Browne Jacobson

Discrimination comes of age

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Official statistics show that 15,336 claims which included a complaint of age discrimination were received at employment tribunals between March 2020 and March 2021.

The figure is more than double the number of disability discrimination claims (the next highest number of discrimination claims) and is a remarkable sixfold increase on the number of age discrimination claims presented the previous year.

Whether the sharp increase is a blip caused by the over-50s having suffered the largest increase in unemployment of any age group during the pandemic or whether it's here to stay remains to be seen.

There is clear tension between:

- our ageing population
- changes in the labour market
- succession planning
- the need to recruit and retain top talent

all of which points towards age discrimination becoming an increasing conundrum and risk for employers including higher education institutions.

Uncapped compensation

Compensation for age discrimination is uncapped. Employment Tribunals have awarded substantial compensation, including for loss of career, injury to feelings, and personal injury. Quantifying the damage losing an age claim can have on an employer's reputation is never precise but it is likely to be significant and long-lasting.

Tribunal judgments are public and often brutal, including their detailed comments on the veracity of witness evidence and the conduct of a party more widely. It is not normally the job of a tribunal to spare the blushes of individuals or organisations, in particular when they consider a witness or organisation has been economical with the truth/lied. Public policy normally dictates that a tribunal is transparent in its written reasons in order to explain its judgment.

Age discrimination is illegal but as Stuart Lewis, founder of Rest Less, an online community for the over 50s, has said:

"age discrimination is still widely seen as a socially acceptable form of prejudice"

There is considerable evidence to support the comment. For example, many job application forms, including ones produced by some of the UK's most beloved retailers, who appear to want to comply with equality law, still require applicants to disclose their age using unnecessarily wide age bands, especially at the upper end without a 'prefer not to say' option. The prefer not to say option is properly afforded to questions on other protected characteristics asked for monitoring purposes. The contrast is striking. Age discrimination against younger persons is no less illegal.

"*The likelihood of returning to work decreases with age*"

Data published by the Office for National Statistics shows that the likelihood of returning to work decreases with age. Between 2007 and 2020, just under a third of people aged 22 to 24 years returned to work within three months; this dropped to a fifth of people in their 30s, and 12.2% of people in their 50s.

In their recently published study, The Unretirement Uprising, 55/Redefined in partnership with Reed Talent Solutions concluded that the relationship between the over 50s and work is "*broken*". It found that:

- two thirds of over 50s predict age will work against them in recruitment processes
- 70% feel it is difficult to start a new career over the age of 50
- almost a third of retirees felt forced to retire

Four recent decisions on age discrimination show how a court or tribunal is likely to view an age claim. Whilst these are not specifically from an HE context, the rulings will be of interest to the HE sector.

Citibank NA and others v Kirk [2022]

In *Citibank NA and others v Kirk [2022],* the Employment Appeal Tribunal ruled that, while a marginal age difference, nine months in that case, meant it would be "*prima facie implausible*" to say age was the reason for the alleged less favourable treatment, a small age difference could, nonetheless, still be a relevant factor.

R Sunderland v Superdry plc

Superdry PLC was recently ordered to pay Rachel Sutherland, a former employee, £96,208 for unfair dismissal and age discrimination following a six-day hearing at which nine witnesses gave testimony. The claim centred on complaints that Superdry failed to promote Ms Sunderland, grant her the job title of Lead Designer, and overworked her, and that younger individuals were recruited, promoted and recognised, which undermined her standing (or perceived standing) in the team.

Having decided that Ms Sutherland was unfairly dismissed, the Employment Tribunal focused on the reason for the unfair treatment. It found that Superdry had treated Ms Sutherland unfairly in significant part because of her age and, crucially, management's assumption that her flight risk was low compared to younger employees.

Mr D Finch v (1) Clegg Gifford (2) Shirley Bellamy

Mr Finch was a 66-year-old insurance broker with a number of health issues. Shirley Bellamy was his managing director. Mr Finch was successful with his harassment claim, on age and disability grounds, by showing he was subjected to humiliating and degrading treatment by Mrs Bellamy. Examples included Mrs Bellamy repeatedly asking him, "*Are you planning on a nap this afternoon?*" and remarking that he had been around "*as long as Pontius was a Pilate*".

The Employment Tribunal also decided that Mr Finch had been subjected to victimisation when a settlement offer was withdrawn following a letter before action that set out his potential claims. They ruled that Mr Finch's resignation was a constructive unfair dismissal.

Pelter v Buro Four Project Services Ltd [2002]

Pelter v Buro Four Project Services Ltd [2002] concerns permanent health insurance (PHI). Under the scheme, payment of benefits ended at 65 – not the greater of 65 or the State Pension age as required by the Equality Act 2010.

Mr Pelter became permanently incapacitated and unable to work. At the time the PHI claim was made, the state pension age was 65, but it increased to 66 soon after. Mr Pelter stopped receiving PHI benefits at 65 and an age discrimination claim followed, on the grounds that the PHI scheme rules should have been updated to reflect the increase to the state retirement age.

The Employment Appeal Tribunal dismissed the claim on the basis that the terms of the benefit crystallised at the point of incapacity, after which responsibility passed to the insurer. Buro accordingly avoided liability as it was only responsible for providing 'access' to the PHI scheme. Employers and scheme providers should, accordingly, keep the terms of employee benefits up to date and under review, given the changes that do occur.

A protected characteristic

Higher education institutions commit considerable resources in their efforts to eradicate inequality based on all the protected characteristics, as well as social mobility, but age discrimination has received comparatively less attention, despite being a protected characteristic.

The sixfold increase in age claims should place age squarely on every EDI agenda and be given due importance; if not, institutions will find themselves seriously at risk when the age claims come in.

The business case is equally clear. As the Unretirement Uprising study highlights, UK employers face the biggest talent shortfall on record at a time when too many of the over-50 generation – capable of injecting around £20 billion into the economy by staying in work — feel abandoned, despite there being 1.2 million job vacancies in the UK between July and September this year and a shortage of candidates.

Contact

Raymond Silverstein

Partner

raymond.silverstein@brownejacobson.com

+44 (0)207 337 1021

Bettina Rigg

Partner

Bettina.Rigg@brownejacobson.com

+44 (0)330 045 2268

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