

The impact of the age regulations five years on

The Employment Equality (Age) Regulations were introduced in to UK law on 1 October 2006. They were aimed at securing the legal rights of older workers and engendering a cultural change towards more positive treatment of this age group in across all parts of the employment cycle. However, this was undermined by the Default Retirement Age – an anomaly contained within the legislation allowing employers to force people from their workforce. This briefing examines the level of impact the Regulations have achieved over the intervening period.

Summary of key points

- Employment practices towards older workers have seen only a slight improvement since October 2006, which Age UK finds extremely disappointing. However, there have been very slight positive changes across most aspects of the employment cycle.
- The existence of the Default Retirement Age has restricted any potential for positive change. Age UK is optimistic that following its abolition improvements will be more significant.
- Line managers are in the vanguard of change, and their views are crucial. However, application of the anti-discrimination laws are highly inconsistent and often not aligned with official HR policies.
- The fears portrayed by business groups in 2005/6 have not come to pass and there is no evidence of any damage to business as a result of the Regulations.
- On a macroeconomic level there has been no change in employment patterns for the 65+ age group.
- Organisational policies in recruitment have seen the biggest positive change, while there is mixed evidence on attitudes to older workers.
- While overt age discrimination may be slightly less prevalent than in the past, it is likely that more subtle age discrimination is still abundant. Such discrimination is hard to prove, and would not necessarily be picked up in much of research.
- Overall, the change is a baby step in the right direction.

1. Five years on: what impact have the Employment Equality (Age) Regulations had?

Background

On 1 October 2006, the Employment Equality (Age) Regulations (referred to as 'the Regulations' throughout) came into force, ostensibly giving people aged 65 and above the same employment rights as people in other age groups. This included access to redress for unfair and constructive dismissal and, of course, making discrimination on grounds of age, either direct or indirect, illegal. The Regulations were transposed into the Equality Act 2010.

The Regulations did, however, contain an anomaly. The Default Retirement Age (DRA), allowed employers to force employees to retire, whether employees agreed or not, thereby ensuring that employment rights failed to progress. We believe this has significantly restricted the positive impact of the Regulations.

So on the fifth anniversary of the Regulations' introduction, what impact have they had? Has the employment field for older workers been transformed, and have employers made significant changes to their behaviour en masse?

A change in practice?

The existing research evidence suggests that employer policies and practices have changed in a small, but positive way since 2005. However, in many areas the change is marginal, and so the effect of the Regulations has been minimal. This is explored in more detail in Section 3.

There is little doubt that the continued existence of the Default Retirement Age (DRA) has restricted the improvements made. As a result employers have lacked incentive to invest time and effort in developing more age friendly practices, leading many to

We are, however, optimistic that in the post-DRA world greater proliferation of age-friendly employment practices will occur.

International comparisons show that legislation has a vital role to play in fostering good practice and changing attitudes. It can act as a catalyst for change.ⁱ

At present, there is still a discrepancy between formal organisational policies (often implemented by Human Resources departments) and the behaviour of line managers – the latter are vitally important in the continuing fight against age discrimination. Simply adjusting formal policies does not equate to a change in practice.

This is supported by the mixed evidence which exists on attitudinal change. Research by the Department for Work and Pensions suggests the 50+ age group appears to have fared badly with regards to employers viewing them as suitable for particular jobs in their organisation, but conversely other evidence shows that most employers do indeed greatly value their older workers. We believe that, on balance, there has been a small attitudinal shift in favour of older workers, and are optimistic that without the DRA this change will continue unabated – in fact, demographic

changes mean it is essential that employers do come to terms with the benefits of employing older workers.

Nonetheless, there is still much work to be done in persuading more employers of the benefits of being age-positive.

Although the Regulations may help foster a change for the better, the Government still has a crucial role in ensuring that individuals have access to the means to extend working lives, for example an improved training offer and better back-to-work support.

2. Macroeconomic differences

When measured on an economy-wide scale, the Age Regulations have had no discernible impact. This is entirely expected, and allays fears that employers would somehow be disadvantaged by their introduction. This was a predominant view held by many employer representatives in the debate leading up to the introduction of the Regulations.

Average retirement ages have been increasing steadily for both men and women since the early 1990s (see Chart 1 below), and the employment rate for the post-65 age group has also been increasing, as clearly demonstrated by Chart y. The medium-term trend continued at the same rate following October 2006.ⁱⁱ

Furthermore, there is no indication that the Regulations either strengthened or weakened older workers position in the labour market as a whole. The increase in employment rates could be entirely due to changes in individuals' desire to work for longer, and have no connection with the Regulations.

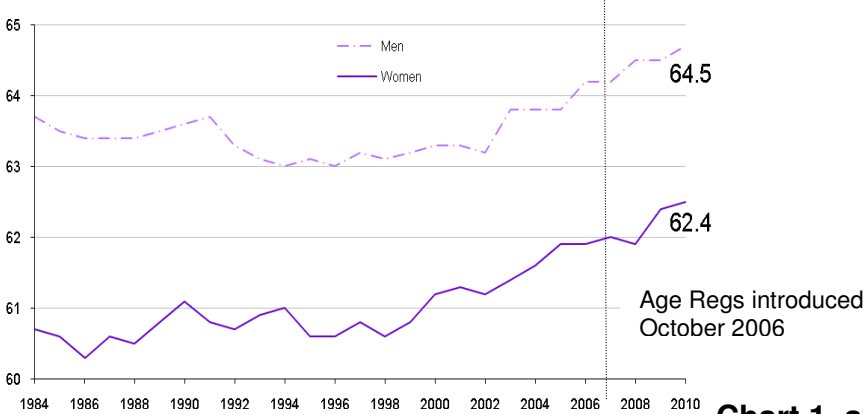
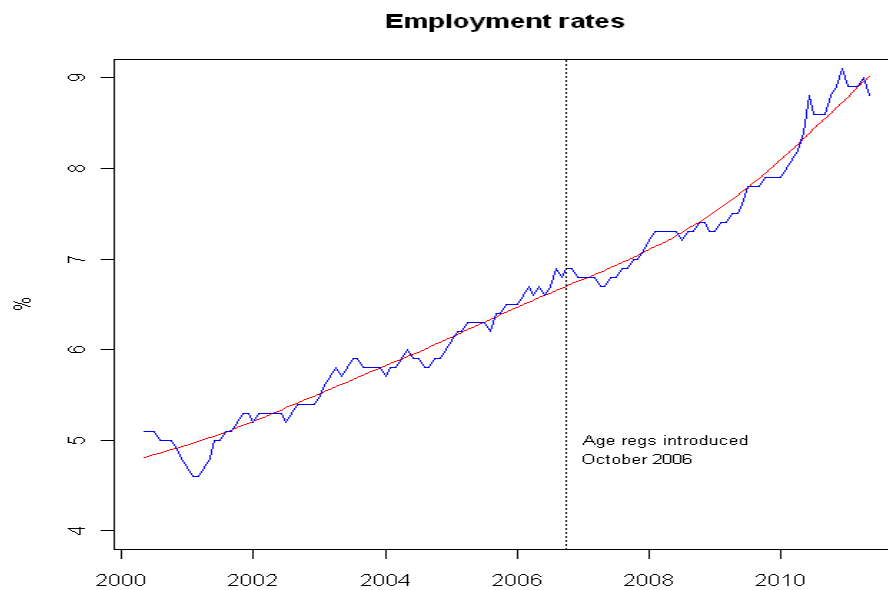


Chart 1, average retirement age

Source: ONS (2011), based on LFS



Source: Age UK analysis of the Labour Force Survey (2011)

Chart 2, per cent of 65+ cohort in employment

Equally, there is no evidence that their introduction has had a negative impact on business or the economy.

For this analysis, the number of tribunal cases is of little relevance as there is no comparison point pre-dating the Regulations' introduction. However, as of 2010-11 the number of discrimination claims made by individuals on grounds of age is broadly comparable to those relating to other characteristics which have been subject to discrimination law for some years, such as race and disability (see section 5).

Rather, from both points of view, the Age Regs have reinforced a cultural trend towards greater acceptance and appreciation of older workers. To look at the detail of what's been achieved here, it is necessary to view at firm level.

3. The impact on employers

There is evidence that the Regulations have had a small but positive impact on employer practice. Just under a third of employers (31 per cent) reported having made some change to their policies and practices as a result of the legislation.ⁱⁱⁱ

This is likely to have been achieved both as part of the initial impact and publicity surrounding the introduction of the Regulations in 2006, and contributing to a gradual trend towards greater awareness and acceptability of older workers. There is evidence to support both views.

Research conducted at the time of the Regulations being introduced found that a majority of employers were aware of the impending legislation, and mindful of the potential effects on their business. However, in most cases this would not necessitate a dramatic change in attitudes or policies aimed at older workers.^{iv} Therefore, the small change in practices over the years following the Regulations' introduction is broadly what we would expect, especially when considering the macroeconomic situation for 65+ employment rates.

The latter is supported by more recent research conducted in 2006/7 (published in 2009), which found:

'Over the course of the project awareness of age-discrimination legislation tended to grow a little, and it may send a useful signal to the general public in the medium-to-longer term – but it has not so far transformed the widespread feeling that the employment situation is likely to remain difficult for people around retirement age.'^v

It is possible, although speculative, that the 2008-9 recession restricted the number of employers who altered their attitudes and practices.

In order to get a fuller picture of the change in practice, it is necessary to break down different aspects of employer practice and policy.

Also included in the boxes throughout are brief summaries of some of the key legal cases with a relevance to older workers.

The default retirement age and its impact

The most notable aspect of the Regulations contained provision for the introduction of a national 'default retirement age' (DRA). This gave employers an exemption to the rest of the Regulations, justifying the removal of 65+ workers on grounds of retirement, provided a set process was followed.

This aspect of the Regulations directly undermined all the other safeguards given to older workers, and represented an unfair and one-sided employment practice. In spite of an appeals process, the reality was that if an employer wanted to remove someone from their workforce they could do so unimpeded, therefore there was in effect still virtually no employment protection for this age group.

However, in January 2011 the Government confirmed it would abolish the DRA. Since 5 April 2011 employers have no longer been able to issue forced retirement notices, and the DRA will effectively be consigned to the history books from April next year.^{vi}

This change was warmly welcomed by Age UK.

The introduction of the DRA had a number of different impacts on employers, depending on how it was interpreted. Research by Flynn (2010) demonstrates examples of varied interpretations^{vii}, including:

- Some managers thought they had to establish written policies about retirement, so introduced a fixed retirement age.
- Conversely, others found there was now no need to use a retirement age as the DRA could be relied upon.
- Others thought that 65 was the only point at which employees could be forcibly retired, so began removing everyone at this age even where before the organisation had no forced retirement policy.
- In some instances a formal retirement policy was designed and implemented, even if this did not explicitly use the DRA.
- Line managers were often responsible for interpreting and implementing bespoke responses in applying the DRA.

It should be noted that there are few instances of employers embarking on this with malice or in an attempt to victimise their older workers from spite. The vast majority acted in good faith based on their own interpretations of the Regulations, even where this turned out to be erroneous.

Therefore, the business need to have a DRA must be seriously questioned in the vast majority of cases.

Flynn finds that 'by explicitly allowing employers to choose whether or not to retain older workers, the regulations have removed any pressure employers might have faced to change their retirement policies.' It is clear that any positive impact on employer behaviour is severely compromised with the DRA in operation.

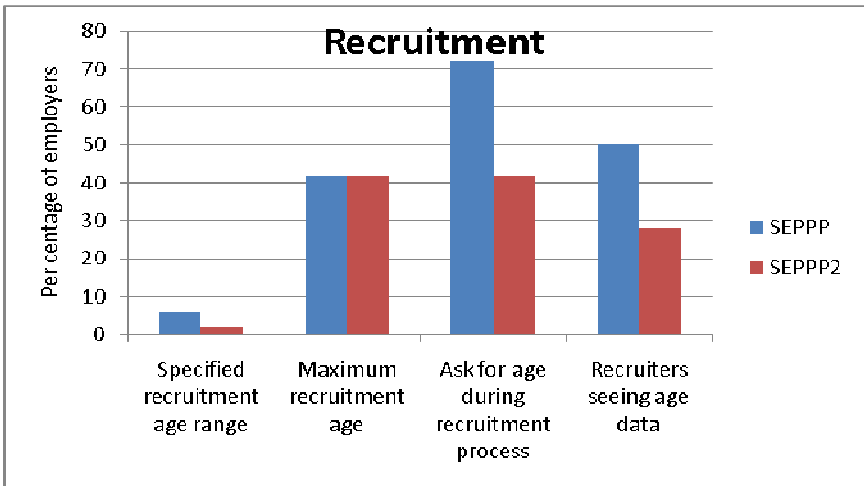
Pre- and post-Regulations comparison

Although small, the Regulations have had an observable impact on employers' policies and practices. In 2005 in preparation for the introduction of the Age Regulations, the Department for Work and Pensions commissioned the 'survey of employers' policies, practices and preferences relating to age' (SEPPP).^{viii} This gave an overall impression of attitudes to age, and some quantitative evidence of how many employers utilise certain practices. In 2009/10 this survey was repeated in preparation for the abolition of the Default Retirement Age, and to provide a comparison of employer behaviour pre and post the Regulations (SEPPP2).^{ix} This gives us a good idea of the impact of the Regulations over this four year period, and shows a small change for the better across almost all parts of the employment cycle.

These two surveys provide the best comparative overview of attitudinal change available. The following sections break this down, issue by issue, and draw primarily although not exclusively on the two SEPPPs. The figures showing the change on particular issues are all from these surveys, and are summarised in Table 1 at the end of the section.

The Chartered Institute for Personnel and Development and the Chartered Management Institute also produced a point of comparison for some parts of the employment cycle in their 2010 *Managing an ageing workforce* survey report.^x As this focuses on members of the two professional bodies, it may not be fully representative of all managers across the workforce. Some figures from this are used here too for comparative purposes.

Recruitment



Source: SEPPP2

Perhaps the most significant change is in recruitment policy. Prior to the Regulations 6 per cent of employers specified an age range in job advertisements, while only 2 per cent did in 2010. However the most significant change in employer behaviour is the dramatic drop off among those who ask for age at some point during the recruitment process – this has nearly halved between 2006 and 2010, falling from 72 to 42 per cent. There is a sectoral variation, with it being more common to ask for this data in lower skilled and manual jobs, including caring.

This is borne out by the CIPD/CMI research, which found that in 2010 64 per cent of employers did not put age on the application form, compared to 44 per cent in 2005.

Recruiting managers seeing age data has also fallen substantially from 50 to 28 per cent.

However, along with all these positive research findings, it should be noted that there is still a great deal of anecdotal evidence of ageism in the recruitment process.

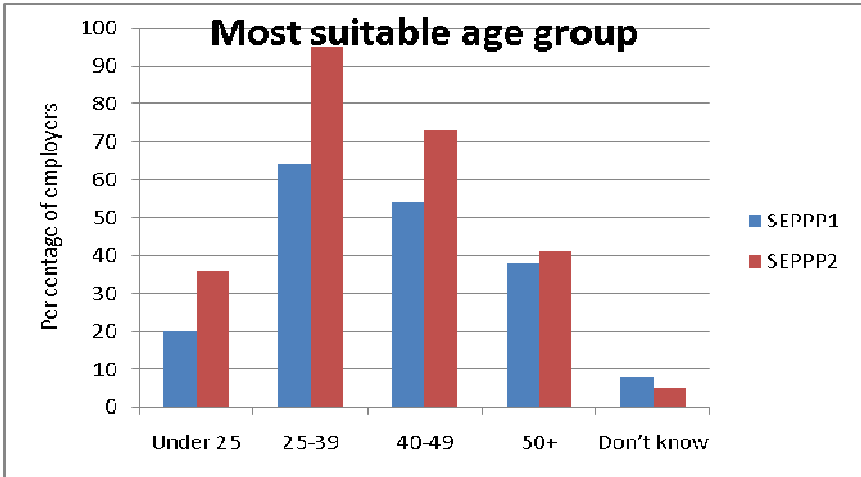
Stereotypes about older workers still prevail, and Age UK’s employment projects around the country all find many examples of negative attitudes towards their clients.

There are several examples of issues in recruitment showing no or even negative change, including:

- Maximum recruitment age shows no change from before the introduction of the Regulations. Employers still appear to have approximately the same attitudes towards factors taken into consideration: for instance, 43 per cent stated that expected length of service affected recruitment decisions in both 2006 and 2010.
- The number of employers considering qualifications has in fact risen over the period, which disadvantages older workers as they are likely to have lower qualifications (18 per cent of 50+ workers have no formal qualifications compared to 9 per cent of under 50s^{xi}).
- There are now more employers considering health and disability factors in their recruitment. This appears to be a move towards increasing discriminatory attitudes on grounds of disability, which is potentially indirect age discrimination.

This is particularly worrying because approximately one million people aged 50+ are currently being migrated from Incapacity Benefit to Employment and Support Allowance. Many of this group will be carrying some form of health impairment yet are expected to be found ‘fit for work’. Negative attitudes towards poor health will make it even harder for them to move into employment.

Attitudinal change

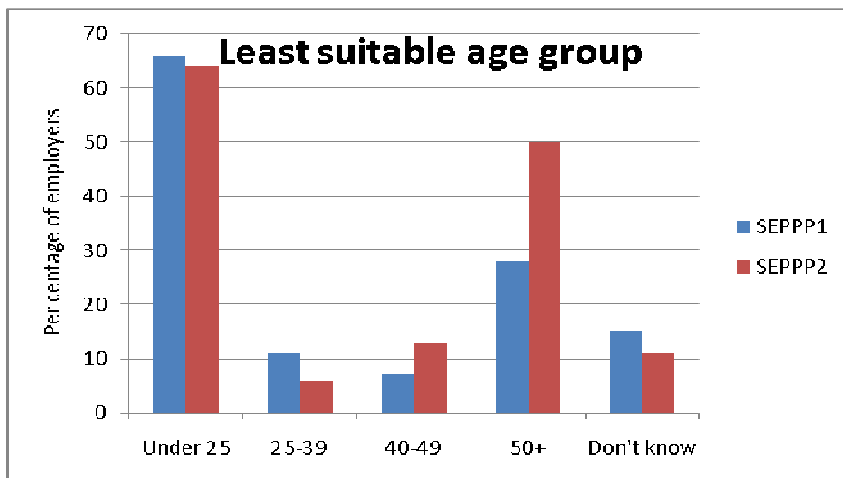


Nearly a quarter of employers (23 per cent) believe some jobs are more suitable for certain ages than others – this has barely changed since the introduction of the age

regulations, suggesting that considerably more work needs to be done to combat stereotypes for older (and younger) workers.

The chart above shows the distribution within age groups among the employers who believe that the most common occupation in their business is more suitable for some age groups than others. There has been an increase among all age groups, but less so among the over 50s which suggests age-positive perceptions are changing more slowly than for younger age groups.

Both the under 25s and over 50s are affected in near equal measure. Of course, this does not separate different types of jobs – so there may be particular sectors or occupations in which a specific age group is particularly disadvantaged.



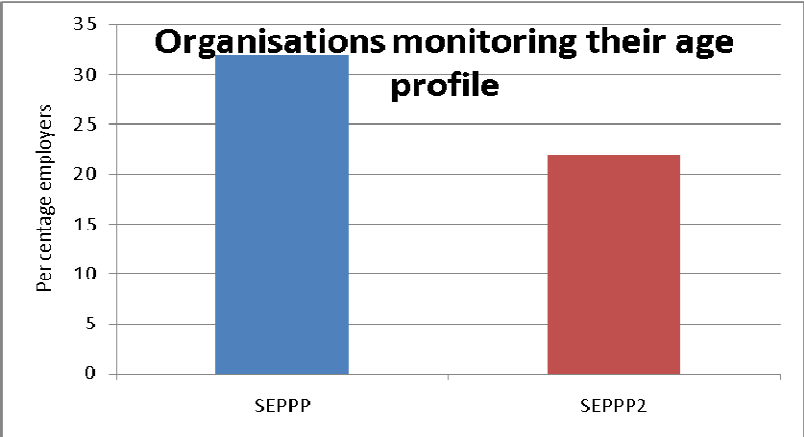
These findings were reflected by the question asking which age ranges were less suitable, with these two groups being considerably adversely affected. Again, under 25s came off slightly worse than over 50s, with 64 and 50 per cent respectively – but the particularly worrying finding is the steep rise in over 50s being deemed less suitable. This clearly indicates negative attitudes to both older and younger workers persist, but that for older workers such views are on the rise.

However, the change since the introduction of the Regulations has been much worse among the over 50s, rising from 28 to 50 per cent of employers. This is among employers who believe age affects suitability, but it shows a worrying change which is contrary to the improved perceptions demonstrated elsewhere.

Monitoring age profile

The number of organisations monitoring the age profile of their workforce has fallen from 32 to 22 per cent since the introduction of the regulations. This is typically done by both 'good' age-conscious and 'bad' ageist employers, therefore it's impossible to say whether it is a change for better or worse. However it does demonstrate an

induced behavioural change and so is a positive sign that at least employers have taken notice of the Regulations.



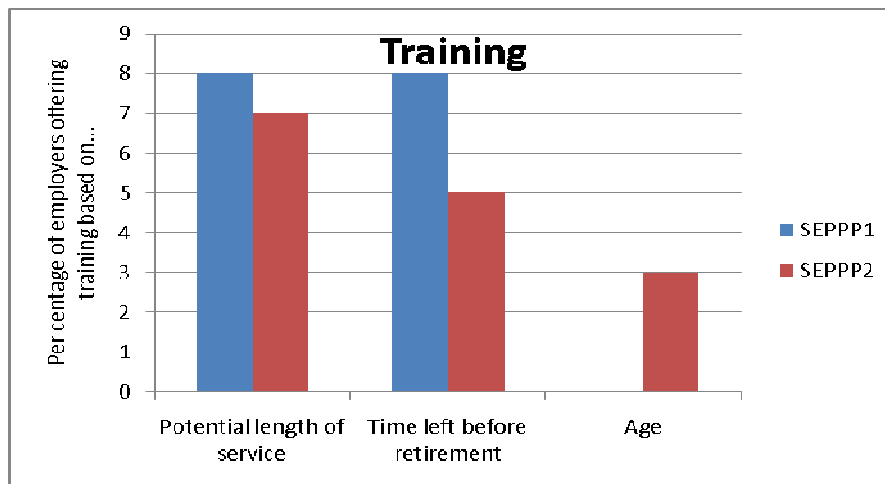
Retirement age

In 2010, 25 per cent of employers, covering 34 per cent of the workforce, used compulsory retirement for some employees, which is, on the surface, an improvement from before the Regulations were introduced when 43 per cent of employers covering 50 per cent of all employees did. This seems positive on the surface, but with the DRA acting as a fallback position, some employers may have de-formalised the retirement planning processes – as borne out by Flynn’s research^{xii}.

SEPPP2 found 12 per cent of employers had changed their retirement policies as a direct result of the 2006 regulations.

The CIPD/CMI research is broadly consistent with this, although it found a slight increase in employers using a fixed retirement age between 2005 and 2010, rising from 52 to 57 per cent.

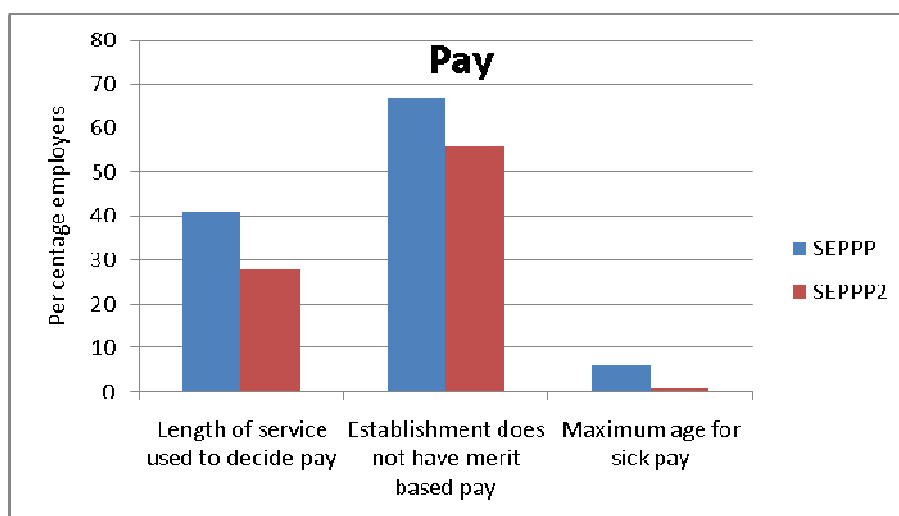
Training



A small minority of employers still use potentially discriminatory methods of selecting employees to undergo training – either age, length of service or period until retirement (two, five and seven per cent respectively). However, this has fallen slightly because of the age regulations, with five per cent having adjusted their practices.

However the changes recorded are marginal (age was not measured in the 2006 survey). There is no significant change in the number of 50+ employees who undergo training. Furthermore the survey does not address type of training offered, and shows nothing about quality of training. Evidence shows these can vary substantially with age. Felstead (2010)^{xiii} shows that employers persist in offering lower quality and fewer training opportunities to older workers, which implies that the SEPPP surveys reflect policy rather than practice.

Pay and benefits



Over the period since the introduction of the Regulations there has been a slight homogenisation of pay levels within an employer. Only a very small minority (one per cent) take into account age as the primary factor.

A larger number (28 per cent) use length of service, but this has fallen by nearly a third. It should be noted that length of service criteria are legal as long as they stop within five years or can be objectively justified to meet a particular business need. This suggests a macroeconomic shift away from Lazear-style contracts, where older workers earn more as part of an informal and unspoken 'career' contract, which in turn results in the stereotype that older workers are more expensive. Therefore, this stereotype is becoming less and less true. It is borne out by the CIPD/CMI finding that only a small minority of employers believe older workers are more expensive.^{xiv} A positive development indeed.

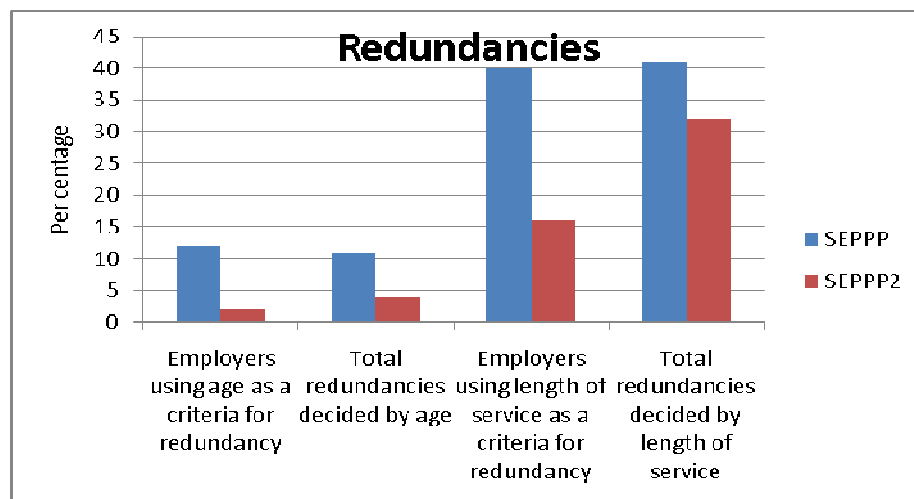
Furthermore, the rise in the number of organisations using merit-based pay as an alternative to other measures of setting salary rates suggests less opportunity for discrimination.

Sick pay

Only one per cent of employers retained a maximum age for sick pay, whereas before the Regulations this was six per cent. This change in behaviour is encouraging and suggests that removing the Default Retirement Age will have less impact than feared by some employers.

On a negative note, there was also a slight fall in the number of employers who provide sick pay above the statutory minimum level, from 69 to 66 per cent. Two per cent curtailed such provision as a direct result and a further two per cent changed their eligibility criteria, including introducing a maximum age.^{xv} Other employers had reduced the amount paid in excess of the statutory minimum because of the regulations.

Redundancy

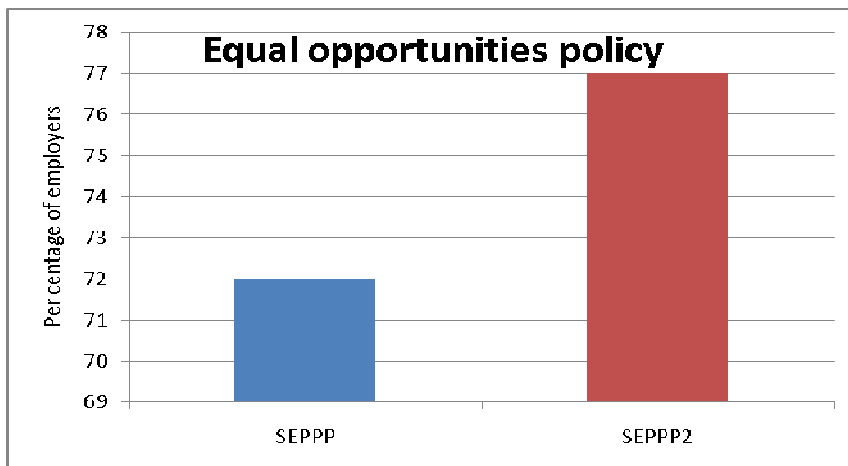


The use of age as a criteria for redundancy has nearly become extinct – at least according to official policies. However, in practice there is anecdotal evidence of age still playing a role in decision-making, suggesting a degree of researcher bias in the SEPPP surveys. Age is used by just two per cent of employers and equating to four per cent of total redundancies. This is a fall from 12 per cent (11 per cent of total redundancies). Length of service has also seen a substantial decrease, falling from 40 to 16 per cent (41 to 32 per cent).

The CIPD/CMI survey report also found a decrease for both categories. Redundancies by age declined from 13 to 11 per cent, while those decided by length of service fell 28 to 21 per cent between 2005 and 2010. On the surface at least, this represents an encouraging picture.

However, while formal policies have changed slightly, anecdotal evidence suggests that in practice this still continues. For example, a study by employment agency Wise Owls found some local authorities made a significantly disproportionate number of older employees redundant, suggesting discriminatory practices.^{xvi}

Equal opportunities policy

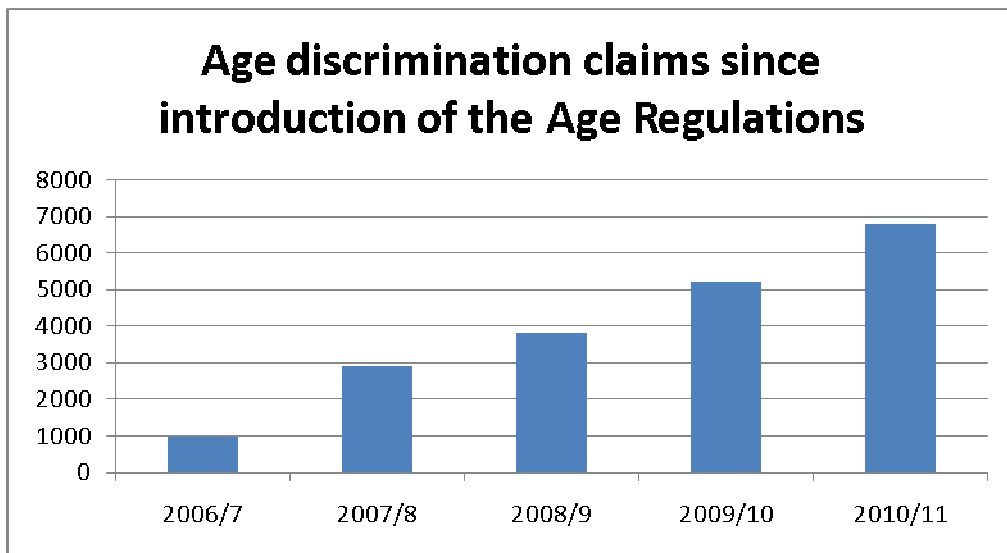


Since 2006 the number of employers with an equal opportunities policy rose to 77 per cent from 72. More encouragingly, those with a policy explicitly examining age rose from 56 to 67 per cent, improving the ratio of firms with an age-specific policy as opposed to a general policy (78 per cent to 87 per cent). This suggests the legislation may have encouraged some who were aware of the issues to formalise their procedures. Furthermore, the gap has narrowed considerably between age and other areas such as gender and health.

9% of establishments, almost entirely larger employers, have introduced training on age discrimination following the introduction of the Regulations.

5. Tribunal claims

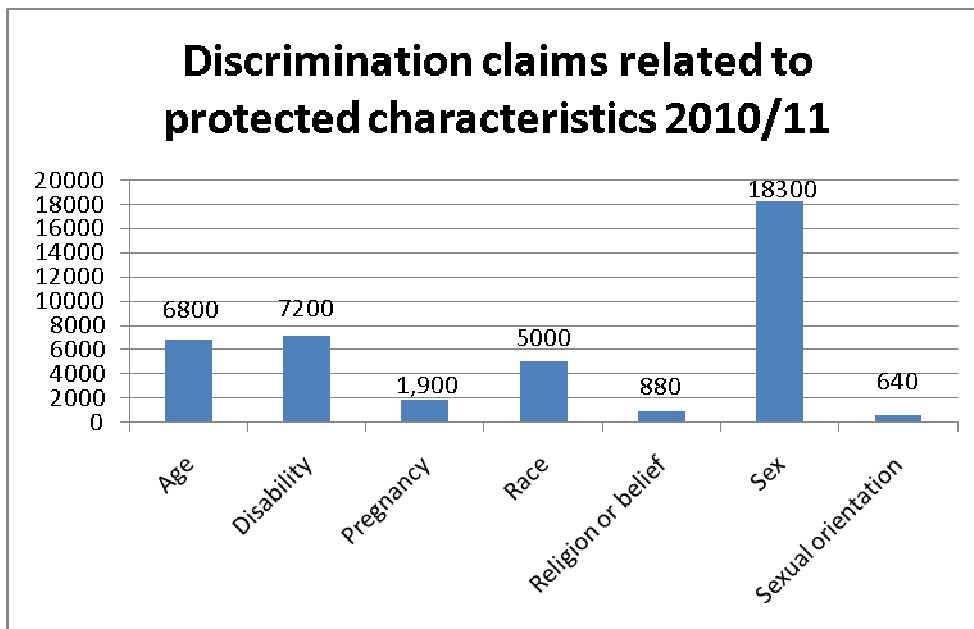
The Regulations made it possible to claim against employers on grounds of age discrimination. Since this time we have seen a steady increase in the number of claims made, as shown by the chart below.



Source: Tribunals Service

This is unsurprising as in 2006 relatively few people would have been aware that they could make a claim, and this will rise over time. The publicity surrounding Miriam O'Reilly's claim against the BBC and, to a lesser extent, the abolition of the DRA, may have fuelled the most recent increase.

The prevailing view is that claims of age discrimination have leapt to unsustainable levels. However, numbers are in line with claims made under the other protected characteristics (see chart below), demonstrating that this is not a particular problem for employers.



Source: Tribunals Service annual report, September 2011

Having a right to redress when treated improperly and illegally is a vital part of the demographic system. We do not believe that this has had anything more than a low-level impact on a minority of employers.

Table 1: Comparison between SEPPP and SEPPP2 on key employment practice measures relating to age.

Key: marked in green = change for the better; amber = no change / works both ways

Employment practice area	SEPPP	SEPPP2	Difference	Good/ neutral/bad
Use a mandatory retirement age	62	57	-5	Good
Equal opportunities policy	72	77	+5	Good
Recruitment age range	6	2	-4	Good
Maximum recruitment age	42	42	-	Neutral
Ask for age during recruitment process	72	42	-30	Good
Recruiters seeing age data	50	28	-22	Neutral
Length of service used to decide pay	41	28	-13	Good
Establishment does not have merit based pay	67	56	-11	Good
Maximum age for sick pay	6	1	-5	Good
Employers using age as a criteria for redundancy	4	2	-2	Good
Total redundancies decided by age	12	11	-1	Good
Employers using length of service as a criteria for redundancy	40	16	-24	Good
Total redundancies decided by length of service	42	31	-11	Good
Pension scheme to which employer contributes	63	66	+3	Good
Organisations monitoring their age profile	32	22	-10	Good
Expected length of service determining training offer	8	7	-1	Good
Expected time until retirement determining training offer	8	5	-3	Good
Age determining training offer	n/a	2	n/a	Good

6. Policy recommendations

- The desired cultural change among employers will not achieve itself. The Government must continue to work with employers and trade bodies to persuade them of the benefits to an age positive approach.
- The end of the DRA represents an excellent opportunity to restate 'age-positive' messages to employers. The Age Positive campaign should be stepped up at this crucial time.
- International examples of good practice should be recognised and promoted.
- Employers must take the steps to prepare their policies and practices for the ageing workforce. The key message that 'preparation is everything' must not be lost.
- The Government must work closely with the Equality and Human Rights Commission, ACAS and organisations like Age UK in order to reach as many employers and individuals as possible.
- Anti-discrimination legislation is a vital part of creating the necessary cultural change and should not, under any circumstances, be compromised or watered down. There is no evidence whatsoever it is detrimental to employers.
- The Government should work to ensure that discriminatory behaviour can be punished through the tribunals system and the courts. Some of the proposed changes to the tribunal system are likely to make this harder to achieve.^{xvii}
- With the possibility of a shift towards greater discrimination on grounds of health and disability, the Government should ensure that sufficient back-to-work support is in place for ex-Incapacity Benefit claimants found fit for work. This includes through Jobcentre Plus and Work Programme contractors, and by communicating with employers to reduce discrimination in recruitment.

7. Conclusion

The Employment Equality (Age) Regulations 2006 have therefore had a marginal but mostly positive impact on employment practices for older workers. As a first step this is encouraging, but Age UK would have hoped for greater progress to be made after five years. However, the effect the Regulations were able to exert was severely hampered by the existence of the Default Retirement Age.

There is contrary evidence on whether attitudes are changing. While employers appear to be aware of the broad agenda, there is little movement to put changes into practice. There is some encouraging evidence about employers valuing their older workers – recent DWP research found 91 per cent agree older workers bring skills and benefits to their business^{xviii} and this is borne out by the CIPD/CMI research. However, the attitudinal research included in the SEPPP2 survey, shown in Section 3, found that the over 50s are still less well regarded than other age groups, and the situation has got worse since 2006.

Nevertheless, Age UK is optimistic that in the post-DRA world, cultural change towards greater appreciation of older workers will occur.

Although formal policies have improved slightly, erroneous interpretation of the Regulations by line managers may increase instances of more 'subtle' age discrimination. As pointed out earlier, the impact of line managers is crucial. So while getting HR professionals on board is undoubtedly a good start, there is an extremely long way to go before ageism in employment is consigned to the dustbin of history.

In spite of employer awareness of the age regulations, it is still apparent that many are still not fully prepared to deal with greater numbers of older workers. The Government and employer bodies must continue to inform employers of the changes and help them implement age-neutral or age-positive policies. The CIPD/CMI found that only 14 per cent of managers believed their organisation was prepared for the upcoming demographic changes. This is clearly not enough, and shows that attitudinal change has yet to be converted into strategic longer-term workforce planning.

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1 October 2011

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- ^{iv} McNair S, Flynn M, Dutton N (2007), Employer responses to an ageing workforce: a qualitative study, DWP Research Report 455.
- ^v Hedges A, Sykes W & Groom C (2009), Extending working life: changing the culture – qualitative research into effective messages, DWP Research Report 557
- ^{vi} Although it is still possible for an employee and employer to negotiate a six-month extension, in which event the final retirement date could be set at 5 October 2012. We expect such arrangements to be rare.
- ^{vii} Flynn M (2010), The United Kingdom government's 'business case' approach to the regulation of retirement, *Ageing & Society*, vol.30 p.421-443
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- ^{xiv} CIPD/CMI (2010), Managing an ageing workforce
- ^{xv} Error due to rounding
- ^{xvi} Local Authority budget cuts during the latter part of 2010 and early 2011 will not be reflected in the research. See <http://www.wiseowls.co.uk/Forums/index.php?action=printpage;topic=7.0> for further details.
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