

Capability – the cost of getting it wrong

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An 89 year old former patient pathway co-ordinator has been awarded £200,000 by an [Employment Tribunal](#) for unfair dismissal and age and disability discrimination following her dismissal on capability grounds. In *Jolly v Royal Berkshire NHS Foundation Trust*, the ET in a judgment published earlier this year criticised the Trust for the manner in which capability proceedings were handled – concluding that the matter had been dealt with as if it was a disciplinary issue, rather than one of capability, and finding that there was no attempt at all to adhere to the spirit of the capability procedure.

The Trust had previously conceded that the dismissal was unfair on procedural grounds as no appeal had been dealt with. However, the Trust contended that the dismissal was substantively fair. The ET disagreed. The ET highlighted many procedural irregularities with the process prior to the appeal stage; it also held that dismissal would not have been reasonable for capability grounds in all the circumstances of the case. The Claimant did not understand her role in the way that her managers understood it; for the role as understood by the Claimant, she was performing competently. The Claimant's training was inadequate and incomplete, and although the Trust accepted that other employees required more training, it attempted to argue that further training would not have been appropriate in the Claimant's case. The Tribunal held that the reason for this difference in treatment was due to the Claimant's age. No warnings had previously been given to the Claimant – and the ET doubted whether the Trust's classification as there being a "catastrophic failure" such as to justify dismissal without previous warnings was appropriate. Various other findings of discrimination in the investigation, and in comments made by other members of staff, were also made.

The case returned to the [ET for an assessment of remedy](#), and in a judgment published this week; the ET awarded £200,000 – including an injury to feelings award of £20,000 and a compensatory award of over £71,000.

Fair dismissals for capability where there have been no prior warnings are reserved for the most serious of issues, and particularly where improvement is not likely. This case highlights the risks with age-related assumptions in respect of an employee's ability to improve, or the benefits of training. It also highlights the need to distinguish between conduct and capability issues - although the Trust failed to arrange an appeal hearing (and in doing so, breached the ACAS Code of Practice), it was clearly hoping to argue that even if a hearing had been arranged, the Claimant's dismissal would stand. The ET, however, declined to make any reductions to the compensation awarded to the Claimant to reflect the chance of a fair dismissal had the correct procedure been followed – the ET held that the dismissal was simply not justified. The ET also declined to make any reductions on the grounds of the Claimant's conduct, concluding that it was not satisfied that the Claimant was guilty of any culpable or blameworthy conduct.

Contact

Mark Hickson

Head of Business Development



onlineteaminbox@brownejacobson.com

+44 (0)370 270 6000

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