

Over-qualified? Or just seen as 'too old'?

Age discrimination

Andrew Baxter hears how difficult it is to win an ageism claim against an employer – and looks at alternatives to ending up in front of a tribunal

Anne Snowden, a jobseeker from Hertfordshire in her early 50s, speaks out: "They said I was over-qualified," she says. "But I didn't believe them – they just thought I was too old. I'll keep trying but it's going to be tough, and I need the money."

That scenario, in which people are told they are overqualified or have too much experience, is a very common problem, says Christopher Brooks, policy adviser for employment and skills at Age UK, the charity.

Age discrimination is a serious issue, he says, but often it is anecdotal because it is quite easy to reject someone for a job subtly rather than overtly. "It can just be perceived, and may not even be real – it is really whether the individual feels they are being discriminated against."

Another common problem occurs when younger managers are deciding on recruitment or promotion. "They may feel awkward giving instructions to someone older or may worry whether somebody older might struggle with taking instructions from them," says James Cox, who heads the UK employment practice at Gibson, Dunn & Crutcher, the law firm. "There are all sorts of psychological elements in age discrimination that don't apply in other forms of discrimination."

Although, theoretically, workers of all ages can be victims of age discrimination – and can take their complaints to an employment tribunal – evidence suggests the majority of problems occur towards the end of working lives, as retirement approaches.

Since the Employment Equality (Age) Regulations were introduced in 2006, in response to a European Union anti-discrimination directive, there is some evidence of a small improvement in employer attitudes, says Mr Brooks. "It's pretty marginal...the trend is slightly favourable," he says.

"We have an ageing workforce and a rising proportion is going to be 50-plus. Employers are going to have to

turn to more older workers to fulfil their skills needs. They will find they can't discriminate so much and have to be more inclusive and accepting."

The 2006 regulations added age discrimination to the reasons for claims to be made to employment tribunals, joining a long list including unfair dismissal, disability, sex and race discrimination.

In 2010-11, age discrimination claims received by tribunals surged to 6,800 from 5,200 in 2009-10, but this is due entirely to a mystery blip in the third quarter, when claims rose from 1,100 a year earlier to 2,900.

Mr Brooks says the rise could be linked to publicity generated by the case of Miriam O'Reilly, the former BBC television presenter of *Countryfile*, who in January won an employment tribunal against the corporation on the grounds of ageism, after a 14-month battle.

The overall numbers are small, however, compared with other reasons for going to tribunals, and Mr Brooks says this could be because the age discrimination laws are relatively new and people are less aware of them.

Also, tribunal success rates are low. Fewer than 4,000 cases were begun in 2010-11: 1,500 were withdrawn, 1,300 conciliated at the Advisory, Conciliation and Arbitration Service, 350 were struck out, 120 dismissed at a preliminary hearing, 320 unsuccessful and just 90, or 2 per cent, successful at tribunal.

"It is much harder to win one of these cases than to bring one," says Mr Cox. "You have to establish a link between what the employer did to you and your age, but even if the tribunal believes you were discriminated against, your employer has the opportunity to justify its action by showing that it was a proportionate way of achieving a legitimate business aim."

Mr Cox says solicitors acting for employees sometimes encourage their clients to bring discrimination claims even when they have no evidence in support, but find it useful tactically to add a discrimination claim in with a standard unfair dismissal case if it is felt a company might then be more likely to settle. "It's a practice that I and other lawyers that represent employers don't think very highly of," he says. "There isn't an effective penalty for bringing such a speculative claim without any real prospect of success. A tribunal could make a cost order, but it would be very unusual."

The balance of power is about to shift, however. On October 1 the UK's default retirement age of 65 will be

scrapped, a move Age UK campaigned for, while some business interests opposed it.

"It's a very positive move," says Mr Brooks. "It will play a part in creating a shift towards age-neutral cultures and employers being more age-aware, treating people more equally and seeing past the stereotypes." Some employers may be exposed in the short term, he says, but they should find solutions and exploit the benefits of being more age-friendly.

Before employees start to dream of picking up a monthly pay cheque in their 80s, however, Mr Cox sounds a warning note. "It's not quite true to say employees will get to choose their time of retirement, whenever they wish," he says. "It will still be possible for employers to retire an employee against his or her wishes."

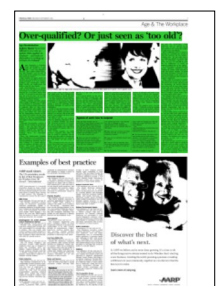
To avoid losing at an age discrimination tribunal, employers must "objectively justify" their decision to retire the person, whether on health and safety grounds or because of succession planning or the need to promote the recruitment and retention of younger employees.

These could be grounds for justifying retirement, says Mr Cox, but it is not known how courts will deal with the arguments. Mr Brooks believes such cases will be rare: some organisations will seek to justify retirement at 65 objectively, he says, "but the government has made clear it will be hard to achieve, except where there are clear public safety risks".

The changes have come too late to keep Margaret Davison-Scott in the workplace, however. Now 67 and from East Yorkshire, she took early retirement at 60 after a lifetime of full-time working, and found two permanent part-time posts – in the local council's housing department and at the library. But the council said she had to retire at 65.

"I don't think anyone wanted me to go but the rules were quite specific, you had to leave then unless you were in a key position," says Ms Davison-Scott. Her local MP advised her to appeal, and she began an industrial tribunal case, but it had no chance of success under existing legislation. "I fell between the cracks," she says.

Losing the extra money from the two part-time posts means she cannot



Ultra-qualificati? O semplicemente considerati "troppo vecchi"? (pds)



afford a lot of things. "I need to change my car as it is approaching old banger status, and I used to love activity holidays but they are very expensive. My holidays now consist of pet-sitting, as that way I get free accommodation."

Ms Davison-Scott concedes it is not right that a small employer should be lumbered with an older worker that refuses to go and is not doing a fair day's work, but people are different and everybody should have a choice. "It has to be a mutual thing and not set in stone," she says.

Ageism at work: how to respond

Have you been passed over for promotion or been denied training? Are you managed differently because of your age or have you seen examples of more subtle discrimination in the workplace such as a job advertisement that asks for qualifications that older workers are less likely to have? If so, this is what to do:

- Work out what the problem is in advance so that you can be clear about why and how it has happened. Write down the points you wish to raise with your employer.
- Speak to your employer and raise a grievance. Put the complaint in writing stating clearly what happened, who

was involved and how it has affected you. Ask a colleague or union representative to the meeting and request that there is someone there to take notes.

- Make sure your concerns are taken seriously and that you are given a satisfactory answer.
- If you are not satisfied contact Acas to mediate.
- If there is still no resolution then think about using the tribunal system - you will need evidence to back up your claim.
- The Government has produced

forms under the Equality Act that will enable you to get information from your employer.

Visit: www.homeoffice.gov.uk/publications/equalities/equality-act-publications/complaints-Equality-Act.

- The tribunal hears arguments from both parties and will then make a decision. If the claimant is successful he or she will receive a monetary award for "injury to feelings" and in some cases where someone has been out of work or forced to leave their job they may receive compensation for injury to health or loss of pension.

Information supplied by Age UK.

