

Women and Equalities Committee

Oral evidence: Older people and employment, HC 359

Wednesday 10 January 2018

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Members present: Mrs Maria Miller (Chair); Tonia Antoniazzi; Angela Crawley; Philip Davies; Rosie Duffield; Eddie Hughes; Jess Phillips; Mr Gavin Shuker; Tulip Siddiq.

Questions 40-97

Witnesses

[I](#): Christopher Brooks, Senior Policy Manager, Age UK, Julie Dennis, Head of Diversity and Inclusion, Advisory, Conciliation and Arbitration Service, Dee Masters, Barrister, Cloisters Chambers, and Elizabeth Prochaska, Legal Director, Equality and Human Rights Commission.

Written evidence from witnesses:

- [Age UK \(OPE0036\)](#)

Examination of witnesses

Witnesses: Christopher Brooks, Julie Dennis, Dee Masters and Elizabeth Prochaska.

- Q40 **Chair:** Good morning and welcome to our witnesses, the people watching in the public gallery and people watching online. This is the second oral evidence session in our inquiry into older people in the workplace. We are grateful to those people and organisations who have already submitted written evidence, which can be seen on our web pages.

Today our focus is on whether age bias and discrimination affect the employment prospects and experiences of people over the age of 50, why that might be and what can be done to address discrimination. We will be tweeting about the inquiry—we encourage people to have a look at that and to use the hashtag #olderworkers. Before we go into our questioning, perhaps I could ask our panellists to say their name and the organisation they represent.

Dee Masters: I am Dee Masters. I am a barrister at Cloisters Chambers.

Julie Dennis: I am Julie Dennis from ACAS.

Elizabeth Prochaska: I am Elizabeth Prochaska, legal director at the Equality and Human Rights Commission.

Christopher Brooks: I am Christopher Brooks from Age UK.

Chair: Brilliant. I remind everybody that the acoustics in this room are appalling; the Victorians were unfortunately not good at thinking about that. I encourage everybody to speak up, particularly for the benefit of those who are taking notes. Tonia will start our questions today. I remind people that it is inevitable in Committees that we have comings and goings, and I hope you will bear with us on that. I know as many Members as possible wanted to take part today.

- Q41 **Tonia Antoniazzi:** Good morning. Previous witnesses cited the greetings card industry as an example of casual or socially acceptable ageism. What impact does societal age bias have on employment for older people? I do not mind who answers that.

Christopher Brooks: The greetings card industry is often used as an example because there is quite a lot of casual ageism in it, which reflects the attitude that it is still okay to make jokes about people's age, whereas it would not be for other characteristics. It is linked to all the stereotypes of older people, which in turn translate into the workplace in various forms and create a disadvantage for people. It is things such as employers often thinking that people are just hanging around to retire, do not want to engage in training, are out of touch, or are over-qualified or maybe under-qualified for roles. It is important to think about how everything relates to everything else, the impact that societal attitudes have and what actors such as the Government can do to try to mitigate that.

Q42 **Tonia Antoniazzi:** Would anybody else like to contribute?

Elizabeth Prochaska: From the commission's perspective, we know from our work on pregnancy and maternity discrimination that there are all sorts of assumptions made about people in the workforce with protected characteristics, and that those assumptions can inform the decisions that are then made about promotion, recruitment and so on. I am sure from what we know about pregnancy and maternity that the same thing would apply to age. We know that in the pregnancy and maternity context employers often back away from difficult conversations with employees who are off on maternity leave, for example, and I suspect the same thing may be true when people are approaching retirement age or approaching a decision to retire. Employers do not want to have those conversations. I suspect that those biases cut across all sorts of protected characteristics.

Q43 **Tonia Antoniazzi:** Chris, your submission argues that age discrimination against older workers is still rife, in spite of it being illegal under the Equality Act 2010. Why is that?

Christopher Brooks: I think it relates to general attitudes to older people, and some of the examples I just mentioned. In the end, most employers are members of the public as well. Most people work in small businesses, and the managers in small businesses are just members of the public, so they hold the same range of diverse views that the public at large hold. Sometimes that will mean they are applying ageist attitudes. Sometimes small businesses are excellent employers, but sometimes less so. It just reflects that.

Dee Masters: In theory, we have a very robust legal system. We have the Equality Act, which prohibits all forms of age discrimination. The real issue, it seems to me, is one of enforcement. What has been so fascinating about the evidence you have gathered so far is that there is a particular issue with external recruitment and age discrimination. But as a practitioner I very rarely see discrimination claims, and not just on age but in respect of any of the protected characteristics. It is very unusual for people to put their heads above the parapet and bring an age discrimination complaint and hold organisations to account. One of the reasons for this is that discrimination is very rarely overt; it is unusual for an organisation to explicitly say, "We're not giving you this job because, frankly, we think you're past it." Discrimination is often motivated by unconscious stereotypes or prejudices.

If you are an older person and you are being turned down for a job, how are you to understand that you have been turned down because of your age? How are you even to make an informed decision about whether it is worth bringing a discrimination case? One of the real problems with discrimination cases generally is what we call the asymmetry of information. If you are an external candidate, you often will not know why you have been rejected, and you might not know who made the decision, especially if there has been some sort of shortlisting on paper. You will not know who the other candidates are, you will not know their relative strengths and you might not even know who is ultimately successful. So,

in those circumstances, how are you to understand and to make an informed decision?

Something that is quite interesting is that we used to have, under the Equality Act, a statutory questionnaires procedure whereby people could question an organisation, saying, "Why did you treat me like this?" and then they could make a decision about whether there was discrimination and whether they should bring a claim. Quite recently—a few years ago—that provision was taken away. I wonder if the mismatch between litigation and the reality of discrimination might be to do with this information asymmetry and whether that is one area where potentially improvements could be made.

Q44 Tonia Antoniazzi: Is there something about age bias that makes it harder for people to identify it as discrimination?

Dee Masters: I think it is difficult across all the protected characteristics; I don't think it is particular to age at all. What might contribute is that there is a lack of openness, and statistics in particular, about age decisions. For example, you will know that there is now gender pay reporting and organisations are beginning to report on that. There is no equivalent with age. Again, that might be one area where improving transparency might encourage people to hold organisations to account.

Julie Dennis: At ACAS, we have got a helpline that members of the public and employers can phone for advice and guidance. When I spoke to our helpline staff, prior to coming here, most of them said that most helpline callers are not specifically saying, "I feel I am being discriminated against in the workplace," or, "I have been discriminated against because of my age." People tend to call with a problem. They will talk to our advisers, who will be able to draw out what the issue is and then say, "That sounds like discrimination."

What is really interesting for ACAS is that when we looked at the types of calls our helpline received, we found that during 2015-16 we received only 3,300 calls that had an element of age discrimination. That equates to only 0.4% of the total calls our helpline received that year. Where we do get calls on this issue they do tend to be from employees. They make up 90% of our callers and they tend to be female. It is a small margin—60% of those callers will be women. Unfortunately, our data does not break it down into more detail, but that is one of the highlight figures we have been able to get for the Select Committee today.

Q45 Tulip Siddiq: I have a question for Dee. You said there was a mechanism through which you could ask an organisation if you had been rejected. What was the take-up for that? You have made it clear that not that many people put their head above the parapet anyway, so how many people actually did that?

Dee Masters: It used to be contained in the Equality Act 2010, and it was abolished a few years ago, but it was—I don't have any statistics, but from personal experience—very popular. The first thing you would do if you were advising claimants or potential claimants was ask questions. You

would say, "Why have I been treated like this? Who else applied for the role?" You might ask for anonymised copies of their CVs. You would ask for the information that would allow you to step back and say, "Is there something else going on here? Is this age? Is this race? Is this gender?" for example. So my personal experience is that it was a very popular and very helpful way of understanding if litigation was worthwhile.

- Q46 **Angela Crawley:** My question is also for Dee. You outlined, quite rightly, the issue of enforcement and the factor of how people understand the Equality Act 2010. What recommendations would you make to engage individuals in understanding what their protections are, and what sanctions are available to them?

Dee Masters: I think that organisations such as ACAS and the commission have a really important role, and they do utilise that role very effectively. I think people are aware that they have rights. I do not think that is the issue. I think the difficulty is that it is almost impossible, or at least very hard, for people to understand whether they have been discriminated against and whether they should bring claims. I think that is where the gap is.

- Q47 **Jess Phillips:** One of the features of anyone who is discriminated against, I think, is the idea of imposter syndrome. I just want to explore whether there was an issue of older people discriminating against themselves and not visualising themselves in certain roles: "That is a job for a younger person," or, "I wouldn't apply for that sort of job; it's not for me," and if there was a significant problem in this area.

Christopher Brooks: Yes, I think there is. We hear from people who often think they don't want to apply for a job because they are crowding a young person out of it. That is very common. People quite often believe the stereotypes about themselves as well. You could be looking through a list of jobs that might well be suitable for you, but then you are thinking, "Oh, I'm an older worker, so actually I'm not skilled enough. I don't have the qualifications to do this job." You can apply the stereotypes to yourself, and actually I think that is quite common, yes.

- Q48 **Jess Phillips:** And is there any legal solution that could be brought to bear to stop this sort of discrimination—this sort of imposter issue?

Dee Masters: One idea I have—and it might address this particular point—is actually looking at extending the duty to make reasonable adjustments, so that it does not just impact on disabled people but also impacts on older people. The reason I mention that is that the fact of a duty to make reasonable adjustments in respect of disabled people, I see, has a very positive impact on the culture within organisations, especially large organisations with sophisticated HR functions. There is a sense in which employers and managers work together to try and identify people who might be disabled, have proactive conversations and then look at ways in which they might be helped, whereas when it comes to age it is a completely different story. I know you have already heard evidence to the effect that there is this reluctance to talk about age in the workplace. I wondered, if we have a duty to make reasonable adjustments in respect of

older people, whether in fact the whole culture of organisations might change. It might be viewed more positively. We might start dealing with imposter syndrome because actually we are reframing age as something which is to be talked about but also engaged with positively.

Julie Dennis: I would say that ACAS would agree with that, in that it is appropriate for line managers to have those open and honest conversations with all their staff. We do get employers who will phone us and who are nervous about having that conversation, because they are nervous that they would then hold themselves open for a potential age discrimination claim. Nowhere in the Equality Act does it say that employers cannot have those conversations about what people's views are as far as their careers are concerned.

As part of the good practice that we share with employers, we encourage line managers and HR to have those conversations on a regular basis, and especially at key points in a person's career, to ask them what their intentions are, but also hopefully to deal with imposter syndrome and help that individual overcome their internal prejudice. For example, a lot of organisations are becoming more digitalised, and there is a perception that older workers are probably not as comfortable with that. It is about those organisations making sure they develop a culture in which all their staff feel that they can develop their skills and feel just as valued, regardless of their age.

- Q49 **Jess Phillips:** Age UK and others have said—it is probably the same with other protected characteristics—that the bias against older workers is most acute at the recruitment stage. Do you agree?

Elizabeth Prochaska: From the commission's perspective, the question about recruitment is most hard-edged in job advertising. The enforcement work that we do around advertising has shown us that there is a real problem with age discrimination, although, as Dee says, it is not translating into legal inquiries to EASS and then to us. We know from the enforcement work that there have been adverts asking for a "sparky office manager", for example, which is probably both gender and age discrimination, and "young dynamic staff", "enthusiastic young graduates" and so on. Since 2014 we have looked at 44 age-discriminatory adverts and taken action in relation to those. There is definitely an issue around recruitment.

- Q50 **Jess Phillips:** I know that much more so now there is a culture within the disabled rights community to notice when, at recruitment and advert stage, there is disability discrimination. If you are asking how many sick days people have had and that sort of thing, you are likely to be referred to the EHRC. There is a culture among the wounded party—is there a problem, to come back to imposter syndrome, that older people do not necessarily identify as a group and as a lobby group?

Elizabeth Prochaska: That is probably right. I am not sure there is any evidence I know about that proves that, but certainly anecdotally that seems to be the case. I think age discrimination has been described by

this Committee as one of the last permissible biases. There was an article in *The Times* just before December that we have picked up on, which was about Facebook's targeted advertising. I do not know if you are aware, but Facebook was permitting the recruitment agency to target adverts at 18 to 35-year-olds. It is interesting that that was picked up and became a national news story. Perhaps age discrimination is getting out there more.

- Q51 **Jess Phillips:** Would it be deemed illegal if an employer put out a Facebook advert and put that in the parameters? We all do it in political campaigning; you can have the parameters of people who live on a specific street. Would that be considered discriminatory?

Elizabeth Prochaska: Yes, it is potentially discriminatory to use targeted age.

Jess Phillips: And that is provable, isn't it?

Elizabeth Prochaska: Yes.

- Q52 **Chair:** Would it be discriminatory for people to advertise a product at younger age groups?

Elizabeth Prochaska: It could be, from a goods, facilities and services discrimination perspective.

Dee Masters: It might well be, and it is interesting because—

Jess Phillips: If they are targeting me, they think I'm older than I am. They're always telling people to have a baby. I've got two.

Dee Masters: It is perfectly possible to bring discrimination cases against service providers, but it happens even more rarely than it does in the employment sector.

Julie Dennis: Coming back to the question about recruitment, at ACAS I have spoken to our helpline advisers and conciliators, and they say that where we are dealing with early conciliation cases, age was an issue but it normally was secondary to race or gender.

We only had one early conciliation case that we could think of, where we had a gentleman who applied for a job and went for the interview. He was 70 years old and he said that within the first few minutes of that interview it was very clear to him that he wasn't going to get the job because of his age. Most of the cases that we are dealing with at the moment are around that. There is an element of age discrimination. On calls to our helpline, we get calls from younger workers as well, who say that they feel powerless or discriminated against in the workplace, but they don't tend to then put in a discrimination claim. Early conciliation cases do still tend to be from older workers.

We have also had calls where older workers are talking about language used in the workplace—that younger workers are using language now that many of us would not deem appropriate in the workplace. Because of youth culture, they are coming out with certain statements or words that

many of us in the workplace are quite taken aback by. So there is that culture of banter, but also not understanding language as well.

- Q53 **Chair:** Before we move on to Eddie's line of questioning, can I just probe a little bit deeper on the issue of targeting? Is there not a provision to say that there can be cases where it is reasonable for people to—sorry, I can't remember the exact language, but there is a reasonableness clause, isn't there, in the Equality Act?

Dee Masters: What we have in the Equality Act is that, unusually, age discrimination can be justified both in respect of direct and indirect. So, targeting—"We only want to speak to people or reach out to people within a particular age group"—would be direct discrimination but would be subject to a justification defence.

- Q54 **Chair:** So if you are Pampers nappies and you want to advertise to 20-year-old women, that is reasonable, but if you are advertising a job as a checkout clerk at Tesco, it would not be reasonable.

Dee Masters: Yes, although the test is quite stringent. It goes beyond reasonableness. In respect of direct age discrimination, the organisation would have to show that they were pursuing a legitimate aim. That legitimate aim would have to link to some broader social policy objective. They would have to demonstrate that their measure was necessary, reasonable and proportionate. So it is not an easy hurdle to overcome but, yes, theoretically, you can justify direct age discriminatory rules.

- Q55 **Tulip Siddiq:** If there is a job advert for someone and it specifies that you need 15 years' experience before you can do the job, and then they are targeting that at people who have 15 years under their belt, surely that can't be constituted as discrimination, because they are specifying that. Or is there a loophole there?

Dee Masters: That could theoretically be indirect age discrimination because there will almost certainly be a link and a relationship between age and experience, but again, there would be a justification defence and it would be a softer justification defence because we would be looking at indirect rather than direct discrimination. So there would be no requirement for the organisation to show that their legitimate aim also had a broader social policy objective.

Julie Dennis: ACAS's best practice guidance would encourage employers to steer away from that because we believe that younger workers could be able to provide experience in other ways, so it doesn't necessarily mean that you can only have those skills by doing so many years.

Dee Masters: To echo that, there can be what I would call lazy thinking—an assumption that more years in the job equals ultimately being better. Yes, there will be some professions and jobs that fall into that category, but it is certainly not inevitable. Often we get to a point where after five years, the sixth, seventh or eighth year doesn't really make much difference. Even then, organisations need to be very careful and really

need to do some soul searching about whether they are simply repeating stereotypes or whether there really is a need to have those sorts of rules.

Q56 **Chair:** Does this work in practice?

Elizabeth Prochaska: In practice, as I have said, we have seen from the discriminatory adverts that there are a lot of assumptions out there. The most obvious ones are where they actually targeted a specific age group but, as you say, there is also asking for years of experience. So certainly it is happening in practice. But what is interesting, and what Dee has highlighted, is that it is not feeding through into cases. You have said, Julie, that you are not seeing the complaints transferring into discrimination claims in the employment tribunals. That is certainly our experience as well. We simply have not been approached by individuals for funding for age discrimination complaints.

Q57 **Chair:** When was the last time you did an age discrimination case?

Elizabeth Prochaska: We supported a number of age discrimination claims in 2013-14 in the higher courts. In terms of funding individual claimants, we have one on the go at the moment that we are currently considering, which came from a referral to us, and that's it. We are not getting anywhere near the volume that you would expect, given what we are seeing in those discriminatory adverts and what we are hearing from evidence to this Committee.

Julie Dennis: The Committee might be interested in our stats around early conciliation and ET claims. I am not sure whether the Committee is aware that ACAS provides independent impartial advice and conciliation services. In order for somebody to take a case to an employment tribunal, an employer or an employee must first contact ACAS. We offer free impartial help, which is our early conciliation stage before they then go on to an employment tribunal.

In 2015-16, we received more than 1,850 early conciliation cases that had an element of age discrimination. That was 2% of our workload, so the figures are really low. There were 800 cases that progressed to the employment tribunal that contained an element of age discrimination. That is 4.3% of those progressing to an employment tribunal. A good proportion of those 800 cases would have already gone through early conciliation, so they could be the same people.

We have limited data on the gender of claimants, but it would appear that men bring the majority of age discrimination claims at both stages, but they are in a small margin. We found those figures quite interesting. We do not know if that is because, when you look at the other protected characteristics, those claimants are probably more likely to be bringing an element of that rather than the age discrimination.

Elizabeth Prochaska: We have got the latest figures from the employment tribunals, which give you a sense of things post the Unison judgment. There has obviously been an increase in all discrimination claims across all protected characteristics. For September, for example,

which was post the Unison case, there were 20,504 claims accepted by the employment tribunal, of which 130 were age discrimination, so you can see what a tiny fraction of employment tribunal claims relate to age.

Julie Dennis: What we have seen in ACAS since the Supreme Court ruling is an increase of cases at both early conciliation and ET1 stage. Our EC cases are up 23% and ETs are up 59% compared with the same figures in 2016, so it is already having an impact on those cases.

Q58 **Eddie Hughes:** I want to get a feel for whether employers are discriminating from a position of knowledge. Do you think that employers understand their obligations under the ban on age discrimination in employment?

Julie Dennis: It depends. We work with a wide range of employers. We work with really big public sector organisations, large employers that actually do understand age discrimination because they have got a big HR department and they have that guidance. There is some really good practice out there. For example, Toyota and BMW are doing some really good things around that. But we also work with small employers that do not have an HR department, and they are the ones that come to us for advice: "How do we deal with this member of staff? I need to know if I can retire them, because they are not performing as well, or they are not picking up new technology." Again, part of the work that we do at ACAS is to work with those employers and encourage them to have a robust performance management process in place with regular conversations, and not to just assume that because a person has become a certain age they need to be exited out of the organisation.

Christopher Brooks: I think it is a bit of both, in the sense that employers are generally aware of the age protections but they probably do not understand the precise detail of them. On the other hand, they are applying most biases against older workers on a subconscious level. They are not thinking, "We do not want an older person." They are just thinking, "We want someone who is x, y and z." Then they apply those characteristics and come up with someone who is probably not an older person. So it is both.

Q59 **Eddie Hughes:** One of the problems we have is something that you mentioned earlier, Chris, which is that you have a lot of small employers who are perhaps employing a handful of people and do not have access to that kind of information, and therefore they do not know. If they do know, it is very limited. Would you say that happens with smaller companies rather than larger ones?

Christopher Brooks: I think it happens across the board. Companies with HR functions, as Julie mentioned, are better placed to put in place policies and procedures that can help their recruiters to overcome some of those prejudices. But in smaller companies, absolutely—it is very difficult. I think there are over 1.3 million small employers in the country. It is impossible to reach them all by a central marketing campaign. The vast

majority will never contact ACAS—the ones that do are probably very engaged.

Julie Dennis: To reinforce that, I do not know if you are aware of Mercer's report, which looked into how age-friendly companies are. It found that employers do not take age discrimination and its impact seriously and few companies have policies in place. The report also found that only 8% of recruitment firms look at age discrimination in adverts. Our evidence and experience has found that there are three types of employers: those who dig their head in the sand and hope that they will not get found out and taken to court; those who realise that there is a problem but do not know where to start—there is a nervousness there because they are worried that they may leave themselves open to potential litigation; and those who recognise that it is an issue and are doing something about it. I have already said that we know Toyota, Mercedes, BMW, BT, and Arriva, for example, are doing some really good work in this area and are starting to have those conversations with their people.

Q60 **Eddie Hughes:** Briefly, to finish, a question for the barristers. In cases that you have prosecuted, did the employer think that they were doing the right thing, or would they not have known what they were doing, or did they deliberately try to subvert the law?

Dee Masters: In my experience, discrimination is almost always an unconscious matter. People are generally aware that there is equality legislation in place, but they are unaware of their own prejudices and stereotypes. That is much more the paradigm situation. Coming back to an earlier point, if there was some obligation on employers to report or make public the age breakdown of their workforce or the people they recruit, that might force them to think, "Do we have a problem? What is motivating us? How are we making decisions?". Certainly, with the gender pay reporting that has come in recently, organisations have had to go through that process.

Q61 **Angela Crawley:** Christopher, you mentioned that it is mainly small to medium-sized enterprises that have the biggest issue in terms of not having access to the same level of HR resource. This is a question for Julie. I wonder whether ACAS could do more in conjunction with people submitting tax returns to ensure that guidance is not something that has to be sought by the employer but that is freely given to all SMEs, to ensure that they have the necessary guidance and support.

Julie Dennis: We are the workplace experts: we provide that free and impartial advice and we have good practice, but we are not in a position to force employers to take on what we are saying. We do not have the powers to do that.

Q62 **Angela Crawley:** Is there an easier way to provide that guidance via ACAS, rather than people having to come to ACAS? Could ACAS work with the Department that enables tax returns to ensure that when people submit online, they have access to a PDF document or literature? I do not

know whether that is within ACAS's remit but is there something that could be done?

Julie Dennis: We are doing some work with DWP at the moment in that area to try to raise that awareness in more detail. You are right, Angela: there are ways that we can let employers and employees know that that guidance is there and what the law says. That is a piece of work that we are doing currently with the DWP.

Q63 **Eddie Hughes:** We have heard evidence that the combination of the abolition of the default retirement age and the ban on age discrimination means that some employers are scared of having conversations with their staff with regard to things such as planning for retirement. Is that your experience?

Elizabeth Prochaska: As I said earlier, that is certainly our experience in relation to other protected characteristics around pregnancy and maternity, and we anticipate that it would be exactly the same. There is no reason why an employer would be reticent about speaking to someone about their maternity leave but not their retirement, and there are similar sorts of questions about leaving the workforce and rejoining it. The question of flexibility is difficult for employers. There is a real need for clear guidance on flexible working and a real imperative for employers to enable their employees to work flexibly, in relation to age and other protected characteristics.

Christopher Brooks: I think a lot of employers are scared of having those conversations. It was mentioned earlier that that is largely just a fear—it is because they don't really understand the law and how it is applied, and what they can and cannot do. There is definitely a role for good practice in promoting that, but I caution against the argument that we had four or five years ago about introducing protected conversations. That is what some of the business groups have called for—they want to be able to set up a separate conversation where they could address these issues more directly with their employees, without fear of legal recrimination. That is definitely not the way to go; it has to be more about normalising the culture around it and making it acceptable to have those conversations, and about helping both parties—individuals and employers—to understand what they can and cannot say, and how to go about it. There is definitely a gap there.

Dee Masters: I think it comes back to the point raised earlier about whether there could be some sense in extending the duty to make reasonable adjustments for older people. I think it might tackle that reluctance for employers to have proactive conversations around age if there was a positive duty to identify barriers and look at ways in which they could be broken down.

Julie Dennis: We would recommend that age discrimination be taken as seriously as other protected characteristics. ACAS has an age audit tool that can help employers to understand their own policies and their impact. We do not get a lot of take-up for that—I think only about 22 employers

took up the age audit toolkit last year, but it does start that conversation. To reiterate what my colleagues have said, this is about employers keeping an open dialogue through the life course of employment with their employees, particularly regarding assumptions about the skills, ambition, development, and performance management of older workers.

Elizabeth Prochaska: Picking up on Dee's point about reasonable adjustments, you may be aware that there is a conversation in the international community about an older persons convention. That would enshrine a right to reasonable adjustment, which we could then reflect in domestic law through the Equality Act. We fully support the move towards an older persons convention. Currently we think that the law doesn't sufficiently protect older people who do not have a disability. An older person with a disability can request reasonable adjustments in relation to their disability, but adjustments for older people generally are not protected in the law. That is something that an older persons convention could deal with, along with flexible working rights.

Dee Masters: One of the topics that you talked about in the last session was dealing with the difficulties that women sometimes face when going through the menopause. Again, a duty to make reasonable adjustments in respect of age might be one way of tackling that. Sometimes there will be barriers associated with age that do not move into the threshold of disability, and indeed older people do not want to self-identify as disabled. Again, a duty to make reasonable adjustments might deal with those problems.

Julie Dennis: We found a clear link between age discrimination and gender pay. If you have a look at the gender pay gap, that increases from 40 onwards, and it is even greater from 50 onwards. That is because of issues around maternity leave. Women also tend to be carers, and that dual responsibility is having that impact.

Q64 **Eddie Hughes:** I understand that age discrimination is the only ground on which discrimination can potentially be justified. Does that cause problems in practice?

Dee Masters: What is different about age discrimination is that direct discrimination can be justified, and it is the only protected characteristic where that is permissible. In reality, I don't think that it does cause problems because the truth is that it is unusual for employers to have directly discriminatory age-based rules. For example, when the default retirement age was removed, we then had the Supreme Court decision in the Seldon case, which made clear that the justification defence is difficult for lawyers. It had a real chilling effect. I would say most employers are not keen on explicitly age-discriminatory rules, so they would rather not have to go through the rigmarole of looking at the justification defence.

Q65 **Eddie Hughes:** So they are not using the justified retirement age approach?

Dee Masters: It is very rare for organisations now to have maximum ages, or default or compulsory retirement ages, because I think there is a

perception that, while they could be justified theoretically, under the Equality Act it is quite difficult to do so.

Q66 **Eddie Hughes:** Are there any comments from others?

Elizabeth Prochaska: There have been some cases from the CJEU—the Court of Justice of the European Union—around the justification defence that have used terms such as “intergenerational fairness” and so on to justify directly discriminatory age criteria. There was an Italian case in the CJEU recently, *Abercrombie & Fitch Italia Srl v. Antonino Bordonaro*, in which Abercrombie & Fitch said that people could be dismissed from on-call contracts at age 25 and above. That was found by the CJEU to have been justified. I think that sits slightly uneasily with age discrimination and the justification defence, but certainly in the domestic courts, as you say, in *Seldon* and so on, it seems harder to justify age discrimination.

Q67 **Eddie Hughes:** I inadvertently wandered into one of their stores once and quickly realised that I was in the wrong place. Intergenerational fairness is part of my final question. The concept of intergenerational fairness is identified as a source of age bias in some of the evidence given to us. It was also recognised as a legitimate justification for age discrimination by the courts. Is it possible to square that circle?

Dee Masters: I think it is. What is unique about age discrimination is that we all have the protected characteristic of age, but there can often be conflicts between different age groups. The risk of those conflicts usually arises from the broader socioeconomic picture. We tend to use the phrase “intergenerational fairness” as an umbrella term. To give you a quick and hopefully uncontroversial illustration, in the last evidence session you heard a lot about the idea that employers could have mid-life MOTs. They could target employees who were over 50, sit them down and look at ways in which they might retrain, phased retirement and so on.

Those are brilliant ideas, but if an employer were to do that, the knock-on effect would be that a younger person could say, “Hang on, that’s direct age discrimination against me, because that’s not something I can benefit from.” That is what is so interesting about age as a protected characteristic. If we try to do things to help certain age groups, there is the potential that it would exclude or be to the detriment of other age groups. One of the legal answers to that is to say, “Yes, it would be direct age discrimination to have, for example, mid-life MOTs, but it can be justified. We can justify it through reference to a legitimate aim—intergenerational fairness—which is a broader social policy objective.”

What you heard at your last evidence session was that there is a different type of intergenerational fairness, which is possibly a myth. It is the idea that older people are blocking younger people from coming into jobs, from being promoted and from seeing their careers progress. It could well be that an employer would try to introduce, say, a compulsory retirement age and then seek to justify it through reference to that type of intergenerational argument. If that type of intergenerational fairness argument was being advanced, there would have to be very robust

evidence that there was a real need and a real issue with older people blocking younger people's roles within that organisation. The myth around that idea is what you heard about in the last evidence session.

Can you square the circle? Yes, you can, but that is because you have to understand that the notion of intergenerational fairness is a very broad umbrella and encapsulates all sorts of different tensions between different age groups. Some of those tensions are legitimate, and so it is justified to treat people differently, and others are derived from stereotypical views, which we need to be cautious about.

Elizabeth Prochaska: In the Abercrombie case, for example, it was said that there is a huge problem of unemployment of younger workers in Italy, so it was justified, on an intergenerational fairness argument, to have a system that privileged them.

Christopher Brooks: It can be specific as well. In the Seldon case, he was a solicitor, and a lot of the arguments were very much rooted in the legal profession. If you are a solicitor, it is very difficult to move firms to get a promotion, so it relies on staying with the same firm for a long time, which, if you have a lot of older workers, can restrict younger workers. I think that was the argument that the lawyers for the firm that he worked for used in the courts, which ultimately proved successful, I guess.

Q68 **Tulip Siddiq:** My question is about intersectionality. When you are looking at the discrimination faced by older people, is it possible to differentiate between different protected characteristics—disability, gender and age?

Elizabeth Prochaska: My view is that age is a protected characteristic and raises particular intersectional issues. Julie referred to the pay gap data. We know that for older women aged 50 to 59, there is a 17% average pay gap, as opposed to 4.5% for women aged 17 to 29. You can see there that the combination of being a woman and being older is what is causing the problem. At the moment, our law does not deal with intersectional discrimination, as you know. It is not possible to bring a claim as an older woman—you bring a claim as an older person or as a woman—so the court cannot analyse the assumptions and biases relating to older women. For that reason, we have called for the introduction of section 14 of the Equality Act, which would enable claims for intersectional discrimination to be brought.

Q69 **Chair:** Do you mind if I ask a supplementary question, Tulip? I think there is also evidence that suggests that discrimination against older women is not only against women who have had children; there are data that suggest it can be purely based on gender. Would I be correct in asserting that?

Elizabeth Prochaska: I am not aware—

Christopher Brooks: There is a lot of very robust academic research that shows that older women find it particularly difficult to get a new job, for example.

Q70 **Chair:** Regardless of whether they have had children?

Christopher Brooks: Yes. Just the fact of being aged over 50 and a woman puts you at a significant disadvantage; men aged 50-plus are disadvantaged, and women aged 50-plus more so. There is really hard evidence to support that, yes.

Julie Dennis: There is also evidence that the Government's lead on age, Andy Briggs, has found where there is a correlation between gender and ethnicity, so it might be worth looking at what Andy Briggs is saying on that subject.

Q71 **Tulip Siddiq:** You have mentioned section 14 already. Would older women or anyone who acquires a disability in later life benefit if the Government brought into force the ban on dual discrimination, which is contained, as you mentioned, in section 14?

Elizabeth Prochaska: Yes, we support the introduction of section 14, although we have some concerns about its limitations. At the moment, it relates only to dual discrimination, so older women rather than, for example, older black women, and, as you have mentioned, ethnicity may be an additional factor in discrimination. We would rather section 14 was broadened to include all protected characteristics in combination.

The other difficulty with section 14 is that, as presently drafted, it relates only to direct discrimination. You could not bring a claim for intersectional discrimination based on victimisation, harassment or indirect discrimination, so we would like to see section 14 beefed up to include those issues as well.

Q72 **Rosie Duffield:** My question has pretty much just been answered, but is the ageism faced by older women at work different from the ageism that men experience? We mentioned the menopause earlier. Is that something that presents itself reasonably often? Is it taken into consideration by employers, do you think?

Julie Dennis: I will refer back to the research that Andy Briggs has done. In terms of recruitment and access to training, his research has found that the over-50s are treated less favourably than those in terms of gender and ethnicity. ACAS do not have any evidence in relation to that. I don't know whether anyone else has anything on it.

Dee Masters: Some of the evidence that we heard in the last session was about not just the menopause, but what was coined as lookism, which means that higher standards are applied to older women than would be to older men. So yes, I think cogent evidence has already been presented to you along the lines that it is age plus gender and also often plus race that creates the real problem.

Christopher Brooks: There is almost a dichotomy in the labour market between how people working in higher-skilled roles are treated versus people in lower-skilled roles. A lot of women in the current 50-plus cohort are working disproportionately in lower-skilled roles, which is probably a legacy of being forced out of work to have a family and then struggling to

get back in at the same level. People working in lower-skilled roles are generally subjected to much worse employment practices and much fewer opportunities to work flexibly—women are more likely to be carers, for example, so are more likely to need that. It is about extending good practice out, away from just people working in professional office jobs and into other areas.

- Q73 **Rosie Duffield:** That is a really good point, and it reminds me of the WASPI argument. Women are being encouraged to retrain at much older ages, and I am sure we will see cases come through as a result of that. We touched on this before, but many people will acquire disabilities or age-related impairments during their lifetime that come within the definition of disability under the Equality Act. Are people who acquire a disability later in life accessing their rights under the reasonable adjustment provisions?

Dee Masters: Speaking entirely personally, I have never come across a case where an older person was relying on a disability that was age-related.

- Q74 **Rosie Duffield:** Okay. The Fawcett Society mentioned that you can only recognise one single protected characteristic at a time. Is that a problem?

Dee Masters: That goes back to the section 14 point. At the moment, the Equality Act is structured in such a way that if you felt you had been discriminated against because of age and disability, you would have to succeed on both claims. You could not bring a claim based on the blend of the protected characteristics.

- Q75 **Rosie Duffield:** So section 14 would stop that.

Dee Masters: Section 14 would make it easier for older people where the discrimination was not simply because of age but because a new and unique identity is created because of the interplay. I suspect you would see that not so much with disability but for, say, a black older woman. It is those three characteristics together and the stereotypes around that that is leading to the discrimination. It would probably be easier for a woman like that.

Rosie Duffield: Mobility that was age-related or—

- Q76 **Chair:** May I interject? Do you think that making that change to section 14 would make a real difference to the sorts of cases you are seeing coming through, or would it encourage new and different cases?

Dee Masters: I think it would probably encourage new and different cases. It would encourage people to bring the true case, if you like, which is the combination of protected characteristics, rather than being forced to segregate their claims into an age discrimination claim, a gender claim and a race claim. It would allow them to test the real prejudice, which is the new and unique identity created by the three protected characteristics coming together.

- Q77 **Rosie Duffield:** Proving that is going to be quite tricky, I would have

thought. You would have to build a bigger case, with all the elements.

Dee Masters: I do not think it would necessarily be harder, because tribunals in particular are used to dealing with a lot of the very negative stereotyping that comes along with particular identities. I do not think it would be harder at all; actually, I think it might make it easier in certain cases.

Elizabeth Prochaska: We know claims have failed on the basis that someone is trying to pull together those protected characteristics and has not been able to as a result of the law. We are confident that a change in the law to recognise intersectional discrimination would make a difference. I think it would improve the chances of existing cases but also, as Dee said, create the possibility for new types of claims that really reflect people's lived experience of discrimination and do not force us all to self-identify by one protected characteristic: "We are not only women; we are also mothers", and so on. It is important that the law reflects that reality.

- Q78 **Jess Phillips:** Age UK, in its submission, said that the conciliation regime for employment disputes run by ACAS should be reviewed to ensure that it operates in a balanced way. What are the problems with the current system? What could be changed?

Christopher Brooks: We need to make sure we are not blindly accepting that it is working well. I am sure Julie will have much better information, but there was a particular problem when there were tribunal fees in place. There were some suggestions that employers were gaming the system by sitting tight and waiting to see whether someone coughed up the fee before deciding how to act. In those circumstances, it may have needed a more thorough review, but now that we do not have tribunal fees, that has changed a bit.

Julie Dennis: I think I said that we have already seen an increase in employment tribunal cases since the judgment. It is difficult for us to say whether employers are sitting on cases. People have the right to raise an ET1. They have to come through early conciliation. They have to go through the process but they don't have to accept the early conciliation; they can go straight to employment tribunal. So it is still in the hands of the individual whether they want to try early conciliation or go straight to an employment tribunal.

Christopher Brooks: I should make it clear as well that we have always fully supported early conciliation. It is a good idea; avoiding litigation is almost always desirable.

- Q79 **Jess Phillips:** Except, in my experience as an employer and employee, early conciliation often feels like you are being a bit rolled over sometimes. It still feels like the power is always in the hands of the employer—that is how employees still feel.

As a group of people, these are older people. It is not like women getting a bit rowdy and disabled people having a rights framework that has built up over the past 20 years. Older people, using some of the imposter

syndrome, would just give in potentially in early conciliation. Is there any truth in that?

Christopher Brooks: Hopefully, that is the kind of thing that a review would unpick.

- Q80 **Angela Crawley:** My question is to Julie. With the introduction of tribunal fees, there was a decrease in the number of individuals who brought forward claims. Have you found that since the ruling there has been an increase again? You touched on that briefly. Could you add to that? Has there been an increase in vexatious claims, as has been implied many times in Parliament? Or do you find that not to be the case?

Julie Dennis: We have not got any evidence of that, so I would not want to answer that, Angela, to be honest.

Elizabeth Prochaska: I think it is still far too soon to tell whether claims are vexatious.

- Q81 **Jess Phillips:** People did not know that you did have to pay.

Christopher Brooks: Previous reviews of tribunals have never found any real evidence of any substantive number of vexatious claims. Hopefully, they won't suddenly jump now.

- Q82 **Chair:** Jess, before you move on, I would like to ask a supplementary of Elizabeth. The idea of early conciliation trying to keep people out of courts is good for the individual but potentially hides the issue to the broader employing public, as it were. Have we got the balance right? Are we doing too much conciliation and not enough visible litigation to send the right messages about how employers should respond to this?

Elizabeth Prochaska: I think it can be more nuanced than that. Certainly, if conciliation was combined with enforcement and compliance powers, so you were able to learn the lessons out of an individual's conciliation and then approach that industry—that employer—and if you could see it as a systems-wide problem and demand changes, then conciliation could have that more systemic impact. But at the commission, our conciliation powers were taken away from us, so we no longer have the power to offer conciliation but we do have the enforcement powers. We are in a situation where we do not have the evidence base to enable those sorts of systemic enforcement actions.

- Q83 **Chair:** But ACAS does.

Julie Dennis: Yes, and we do work—

- Q84 **Chair:** So why don't you talk to each other?

Julie Dennis: We do. We work very closely together but we will also work with organisations after dispute to support further improvements. Our conciliation services are also available right up to the day of the tribunal hearing. An individual can come back to us if they need to at any point. We have got evidence where we have worked with organisations and they have made improvements.

Q85 **Chair:** But you don't have the enforcement powers; EHRC do. There is a breakdown here isn't there?

Elizabeth Prochaska: We often hear from ACAS about issues, although I am sure we could get better at learning the lessons from their conciliation and pushing it through our enforcement process. There is certainly work to be done where you can make those systemic changes, despite the early stage conciliation process and the anonymity and so on that would go with that in relation to the claimant.

The other point to note from a legal perspective is that the employment tribunals did have a power to make recommendations off the back of individual cases, a bit like coroners have the power to make recommendations in relation to deaths, but that was, again, taken away a couple of years ago. Reinstating that ability to make recommendations might help to bridge the gap between the individual and the systemic, so that employment tribunals are really able to make changes across an industry or an employer when they have seen something that looks like a systems problem.

Q86 **Jess Phillips:** Would anybody, such as an agency, ever check on those recommendations? I know you are saying that it does not exist now, but the enforcement is only as good as an audit.

Elizabeth Prochaska: It's something that I assume the commission and ACAS would monitor.

Q87 **Jess Phillips:** For how many years would you monitor it, going forwards?

Elizabeth Prochaska: Indefinitely. If there were a power to make recommendations, those would be collated centrally by us and we would monitor how they were effected. The same arguments are being made at the moment about coroners' courts—the lack of a centralised system for enabling those recommendations to be monitored—but actually, in this context, there are existing organisations that could do that work.

Q88 **Jess Phillips:** Going back to the enforcement piece, as there are just fewer age discrimination cases—lots of you have touched on that already—what do you each think is the barrier to individuals being able to bring action and to get any enforcement?

Christopher Brooks: It is actually incredibly stressful taking a claim, and it is not the kind of thing that most people would want to do, sometimes under any circumstances. For your personal wellbeing, it is much easier to put it behind you and move on, in many cases, even if that moving on means not working. Obviously, a legal system needs to be robust and have that degree of proof, so—

Q89 **Jess Phillips:** But that is the same for a sexual harassment case, a sex discrimination case, or a pregnancy discrimination case—you have quite a lot coming up when you are pregnant. Why do we think that there are still fewer specifically in the age piece?

Julie Dennis: I would say that people are not aware of the act itself. At ACAS, we have advice on age discrimination, pitched at age generally, rather than just aimed at older workers. As part of our good practice guide, we are in the process of reviewing our age discrimination guidance, starting in around April. The aim of that guidance is to look at age discrimination and key points in the workplace. We would welcome stakeholders and consultees who wish to be involved in that guide to come forward following this Committee session.

Also, just to reiterate the point that Angela made about us working more with other organisations, I want to recap on the work that we are doing with the DWP, and the "It's good to talk" initiative so that we dispel the myth among managers and individuals that they are not allowed to talk about age, retirement or mid-career life alignments. One of the aims of that is to look at a television campaign within the framework of pensions. We also know that there is research from Kent University that also wound up in the statistics.

We need to make people more aware of what age discrimination is in the workplace, how it manifests itself, and that it is unlawful. Hopefully that would result in more people coming forward, but as Christopher says, if you speak to anybody who takes an employment tribunal case, the impact on that person's health and wellbeing is—

Q90 **Jess Phillips:** Horrible?

Julie Dennis: Yes.

Q91 **Jess Phillips:** I think that what the Chair was alluding to was that if there had been a big, sexy court case around age discrimination, publicising that people could take these cases, that would potentially have made people more aware of it. Older people's stuff is just not very sexy, is it?

Julie Dennis: I suppose as well, Jess, that the cases that you are seeing are the more high-profile people, in big corporate organisations. Everyday people who are sat at work being made to feel less valued think, "That does not relate to me." It is not like some of the other protected characteristics which people may be able to relate to themselves.

Dee Masters: I think, Jess, that you are probably right. To put this in a different context, in the past couple of years there has been a huge increase in equal pay claims focusing on private employers. You can almost certainly trace that to a lot of the media publicity around one particular case, which was against a private organisation. Historically, there have been lots of equal pay cases against public organisations, and then all of a sudden the press was full of that one particular case against a private organisation. We then see that trickling through. Once it's on people's agendas, they think about it more. It could well be that some sort of high-profile litigation around this would encourage people to come forward.

Q92 **Chair:** I know Angela wants to come in with a supplementary, but I just want to delve into this a tiny bit more. If there was a successful

enforcement—a case that had gone to court, where somebody had clearly been discriminated against because of their age—what would that look like, in terms of enforcement action on the employer and the employee? I don't get a feeling of what that looks like.

Dee Masters: Essentially, compensation. There would be a claim in the employment tribunal, and if it was successful the employee could ask the tribunal to award them compensation that reflected the losses that flowed from the discrimination.

Q93 **Chair:** What is a really good example? In pounds, shillings and pence, what does that look like to an employee? Is it a multiple of their income?

Dee Masters: Quite. Let us take a hypothetical situation in which someone was dismissed at 60 because they were 60 and were able to prove that. They could say to the tribunal, "If I hadn't been dismissed in a discriminatory way, I would have worked until I was 65, so my compensation should be my loss of remuneration for those five years." In theory, that is how it would work. In practice, awards for discrimination often aren't very high, but that is the theory behind it.

Q94 **Chair:** What is the best case? What is a good case in which somebody has got a really good award? How much do they get?

Dee Masters: I would say that the upper limit is typically maybe a year to two years' pay. What is interesting about age discrimination is that, because we know that there is age discrimination within the recruitment market, an older claimant who was successful would have a very powerful argument to say, "I should be getting more than one or two years' loss of earnings, because I am going to have to try to find a job in a discriminatory market, so I should be looking at more like five years' compensation."

Q95 **Jess Phillips:** What does the change look like, as well as the enforcement? Let's say that there was a recommendation. In other areas, you can have positive discrimination and training, and reasonable adjustment is made for disability—it might be that. Forcing an employer to be more age-friendly—

Dee Masters: Creating cultural changes.

Jess Phillips: Yes. It is more obvious with other protected characteristics what that might be.

Dee Masters: A starting point would be greater transparency. If employers were required to disclose data concerning the age make-up of their population so we could all see whether there is an issue, that might be a start. There could be a positive duty to make reasonable adjustments for older people. Those sorts of initiatives create cultural change, rather than necessarily a big loss.

Jess Phillips: We will see whether the gender data makes a change.

Q96 **Angela Crawley:** It is encouraging to hear from Julie that ACAS are

taking a more proactive approach and are working with other Departments. Echoing Jess, I don't necessarily think that litigation is the sexiest subject for many people. To wrap this up, may I ask each of the panel what one key recommendation you think would make a difference? Try to keep it brief.

Christopher Brooks: Having an open culture among employers. I think it is about the cultural side. It is really important to have the law underpinning it and access to the law so it is possible to enforce it legally, but culture is probably where it is really at.

Sometimes talking about age too much can end up reinforcing stereotypes and can be a bit unhelpful. I like the idea of having more promotion—maybe a kitemark—around flexible working, which is a more neutral issue. Loads of people can benefit from working flexibly. In fact, I think the large majority of people want to work flexibly, regardless of who they are or what they do. Pursuing that kind of thing would have a disproportionately large benefit to older workers and would be really helpful. I would try to focus there.

Elizabeth Prochaska: We would be interested in seeing the older persons convention come to fruition. It would support the rights of older people in work, but also contain rights in relation to lifelong care and end-of-life care, and a broader protection for age discrimination.

Q97 **Angela Crawley:** On that point, you are aware that there is the Scottish Older People's Assembly and that works quite well. Is that what you would be advocating for the rest of the UK?

Elizabeth Prochaska: Yes. We are advocating for an international convention along the lines of the convention on the rights of people with disabilities, and so on. But at the moment, older people are not captured in any existing international convention. That would help to effect cultural change, but also give people enforceable rights, if it was translated into domestic law.

Julie Dennis: In terms of ACAS, it is about showing best practice. As I have already said, we encourage line managers to have conversations with all staff. We would encourage good practice in removing age and date of birth from application forms, and doing the blind recruitment process, because we know that works. Good employers should look at having equality policies in place, including on all sorts of discrimination, including age, and ensure those policies address discrimination, harassment and victimisation, and that when people raise grievances in relation to that, they are taken seriously by employers and they follow those guidelines.

We should ensure that employers give training and internal promotion that is equally available to all employees, and not looked at in terms of age. Our website has a wealth of guidance, tools and templates that employers can use to develop policy, and we can also go out and support employers to implement that. I also reiterate the stuff around flexible working. Extension of flexible working is one way of addressing some of the concerns, especially those that affect older workers in the workplace.

Dee Masters: From a litigator's point of view, going back to the suggestion I made at the beginning of the session, reintroducing the questionnaires procedure would make a huge difference, because it would allow lawyers to advise clients much earlier on as to whether they had a claim and whether they were likely to succeed.

Chair: I think we have probably covered the last question. Thank you very much for your help today, it has been incredibly useful. It is a fascinating area and you have brought a great deal of insight, so on behalf of the Committee I thank you for all the time you have taken to prepare and come along this morning. We are very grateful indeed.