discrimination

WORK IN PROGRESS

As we await the Supreme Court's judgment in *Seldon*, **Suzanne McKie** and **Laura Bell** consider how employers can currently justify a compulsory retirement age, and what further guidance is needed

The forthcoming judgment of the Supreme Court in *Seldon v Clarkson Wright & Jakes* (CW&J) ensures that age discrimination and partnerships continue to receive high-profile coverage. The repeal of the default retirement age on 1 October 2011 also means that the case will take on greater significance for employers as well.

Seldon, a partner in CW&J, was compulsorily retired in accordance with the terms of the firm's partnership deed at the end of 2006, following his 65th birthday. He brought a claim for unlawful direct age discrimination under the Employment Equality (Age) Regulations 2006 (now repealed and replaced by the Equality Act 2010).

The Employment Tribunal (ET) concluded that Seldon had suffered less favourable treatment as a consequence of his age, but that his treatment was justified. The ET found that the policy had the legitimate aims of: (1) giving associates the opportunity of partnership after a reasonable period; (2) facilitating partnership and workforce planning ((1) and (2) identified in short as 'dead man's shoes'); and (3) limiting the need to expel partners through performance management, thus increasing and identified in short as 'collegiality'. The Employment Appeal Tribunal upheld the ET's decision save that, in relation to aim (3) 'collegiality', it held that CW&J were not entitled to form the view that the aim justified fixing the age at 65.

Seldon appealed and the Court of Appeal further considered the legality of the compulsory retirement age of 65 (*Seldon v Clarkson, Wright & Jakes (SoS for Business, Innovation and Skills intervening)* [2010] EWCA Civ 899).

Seldon argued that, in light of the decisions of the ECJ and Blake J in the Age UK litigation, a firm's legitimate aim must be of a "social policy/public interest nature" and not simply an aim peculiar to their own situation. The Court of Appeal disagreed. It held that the ECJ's guidance for the UK to determine whether the Age Regulations were justified (national legislation could only derogate from the principle prohibiting discrimination on the grounds of age in respect of measures justified by legitimate social policy aims) was distinct from whether the actions of an employer or firm were justified.

In his judgment, Sir Mark Waller suggested that the actions of employers and firms must be consistent with the social or labour policy of the United Kingdom which justified the Age Regulations. Where there was such consistency, their actions would be lawful if they were a proportionate means of achieving the aim. Taking this into account the Court of Appeal found that both the 'dead man's shoes' and 'collegiality' aims were legitimate. Sir Mark Waller stated in respect of the latter that "an aim intended to produce a happy work place has to be within or consistent with the government's social policy justification for the regulations".

The Court of Appeal judgment also confirmed a number of other matters: (1) a discriminatory measure may be justified by a legitimate aim other than that which was specified at the time when the measure was introduced; (2) it is a legitimate consideration that the compulsory retirement clause had been negotiated by parties of equal bargaining power; (3) 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; (4) 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.

PROTECTED CHARACTERISTIC

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 (section 13(2) of the Equality Act 2010). The test of justification is the same as that applied to indirect discrimination under section 19 of the Equality Act 2010 and there is no reason why the same business reasons cannot be used to justify directly and indirectly discriminatory treatment.

The future for justification

Many firms and employers have already chosen to abolish any compulsory retirement age (CRA). For those that have not, the Court of Appeal judgment in Seldon is the most recent authoritative statement of what is required for justification. Although a firm may choose to repeat the 'legitimate aims' relied upon by CW&J to justify a CRA in its partnership agreement, it should not be assumed that it will be able to demonstrate that its CRA is proportionate to meet those aims.

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Now that the default retirement age is soon to be abolished, there is no longer any support that can be derived solely from the old statutory default age for the choice of 65 as a fair and proportionate cut-off point. Unless the Court of Appeal judgment is overturned, the abolition of the default retirement age may be an academic exercise, as it will continue to be justified to enforce retirement at 65, in accordance with the judgment of Sir Mark Waller.

In order to justify a CRA firms and employers may now need to present evidence which shows that it directly affects workforce planning and partnership opportunities for others. Of course partners and employees can adduce evidence to show the contrary. Careful analysis should be undertaken and recorded, and any CRA policy should be kept under review.

Where firms and employers choose to justify a CRA on performance grounds, they may also need to show that performance declines after the chosen age. Both employees and partners should be monitored under performance programmes. In general, the performance of partners has rarely been challenged to date. The Supreme Court judgment in *Seldon* is likely to consider the 'dignity argument' touched upon in the Court of Appeal.

Consideration of whether the CRA clause had been negotiated by parties of equal bargaining power is likely to remain an important factor in partnership disputes. Consultation and informed agreement between parties of equal bargaining power should be evidenced.

A wish to reduce costs alone cannot justify an act of indirect discrimination or direct discrimination in respect of age; however, this has involved tribunals engaging in the artificial task of searching for some factor in addition to cost to justify the decision.

The current position was expressly doubted (obiter) by the EAT in *Woodcock v Cumbria Primary Care Trust* [2011] ICR 143. Woodcock was followed in *Cherfi v G4S Security Services Ltd* (EAT/0379/10), an indirect religious discrimination case which has been appealed. How *Cherfi* is dealt with on appeal is important in age discrimination cases where the employer argues that retirement at a certain age is necessary to reduce costs involved with employing older people; for example, in relation to costs of health insurance premiums and sickness absence.

Imposed retirement is just one area of potential discrimination affecting equity partners, and they are becoming increasingly aware of their rights as far as discrimination law is concerned. There have been several recent high-profile cases concerning sex discrimination, race discrimination (one going back over the ten-year history of the equity partner) and disability discrimination (which have featured in particular duties of the part of LLPs to make reasonable adjustments even though this is generally not something LLPs think about in the context of people they regard as 'co-owners' of the business).

What is clear is that LLPs, and partnerships generally, need to be more alive to the implications of their actions in relation to their members.

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