EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/25: Supreme Court rules on compulsory retirement at 65 (UK)

<p>A retirement age of 65 may be lawful. Justification for direct age discrimination requires reasons of a public interest nature. The CJEU jurisprudence establishes that reasons for age discrimination must ensure either inter-generational fairness or dignity.</p>

Summary

A retirement age of 65 may be lawful. Justification for direct age discrimination requires reasons of a public interest nature. The CJEU jurisprudence establishes that reasons for age discrimination must ensure either inter-generational fairness or dignity.

Facts

A solicitors' partnership deed required retirement at 65. The senior partner, who was approaching that age, attempted to negotiate an extension but was refused consent by his partners on the basis there was no business case to do so. During the course of these negotiations the Employment Equality (Age) Regulations 2006 (the "Regulations") came into force. This was the measure by which the UK gave (partial) effect to Council Directive 2000/78/EC (the "Directive"). The senior partner, who ceased to be a partner on 1 December 2006, brought proceedings under the Regulations before an Employment Tribunal.

The claim alleged direct age discrimination. The firm claimed justification. The firm succeeded in defending the claim on the basis of three of the six reasons they put forward. The successful reasons were (1) to provide non-partners an opportunity of partnership after a reasonable period of service and thereby retain their service; (2) to facilitate long-term planning within the partnership; and (3) to limit the need to expel partners by performance management. The firm made clear they had no criticism of the claimant's personal

performance and were relying only on the circumstances of their firm.

The Employment Tribunal concluded that the reasons given were a proportionate means of achieving a congenial and supportive culture and encouraging professional staff to remain with the firm.

The claimant appealed to the Employment Appeal Tribunal without success. At the Employment Appeal Tribunal, however, the issue was raised that there had been no evidence as to why, to achieve the reasons for a retirement age, the age selected had to be 65. It was held that this issue must go back to the Tribunal to be considered again. A further appeal to the Court of Appeal failed, with that court upholding the decision of the Employment Appeal Tribunal.

The claimant, undaunted, proceeded to the Supreme Court where the three issues identified were (1) whether the three aims accepted by the Employment Tribunal were capable of being legitimate aims justifying direct age discrimination; (2) whether the firm had to justify the retirement clause both generally and in the individual case; and (3) whether reliance on the retirement term was a proportionate means of achieving the identified aims.

The hearing before the Supreme Court took place in January 2012. The tribunal proceedings had been brought in 2007 during which time the ECJ had heard a number of age discrimination cases, which had to be considered by the Supreme Court. Also, at the time the alleged discrimination took place in 2006 there were other regulations in force in the UK that permitted dismissal of employees (but not partners) at 65 or over. These regulations were repealed in 2011.

Judgment

The Supreme Court reviewed the decisions of the ECJ/CJEU on age discrimination decided between 2006 and 2011. The cases considered were *Félix Palacios de la Villa* (C-411/05); *Bartsch* (C-427/06); *Age Concern* (C-388/07); *Kücükdeveci* (C-555/07); *David Hütter* (C-88/08); *Wolf* (C-229/08); *Petersen* (C-341/08); *Ingeniørforeningen I Danmark* (C-499/08); *Rosenbladt* (C-45/09); *Georgiev* (C-250/09); *Prigge* (C-447/09); *Fuchs* (C-159/10) and *Hennings* (C-297/10) (together the "Luxembourg jurisprudence")

The court drew seven "messages" from these decisions:

all had concerned national laws or terms of collective agreements and not an individual contract;

justification of direct age discrimination under Article 6(1) of the Directive must be on the basis of social policy objectives, such as those relating to employment policy, and not purely individual reasons particular to the employer;
flexibility for employers is not of itself a legitimate aim but some flexibility may be extended to them in pursuit of social policy;
all of the legitimate aims that had been recognised by these decisions could be categorised as either inter-generational fairness (e.g. promoting access to employment for younger workers) or the preservation of dignity (e.g. avoiding disputes over fitness to work over a certain age);
any measure had to be both appropriate to achieve its legitimate aim and necessary to do so;
in assessing necessity, the gravity of the impact on the employee had to be weighed against the legitimate aim; and
the scope of the test for justifying any indirect discrimination under Article 2(2) (b) of the Directive and the scope of the test for justifying (direct or indirect) age discrimination under Article 6(1) are not identical and it is for the Member State and not the individual employer to establish their legitimacy.

The conclusion the Supreme Court drew about the applicability of social policy aims to employers was that it was open for them to choose which to pursue provided they were capable of consisting of objectives of public interest within the Directive, that they were in line with the social policies of the state and that they were proportionate, in the sense that they were appropriate to the aim and necessary to achieve it.

The court also observed that there was no hint in the Luxembourg jurisprudence that the objective pursued must be the one that was in the mind of those who adopted the measure in the first place. Thus, if the measure is maintained for what turns out, on a subsequent rationalisation, to be a legitimate objective, that is sufficient. In addition, when determining the tests of appropriateness and necessity the court must scrutinise carefully the particular business concerned to see whether the retirement age imposed actually did achieve the aim put forward and also whether there were any less discriminatory measures that could achieve the same aim.

Finally the court considered whether the justification of the measure had to be applicable to the individual as well as in general. The Court accepted the view of the lower courts that legitimate aims can only be achieved by the application of general policies. It held that if it is justifiable to have a general rule, that will usually justify the resulting treatment of an individual. However it considered that the context might be relevant, in this case that the rule had been recently approved unanimously by the partners in the firm. Alternatively, in the context of inter-generational fairness, partners might in the past have benefited from the rule when they themselves were promoted.

The result was that the appeal failed and the decision to remit the question of the appropriateness of the specific age of 65 to the dignity issue remained in place but the court added that this might also be applicable to all of the inter-generational issues as well.

Commentary

Initially this decision was greeted as upholding the right of a professional partnership (or employers more generally) to impose a retirement age of 65. That is, however, a simplistic conclusion to draw, as the terms of the decision leave a number of difficult issues for advisers and their clients, particularly in relation to the evidence that will have to be produced to defend claims.

One particular point is the emphasis on the test of necessity, which in many UK cases has been secondary to establishing whether a legitimate aim can be shown. For example when this case goes back to the Tribunal the Supreme Court have made it plain that the appropriateness of the age of 65 will need to be considered in relation to the aims relied on. Put another way, the employer will have to show that the potential legitimacy is established by the test of necessity in relation to their specific business. Enquiry will be made as to whether there was in fact any risk that younger lawyers were leaving the firm because they feared lack of advancement and also whether it is the case that performance management would impact on the dignity of a senior partner. If that is established there is also a requirement to apply the necessity test again in deciding if using another (possibly older) age could have averted the risk.

The court held that stereotypical assumptions linking age to competence or capability need to be ignored, which again emphasises the need for employers to be able to produce cogent evidence for their legitimate aims and the proportionality of their rules.

In addition, when it comes to upholding the proportionality of a rule, the Supreme Court have trailed a number of possible arguments that are likely to be utilised by employees in future cases. This case concerned an agreement amongst partners reached relatively recently. There are many businesses that impose rules without any form of real consultation and in the absence of equality of bargaining. These factors may well become of importance in the future.

Consistency with the aims of the state is also a moveable feast as policies can change over time. A regular review of the continuing appropriateness of retirement rules is called for.

The wide review of the Luxembourg jurisprudence in this case makes the judgment highly appropriate for consideration in other jurisdictions. There is a lot more to come in this area, as the conflict created by the levels of high employment amongst the young, and the remorseless

pressure on individuals to work for longer than they anticipated 10 years ago, means that the social policies on which these laws are predicated are likely to remain in flux for many years.

Comments of other jurisdictions

Germany (Elisabeth Höller): In Germany provisions under which an employment relationship automatically terminates upon achievement of a specific age are often used and considered a limitation in time. As such, the end of employment due to the achievement of a specific age needs to be justified.

If the age limit is agreed on in the employment contract, sec. 41 SGB VI (Social Code – "Sozialgesetzbuch") applies, according to which an employment agreement can provide for the automatic termination upon reaching the statutory retirement age. An agreement providing for automatic termination at an earlier age is only valid if concluded within three years before the agreed termination date. Said provision further states explicitly that a notice of termination cannot be justified by the fact that the employee has reached retirement age.

Collective bargaining agreements however are not governed by this provision of the SGB VI, but are also only valid if there is sufficient reason for the limitation in time – usually this requirement leads to a situation in which also the statutory retirement age is referred to.

However, age limitations can still be justified if they follow the general regulations for termination conditions. A justification can for example be found in safety requirements. It has been long standing case law that age limitations for cockpit personnel can be subject to lower age limits than the statutory retirement age, since there are certain health requirements. On 15 February 2012 the Federal Court for Labour and Employment law (BAG 7 AZR 946/07) decided that provisions on age limits for pilots in a collective bargaining agreement pursuant to which the employment relationship automatically terminates upon reaching the age of 60 violates the prohibition against age discrimination according to EU law.

Therefore, in principle the justification of a limitation due to the age of the employee is still possible, but the requirements for a justification need to be considered carefully.

Subject: Age discrimination

Parties: Seldon - v - Clarkson Wright and Jakes

Court: United Kingdom Supreme Court

Date: 25 April 2012

Case Number: [2012] UKSC 16

Internet publication: www.bailli.org/uk/cases/UKSC/2012/16.html

---

Creator: UK Supreme Court
Verdict at: 2012-04-25
Case number: [2012] UKSC 16