate cases.
- *Claims to recover land* would not fall under the main regime but would be subjected to a 10-year limitation period that will run from the date on which the cause of action accrued.

At the time of writing, no further action has been taken.

## EMPLOYMENT RIGHTS

An ever-increasing feature of contract law is the way in which particular contracts are controlled by legislation to which the general principles of contract law yield; nowhere is this more obvious than in the contract of employment. Accordingly, the main features of this legislation, which are so important in all walks of business life, are given below.

### Recruitment and selection of employees

Here the prospective employer must take account of discrimination legislation. The Equal Opportunities Commission set up under the Sex Discrimination Act 1975 (SDA) has the duty to work towards the elimination of discrimination on the grounds of sex. The Race Relations Act 1976 (RRA) sets up the Commission for Racial Equality with powers much the same as the Equal Opportunities Commission. The Disability Rights Commission set up under the Disability Discrimination Act 1995 (DDA) has similar powers. The government intends to create one commission to deal with all of the ever growing areas of discrimination liability. This has been initiated by the Equality Act 2006. It provides for the setting up of the Commission for Equality and Human Rights. The government has stated that the new Commission will become operative in 2007 with all Commissions and matters of discrimination being incorporated in 2008/09.

It is unlawful for a prospective employer (and an employer) to discriminate between applicants for jobs on the grounds of sex or marital status, colour, race, nationality or ethnic or national origins or on the grounds of sexual orientation, religion or belief, gender reassignment or age.

It is also unlawful to publish an advertisement which could be interpreted as discriminatory. Thus job descriptions such as 'waiter' and 'salesgirl' have largely disappeared from our newspapers. However, one still sees advertisements which are clearly intended to attract female employees which are nevertheless within the law, e.g. 'publishing director requires sophisticated PA/secretary with style and charm who can remain cool under pressure'.

Under the SDA it is unlawful for a person to discriminate against another on grounds of sex or on grounds of marital status when determining who will be offered a job and in regard to the terms and conditions of the job. There are exceptions where the sex or marital status of the person required is a genuine occupational qualification (GOQ), e.g. for reasons of physiology (as in the employment of a model) or for reasons of decency or privacy (as in the case of

an attendant in a public lavatory) or where the job is one of two held by a married couple, as where the woman is to be a housekeeper living in with her husband who is to be employed as a gardener or a married couple is required to manage a club and live in.

## Sex and race discrimination

Discrimination may be direct or indirect.

**Direct discrimination.** There is direct discrimination against a person if on the ground of race or sex that person is treated less favourably than a white or male person would be. This covers the usual scenario though, of course, both white and male persons can be discriminated against, but there is little case law on this.

**Indirect discrimination.** This occurs, e.g., where an employer has applied requirements or conditions to a job but the ability of some persons to comply because of sex, marital status or race is considerably smaller and cannot be justified.

### Examples

- A company wishes to appoint a black woman to supervise a call centre but changes its mind when some of the white operators object. *This is direct racial discrimination.*
- A firm wishes to appoint a woman to a post as senior manager but she will be dealing mainly with one particular client who says he would prefer to work with a man. The firm, therefore, appoints a man instead. *This is direct sexual discrimination by the employer.*
- A company has a strict office rule that women may not wear trousers in the office. A Muslim woman who applies for a job with the company is unable to comply with this rule because religion and custom forbid the wearing of skirts and she must cover her legs. The proportion of the members of her racial group who can comply is considerably smaller than the proportion of other persons who can comply, although religious discrimination as such is not forbidden. *This is indirect discrimination under the RRA but also now the discrimination rules relating to religion or belief.*

An employer need not take the above applicants into work, but if he does not, he faces a claim for compensation. There may also be a genuine occupational qualification (see below).

However, s 7(4) of the SDA imposes a duty on employers to take reasonable steps to avoid relying on GOQ exceptions, so that where the employer already has sufficient female staff in a department store to, say, measure women for clothing, it may be unlawful not to employ a man for other duties in the relevant department of the store, e.g. in the women's shoe section or even in the clothing department if the job does not include intimate contact with the customers.

It should be noted that it is unlawful in *all* partnerships to discriminate on the grounds of race in regard to the selection of new partners and benefits, facilities, or services given to partners, unless a GOQ applies. Sex discrimination is unlawful in partnerships of all sizes and sex and race discrimination is unlawful in all companies and by sole traders, no matter how small the workforce.

It is also contrary to law to give unfavourable treatment to a person by way of *victimisation*. This occurs where, e.g., the person has taken proceedings in respect of discrimination or has threatened to do so, as where an employer refuses a job to a female applicant because she is involved in an unresolved sexual harassment case as in *Cornelius v Manpower Services Commission* (SXD 36117/86).

As regards race, it is lawful to discriminate where there is a GOQ for the job as, for example, in the employment of a West Indian social worker or probation officer to deal with problems relating to young persons of West Indian extraction. Other instances are dramatic

performances or other entertainment, artists or photographic models and employment in places serving food or drink to be purchased and *consumed* on the premises by the public. Thus, being Chinese is a GOQ for employment in a Chinese restaurant, but not necessarily in a 'take-away'.

## Exceptions

(a) **Work outside Great Britain.** Race, sex and disability discrimination legislation does not apply to work which is done wholly outside Great Britain.

However, under discrimination regulations passed to implement the EU Equal Treatment Directive a person who works or is to work wholly outside Great Britain will be able to use the discrimination laws if:

- the employer has a place of business at an establishment in Great Britain; and
- the work is for the purposes of that business; and
- the employee is ordinarily resident in Great Britain at the time when he applies for or is offered the employment or is so resident at any time during the employment.

(b) **Under s 5 of the Employment Act 1989.** Under these provisions the appointment of head teachers in schools and colleges may be restricted to members of a religious order where such a restriction is contained in a trust deed or other relevant instrument setting up the school or college. This is still the case in spite of the rules rendering unlawful discrimination on the grounds of religion or belief.

## Enforcement

As regards enforcement, those who believe they have been discriminated against may complain to an employment tribunal within three months of the date of the act complained of. A conciliation officer of the Advisory Conciliation and Arbitration Service will try to settle the complaint without the need for a tribunal hearing.

In addition, it is possible once in employment for an employer and employee to settle a dispute by a binding agreement, called a compromise contract or agreement, in which the employee waives the right to bring or continue with a claim before an employment tribunal relating to the dispute in question. However, it is essential that the employee has received independent legal advice before entering into the contract.

If the matter goes to a tribunal, the tribunal may make an order declaring the rights of the parties in relation to the complaint. In addition, it may make an order for compensation, without limit as to amount, which could cover loss of prospective earnings and injured feelings. It may also recommend that the employer take, within a specified period, action which appears to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect of any act of discrimination on which the complaint is based. Proceedings (relating for example to discriminatory advertisements and instructions to discriminate) will in future only be instituted by the Commission for Equality and Human Rights.

*Johnson v Timber Tailors (Midlands)*, 1978 – Racial discrimination (249)

*Sisley v Britannia Security Systems*, 1983 – A matter of decency (250)



## Trade union members and non-members

Discrimination against job applicants on the ground of trade union membership or non-membership is dealt with in much the same way as other forms of discrimination. It is

unlawful to refuse employment to a person because he or she is or is not a member of a trade union or is unwilling to become or remain a member. Application to a tribunal must be made within three months of the date of refusal and there is no cap on awards.

## Discrimination against the disabled

The Disability Discrimination Act 1995 applies as follows.

### *Applicants for employment*

It is unlawful to discriminate against disabled persons in deciding whom to interview, whom to give the job to and the terms of the offer. The potential employer has a defence if he believes on reasonable grounds that the nature of the disability will substantially affect the disabled person's ability to carry out the required task(s).

Employers are required to make reasonable adjustments in the working conditions and the workplace to accommodate disabled persons, but cost may be taken into account in deciding what is reasonable.

Reasonable adjustments include changes to the physical environment, such as widening a doorway to allow for wheelchair access. Also included are changes to arrangements in the workplace, such as flexible working hours, purchasing specialised equipment and allowing time off for treatment. If the employer rents his premises, the landlord cannot reasonably refuse permission to accommodate the disabled person(s), however, the landlord may require that the premises be returned to their original condition when vacated. Unreasonable refusal to make changes by a landlord can result in a claim for discrimination before an employment tribunal which can recommend steps to be taken by the landlord, refusal to take these steps resulting in increased money compensation.

These provisions have effect on the GOQ rules that apply more clearly in other areas of discrimination. With a disabled person the occupational qualification, i.e. for a non-disabled person can often be overcome by making adjustments in the workplace.

### *Exceptions*

The 1995 Act only applies to employers who employ 15 or more people. This exception is removed from 1 October 2004 by the Disability Discrimination Act 1995 (Amendment) Regulations 2003. The disability discrimination rules will from then on apply to all employers, though it does not apply to operational staff in the prison service or fire service. Complaints must be made to a tribunal within three months of the act complained of and monetary compensation can be awarded. There is no cap upon the amount.

### *Disability defined*

The 1995 Act defines disability as 'a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities'. Impairment includes things such as blindness, deafness or learning disabilities and mental illness. 'Substantial' means more than a minor or trivial problem. 'Long-term' means effects that have lasted at least 12 months or are likely to last for the rest of the person's life. Persons are covered by the Act if they have a severe disfigurement, even though it may not have any effect on the ability to carry out normal activities.

'Day-to-day' activities are defined as activities that involve moving from place to place, manual dexterity, physical co-ordination, continence, the ability to lift, carry or move objects, speech, hearing or eyesight, memory or the ability to concentrate, learn or understand and being able to recognise physical danger. The definition includes persons who have

had a disability in the past, even if they no longer have it. This follows a government pledge to include those with a history of disablement. Medication or equipment that helps the disabled person is ignored, but glasses or contact lenses are not. It is the disability *with* the glasses or contact lenses which is considered.

The Disability Discrimination Act 2005 extends the definition of 'disability' specifically to cover those with HIV infection, cancer and multiple sclerosis *from the time of diagnosis*. The 1995 Act required that they had reached a significantly disabling point. Furthermore, the requirement in the DDA 1995 that a mental illness must be 'clinically well recognised' is removed.

The DDA 2005 also carries provisions relating to discriminatory advertisements which were not in the DDA 1995.

### Enforcement

This is by application to an employment tribunal within three months of the discriminatory act. Damages for financial loss or hurt feelings is recoverable with no cap on the award.

### Discrimination against transsexuals

The decision of the ECJ in *P v S and Cornwall CC* [1996] IRLR 347 was to the effect that the SDA 1975 should be applied to discrimination in connection with gender reassignment. The decision was confined to the public sector on the basis of the direct effect of EU law on 'emanations of the state'. However, in *Chesington World of Adventure Ltd v Reed* [1997] IRLR 556 the Employment Appeal Tribunal ruled that it was possible to interpret the SDA 1975 as applying to prohibit discrimination in connection with gender assignment in the private sector. The position now is that the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) have inserted s 2A into the SDA 1975 and this prohibits direct discrimination against a person on the grounds that he or she intends to undergo, is undergoing or has undergone gender reassignment. *This provision regulates equal pay in this area rather than the Equal Pay Act 1970.*

Section 2A does not protect against indirect discrimination but the EU Equal Treatment Directive would appear to do so. In addition, s 2A applies only in the context of employment and vocational training. In view of the probable contravention of the Equal Treatment Directive, UK law may require further amendment.

### Restricted reporting orders

It is, of course, important in the above cases that confidentiality be preserved. In this connection, procedural rules for cases in the High Court allow for restricted reporting orders to be made. There is now *specific* power to make such orders in current rules relating to tribunals.

### Genuine occupational qualifications

The SDA 1975, as amended, provides for GOQ exceptions to this form of discrimination. However, the alleged GOQ must be accepted by the court or tribunal. For example the Court of Appeal decided in *A v Chief Constable of West Yorkshire* [2003] 1 All ER 593 that a person who had declared to the employer on interview that she was a male to female transsexual was discriminated against on the grounds of sex when she was refused a post as a woman police officer because by law certain searches had to be conducted by a person of the same sex. The claimant was prepared to declare the gender change at the time of search.

On the facts of this case a person who had become the acquired gender after following the procedures set out in the Gender Recognition Act 2004 would be discriminated against



without court approval because the SDA 1975 is amended by the 2004 Act to give statutory recognition to the acquired gender.

### **Human rights**

Although transsexuals have some protection as regards employment and vocational training under UK discrimination legislation, the European Court of Human Rights is extending protection by applying the Convention on Human Rights. Thus in *Goodwin v UK* [2002] IRLR 664 the ECHR considered the case of a male to female transsexual who complained of discrimination in that she was still regarded as a man for the purposes of retiring age, i.e. 65 not 60 and the requirement to pay national insurance contributions after age 60. Such contributions cease on reaching state retirement age. The ECHR ruled that Art 8 of the Convention (right to respect for private and family life) had been infringed.

## **Discrimination on the grounds of sexual orientation**

### ***The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)***

They apply from 1 December 2003. The regulations make it unlawful to discriminate on the grounds that a person is gay, heterosexual or bisexual in employment and vocational training. They prohibit direct and indirect discrimination in recruitment and victimisation and harassment once in employment. All partnerships of whatever size are covered.

**Genuine occupational requirements (GORs).** The regulations use the expression 'genuine occupational requirement' rather than a reference to a 'genuine occupational qualification'. The practical effect is the same. Importantly the regulations make clear that a GOR can exempt an otherwise unlawful discrimination. There is a specific GOR for the purposes of 'an organised religion' that would allow such a religion to exclude, e.g., gay clergy.

**Positive discrimination.** The regulations allow positive discrimination in regard to training where it reasonably appears to the person initiating the positive discrimination that it will prevent or compensate for disadvantages linked to sexual orientation suffered by persons of that sexual orientation doing certain types of work or likely to take it up. This substitutes for the test in other areas which is that workers covered are under-represented in the workforce which would not be easily ascertainable in terms of sexual orientation.

**Marital status.** The regulations do not prohibit anything such as a term of employment that prevents access to a benefit by reference to marital status. Obviously discrimination on the grounds of marital status is unlawful under the SDA 1975 so that it would be unlawful to exclude married persons from benefits. However, only persons who are married according to law can regard themselves as within the protection of marital status. Persons of the same sex living together are not within the protection offered by marital status.

**Pensions.** It is unlawful for an employer to discriminate against a person on the grounds of sexual orientation in relation to membership of a pension scheme. The regulations do not extend protection to the trustees and the managers of schemes. Provisions covering these persons have now been made and are in force.

**Claims jurisdiction.** Claims may be brought before employment tribunals in line with the time limits set for other discrimination claims. There is no cap on compensation.

**Direct and indirect discrimination: definitions.** Although the Religion and Belief Regulations are considered more fully below, it is convenient to deal with the definitions here because they are similar to those for sexual orientation.



**Direct discrimination.** The SDA, the RRA and the Sexual Orientation and the Religion and Belief Regulations all use the same method for identifying direct discrimination, i.e. less favourable treatment by comparing the treatment of the alleged victim with that of an actual or hypothetical comparator not of the same sex, race or sexual orientation or not of the same religion or belief.

**Indirect discrimination.** The Sexual Orientation and the Religion and Belief Regulations both use the same basic test and state that a person (A) discriminates against another (B) if: A applies to B a provision, criterion or *practice* which he applies or would apply equally to persons not of the same sexual orientation or religion or belief but which –

- puts or would put persons of the same sexual orientation or religion or belief as B at a particular disadvantage when compared with other persons;
- puts B at that disadvantage; and
- A cannot show this to be a proportionate means of achieving a legitimate aim.

No doubt tribunal case law will soon start to interpret the above provisions. It is, however, worth noting that *informal practices* can be indirectly discriminatory under the test as well as contractual requirements.

## Discrimination on the grounds of religion and belief

The Employment Equality (Religion and Belief) Regulations 2003 (SI 2003/1660) apply from 2 December 2003. Prior to the coming into force of the regulations some religious groups have been able to claim protection under the RRA 1976, e.g. Jews and Sikhs. However, the Religion and Belief Regulations introduce for the first time a general protection from discrimination on the grounds of religion or belief. This is defined by the regulations as any religion, religious belief or philosophical belief. It is thought that political beliefs will not fall within the regulations. As to what is a religion or belief, it is likely that tribunals will see the need for factors such as collective worship, a clear belief system and/or a profound belief affecting a person's way of life and view of the world when deciding whether in the circumstances the regulations should be applied.

**Direct and indirect discrimination.** These matters have already been considered when dealing with the sexual orientation regulations. There is, however, a specific instance of indirect discrimination regarding Sikhs. Under this provision the requirement that those on construction sites must wear helmets would, by excluding Sikhs, be a form of indirect discrimination against them. It would be a requirement that they could not meet because of a religious requirement to wear a turban. The regulations here are consistent with s 11 of the Employment Act 1989 that exempts Sikhs generally from requirements to wear safety helmets on construction sites.

**Genuine occupational requirements.** There is a general GOR provision in regard to the Religion or Belief Regulations that is the same as the GOR for sexual orientation and has already been considered. There is also an additional GOR that applies where being of a particular religion is a *proportionate* requirement for the job.

**Positive discrimination.** The regulations contain an exception to allow positive discrimination on the lines of the Sexual Orientation Regulations.

**Pensions.** The government has taken the same position here as it has for sexual orientation.

**Claims jurisdiction.** The Religion and Belief Regulations take the same position as regards the forum for claims as do the Sexual Orientation Regulations. Once again, there is no cap on compensation.

The Equality Act 2006 makes amendments in the 2003 regulations as follows:

- The regulations are extended to cover discrimination against those who lack religion or belief and the requirement that a philosophical belief be similar to a religious belief is dropped.
- There is also an amendment to the regulations to make clear the fact that direct discrimination can occur even if it is another person's religion or belief and not the victim's which constitutes the grounds for discrimination, as where a manager discriminates against an employee on the basis that the victim associates with a person of a particular religion or belief. For example, an anti-semitic manager may discriminate unlawfully against an employee who associates with a member of the Jewish community.

### Some case law

Some examples of claims under the regulations are coming before tribunals. Thus, in *Williams-Drabble v Pathway Care Solutions Ltd* [2005] IDS Brief 776 an employment tribunal ruled that where an employer changed a Christian employee's hours so that she had to work on Sundays there was indirect religious discrimination under the Religion or Belief Regulations. It was a condition of working that made it difficult for Ms Drabble to comply with since she could not attend Sunday service. The employer was on notice that she was a practising Christian.

In *Brooks v Findlay Industries Ltd* [2005] IDS Brief 784 Mr Brooks, a homosexual, was employed by Findlay. He did not want his homosexuality to be known to his fellow workers. His line manager, who knew, informed the human resources manager in order to joke with him about this and rumour spread among the workforce and Mr Brooks was subjected to inappropriate and insulting remarks. A tribunal held that Mr Brooks had been subjected to conduct which fell within the sexual orientation regulations. The acts constituted direct discrimination against Mr Brooks.

### Discrimination on the grounds of age

The Employment Equality (Age) Regulations 2006 (SI 2006/1031) came into force on 1 October 2006.

#### *The regulations generally*

The regulations follow the existing regulations on sex, race, religion or belief and sexual orientation:

- Direct and indirect discrimination on the grounds of age are unlawful and so is victimisation and harassment.
- There is an exception where there is a genuine occupational requirement where 'possessing a characteristic related to age' is concerned, provided it is proportionate to apply that requirement in a particular case – for example, if a person is producing a play which has parts for older or younger characters. Thus, a 60-year-old who was turned down for the part of Peter Pan could hardly claim discrimination!

- Positive action is allowed to encourage 'persons of a particular age' to take advantage of employment opportunities where this 'prevents or compensates for disadvantages linked to age suffered by persons of that age who do the work'.
- Claims may be brought in employment matters before an employment tribunal and potential claimants may serve a questionnaire to obtain information from a potential defendant. The county court will take claims in non-employment areas, e.g. discrimination in further or higher education.
- Post-termination discrimination is covered as where the ex-employer refuses a reference.
- Employees are obviously covered but also the self-employed, partners in a partnership, contract workers, office holders, members of trade organisations and those in vocational training are included.

The regulations apply in the case of age discrimination in terms both of recruitment and once in employment.

### Exceptions

Regulation 3 provides that discriminatory treatment may be justified if it is a proportionate means of achieving a legitimate aim. This applies to direct and indirect discrimination. Examples given are:

- The setting of age requirements to ensure the protection or promote the vocational integration of people in a particular age group. This could include the health, welfare and safety of the individual, including protection of young people or older workers.
- The fixing of a minimum age to qualify for certain advantages linked to employment or an occupation so as to recruit or retain older people where perhaps these are under-represented in the workforce. This could include travel facilities and gift vouchers.
- The fixing of a maximum age for recruitment which is based upon the training requirements of the post or the need for a reasonable period in post before retirement. This is a general rule but the regulations provide more specifically that where a person is older than the employer's normal retirement age or will be within six months, or 65 if the employer does not have one, the employer may refuse to recruit that person.

Regulation 26 gives a further exception where employers must comply with other legislation, e.g. the law that prohibits under-18s from being employed in bars where alcoholic drinks are sold.

### Default retirement at age 65

It will not amount to age discrimination if employers retire employees at or above age 65 where it is a genuine retirement. Employers are able to continue the employment of people beyond the default age. A retirement age below 65 will in general be unlawful. A lower age will be permitted, but only if the employer can satisfy the objective justification test.

In this connection the ruling of the EAT in *Payne v Royal and Sun Alliance Group plc* [2005] IRLR 848 is instructive although not a case brought under the Age Regulations. Mr Payne's contract provided for him to retire at age 65. The employer changed the retirement age, unilaterally and without Mr Payne's consent, to 62 and then terminated Mr Payne's contract at that age. Mr Payne successfully claimed wrongful and unfair dismissal by reason of breach of contract by the employer in terminating his contract at 62 and therefore not in accordance with its terms. The EAT agreed with the tribunal ruling in an area where there has previously been no clear authority that the normal retirement age cannot be earlier than the contractual retirement age unless the employee consents. Mr Payne's claim was not