

Age accommodation without discrimination "a challenge"

One of the challenges employers face when it comes to age discrimination is that "you're always going to be discriminating against one age group or another", says Clayton Utz lawyer Stuart Pill.

"By providing accommodation to, for example, older workers, younger workers might say, 'Well *I'm* not being provided with equal access'," he says.

In some states there are general exceptions that allow employers to provide more generous differential treatment to older workers "to address an otherwise discriminatory impact" and enable them equal access to the work they might otherwise be unable to perform, Pill says.

There are also exceptions under the *Federal Age Discrimination Act* which, for example, allows employers to provide better redundancy entitlements to older workers because it recognises their job prospects when retrenched are less favourable than that of younger workers.

"One of the challenges for employers, particular national employers, is the breadth of exceptions - and whether these clearly apply to some of those sorts of matters differs from state to state. So whilst you might be very confident that you're not going to breach the *Federal Age Discrimination Act* you might still be breaching the *Victorian Equal Opportunity Act* in the strict sense," he warns.

Because of "competing policy considerations that sit behind the legislation", the starting point for legal compliance and best HR practice is "to make your decisions independent of age and based upon the skills, capabilities and personal preferences of your workforce", Pill says.

70-year old worker awarded damages for discrimination

Earlier this year, a NSW employer that referred to a 70-year-old bus driver's age when raising concerns about his ability to perform his job, was found guilty of age discrimination by the Administrative Decisions Tribunal, and ordered to pay \$20,000 in damages for "hurt, humiliation, and injury to feelings".

"The company's position and the company's evidence was that it put [the worker] on shorter bus routes and ultimately didn't offer him further work because of performance issues," Pill says.

"The Tribunal accepted that there were performance issues and accepted the company was motivated by those performance issues, but where the company fell down was that the Tribunal held that it was open to infer that it had also taken into account [the worker's] age, and some assumed... inabilities based on his age.

"As a generalisation there *are* some issues that arise with older workers as our bodies age, which statistically lead to greater incidence of accidents and injuries. Employers still have the right to ensure and insist that each employee is capable of meeting the requirements of their role [but should] focus on their capacity to perform the inherent requirements without overlaying it with assumptions about what they can and can't do because they're 25, 45, or 75," Pill says.

"In this case they could have had [the driver] tested, they could have required him to go through a medical to make sure he was physically and mentally capable of performing the role of bus driver safely."

Given the absence of medical evidence, the employer should have completely discounted the worker's age and focused solely on the performance issues, he says.

"They should have made a decision on the appropriate disciplinary consequence that would have been the same [if] he had been, for example, a 25-year-old bus driver with the same performance issues.

"That's ultimately why the Tribunal found against them; they found that if [he] had been younger with the same performance issues, the same outcome would not have been imposed - he would have been counselled, he might have been the recipient of some kind of disciplinary letter, but he would have retained his work and been performance managed."

Prepare for an increase in age-discrimination cases

Pill says employers can expect to see more age discrimination cases in coming years.

"We're starting to approach that point where people have a greater awareness of their rights not to be discriminated against on the basis of age, and I think it's going to translate into some more claims which in turn will drive higher compliance levels," he says.

At the same time, some industries are facing skills shortages and the available pool of workers is ageing, "so I think we will see more structured programs designed to enhance the attractiveness of employment for older workers and policies directed at making it easier for the company to retain those older workers and for those older workers to make a continuing contribution to the company".

In addition to economic incentives, employers have a duty to provide reasonable accommodations to assist workers, "and a prudent employer would also look at ways in which they can provide reasonable accommodation to persons who may be in particular age groups [and] have particular needs based on being in those particular age groups", Pill says.

"Providing what you're proposing is something that is more beneficial or more generous than something you would ordinarily provide, there's very little risk in [offering an accommodation] on the basis that because the person is of a particular age or in a particular age group, the company recognises that there may be some additional needs."

However, it is important to do so with sensitivity and without making assumptions.

"[Approach] an employee on the basis that, 'Look, we've had some other employees

in this age group that have had particular needs or have been assisted by us providing this sort of additional accommodation, is that something that would be of interest to you or assist you?."

If employers offer specific age-related accommodations, they must ensure that they only do so where they are entitled to under the relevant legislation, Pill warns.

"The other trap [is that] age discrimination is not just about older workers. Age discrimination is about workers of each particular age group and discrimination against young workers is also a significant issue."

Employers should ideally have a clear policy statement, which would usually form part of a broader equal opportunity policy, about their stance against age discrimination, and reinforce it with training and education, he said.