Claims by equity partners

Employment tribunals are increasingly having to resolve discrimination claims brought against partnerships. Suzanne McKie and Laura Bell look at the key issues

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It is fair to say that equity partners are becoming increasingly willing to pursue their rights under discrimination law. There have been several recent high-profile discrimination cases brought by equity partners asking tribunals to consider their treatment by firms over many years of their careers in equity. This article explores the issues that arise frequently in such claims.

Age discrimination

The Equality Act 2010 (EA 2010) applies to proposed and established partnerships (s44) and limited liability partnerships (s45). Age is unique in being the only protected characteristic for which direct discrimination can be justified if it can be shown that the alleged act of discrimination is a proportionate means of achieving a legitimate aim (s13(2) EA 2010). The test for justification is the same as that applied in indirect discrimination cases under s19 EA 2010. There is no reason why the same business reasons cannot be used to justify direct and indirect discriminatory treatment (*R (Age UK) v Secretary of State for Business, Innovation and Skills (Equality and Human Rights Commission intervening)* [2009] per Blake J at para 92).

The forthcoming judgment of the Supreme Court in *Seldon v Clarkson Wright & Jakes LLP (CW&J)* and the recent repeal of the default retirement age both ensure that age discrimination in a partnerships context currently has a high profile. Seldon, a partner in CW&J, was compulsorily retired in accordance with the terms of CW&J's partnership deed at the end of 2006, following his 65th birthday. He brought a claim for unlawful direct age discrimination and the employment tribunal concluded that he had suffered less favourable treatment as a consequence of his age, but that his treatment was justified. It found that the policy had the legitimate aims of:

- giving associates the opportunity of partnership after a reasonable period;
- facilitating partnership and workforce planning; and
- limiting the need to expel partners through performance management.

The first two of these aims can be summed up as 'dead man's shoes', while the third can be identified in short as 'collegiality'. The Employment Appeal Tribunal (EAT) upheld the employment tribunal's decision except that in relation to 'collegiality', it held that CW&J was not entitled to form the view that the aim justified fixing the retirement age at 65.

Seldon appealed to the Court of Appeal but the appeal was dismissed (*Seldon v Clarkson Wright & Jakes (A Partnership) & anor* [2010]). In the process, the Court of Appeal made the following findings:

- a discriminatory measure may be justified by a legitimate aim other than one that was specified at the time when the measure was introduced (para 28);
- it is a legitimate consideration that the compulsory retirement clause has been negotiated by parties of equal bargaining power (para 30);
- once a retirement clause or rule of that kind is justified as a

proportionate means of achieving a legitimate aim, it will be rare that the application of the rule to the particular employee or partner will require much justification (para 36); and

- the fact that an age other than 65 may also be justifiable does not prevent the employer from choosing 65: whatever age is chosen is going to discriminate against some age group (para 39).

Many employers have already chosen to abolish their compulsory retirement age. Those who do wish to justify enforced retirement at a particular age need to present evidence that shows that it directly affects workforce planning and partnership opportunities for others. Careful analysis should be undertaken and recorded, and any policy should be kept under review.

Indirect and direct discrimination cannot be justified on the grounds of cost alone. This has resulted in tribunals having to engage in the artificial task of searching for some additional factor to justify the decision. The EAT cast doubt on the current position in *obiter* comments in *Woodcock v Cumbria Primary Care Trust* [2010]. *Woodcock* was followed by *Cherfi v G4S Security Services Ltd* [2011], an indirect religious discrimination case that has been appealed. How *Cherfi* is dealt with on appeal will be important in age discrimination cases where the employer argues that retirement at a certain age is necessary to reduce the cost of employing older people, for example the cost of health insurance premiums and sickness absence.

Equal pay

Under the EA 2010, equity partners can now bring equal pay claims comparing themselves with other equity partners. The ability to use a hypothetical comparator under s71 EA is a welcome development, but this is only possible if a claim is brought for sex discrimination under s13 EA. Equal pay claims (ss65 and 66 EA) still require an actual comparator who is doing like work, work rated as equivalent or work of equal value. It is highly debatable whether an expert would assist in an equal value claim that relates to a complex financial services job and careful consideration must be given to whether to use s13 or s65.

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Disclosure and confidentiality

Issues of disclosure and the desire to maintain confidentiality can cause acute problems in cases involving professional services firms where their clients are named or in possession of relevant documents.

A tribunal can order disclosure in accordance with Part 31 of the Civil Procedure Rules (CPR) and the overriding objective, pursuant to 10(2)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. There is a significant burden on respondents to disclose documents in discrimination cases *EB v BA* [2006]. The burden is greater on partnerships because they must search documents in the control or possession of all partners involved in the case.

Confidentiality is not a reason for withholding disclosure; any duty of confidentiality owed to a third party is almost certainly trumped by the duty of disclosure (*Science Research Council v Nasse* [1980]). Although redaction is often the answer, it should be noted that tribunals and courts are increasingly looking out for excessive redaction. Only parts of a document that are confidential, irrelevant and privileged may be redacted. Codifying the names of clients, employees and fellow partners should also be considered, which seems to find favour with some courts and tribunals.

Searching for documents

Searching computers used by claimants, even if owned by the firm, by using the claimant's passwords (discovered by the IT department) to access google or hotmail accounts will fall foul of s1 of the Computer Misuse Act 1990 and is a criminal act. Where an equity partner makes a request under the Data Protection Act 1998, the firm must respond to this in the same way as a subject access request made by an

Parties

It may be thought that a partner, in suing the partnership, is effectively suing themselves. However, s1(2) of the Limited Liability Partnership Act (LLPA) 2000 states that an LLP is a 'body corporate', with its own legal entity.

Members of the LLP are its agents (s6(1) LLPA 2000), and their acts bind the LLP if another person acts on the representations made. Members owe fiduciary duties to the LLP. This is highly relevant when considering what criticisms may be made of the claimant as an equity partner and what might be expected of them in terms of managing the internal grievance process.

As a consequence of the EAT decision (Underhill J) in *London Borough of Hackney v Sivanandan & ors* [2011], tribunals are more likely to make a single award where individual respondent partners are named in discrimination cases alongside the LLP. Such an award will be made on a joint and several liability basis. Consideration should also be given to the EAT's recent decision in *Bungay & ors v Saini & ors* [2011], which says that the agency provisions of the Equality Act need to be interpreted purposively. Members of firms' management boards (even if not partners) may therefore well be found liable as agents if they make discriminatory decisions affecting the claimant partner.

employee. The search need only be that which is reasonable and proportionate (*Ezsias v Welsh Ministers* [2008]).

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Disclosure of electronic documents

CPR Practice Direction (PD) 31B on disclosure of electronic documents applies to civil proceedings commenced on or after 1 October 2010. 'Electronic document' is defined by para 5(3) as any document held in electronic form, including documents stored on servers and back-up systems, deleted documents and metadata. Parties should attempt to agree search terms in advance of the date for disclosure.

PD 31B para 21 sets out a non-exhaustive list of the factors that may be relevant in determining the reasonableness of a search for electronic documents. A party requesting disclosure of documents that are not reasonably accessible must demonstrate their relevance and materiality, and justify the cost and burden of retrieving and producing them (para 24). Guidance is also given on the use of keyword searches and how disclosed electronic data is to be presented (paras 25-35).

In high-value employment tribunal discrimination claims and High Court proceedings commenced before 1 October 2010, it may be prudent to make an application for an order that parties comply with the spirit of PD 31B.

Legal professional privilege

In the course of proceedings, a partnership may seek to protect information or documentation that is said to have the benefit of legal professional privilege. This can arise in two ways: legal advice privilege and litigation privilege. For both forms of privilege, the privilege is the client's to waive, not the lawyers.

To have the protection of legal advice privilege, the advice must be given by a qualified lawyer acting in their capacity as a lawyer, as opposed to in an executive or compliance capacity (*Howes v Hinckley and Bosworth BC* [2008], per Elias P). There is one exception. In *Akzo Nobel Chemicals Ltd & Akcros Chemicals v European Commission* [2010], a competition case, the European Court of Justice held that for privilege to apply, communications must be with 'independent' lawyers. In other words, they must not be engaged in a contract of employment with the people to

whom they are giving advice. This is a very disappointing judgment, and one which is bound to lead to a more cautious approach in communications with in-house lawyers and an increased use of external legal teams. Assuming that the principle in this case is limited to competition cases is probably unwise.

In *R (Prudential plc) v Special Commissioner of Income Tax* [2010], the Court of Appeal held that legal professional privilege only applies at common law to solicitors, barristers and appropriately qualified foreign lawyers. In so doing the court rejected an argument that Article 8 of the European Convention on Human Rights permitted it to apply legal professional privilege outside of the legal profession. The Court of Appeal emphasised that were the privilege to extend beyond lawyers it would be difficult to limit the scope of people to whom it applied.

Legal advice privilege will only attach to communications between a client and their legal advisers. In the context of partnership disputes, where the partnership is being sued and is seeking advice, a key question is who the client is. The client will only include the individuals specifically tasked with seeking and obtaining advice, and does not extend to everyone in the firm, or even the whole department or division seeking or receiving legal advice. Communications between individual clients within the client team will not attract legal advice privilege if they are simply commenting on the merits of a particular matter, and not receiving or seeking legal advice.

The advice must be confidential and have a legal context in order for it to be privileged. Communications with a solicitor acting as a 'man of business', giving general commercial advice, will not be covered (Lord Scott in *Three Rivers District Council & ors v Governor and Company of the Bank of England* [2004]). However, provided advice is given in a legal context, legal advice privilege extends beyond advice simply on legal rights and obligations (Taylor LJ in *Balabel v Air India* [1988]).

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In contrast to legal advice privilege, litigation privilege attaches to documents prepared for the dominant purpose of litigation. Litigation must be actual or reasonably in prospect. Litigation privilege only attaches in the context of adversarial proceedings, not proceedings such as internal grievance and disciplinary hearings, investigations or inquiries (In *re L (a Minor)* [1997]). It was for this reason that litigation privilege could not be relied upon by the bank in the BCCI disputes, which were in the context of an enquiry (see *Three Rivers District Council & ors v Governor and Company of the Bank of England (no 5)* [2002]). Although litigation privilege is, in a sense, narrower than legal advice privilege, it will extend to communications between a client and a third party.

It is important that any partnership involved in a dispute should clearly nominate the person or people who will act as 'the client' for the purposes of the dispute at an early stage. Any communication with the solicitor should be directed through that person or those people alone. Where there is an in-house legal team or lawyer instructing external lawyers, they will usually be the client. It is important that the circulation of legal advice is restricted; privileged documents should only be circulated on a need-to-know basis, and to third parties pursuant to a confidentiality agreement. Documents should not be created unnecessarily, but if non-clients have to produce written communications to seek legal advice the supporting reasons should be recorded as this may help to reduce the risk of the document's status being misconstrued at a later date. It is also important to ensure that privileged documents are not annotated and do not have manuscript notes made on them. Such comments are unlikely be privileged.

Without-prejudice discussions

When seeking to resolve disputes within a partnership structure, it is common to have informal 'without-prejudice chats' between partners to keep disputes low-key. The without-prejudice principle is a rule of public policy that encourages settlement by allowing parties to speak freely, safe in the knowledge that what they say will not be used to prejudice them. Although the rule should be strictly applied, there are exceptions to it (*Unilever plc v The Procter & Gamble Company* [1999]).

In *BNP Paribas v Mezzotero* [2004], the claimant sought to rely on evidence from discussions about her grievance at a without-prejudice meeting to support her claim of sex discrimination. The tribunal allowed her to do so, a decision which was upheld on appeal. The EAT held that for the without-prejudice rule to

Arbitration

An arbitration clause in a members' agreement will not be valid to exclude the jurisdiction of the employment tribunal. In *Clyde & Co LLP & anor v Winkelhof* [2011], the claimants sought a mandatory injunction staying the defendant's tribunal proceedings to allow compliance with the dispute-resolution procedures contained in the members' agreement. The High Court held that the relevant clause, which made arbitration a final resolution of a member's dispute, breached s144 EA 2010. This was because s144 had the effect of rendering unenforceable an agreement to preclude or limit the continuation of discrimination proceedings.

apply, there must be a dispute between the parties and the discussions must be a genuine attempt to compromise it. The raising of a grievance did not necessarily give rise to such a dispute. In particular, there was no dispute about termination at the time of the meeting. This aspect of the judgment has been criticised as unrealistic, on the basis that the employer should be allowed to propose a clean break on a without-prejudice basis.

Cox J went on to deal with the alternative argument that the contents of the meeting fell under the 'unambiguous impropriety' exception to the without-prejudice rule. In finding that they did, she relied upon the public interest in allegations of unlawful discrimination being heard and the difficulties of proving such cases. (Examples of other types of case deemed to fall within this exception include threats and attempts at blackmail made under the cloak of without-prejudice communications, such as *Greenwood v Fitts* [1961], *Hawick Jersey International Ltd v Caplan* [1998] and *Underwood v Cox* [1912]).

In *Woodward v Santander UK plc* [2010] the claimant sought to rely on *Mezzotero* to reveal details of without-prejudice discussions. The EAT reviewed the authorities, stressing the public importance of the without-prejudice rule and the need to apply any exceptions to it strictly (*Cutts v Head* [1984], *Unilever, Ofulue & anor v Bossert* [2009]; *Savings & Investment Bank Ltd v Fincken* [2004]). It analysed *Mezzotero* and concluded that no new exception to the without-prejudice rule could be derived from it (para 58). On the facts of that case, unambiguous impropriety was established because the employers used the cover of without-prejudice language to 'announce a course of action which was blatantly discriminatory'.

Rather than finding that discrimination cases generally should be seen as an exception to the without-prejudice rule, the EAT held that the policy arguments in favour of the rule might apply with particular force in discrimination cases, which often place a heavy emotional and financial burden on both parties, thereby increasing the importance of settlement (para 60). The exception for impropriety will therefore apply 'only in the very clearest cases' (para 62), which would include words that are unambiguously discriminatory. (Cox J gave the example in *Mezzotero* of someone being told in a without-prejudice meeting 'we do not want you here because you are black'. But such a comment as 'we can't have you working here now that you've brought a claim' could equally be regarded as unambiguously discriminatory, as it is a clear act of victimisation.)

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The tribunal in *Woodward* also rejected the claimant's submissions that because the without-prejudice material was already in the public domain (it had been referred to in previous witness statements, without objection), the without-prejudice rule did not apply. The EAT held that the without-prejudice principle goes wider than confidentiality and therefore continues to apply even when matters are in the public domain.

The tribunal in *Woodward* had dealt with the application to hear the arguments about the without-prejudice rule at the start of the hearing. The EAT held that it did not err in doing so, but recommended that such issues of admissibility should be raised at a preliminary hearing well in advance of the final hearing. ■

Akzo Nobel Chemicals Ltd & Akcros Chemicals v European Commission [2010] EUECJ C-550/07_O

Balabel v Air India [1988] Ch 317

BNP Paribas v Mezzotero [2004] UKEAT 0218/04/3003

Bungay & ors v Saini & ors [2011] UKEAT 0331/10/2709

Cherfi v G4S Security Services Ltd [2011] EAT/0379/10/2405

Clyde & Co LLP & anor v Winkelhof [2011] EWHC 668 (QB)

Cutts v Head [1984] Ch 290

EB v BA [2006] EWCA Civ 132

Ezsias v Welsh Ministers [2008] EWCA Civ 874

Greenwood v Fitts [1961] 29 DLR (2d) 260 (BCCA)

Hawick Jersey International Ltd v Caplan The Times, 11 March 1998

Howes v Hinckley and Bosworth BC [2008] EAT 0213/08/0407

In re L (a Minor) [1997] AC 16

London Borough of Hackney v Sivanandan & ors [2011] UKEAT 0075/10/2705

Ofulue & anor v Bossert [2009] UKHL 16

R (Prudential plc) v Special Commissioner of Income Tax [2010] EWCA Civ 1094

Savings & Investment Bank Ltd v Fincken [2004] EWCA Civ 1630

Science Research Council v Nasse [1980] AC 1028

R (Age UK) v Secretary of State for Business, Innovation and Skills (Equality and Human Rights Commission intervening) [2009] EWHC 2336

Seldon v Clarkson Wright & Jakes (A Partnership) & anor [2010] EWCA Civ 899

Three Rivers District Council & ors v Governor and Company of the Bank of England [2004] UKHL 48

Three Rivers District Council & ors v Governor and Company of the Bank of England (no 5) [2002] EWHC 2730

Underwood v Cox (1912) 4 DLR 66

Unilever plc v The Procter & Gamble Company [1999] EWCA Civ 3027

Woodcock v Cumbria Primary Care Trust [2010] UKEAT 0489/09/1211

Woodward v Santander UK plc [2010] UKEAT/0250/09/2505