

SELDON – CLARIFICATION OF AN AGE OLD PROBLEM?

EMPLOYMENT

This note looks at the evolving area of age discrimination following what is (probably) the final word in the long-running saga of *Seldon v Clarkson Wright and Jakes*. The case began in the Employment Tribunal some six years ago, travelling all the way to the Supreme Court in order to determine which possible aims might legitimately underpin a mandatory retirement age of 65.

The case will give some comfort to employers wishing to impose or retain a mandatory retirement age, but should still be treated with caution.

JUSTIFICATION: A TWO-STAGE TEST

Age discrimination is unusual in that it can be justified even when it is direct. Most types of discrimination can only be justified when they are indirect. Indirect discrimination occurs where the action does not expressly discriminate on the basis of a particular characteristic, but adversely affects one particular group who have that characteristic.

In order to be justified, the discriminatory step must be a proportionate means of achieving a legitimate aim. It is important to consider each of those elements in turn.

LEGITIMACY

The Supreme Court in *Seldon* clarified the meaning of “legitimate aim” in the age discrimination legislation. Although the Equality Act 2010 does not contain any difference in wording when referring to justification of direct or indirect age discrimination, in order to conform to the underlying European directive, The Supreme Court held that direct discrimination can only be justified by an aim which is in the public interest and consistent with the social policy of the state.

Two particular legitimate aims that have been recognised in European case law are:

- i. inter-generational fairness; and
- ii. dignity.

These were developed by The Supreme Court to encompass three legitimate aims:

- ◆ the retention of ambitious junior staff;
- ◆ recruitment planning; and
- ◆ collegiality (the avoidance of difficult conversations with underperforming older partners).

PROPORTIONALITY

Proportionality means going no further than is necessary to meet a particular aim.

The Supreme Court concluded that a mandatory retirement age of 65 was not a proportionate way of achieving collegiality, since not enough evidence had been provided to show that performance levels generally declined after the age of 65.

The Employment Tribunal was asked to judge proportionality with regard to the other two legitimate aims: retention and planning. It concluded that 65 was proportionate for both aims, so that the mandatory retirement age was justified overall. A much higher retirement age might act as a disincentive to ambitious associates keen for promotion, but facing a long period with no openings; a much lower age might unduly limit the number of years a new partner would remain in the partnership.

SOME CAVEATS...

This litigation involved a law firm structured as a partnership. Partnerships were not governed by the national default retirement age, when it was introduced in 2006. Despite that, the Tribunal regarded the fact that a default retirement age operated for employees as support for the partnership’s choice of 65 as its retirement age. The Tribunal also felt that because the partners had consented and signed up to the terms in the partnership deed, this was a further reason to uphold its terms.

Both those supporting reasons may well provide little assistance to employers (whether companies, LLPs or partnerships) facing similar challenges in future. There is no longer a mandatory retirement age, and in all but the smallest partnerships new partners are often more akin to employees in their ability to negotiate amendments to the partnership documentation.

Many businesses scrapped their default retirement ages in 2011, when the national default retirement age for employees was abolished. Those that have retained a mandatory retirement age will gain some comfort from the *Seldon* saga, but should note Baroness Hale’s words in the Supreme Court that: “*All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified.*”

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