

# Age discrimination – how does it affect succession planning?

A Guest Article by Richard Linsell  
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Successful businesses are not only efficient in what they do in the present but will always be anticipating future challenges. Succession planning is one area that businesses would be well advised to consider in good time, in order to avoid the panic that so many experience when it is realised that a key individual is approaching retirement without an obvious successor waiting in the wings or where senior management or business owners have been running a business for some years and suddenly wake up to the fact that the majority of mid ranking and senior employees are in their late 50s or early 60s, with a large gap to the next layer of employees who may be in their 20s or early 30s. It might be that there is no-one with the necessary skills and experience to take over in a few years time or that some of those older employees are not adapting to new working methods, which means that they are no longer perceived as part of the future of the company in a dynamically changing market.

The aim of this article is to raise some of the legal issues that might impact on a company's considerations surrounding succession planning. However, employment law is not a simple beast and it is necessary to consider a number of overlapping and sometimes conflicting areas on which one must come to a reasoned conclusion based on the particular circumstances of the case. This article therefore looks at broad principles but will hopefully provide to employers the legal context in which succession planning operates before checking their plans with their legal advisers!

### Identifying the problem

The first task is to analyse the true cause of the perceived problem: is it the age profile of the workforce or is it performance and capability issues of those in the latter stages of their careers? Perhaps it is actually a management preconception about the capabilities and experience of the younger members of staff?

I will not deal with performance issues in depth although they should always be considered as part of any comprehensive analysis. Companies are often reluctant to deal with issues of performance or a failure by an employee to move with the times, as it frequently relates to long serving employees, people with whom they have worked for many years and who they often consider to be friends. They therefore try to raise issues indirectly in what they consider to be a humane way but then fail to tackle the core problem until it becomes business critical and is too late to deal with without attracting considerable liabilities for the company. Usually the employee will not share the same perception about their performance and importance to the business and will therefore take any attempt to deal with it as an unfair and unwarranted attack on their dignity. It

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will therefore be met with resistance and hostility, which will make the process that much more painful for all concerned.

### Move over!

One problem with succession planning is that it can often involve making room for a new person by removing an existing employee, possibly by sidelining them from a former position of responsibility into a diminished role. If this is the removal of an older employee in favour of a younger employee, the age discrimination law will come into play.

The law states that an employer cannot discriminate against someone on grounds of age unless it can be objectively justified. There is still insufficient case law to know what employment tribunals will consider to be justified, since the legislation does not dictate what factors are capable of being justified. Although the Government's consultation document did suggest that "the facilitation of employment planning" would be a possible justification, it will, in my view, always be difficult to justify removing someone from his or her existing job simply with a view to long term planning. Whilst the law does usually allow proper business decisions to be taken, it will rarely be fair to an individual to dispense with their services simply because management has previously failed to implement proper succession planning. Attempts to use the performance management procedure may also fail if performance is raised as an issue after the intention to undertake succession plan has been revealed, as the tribunal is likely to conclude that that was the true reason for an alleged performance dismissal. It is therefore necessary to address the issue well in advance and adopt a strategy that will allow the company to achieve its goals.

On the other hand, succession planning by the appointment of staff of a certain age to a post may be possible to defend against a claim of age discrimination on the grounds that the appointment was required in order to achieve a balanced age profile for the workforce (although it is still too early to say whether such an argument would succeed). So, in the example above, appointing someone in their 40s to a role rather than someone in their late 50s may be justifiable, although that does not mean the employer is totally in the clear, as the tribunal could still ask whether it really was the case that the 50-year old did not have the right skills to do the job? Not appointing someone simply because of his or her age in those circumstances may yet land the employer in tribunal.

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### Quantifying the risk

Whereas the compensation for unfair dismissal is currently capped at £63,600, compensation for age discrimination is uncapped so, for someone who is in their late 50s or early 60s who may not work again, an employment tribunal can compensate them for their loss of earnings until retirement which can be a large six or seven figure sum. It should be recognised however that the risk in respect of a younger employee is lower in terms of compensation, as it is going to be harder for them to argue that they should be entitled to several years' loss of earnings on the basis that they are unlikely to work again. On top of any award, there are also the legal costs and the management time and focus wasted defending claims, which will inevitably involve dissecting historical events with a fine-toothed comb. This can only distract the business' attention away from the increasingly important job of driving the business forward.

The lesson therefore is that succession planning must be part of a long-term strategy rather than a panic measure if the business is not to be hampered by substantial liabilities.

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If you would like more information on any of the points covered in this Guest Article, please contact **TCii** on **020 7099 2621**.