

Insight: Employment & Benefits

May 2012

Age discrimination and compulsory retirement in the UK – Seldon v Clarkson Wright and Jakes

This Insight focuses on the recent Supreme Court judgment in *Seldon*¹, a significant case in the UK concerning the scope of justification for direct discrimination on the ground of age and, in particular, a mandatory retirement age contained within a partnership agreement.

On 28 July 2010, the Court of Appeal upheld a tribunal's decision that a rule requiring partners in a firm of solicitors to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities. On 17 January 2012, the Supreme Court heard the combined appeals in *Seldon* and *Homer*² and the reserved judgment was handed down last week. The Supreme Court unanimously dismissed the appeal in *Seldon*, holding that compulsory retirement was a proportionate means of achieving legitimate workplace-related aims. In the wake of the abolition of the statutory default retirement age, employers will now have some comfort that they can rely on a set retirement age, as long they can objectively justify it. We summarise the key facts and consider the ramifications that this latest ruling will have on employers in the future.

UK age discrimination and retirement

The Equality Act 2010 (the "EqA 2010") prohibits direct age discrimination, indirect age discrimination and age harassment in the workplace. It also prohibits victimisation in the workplace against employees who have taken steps under the EqA 2010. On 6 April 2011, the default retirement age of 65 was abolished. A retirement dismissal will now amount to direct age discrimination unless it can be objectively justified.

The facts

Mr Seldon, a partner in a firm of solicitors, was compulsorily retired on 31 December 2006, at the age of 65, in accordance with a partnership deed which (like earlier deeds) provided that partners who attained the age of 65 had to retire from the firm by the end of the following December. Mr Seldon wanted to continue working beyond the age of 65 but this was rejected on the basis of there being no sufficient business need. The partners did, however, offer Mr Seldon an ex gratia payment of £30,000, which was withdrawn when they learnt that he was considering his rights under the old age discrimination legislation. Mr Seldon issued proceedings alleging that his forced retirement was an act of direct age discrimination and that the withdrawal of the offer of the ex gratia payment was an act of victimisation. The firm could not rely on the statutory default retirement age provisions as these applied only to employees not to partners. Therefore in order to successfully defend the claim it had to be shown that the retirement at 65 was justified in the circumstances.



Stephen Ravenscroft

Partner, London

+ 44 20 7532 2118

sravenscroft@whitecase.com

Oliver Brettle

Partner, London

+ 44 20 7532 2103

obrettle@whitecase.com

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¹ *Seldon v Clarkson Wright and Jakes (A Partnership)* [2010] IRLR 865

² *Homer v Chief Constable of West Yorkshire Police* [2010] IRLR 619

The Employment Tribunal and Employment Appeal Tribunal

The Employment Tribunal dismissed the claim and held that compulsory retirement was a proportionate means of achieving the following legitimate aims:

- Retention of associates by providing them with opportunities to make partner after a reasonable period.
- Facilitating partnership and workforce planning with realistic exceptions as to when vacancies would arise.
- Contributing to a congenial and supportive workplace culture by limiting expulsion of partners through performance management.

Therefore, despite suffering adverse treatment as a consequence of his age, the tribunal held that Mr Seldon's treatment was justified and would not amount to age discrimination. Mr Seldon appealed. The EAT upheld only one of his grounds of appeal, ruling that while the tribunal had been entitled to find that the principle of compulsory retirement at a particular age achieved certain legitimate objectives, including the maintenance of a congenial and supportive workplace culture, there was no evidence to support the firm's claim that it was justified in fixing the compulsory retirement age at 65 on the basis that performance would decline at around that age.

The Court of Appeal

Mr Seldon appealed to the Court of Appeal where he argued that the firm's objectives were illegitimate as – in light of the decisions of the ECJ and the High Court³ – justificatory aims had to be of a 'social policy/public interest nature' and it was simply insufficient to rely on the particular business aims of the employer.

The Court of Appeal rejected Mr Seldon's appeal on a number of grounds:

- The Court of Appeal disagreed with the argument that legitimate aims had to be of a social policy/public interest nature

and therefore the fact that the firm's aims were not of a public nature was not relevant.

- The Court of Appeal also rejected Mr Seldon's argument that an aim must continue to achieve its original purpose for it to remain legitimate. The tribunal had found that the firm had the legitimate aims it identified both at the time the clause in the partnership deed was introduced and when it was relied on to retire Mr Seldon. The Court of Appeal agreed with this decision.
- The Court of Appeal agreed with the EAT that the alternative rule suggested by Mr Seldon would not have achieved the identified aims, because the suggestion that a retirement age was dependent on there being a prospective partner would not encourage retention.
- The Court of Appeal agreed with the two categories of legitimate aim identified at tribunal level: (1) "dead men's shoes" which covered both providing associates with the opportunity of partnership after a reasonable period; and enabling partnership and workforce planning with realistic expectations as to when vacancies would arise; and (2) "collegiality" by limiting expulsion of partners through performance management and so contributing to a congenial and supportive workplace.

The Supreme Court

On 25 April 2012, the Supreme Court unanimously dismissed the appeal and ruled that a mandatory age in a partnership agreement can be justified. The case has been remitted to the Employment Tribunal on only one outstanding issue, namely whether 65 was an appropriate age to compulsorily retire Mr Seldon.

The Supreme Court ruled that the test for justifying direct age discrimination is different and narrower than the general test for justifying indirect discrimination. The test for justifying direct age discrimination, as now clarified by the Supreme Court, is that employers must show that they have an aim, which is legitimate as a 'public interest' aim and in the particular circumstances of the

employment or partnership concerned, and that the means chosen to achieve the aim is both appropriate and necessary (having first given consideration to other, less discriminatory, measures which would achieve the aim).

The Supreme Court held that there are two different kinds of legitimate objectives that have been sanctioned by the ECJ: inter-generational fairness and dignity. The former encompasses recruitment, retention and the sharing of limited opportunities between generations. The latter includes the more controversial aims of avoiding the need to dismiss older workers on grounds of incapacity or underperformance and the avoidance of costly and divisive disputes about those issues. It would seem that the former was applied in *Seldon*.

Looking forward

This is the first substantial case in the UK seeking to justify a mandatory retirement age for a partnership. As expressly recognised by the Supreme Court, the abolition of the designated retirement age has placed employers in the same position as partners, such that the principles set down in *Seldon* will also be relevant to that wider section of the working population. Employers will need to give particular consideration to whether a "public interest" was served when requiring anyone to retire. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified in their particular business.

This case provides some clarity for employers who can now rely on employment being shared out among generations, and that it is also legitimate to preserve the dignity of older workers by retiring them. However, it is still unclear as to what is the correct age to retire somebody. Business groups have argued that employers have been left in limbo, fearful of asking workers aged 65 or over to leave the business for fear of being accused of ageism. However, this decision will give greater certainty to those businesses that have chosen to apply a set retirement age.

³ *Age UK (formerly Heyday) [2009] ECR I-1569, ECJ and [2009] EWHC 2336 (Admin)*