SUMMARY

2010/76: Mandatory retirement of law firm partner at age 65 justified (UK)

<p>It was lawful for a law firm to operate a policy of mandatory retirement of partners at the age of 65 as this was a proportionate means of meeting various legitimate aims.</p>

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Facts

Mr Seldon was an equity partner at Clarkson Wright and Jakes, a small firm of solicitors. In the firm's partnership deed, to which Mr Seldon was a party, there was a clause providing for mandatory retirement of partners at the end of the year following their 65th birthday. By a later redraft and execution of the partnership deed, partners could be kept on beyond age 65 by agreement.

Through the application of the mandatory retirement clause, Mr Seldon was compulsorily retired against his wishes. The firm did not take him up on his offer to stay with the firm on a consultancy basis. Mr Seldon brought a claim in the Employment Tribunal for direct age discrimination under the Employment Equality (Age) Regulations 2006 (the "Age Regulations"), which is the UK legislation implementing the age discrimination provisions of the EC Framework Directive (2000/78/EC).

The Age Regulations and other relevant UK legislation currently permit employers to require *employees* to retire at the age of 65 or older without attracting liability for age discrimination or unfair dismissal liability. This is known as the "default retirement age" (DRA). To qualify for this exemption, an employer has to follow a statutory retirement procedure, including considering any request by the employee to continue working beyond

retirement age. However, since Mr Seldon was a partner rather than an employee, the firm could not rely on the DRA regime in defending his claim.

The Employment Tribunal's Decision

Before the Employment Tribunal, the firm accepted that retiring Mr Seldon constituted direct age discrimination but contended that this was justifiable as a proportionate means of achieving a legitimate aim. The firm pointed to various specific aims that the imposition of a mandatory retirement age of 65 was intended to further, three of which were accepted by the Employment Tribunal as being justified:

1. ensuring associates were given the opportunity of partnership after a reasonable period;

2. facilitating planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies would arise; and

3. limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm.

Mr Seldon appealed to the Employment Appeal Tribunal (EAT).

The Employment Appeal Tribunal's Decision

The EAT upheld the Employment Tribunal's decision in respect of aims 1 and 2. However, the EAT decided that the firm had not been entitled to form the view that the specific cut-off age of 65 was justified by aim 3 because there was no evidence to support the supposition that quality of performance tails off around the age of 65. Whilst a cut-off age of 65 might be justified for some jobs, this had not been established in this case. The EAT decided to send the matter back to the Employment Tribunal for it to make further findings of fact on this point. Before the remitted hearing took place, Mr Seldon appealed to the Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal concluded that all three aims identified by the Employment Tribunal were legitimate and there had been no need for them to have been consciously recognised at the time the firm's mandatory retirement age was introduced. A discriminatory measure could be justified by a legitimate aim other than that which was specified at the time when the measure was introduced.

The Court added that it was a legitimate consideration that the mandatory retirement rule had been agreed by parties of equal bargaining power. The Employment Tribunal and the EAT had been entitled to take that factor into account.

Referring to the *Age UK* case ([2009] IRLR 373), the Court of Appeal noted that the ECJ's judgment in that case concerned whether the DRA under the Age Regulations was valid by reference to social and employment policy aims, rather than whether a decision by a firm to have a retirement age and enforce it was justified. There was a "margin of appreciation" available to a national government which was not available to an employer or to parties entering into a partnership deed. Nonetheless, if a partnership was acting consistently with the social aim that justified a legislative provision, it would contradict that aim to render the partnership's provision unlawful if it was proportionate.

In the present case, the Court concluded that there were legitimate aims related to ensuring that associates had promotion prospects and the partnership had a collegiate culture. These were consistent with the Government's social policy justification for the Age Regulations. The Court said it might be thought better to have a cut-off age rather than force an assessment of a person's decline in performance as they got older. It was a justification for having a cut-off age that people would be allowed to retire with dignity.

Mr Seldon had argued that the firm's mandatory retirement age had to be justified both as a general measure (in the abstract) and also in its application to his case. He argued that the firm should not have applied the mandatory retirement rule to him because there were not necessarily associate solicitors in the wings, ready for partnership, waiting to replace him. The Court of Appeal rejected this, holding that the Employment Tribunal had been entitled to focus on the justification of the clause rather than its application. There could be exceptional cases where a justified rule could be unjustified in its application, but that did not arise in the present case.

Finally, the Court decided that the retirement age of 65 that the firm had designated was proportionate. The fact that the firm could have chosen a different (higher) age, which would

have been less discriminatory to some individuals, did not automatically mean that 65 was not justified. Moreover, the fact that UK legislation currently provided for a DRA of 65 for employees supported the firm's choice of 65 as being a fair and proportionate cut-off point.

Commentary

This case is likely to be of significance in future because the UK's Coalition Government has published plans to phase out the DRA over a six-month period during 2011. The key proposals in the Government's consultation paper are:

- Retirements using the DRA will cease completely in October 2011 and no new notices of intended retirement may be issued from April 2011.

- From October 2011, employers wanting to retain a retirement age for employees will need to demonstrate that it is objectively justified – i.e. a proportionate means of achieving a legitimate aim or aims.

- The procedural requirements for retirement dismissals will be abolished.

The arguments in *Seldon* will therefore be of particular interest to employers who may be looking to retain and justify their own retirement age for employees in the future.

UK employers' organisations, such as the Confederation of British Industry, have expressed concern that the demise of the UK's DRA regime will make managing the end of employees' careers much harder, with an increased risk of age-based litigation. Whilst *Seldon* indicates some of the justification arguments that employers may be able to run in support of compulsory retirement, the considerations applicable to law firm partners may not be so relevant for other industries, professions and occupations. In particular, the Court of Appeal took into account the equal bargaining power between partners in a law firm, the absence of which in most employer/employee relationships is bound to affect any analysis as to justification.

Whilst *Seldon* identifies a number of legitimate aims that may be capable of justification, cogent empirical evidence will be required as to both the decision to implement a retirement age and the choice of any particular age. It is likely to become more difficult in future for employers to justify an across-the-board retirement age for all grades and occupations. Furthermore, the Court of Appeal in *Seldon* placed reliance on the existence of the DRA itself in concluding that retirement at age 65, in particular, was proportionate. This argument will no

longer be available once the DRA has been abolished.

Rather ironically for the UK, the European Court of Justice recently once again endorsed the broad discretion of EU Member States to adopt default retirement ages (*Rosenbladt* C-45/09, 12 October 2010, unreported). Whilst the ECJ helpfully recognised that avoiding humiliating capability dismissals for older workers and ensuring effective staff planning could amount to legitimate aims, this was in the context of the broad social and economic policy considerations for national governments when legislating on retirement age. Despite some of the Court's remarks in *Seldon*, employment tribunals in the UK are likely to demand a more rigorous, evidence-based analysis in determining whether justifications for mandatory retirement ages put forward by individual employers are valid.

A more prosaic issue for many employers will be how to broach 'retirement' discussions with older staff, once the statutory procedure has been abolished, without prompting allegations of age bias. The consultation document hinted that the Government may publish formal guidance on this issue or even a statutory code of practice.

Comments from other jurisdictions

Spain (Ana Campos): By Spanish Law, it is forbidden to establish compulsory retirement ages, unless set forth in a collective bargaining agreement and, even then, only as long as certain requirements have been met, namely (i) that the employee is entitled to a state retirement pension and (ii) that the measure is linked to other measures set forth in the CBA, such as the pursuit of employment stability, transformation of temporary employment contracts into indefinite term contracts or increases in recruitment.

However, in the case at hand, there was no employment relationship and retirement provisions between parties in such circumstances would not be considered age discriminatory.

Subject: Age discrimination

Parties: Seldon – v – Clarkson Wright & Jakes

Court: Court of Appeal (England and Wales)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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