

## **DEFENDING TERMS AND CONDITIONS FOR OLDER WORKERS**

### **Introduction**

There are now more older people in the UK than ever before - according to the Office of National Statistics the population of over 65's has increased by 21% since 2005. The working population in Britain is getting older due to different factors including demographic changes, medical advances mean people are living longer and changes in government policy including the increase in the state pension age. Higher costs of living and dwindling savings also mean that where workers were able to retire at their state pension age, they now cannot afford to.

The removal of the mandatory retirement age and increase in the state pension age has given people the ability to work longer and has had a massive impact on the proportion of older workers still working through self-employment or flexible working policies. Older workers contribute a lot to their workplaces and employers are seeing the benefits of retaining employees with experience and skills they have built up over many years. This guide will look at why older worker issues are increasing in the workplace, the law and its protections for older workers, along with branch advice on negotiating workplace policies to support older workers.

### **What is an “older worker”**

In terms of this guidance there is no single age where someone becomes an “older worker”. Trade Union Congress (TUC) research in this field suggests that some organisations define an older worker as one who is over 50, while others define older workers as those over 65 or over the State Pension Age.

Branches need to be clear with their employer that there are different issues that could come about in the workplace as a result of an aging workforce and that there should be measures put in place to support workers at whatever age an issue may occur.

### **Older workers in work**

The Department for Work and Pensions estimates that:

- employment of workers over the age of 50 has grown significantly over the past decades;
- the employment rate for people aged 50-64 has grown from 55.4 to 69.6 per cent over the last 30 years;
- the employment rate for those workers aged 65 and over doubled in the past 30 years, from 4.9 to 10.2 per cent;
- the proportion of people aged 70-74 in employment almost doubled over the past 10 years to 9.9 per cent (258,000);
- workers over 50 have risen faster than the population over 50.

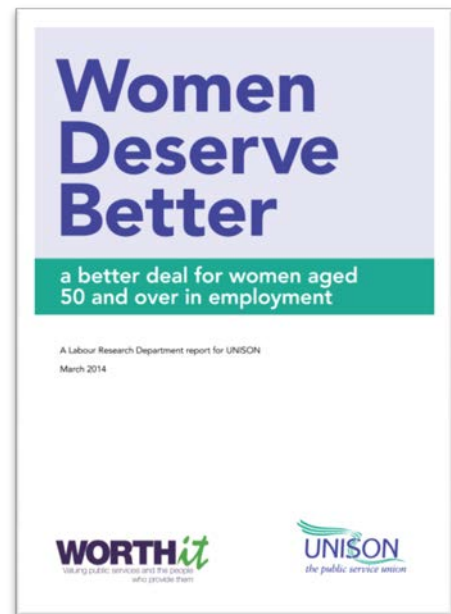
To support these figures UNISON research has also identified that women over 50 are a growing demographic of workers. Economic activity in this age bracket (over 50) is much higher for women than men.

Our research showed that it is common for women to experience workplace issues related to their age including lack of promotional chances, lack of training opportunities and women felt they were stuck in part-time work as these were the only roles open to them.

We also looked at the reasons women were working longer and some of the specific issues that were impacting women in this age group.

The report compiled by the Labour Research Department picked up on some key trends which will be discussed more fully later in this guide including lack of promotional opportunities and pay disparities between men and women in this age group.

The report identified an increase in the employment rates for women aged 50 and over (particularly in the public sector) and of those surveyed 61% of women were working full-time. Within the 60-64 age group over half who were surveyed were still working full-time – suggesting that women are now working longer for financial reasons due to changes in the law and state pension age. There was also a large section of women we surveyed that said they were willing and would like to work over the age of 64, but that there were fewer opportunities.



## **The law – how are older workers protected**

The Equality Act 2010 makes it unlawful for an employer to discriminate on the grounds of age. Under this legislation age is a 'protected characteristic' and protects workers not just employees – this can include prospective and actual employees, ex-employees, apprentices, some self-employed workers, contract workers and people seeking or undertaking vocational training.

The law states:

- It is unlawful because of age to discriminate against anyone, this means to treat them less favourably than others because of their actual or perceived age unless it can be objectively justified.
- It is also unlawful to discriminate indirectly against anyone – that is, to apply a criterion, provision or practice which disadvantages people of a particular age unless it can be objectively justified;
- Subject someone to harassment related to age;
- Victimise someone because they have made or intend to make a complaint or allegation or have given or intend to give evidence in relation to a complaint of discrimination because of age;
- Discriminate against someone, in certain circumstances, after the working relationship has ended, unless objectively justified;
- Compulsorily retire an employee unless it can be objectively justified.

## Retirement age

The current state pension age is in the process of being reviewed by the Government and a report with recommendations is due out later this year.

At the time of writing this guide the current state pension age is 65 for men and 60 for women. The age at which women qualify for state pension age will rise from 60 to 65 by November 2018 (depending on month they were born). Between October 2018 and October 2020 both men and women's state pension age will increase to 66 and between 2026 and 2028 it will rise to 67.



According to TUC research there is a massive drop in participation in the labour market from well before state pension age and there are nearly half a million people within 5 years of the state pension age who are too ill or disabled to work<sup>1</sup>. Many of these workers would like to stay in employment, but all too often employers are not offering 'reasonable adjustments' in the workplace or flexible working as an alternative to retirement and are losing skilled and experienced workers in the process.

Some workplaces (due to custom and practise) have set a normal retirement age of 65 years old under their retirement policy or are unaware of the changes to employment legislation that make this problematic. This is also opening themselves up to age discrimination claims under the Equality Act.

Employers argue the need to know what the intensions of their employees are (when they are over 65) for future workforce planning. UNISON has seen some workplace retirement policies where they ask their employees to indicate six months before their 65<sup>th</sup> birthday if they wish to carry on in their employment or retire at 65. It is unlawful for an employer to make an employee compulsory retire because of their age and Acas guidance makes it clear to employers that they should have open and transparent discussions with all employees (regardless of age) about their future objectives, performance, training and development needs. During this process employees have the opportunity to discuss if they intend to retire or not but this should not be led by the employer. This process also allows the employer to develop future plans where an employee's skills and abilities can be matched to the organisation's business plan.

## Removing age bias from recruitment, selection, training and promotion

The Equality Act 2010 protects actual and prospective employees against discrimination on the basis of their age. Job applicants are prospective employees and therefore it is important that employers review with the trade unions their recruitment and selection processes, including application forms, job descriptions, job specifications and adverts to make sure there is no age bias or language that could deter older applicants from applying. It could be something small like a job description which requires applicants to have a certain qualification, which are no longer relevant – this could put off older applicants from applying.

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<sup>1</sup> TUC: Postponing the pension: are we all working longer? (2016)

Job adverts must be designed for the job and any reference to age is (in most cases) unlawful. A prospective employer can ask for the age of the applicant but this must be done as part of an employer's equality and diversity requirements and is usually asked for in a separate monitoring form. Short listing and interviewing should be done by employees that are trained in these skills and part of that training should be to not show age bias to older candidates. Some UNISON branches have negotiated a reserved seat for a rep on the selection panel for vacancies at their organisation, to oversee and scrutinise this process and make sure that employers are upholding the principles within the Equality Act 2010.

As well as prospective employees, employers should make sure that the training needs of their existing workers are met. The TUC and CIPD research highlighted that older workers were less likely to discuss with their employer where they felt they may have skills gaps through fear that they may be seen as incompetent. It is important that all employees receive regular development reviews and 1-2-1 with their manager to discuss development needs. This will go a long way to make sure that older workers feel supported in work for longer.

Many older workers have also identified that they feel discriminated against when they apply for promotion and that they are overlooked because of their age and are losing out to their younger counterparts. UNISON's survey of women over 50 years old showed that fewer than 6% of those surveyed felt they had good promotional opportunities. Branches should speak with their employers and ask them what they are doing to address this issue. Due to changes in government policy women are expected to work longer, therefore they should equally have better promotion prospects and expect better training and pay. All older workers should not be expected to continue working where there is age bias and an expectation that they do not want the same rights to promotion as everybody else.

### **What can branches do?**

**Conduct an age survey** - Work with your employer to survey employees in the workplace in order to establish the age profile of the workforce. This is a good basis of working with the staff side unions to look at workplace policies (of the type listed above) and review if there are any changes that need to be made that would support older workers and enable them to stay in employment longer.

Employers should plan to support older workers in the workplace by removing age bias from their policies. Acas advice identifies that employers should look particularly at their sickness absence, leave and holidays, discipline and grievances, staff transfers, flexible working, use of computers and individual space requirement policies (ergonomic policies).

**Impact assessments** - Impact assessments are designed to measure the impact of policies and procedures on certain groups of workers – It is important that an employer completes an impact assessment when reviewing a policy and gives them to the trade union staff side for scrutiny.

**Regular development reviews and access to training** – Employees should receive (at the very least) a yearly development review to discuss with their manager their progress over the past 12 months and to review any future training requirements or skills gaps they feel they may have, to help support them in their job. This includes workers on fixed term or temporary contracts who often are older women workers in these roles that are excluded from training. The TUC are also calling for the right for employees to have a mid-career review. These reviews are aimed at helping workers review where they are mid-way into their career and to discuss and barriers to future progression.

## **Removing age bias from pay systems and tackling the gender pay gap**

Some pay and benefit systems are built to reward employees that have been employed for longer - this could be that an employee goes up a pay increment every year they have worked for their employer or placing younger new employees onto lower pay bands. These types of pay systems should be reviewed by branches with their employer to make sure there is equality in pay and reward. A good example of this is the NHS Agenda for Change pay system, where employees progress through the pay system based on competency and not by age.

Age bias within pay systems also has had a major impact on the gender pay gap. Branches should note that the reporting of the gender pay gap is due to start being recorded in April 2017 and more information is available in UNISON's [gender pay reporting](#) guide. Employers with 250 or more employees in the voluntary and private sector should be publishing this information on their website. It is also worth branches asking employers as good practise to include with the numbers an explanation for any differences and measures that the organisation might be putting in place to address any disparities. These measures are also being extended to the public sector.

According to the ONS the pay gap is at its greatest between women and men in the over 50s age category. Reasons given for this pay gap are that women in this age group have caring responsibilities for older relatives and children and may have also taken a career break for children, which means when they return to work it is often on a lower salary or part-time hours. It was reported in the Guardian that when women turn 50 they earn £8,504 less a year than a men<sup>2</sup> in the same age bracket.

## **Redundancy issues faced by older workers and public sector exit payments**

There is no longer any age limit to those workers that qualify for statutory redundancy pay (SRP). Even though the age limits have been removed, employers must make sure in a redundancy situation that they do not pressurise older workers to take voluntary redundancy or early retirement as a way of reducing their headcount. It is also prudent to review everyone in the pool for redundancy and make sure the organisation retains older workers with knowledge and skills that have been built up over many years – many organisations lose out when they lose their longest serving employees through voluntary redundancy.

In the same way that it is unlawful to discriminate against older workers, it is also a concern if employers are using the 'last in, first out' method of selecting workers for redundancy (which is often younger workers). Using length of service to select someone for redundancy is likely to be unlawful, unless an employer can show that they have used other measures fairly for selection.

Offering workers enhanced pension benefits in a redundancy situation is exempt from the age discrimination laws as part of the Equality Act 2010 for existing and prospective members. These rules are only exempt from age discriminatory rules for employees who were eligible to be part of the pension scheme before the Age Regulations came into effect in October 2006<sup>3</sup>.

Another thing that older workers might want to consider if they are offered voluntary redundancy / early retirement and they work in the public sector is the introduction of the

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<sup>2</sup> <https://www.theguardian.com/money/2016/oct/14/gender-pay-gap-widest-during-50s-analysis>

<sup>3</sup> Representing Older Workers – A guide for trade union negotiators (July 2013) – Labour Research Department Booklet

recovery and cap on exit payments. This is an England only policy and the sting in the tail of this policy is that it will likely hit older workers with long service if they take early retirement or redundancy - the payment is now capped at £95,000 and although that might sound like a lot of money this exit payment this will hit public sector workers on modest incomes of £25,000pa like nurses or social workers with long service.

The other change covers any worker who leaves their job with an exit / redundancy or early retirement package and who rejoins the public sector in a new role within 12 months. The scheme would mean they would need to repay their exit / redundancy payment back to their old employer if they got another job, although it is important to note that this part of the policy will only hit higher earners (those earning over £80,000pa) in the public sector.

These changes in government policy are detrimental and are making it harder and less financially viable for older workers to rejoin the job market after being made redundant.

#### **What can branches do?**

**Public sector exit payments** – Although the government are still consulting on some of these changes, UNISON has developed a [branch guide](#) for more information on exit payments in the public sector and caps on payments.

#### **Beware of capability issues**

It is unlawful for an employer to discriminate on the grounds of age or force an employee to retire when they reach state pension age. UNISON branches are increasingly reporting the use of capability procedures in order to manage / force older workers out their jobs.

UNISON branches should be clear with the employer where they feel the policy is being misused and seek advice from their regional organiser. Branches should also monitor the use of the policy to see if there are any patterns and examine why an employer is choosing to use this way of managing performance, instead of other methods. A good capability procedure should be agreed with the union and will allow the UNISON rep to accompany their member to all capability meetings. It is also important that everyone, particularly managers are trained in this policy before it is inactive so they are aware of any issues that may be unlawful under the Equality Act 2010.

#### **What can branches do?**

**Monitor the use of the capability procedure** – Due to changes in equality legislation, it is now unlawful for an employer to dismiss or force an employee to retire because of their age. UNISON branches are reporting an increased use of employers using ‘capability’ as grounds of dismissing older workers. Branches should regularly review the use of this procedure with their employer and the grounds in which it is being used, to make sure that where there are patterns of misuse it should be challenged. UNISON branches should also negotiate a fair and equitable capability policy to make sure that members can be accompanied by their UNISON rep to all meetings under the procedure. A model capability procedure can be found [here](#).

## Promoting flexible working including flexible retirement

The right to request flexible working is available for all employees that have 26 weeks qualifying service.

The Chartered Institute of Personnel and Development (CIPD) surveyed the views of nearly 4,000 employers across the public, private and not for profit sectors about how they are managing an age-diverse workforce. They asked their sample of employers what they offered in terms of provisions to support employee health and well-being of employees of all ages. The results showed that employers saw merit in putting some support systems in place to support health and well-being of employees, although it was disappointing that nearly a quarter had no provision. UNISON's response to the working longer review (2013) also highlighted as the age of the workforce increases there may be an increase in diseases where age is a risk factor, like diabetes.

As mentioned previously the CIPD survey asked what employers were doing to support the extension of working life. Employers responded that they were using flexible working options (42%) and flexible retirement policies (30%) as a way of supporting the extension of working life along with home-working (20%) and health and well-being provisions (18%) to support their workforce. Clearly this survey showed that across all sectors employers are responding to an aging workforce and are putting policies in place to support older workers.

Employer responses	%
Access to occupational health	40
Healthcare insurance	22
Employee assistance services	30
Guidance on managing lifestyles	22
Line manager training to be alert to early warning signs about employee health issues	29
Ergonomic job design (taking into account physical requirements and characteristics relevant to the role)	25
Stress management training for individuals	23
Good practises in managing sickness absence	47
None – No provisions are in place for employees' health and well-being	24

It is common that many older workers having caring responsibilities for older relatives or grandchildren.

The TUC research suggests that many workers choose to retire instead of staying in work because they are not being offered the opportunity to access flexible working or to reduce their hours.

Although flexible working is on offer by employers it is largely associated with younger workers or parents.

Many older workers are unaware of the options available to them which could include flexitime, part-time hours, job sharing, compressed hours, term-time only, homeworking and unpaid leave.

Flexible retirement is another way in which older workers can remain in employment for longer. The NHS offers flexible retirement as way in which staff and organisations can be flexible about what age workers retire and allows workers to retire over time.

Source: CIPD Survey – Managing an age diverse workforce

Although not all of these options will be available to organisations as pension schemes will have different rules; they do show how flexible retirement can offer an alternative for employers, and give employees the time and opportunity to pass on knowledge and share their skills with others before they retire. Within the NHS there are different flexibilities that are on offer to employees:

<b>Step down</b>	Staff can step down into another role, for example reduce the level of responsibility whilst remaining in the organisation
<b>Wind down</b>	Staff can wind down to retirement remaining in their current post but reduce the number of hours and days they work
<b>Retire and return</b>	Members of staff that have reached the minimum age for pension can retire, claim their pension and then return – Members should seek advice if they are considering this option due to government policy changes in exit payment caps.
<b>Draw down</b>	Members can take part of their pension benefit and remaining working.
<b>Late retirement enhancement</b>	Members can choose to retire later and have their pension benefits enhanced.
<b>Early retirement reduction buy out</b>	Members or employers can pay additional contributions to buy out the reduction applied to the member's pension if they retire before their normal pension age.

Source: NHS Employers – Flexible Retirement

### What can branches do?

**Promote flexible working** - All employees have the right to request flexible working arrangements if they have 26 weeks service, but this does not necessarily mean that the request will be granted - An employer needs to show that the request has been dealt with in a “reasonable manner”.

The TUC and UNISON are campaigning for the right to request flexible working as a ‘day one right’, and also that it should be harder for employers to refuse the request from workers that have caring responsibilities. Branches reviewing their flexible working policies could gain an agreement with their employer that the right to flexible working can be accessed by workers earlier than 26 weeks set out in legislation, especially in cases where staff have caring responsibilities.

Branches should work with their employer to ensure that flexible working opportunities are promoted widely to staff within their organisation and that there is a clear process of how to apply for flexible working. Employers should keep records and monitor the use of flexible working within their organisation to make sure that the policy is being applied equitably across all age groups.

**Negotiating a (flexible) retirement policy** - Branches should be cautious when negotiating retirement or flexible retirement policies and make sure that an arbitrary retirement age is not put into the policy. Good practice would be to state that your organisation does not operate a compulsory retirement age and is committed to the principles of equal opportunities.

**Pensions auto-enrolment** – The TUC are calling for the expansion of the auto-enrolment pension system as their research shows that millions of women are still missing out on employer contributions into their pension because they earn less than the earnings trigger. The government have said that they are going to review this issue this year, to see what changes can be made to address this. UNISON offers reps specialist training on pensions and pensions issues, so now may be the time to review who in the branch has specialist knowledge on pensions or branches can enrol reps on some training so that the branch is equipped to deal with the growing number of pension queries they are likely to get in the future.



As the workforce is getting older, it is important that employers put the right measures in place to help support their employees. Older workers may have different needs of a working environment than younger workers. UNISON health and safety reps can help by doing regular risk assessments of the workplace and working with the employer to make sure 'reasonable adjustments' are put in place. Where there are health and safety risks in the workplace all workers regardless of what age should receive training.

### **What is a reasonable adjustment?**

A reasonable adjustment is something that is recognised within equality law which means changing the way in which employment is structured and the removal of physical barriers to provide extra support for a worker.

Reasonable adjustments and changes to the working area can help keep an employee in good health and doing the job for longer, for example a new desk that a person can stand and work at, foot rests, voice recognition software on the computer, hands-free headset for phones and new desk chair.

As people get older you should not assume that a job will become harder or that it will become impossible to do the more physically demanding jobs, so employers need to work with branches and look at where this might become an issue and redeploy older workers into other areas of work. One of the main criticisms UNISON highlighted in the 'working longer review' was the lack of forward planning and jobs on the same level and parity in pay for older workers to request to be deployed into.

### **Stress**

Health issues can affect everyone regardless of age - research from the Health and Safety Executive (HSE) has shown that women are more likely to suffer from stress (across all age groups compared to men). Women aged over 50 reported higher levels of work related stress, anxiety and depression, but a reason for this may be because women are more likely to seek help and report their symptoms than men.

Stress can increase with age, therefore employers should discuss openly with older workers the type of work they do and whether they would benefit from flexible working. UNISON has produced a [guide](#) for branches about how to deal with stress in the workplace, which includes a stress survey which branches could conduct as a way of presenting this issue to the employer.

### **Menopause**

The TUC and UNISON have produced guides on [the menopause and work](#) and an increasing amount of employers are seeing the benefits of introducing measures within the workplace to help support women going through the menopause.

Employers should, in partnership with the unions, review their health and safety policies and make sure that they are all 'age aware' in order to increase the support of workers in this age group. Some of the most debilitating symptoms of stress and anxiety are experienced by women going through the menopause. On average the onset is between the ages of 50-55, but some younger women can start feeling some of these symptoms 5-10 years before the menopause. As well as stress women sometimes suffer from hot flushes, fatigue, depression, mood swings, sleep disturbances (night sweats) and impaired memory<sup>4</sup>.

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<sup>4</sup> NHS Choices – Menopause Symptoms

Our research showed that employers could make a big difference by offering flexible working arrangements or a new work patterns to accommodate health reasons like the menopause.

### **Health and Wellbeing policies**

An employer can promote having a healthier lifestyle from within the workplace. Some employers offer health checks to employees over a certain age, where a health professional can give advice on diet and lifestyle. Other initiatives include cycling to work schemes, giving up smoking services, gym memberships or workplace gyms and counselling help lines where employees can phone if they have a problem and want to speak with a trained counsellor. As discussed previously employers would benefit by have workplace policy which allows time off work for doctors appointments and health screenings.

#### **What can branches do?**

**Reviewing Health and Wellbeing policies** – Employers should, in partnership with the unions, review their health and wellbeing policies and make sure that they are all ‘age aware’ in order to increase the support of workers in this age group.

**Work health screenings** - Larger organisations may already have health checks in place for their employees over a certain age. There are also free health checks available to people on the NHS between the ages of 40 – 74 years old. Branches could review what time off is given to employees to access things like doctor’s appointments and health checks. Simple workplace policy changes can make a big difference to workers (of all ages) that worry about having to take annual leave to see the doctor or that any time-off to see a doctor may trigger the sickness absence policy and that they are opening themselves up to a first written warning. UNISON has also produced a guide with advice for branches on [time off for medical appointments and health screening](#).

#### **What should I do if I have been discriminated against because of my age?**

Unfortunately despite changes in the law and changing attitudes to retaining skilled staff, there are still some negative stereotypes in some organisations which could present barriers to older workers in the workplace. If you think you are being harassed or discriminated against because of your age speak with your line manager or UNISON representative. Members should always keep a diary of events of any incidents of discrimination/harassment and any witnesses to these incidents. Acas guidance advises workers to ‘express their concerns’ at an early stage, informally and to speak with the person who is harassing you to tell them that their behaviour or language that they are using is not appropriate. If you express your concerns to your line manager or human resources about a colleague they should be dealt with quickly and you should be informed of the outcome.

If the discrimination or harassment continues then it may be time to use your organisation’s grievance procedure. Your UNISON rep can help support you through this process, has the legal right to attend meetings with you and give you advice about what evidence to present in the grievance hearing.

If you are not satisfied with the outcome of your grievance, your employer should give you the right of appeal, which will be heard by a different person. You have the legal right to be accompanied by your UNISON rep to the appeal hearing.

As part of the grievance your employer may ask you to take part in 'mediation', this is when a third person mediator can, in some cases, help resolve grievance issues. This is a voluntary process which both parties enter into to try and find a solution. Mediators may be employees at your organisation but they must be trained.

If mediation isn't an option or hasn't worked and the internal grievance procedure has been exhausted and has not resolved the issue, then you can think about making a claim to an employment tribunal. At this point you will need the support of your UNISON rep and regional organiser as your case will need to be reviewed by the region and a legal opinion sought. Complaints to employment tribunals have very tight legal deadlines and must be brought within three months of the act you are complaining about.

### **Other Sources of Information**

UNISON [Women Deserve Better Report](#) (2014)

UNISON branch guide to [gender pay reporting](#)

UNISON model [grievance procedure](#) and [capability procedure](#)

UNISON branch guide on [time off for medical appointments and health screenings](#)

UNISON [submission](#) to the NHS working longer review

UNISON [stress at work](#) guide

UNISON [menopause](#) guide

UNISON [aging workforce](#) guide

TUC guide - [Postponing the pension: are we all working longer?](#)

TUC guide – [The health and safety of older workers](#)

Labour Research Department – Representing Older Workers Guide (2013)

Labour Research Department – Workplace Report (February 2017) – Older Workers

Acas guidance – [Employing older workers](#)

Acas guidance – [Age and the workplace](#) (2011)

Resolution Foundation – [As time goes by – Shifting incomes and inequality between and within generations](#) (February 2017)

CIPD survey report – [Managing an age-diverse workforce](#) (March 2014)

Guardian report – [Flexible retirement age: an idea whose time has come?](#) (Feb 2016)