

Age UK is the new force combining

AGE and **HELP THE AGED** WE WILL
Concern



Consultation response

Ref: 3011

Resolving workplace disputes

20 April 2011

All rights reserved. Third parties may only reproduce this paper or parts of it for academic, educational or research purposes or where the prior consent of Age UK has been obtained for influencing or developing policy and practice.

Name: Christopher Brooks
Email: christopher.brooks@ageuk.org.uk

Age UK
Astral House, 1268 London Road
London SW16 4ER
T 020 8765 7200 F 020 8765 7211
E policy@ageuk.org.uk
www.ageuk.org.uk

Age UK is a charitable company limited by guarantee and registered in England (registered charity number 1128267 and registered company number 6825798). The registered address is 207-221 Pentonville Road, London N1 9UZ.

This response outlines Age UK's view on some of the Government's proposals to reform the employment tribunal systems. It looks at various options for change, including a focus on pre-claim conciliation; additional measures to dissuade people from taking claims to tribunals; measures to help the tribunal system work more efficiently and effectively; and changing the unfair dismissal law so claims can only be made on this ground after two years employment.

Key points and recommendations

- Age discrimination in the workplace and in recruitment is an extremely significant problem. The Government must recognise this and ensure that reforms to the tribunal service do not skew the system against claimants aged 50+.
- We broadly support efforts to improve the pre-claim conciliation process.
- Measures to impose financial penalties on claimants as a means of deterring them from making a claim are likely to reduce access to justice. The Government must ensure that people claiming in good faith – i.e. because they believe or have been advised that they have been discriminated against – are not deterred from doing so.
- We do not consider there is any evidence to substantiate the view that there are many vexatious claims or that the system is biased in favour of claimants. The statistics from the Tribunal Service indicate that if anything the opposite is true.
- We do not believe that the Government should introduce fees to make a claim.
- For those not in work who have either already left the employer against whom they are claiming, or have been discriminated against in the recruitment process, the reforms will act only as a deterrent to claiming. In this respect, we believe the system will become heavily weighted in favour of the employer.
- The Government needs to provide greater clarity to employers and employees on what constitutes age discrimination. This will help both parties proceed with greater confidence and could reduce the number of cases taken to tribunal.
- We do not support the proposed changes to the unfair dismissal law. There is no evidence to suggest that the policy change will enhance economic growth or job creation, or indeed that employers widely support the change, and we believe it will only play in to the hands of unscrupulous employers who routinely dismiss staff before they qualify for such protection.

1. Pre-claim conciliation

Age UK supports in principle the move to extend the number of cases where pre-claim conciliation and mediation in the workplace are used to resolve disputes (**Questions 1-7**). We believe that older workers could benefit from this, providing the process accommodates and is responsive to the needs of individual older employees.

It is worth noting that a recent CIPD survey found that 57 per cent of employers out of a sample of 206 used pre-claim conciliation in 2010, a rise from 43 per cent in 2008. Over 80 per cent that use mediation say they do so to improve employee relations, which we believe is a positive sign.ⁱ This rise shows the trend is moving in this direction anyway so many employers may need only a ‘nudge’ to deliver this.

However, there are three principle issues with which we are concerned:

1) If ACAS is given the proposed powers to intervene, advisers must be trained to understand the full range of situations which could affect older workers and lead them to bring forth claims (**Questions 12-16**). Most pertinently, this includes an ability to understand the nature of age discrimination and how it is manifested in workplace and recruitment situations. Advisers must be aware of available evidence on this issue and how it affects different age groups. For example, research by the DWP shows that both older and younger workers are significantly adversely affected.ⁱⁱ Therefore, the proposed tribunal reforms are likely to have a significantly greater impact on these groups (with regard to age discrimination as opposed to other grounds for making a claim), which brings into question whether the reforms are consistent with equalities legislation.

	% establishments	% establishments where age affects suitability for largest occupational group
Jobs in the largest occupational group are considered more suitable for certain ages	8	100
Age ranges that are most suitable		
under 25 years	3	36
25-39 years	7	95
40-49 years	6	73
50 years or older	3	41
don't know most suitable ages	*	5
Age ranges that are less suitable		
under 25 years	5	64
25-39 years	1	6
40-49 years	1	13
50 years or older	4	50
don't know less suitable ages	1	11
<i>Base weighted</i>	2205	165
<i>Base unweighted</i>	2205	133

Multiple response.
^a Not available

Table 1 is an extract from DWP research which shows that older and younger workers are perceived as being less suitable for the most common job within an organisation than are the 25-39 and 40-49 age groups; and also that the same two age groups are deemed less suitable when the question is inverted.

ACAS should be aware of the implications of this when examining the merits of each case, or the efforts at mediation and conciliation will be ineffective in areas where such discrimination is typically less visible.

Table 1: Employers' perceptions of age in relation to their largest occupational group (Source: DWP (2010))

2) We believe the Government should clarify what constitutes age discrimination, so both individuals and employers are aware of what decisions, attitudes and behaviours they can expect. Providing such guidance, with examples, could help give employers and individuals the confidence to take decisions in the knowledge they will not be construed as discriminatory, and help avoid claims being made. This could effectively be a review of the age discrimination legislation and its practical impact.

3) The timescale in which ACAS must deal with each case should not be fixed (**Questions 19-20**). The specified one-month period should be flexible, in particular capable of being extended when appropriate, to allow people and employers to deal with changing, and sometimes difficult circumstances.

2. The employment tribunal and process

Claims

In carrying out the reforms, it is important to remember that the vast majority of claims are made in good faith, and there could, therefore, be unintended consequences of changing the process. If people with legitimate concerns are deterred this could reduce access to justice. There is no evidence to suggest that the system is prone to encourage 'vexatious' claims and therefore no need to make reforms on this ground.

In spite of the assertions in the consultation paper and impact assessment, there is no evidence that many claims have 'no merit'. Such contentions are wholly inappropriate and only serve to undermine confidence in the tribunal system while having a negative impact on equalities and access to justice, and should not be the basis of policy decisions.

In fact, in 2009-10 92 per cent of discrimination claims made did not even reach a hearing. In the age discrimination strand, only two per cent of total claims were successful at a hearing,ⁱⁱⁱ which does not back up the assertion that 'the tribunal system is weighted in favour of the claimant'.^{iv} In the majority of cases the claim was withdrawn or no award was made. Age discrimination is notoriously hard to prove, and the system must be designed to judge such claims objectively and consistently, not to restrict such claims from being brought.

39 per cent of age discrimination claims were withdrawn. This does not imply, as the consultation paper claims, that the system is riddled with weak claims – instead it implies that those claims which do not have merit do not make it to the stage at which significant costs start being incurred. A further 13 per cent are struck out before a hearing.^v

Recruitment

The proposed changes are targeted at those who have or had a contract with an employer. Anecdotal evidence suggests that a significant amount of age discrimination occurs in recruitment – the proposals to deter claims from being made

will have the highest impact on this group. The Government must address this issue and ensure that those being discriminated against in the recruitment process do not:

- i) Suffer a reduction of access to justice
- ii) Incur additional costs.

For an individual who is out of work any additional costs could act as a significant deterrent to bringing forward a claim, even where it is fully legitimate.

The 2009/10 Citizenship Survey finds that four per cent of people aged 50+ believe they have been discriminated against when being turned down for a job because of their age.^{vi} Across England and Wales this could equate to about 750,000 people.^{vii} A survey conducted in 2010 among members of the Chartered Institute of Personnel and Development and the Chartered Management Institute found that 40 per cent of participants had experienced age discrimination of some form at work.^{viii} However, it is more common for the individual to leave their job than to pursue a discrimination claim.^{ix}

Charging fees

Any fee is likely to act as a disincentive to making a claim, and we consider this is likely to restrict access to justice. This would in particular affect claimants who have been forced out of work because of their age (or other discrimination). These people may be subsisting on Jobseekers Allowance (JSA) of £67.50 per week. Considering that fee levels could be set higher than a week's income demonstrates the extent to which pursuing a charge of discrimination will make it unaffordable for many who have been forced out of work.

The assumption that charging will lead to more individual employment disputes being resolved prior to tribunal^x is, we believe, questionable. This could only happen because it affects the relative bargaining positions of the claimant and employer (i.e. strengthens the employer's hand), which will remove a degree of objectivity from the system. At least as likely is the outcome that fewer claims will be made in the first place.

There is also the possibility that introducing a system of charging could result in the unintended consequence of a proliferation of no-win-no-fee lawyers. The Government should proceed cautiously.

3. Unfair dismissal

Age UK does not agree with the proposed changes to the unfair dismissal law (**Questions 57-61**). We do not consider the evidence presented by the Government in the impact assessment sufficient to justify such a change in policy.

Furthermore, there is no firm evidence presented that changing the law in this way will promote growth and jobs, as is claimed^{xi}. We believe the Government should fully research the implications of this change. As the impact assessment points out, there are substitutes for unfair dismissal, notably breach of contract, which many claimants

may be able to refer to instead. This makes it virtually impossible to estimate the impact any change will have, and renders the figures given invalid.

We believe it will merely play into the hands of the small minority of employers who routinely dismiss staff before they gain this additional protection.

Although we recognise that in general older workers will be less affected by the change than younger workers and other demographic groups, there are still many older workers whose jobs will be put at risk. In particular, both those in the workplace who have caring responsibilities and older workers with health conditions may end up being victimised.

It is important that individuals are aware of the discrimination laws. We call on the Government, maybe through ACAS, to provide signposting to a resource which clearly explains that discrimination law takes precedence over the unfair dismissal rules – i.e. that a claim on the basis of one of the discrimination strands can still be made by individuals with less than two years of service.

ⁱ CIPD (2011), Conflict management

ⁱⁱ Source: DWP (2010), Second survey of employers' policies, practices and preferences relating to age

ⁱⁱⁱ Employment tribunal and EAT statistics 2009-10 (March 2011)

^{iv} BIS (2011), Resolving workplace disputes, Impact Assessment

^v Employment tribunal and EAT statistics 2009-10 (March 2011)

^{vi} Communities and Local Government (2010), Citizenship Survey 2009-10

^{vii} Projection based on: ONS (2010), Population estimates mid-2009

^{viii} CIPD/CMI (2010), Managing an ageing workforce. The average age of participants was 52.

^{ix} Rolfe H, Duhdwar A, George A and Metcalf H (2009) Perceptions of discrimination in employment
Government Equality Office

^x BIS (2011), Resolving workplace disputes, Impact Assessment p.142

^{xi} BIS (2011), Resolving workplace disputes, Consultation Paper, p.51