



The age old problem - discriminating against elderly employees

By **Philip Cameron** - 25 February 2019

Acas has recently published new guidance on age discrimination. This update is timely in light of an age discrimination claim brought by an NHS employee that caught the public's attention.

The new Acas guide

The [Acas guidance](#) is a useful practical guide for employers that provides a succinct, clear and simple way through one of the most challenging areas for employment lawyers and HR professionals. Whilst not of legal force, the tribunals may take the guidance into account when determining claims.

Two particularly useful one-sheet summaries accompany the guide, dealing with ten obligations on employers and the top ten myths about age at work respectively.

Amongst these myths, Acas highlights that there is no evidence that older employees are difficult to train and less able to learn new skills; Acas notes that provided training is organised, planned and coherent, employees adapt irrespective of their age.

The guidance cautions against making age-based assumptions about what employees are capable of, the impact of their health and how they will behave. It also warns against assuming there is value in training younger staff and little or no value in training older employees.

The case of Mrs Jolly

Although the Acas examples appear to be a matter of common sense and basic employee relations, the recent tribunal claims brought by an NHS worker illustrates an employer apparently falling into this very obvious trap.



At the age of 88, Mrs Eileen Jolly is thought to be the oldest claimant ever to succeed in an age discrimination claim. Mrs Jolly started work with the NHS at the age of 61 in 1991. In 2015 she was told her role had changed to a patient pathway co-ordinator. She was required to undertake training on waiting lists in this new role. The training was delivered by a colleague and was, according to the tribunal, rather brief because the trainer was not fully up to speed on some parts of the training. The complete training was never re-scheduled.

In September 2016, Mrs Jolly was summoned to a meeting with the Trust's Director of Operations who told her that she was being investigated and placed on special leave. She was instructed to collect her things and leave the premises. Unsurprisingly, the tribunal found that this special leave was in fact a suspension.

During a subsequent investigation into her ability at work, Mrs Jolly's was asked to provide written answers to questions whilst on holiday. At the start of 2017 she was dismissed for poor performance; the Trust concluded that retraining her would not enable her to perform as she was resistant to the current models of working. The tribunal noted that the consultant for whom Mrs Jolly worked had no issues with her performance.

Mrs Jolly appealed against her dismissal, but the Trust told her it was out of time (it wasn't) and did not consider her appeal. She raised a grievance complaining about age discrimination in what the Trust was doing. The Trust failed to deal with the complaints Mrs Jolly raised.

The tribunal found that the dismissal was unfair and because of Mrs Jolly's age. It found that the taking into account of comments made by Mrs Jolly's colleagues about her age, such as her ability to walk the length of the building, her frailty, and her difficulties in walking (she had arthritis) also amounted to age discrimination. These comments, the tribunal found, tainted the Trust's view of Mrs Jolly's performance. Other aspects of the Trust's conduct towards Mrs Jolly also amounted to age discrimination such as failing to deal with her appeal against dismissal.

Key take-aways

This case serves well to emphasise the very obvious dangers of making assumptions based on a protected characteristic, in this case age. Training and opportunities should be given to employees of all ages and it may very well be unlawful to assume, for example, that older employees are stuck in their ways and resistant to change, or that they are physically less able than younger employees.

Employers need to ensure that they are seen to listen to the views expressed by their employees. This is particularly true when such concerns are in the form of an appeal against dismissal or a grievance complaining about unlawful treatment.