

Group Briefing

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The age old question – When is there age discrimination?

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

Employers and courts alike continue to be vexed by issues relating to age as a ground of discrimination. This is not surprising given culturally there is still a level of acceptance regarding “banter” or comments about someone’s age.

Most of us (at least those over a certain age) have received a birthday card making a joke about our increasing age and subsequent capability or looks! The recent English case, *Jolly v Royal Berkshire Hospital*, is an excellent example of an employer failing to address age discrimination and illustrates how not to conduct a capability procedure; it warrants taking a closer look.

THE FACTS – WHAT HAPPENED?

Mrs Jolly worked from 1991 until 2015 as a medical secretary, and subsequently between 2015 and September 2016 as a patient pathway coordinator, until she was suspended by her employer, escorted from the premises, investigated under a capability procedure and ultimately dismissed. In 2016, Mrs Jolly was 86, and suffered from a heart condition and arthritis.

The follow up letter from the Director of Operations stated Mrs Jolly was being investigated over a concern about her capabilities ‘due to a third serious incident in two years’ regarding administration of the hospital waiting

list. Here, the Employment Tribunal points out that Mrs Jolly had no idea what the first two incidents referred to were as no serious incidents had been raised with her previously and indeed “none of the Respondent’s witnesses were able to identify the first two serious incidents...”

The manager conducting the investigation contacted Mrs Jolly to arrange an interview four days later. Mrs Jolly sought to postpone the meeting as she could not get union representation. When a second date of another four days later was offered, Mrs Jolly sought to postpone again due to a pre-arranged medical appointment, the fact that she still could not obtain union representation, and because she was about to go on holiday. The manager’s view was that the capability meeting should go ahead without her and a report be prepared in her absence. He considered that Mrs Jolly had plenty of time to rearrange her medical appointment, given she had been suspended. The manager subsequently decided he should obtain Mrs Jolly’s input and sent her some questions

which she received and responded to on holiday.

A part of the investigation, the manager spoke to a number of Mrs Jolly's colleagues. Her colleagues made a number of discriminatory comments including: she was too old to walk the length of the building; she was frail because of her age; she had difficulty with walking and arthritis; comments about her health; and concerns regarding her working overtime because of her age. The investigating manager himself referred to Mrs Jolly being 'stuck in old secretarial ways'. When questioned, the manager said he did not take these comments into account and just reported them. However, there was nothing in the investigation report to suggest they were not taken into account and Mrs Jolly was not given an opportunity to respond to them.

Mrs Jolly was invited to a second investigation meeting where it was said her actions in relation to the waiting list and competency in role would be considered. Mrs Jolly raised a grievance regarding: the way she had been treated; the fact that the consultant she worked for did not work in accordance with the process they raised and had no issue with her performance (which the consultant supported in his evidence); that she had been given inadequate training regarding the new process; and the way she was being treated was due to her age.

The Director of Operations stated that Mrs Jolly's grievance would be heard as part of the second capability review meeting. However, at the review meeting he did not ask Mrs Jolly about age discrimination or deal with her grievance, other than to ask her whether she had said everything she needed to say.

Mrs Jolly was dismissed and, when she appealed, she was initially incorrectly told her appeal was out of time. When this error was pointed out, there was still no consideration of, or response to, her appeal.

Unsurprisingly, Mrs Jolly raised claims for unfair dismissal, discrimination

on the grounds of age, disability discrimination and breach of contract.

THE DECISION - WAS THE EMPLOYEE DISCRIMINATED AGAINST?

In finding in favour of Mrs Jolly, the Employment Tribunal noted:

- » The capability policy attempts to secure the improvement of an employee's performance. The investigating manager did not approach the process in "the spirit of the capability procedure" but "more akin to a disciplinary process."
- » The investigating manager took into account the totality of the comments expressed by Mrs Jolly's colleagues relating to her age and health. By taking these comments into account in relation to Mrs Jolly's performance, the conclusions were tainted by her age and disability. This amounted to unreasonable treatment and constituted discrimination.
- » The Director of Operations did not deal with Mrs Jolly's grievance at all. The grievance raised the issue of age discrimination and the employer accepted that inappropriate comments had been made relating to Mrs Jolly's age and frailty. On that basis, there were sufficient facts to conclude that she was treated less favourably on the grounds of her age. The failure to consider her grievance constituted discrimination.
- » The Director of Operations did not allow Mrs Jolly time to improve after an appropriate warning. Mrs Jolly was not offered training as the Director of Operations did not think it "appropriate in the Claimant's case". The Tribunal found there was no justification for this conclusion and inferred that the difference in treatment was due to Mrs Jolly's age, and her subsequent dismissal was less favourable treatment due to age.
- » The failure to consider or respond to Mrs Jolly's appeal appeared from the facts to be because of her age and the employer did not provide a response to show it was not due to age.

» The comments made by colleagues and communicated to Mrs Jolly during the investigation had the purpose and effect of violating her dignity in relation to her age and disability and created a hostile and intimidating environment for her.

» The unfavourable treatment because of her age was by reason of symbiosis also because of her disability.

» The dismissal was unfair due to discrimination, harassment relating to age and disability, and because the procedures followed, not least the employer did not follow its own capability procedure.

POINTS TO CONSIDER – WHAT SHOULD AN EMPLOYER DO?

What should employers take from this case, other than a salient reminder on the purpose and conduct of a capability procedure? Employers should remember the following:

- » With the removal or postponement of compulsory retirement ages and an increasingly aging workforce, it is important that your workforce is appropriately trained in relation to age discrimination.
- » As with any other protected characteristic, managers should be aware of bias in relation to age and ensure it does not impact how employees are treated in the workplace e.g. by not offering training to certain employees. Particular care should be taken to rule out unconscious bias.
- » Derogatory comments because of age are not acceptable in the workplace and may amount to discrimination. They should be treated as seriously as derogatory comments based on any other protected characteristic.
- » Capability procedures should be conducted fairly and with a focus on the skills required for the role. If the issue of age is raised, this should be clearly and categorically removed from consideration, and handled appropriately.
- » If the organisation has a capability

procedure, it should be followed!
Any capability procedure should at a minimum include:

- a. an initial informal warning or discussion regarding performance concerns;
- b. a reasonable assessment or investigation into the employee's work, which is provided to the employee who is given an opportunity to comment on the findings before a formal procedure is commenced;
- c. a capability meeting where the performance concerns and any relevant documents are discussed;
- d. if performance is found to be lacking, a warning outlining the areas where performance is below standard, targets for improvement and any training or assistance which the employer will provide;
- e. a review period to enable the employee to improve;
- f. if necessary, a further capability meeting followed by a further warning and/or dismissal and/or review period; and
- g. a right of appeal for the employee at each stage.

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