

Coming of age



"Discrimination remains difficult to prove because it is to be found in the actions of individuals rather than in what is spoken"

Equality guidelines on hiring and retiring solicitors form part of the new Solicitors Code of Practice, but don't forget to look out for the outcome of *Seldon* – it should bring further clarity to age discrimination legislation, says **Anthony Philpott**

In the UK the new anti-age discrimination legislation is being used to respond to the silent discrimination that has been felt by many older people in the workplace, while at the same time allowing younger people to realise their full potential through the operation of fair company employment policies and procedures.

The legislation introduced addresses the sometimes competing aims of the young and old against the backdrop of a continuing debate on how the country copes with the problems of an ageing population and rising youth unemployment in a period of economic austerity.

When it comes to law firms, the new Solicitors Code of Practice in force from 6 October 2011 contains specific provisions on the engagement and retirement of solicitors. Equality and diversity policies must include provisions to encompass recruitment and interview processes and details of how the firm will ensure equality in relation to the treatment of employees and managers.

The new age discrimination legislation, including the Equality Act 2010 and the Employment Equality (Age) Regulations 2006, is 'age blind' and age neutral. It also does not remove age from decision making by employers but instead requires discriminatory age-based decisions to be

justified by a legitimate aim that is proportionate.

The Supreme Court has granted leave to appeal to solicitor Leslie Seldon, who claims age discrimination against the law firm in which he was a partner after he was forced to retire in 2006 because he was aged 65. With the abolition of the default retirement age the legitimacy of compulsory retirement will be assessed by the measure of whether retirement is a proportionate means of achieving a legitimate aim.

Justifying discrimination

In *Seldon v Clarkson Wright & Jakes and Equality and Human Rights Commission* [2010] EWCA Civ 899, Seldon had been an equity partner in a firm of solicitors since 1972. He was compulsorily retired at the end of the year following his 65th birthday, as required by the partnership deed. The partnership deed provided for the removal of partners only on certain specific grounds which did not include poor performance.

Seldon alleged that enforced retirement constituted direct age discrimination. The issue was whether the discrimination could be justified as a proportionate means of achieving a legitimate aim. The Employment Tribunal decided that the compulsory retirement rule was justified as

achieving the following legitimate aims:

- (i) ensuring that associates were given the opportunity of partnership, thereby preventing them from leaving the firm;
- (ii) facilitating the planning of the partnership and workforce across the department by having a realistic long-term expectation as to when vacancies would arise; and
- (iii) limiting the need to expel partners by way of performance management thus contributing to the congenial, supportive and collegiate culture of the firm. Partners whose performance deteriorated with age could simply continue until retirement without any adverse consequence.

The Employment Tribunal had been entitled to find that the principle of compulsory retirement was justified and achieved legitimate objectives, but had not been entitled to find that the firm had established that it was justified in fixing the relevant age at which partners should be retired at 65 because performance would drop off at around that age. There was no evidential basis for that assumption.

The tribunal had not erred in considering legitimate aims which had not been considered by the partners at the time of

the partnership deed, but had been put forward to justify the rule retrospectively. On this point, "the courts have stated on a number of occasions, it will be sometimes more difficult for an employer to justify *ex post facto* a provision or policy which has

a discriminatory effect in circumstances where there was no conscious understanding of those effects at the time the provision or policy was adopted". The EAT said the tribunal is entitled to look with particular care at alleged aims which in fact were not or may not have been in the rule maker's mind at all.

The desire to run the operation in a collegiate way and to structure the partnership agreement to achieve that effect was a legitimate objective. The tribunal had been entitled to conclude that an environment where partners would not save in exceptional circumstances be subject to disciplinary procedures in respect of underperformance was an element which was directed to achieving that objective of collegiality.

The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 came into force on 6 April 2011 to abolish the default retirement age but it will still be possible for employers to operate a compulsory retirement age that can be objectively justified. This means that any dismissal because of age and taking place after 6 April 2011 will constitute direct discrimination under the Equality Act 2010 unless it is allowed under the transitional provisions.

Under the 2006 regulations there was a notice procedure whereby the employer would notify employees six to 12 months in advance that they intended to retire them when they reached the age of 65. If the

employee made a request to work beyond 65, the employer was required to consider that request and have a meeting to discuss it. As the employer had no obligation to agree to the request the employer could still insist on the employee retiring at that age.

This old rule allowing retirement at the default retirement age will still apply under the transitional provisions if the employee has reached the age of 65 on or before 30 September 2011 provided that notice of retirement has been issued on or before 5 April 2011.

However, if employers forcibly retire employees on or after 1 October 2011 because of the default retirement age of 65 they will leave themselves open to claims of age discrimination in the employment tribunal, which they will only be able to defend if they can show that it is justified.

Appropriate actions

Direct discrimination will not be unlawful if the employer can justify discriminating on the grounds of or because of age but they have to prove that it is a 'proportionate means of achieving a legitimate aim', that is if the employer can objectively justify it. Proportionate means that what the employer is doing must be appropriate and necessary.

It will be for the employment tribunal to decide on a case-by-case basis whether a measure is justified. Examples of aims that might be legitimate include the health and safety of employees and customers; the need for an employee to be in post for a reasonable time before retirement; and business needs and efficiency.

In *Hampton v Lord Chancellor* [2008] IRLR 258, Hampton held a judicial office of recorder. He was retired from this role

because he had reached 65. He complained and argued that the retirement age should be 70 and not 65. The Lord Chancellor argued that the retirement age of 65 rather than the statutory maximum of 70 was necessary to maintain a free flow of new appointments. The respondents had not shown that their discriminatory treatment of Hampton was a proportionate means of achieving a legitimate aim of maintaining a reasonable flow of new appointments. On the evidence it was shown that the assumption that all recorders aged over 65 would remain in post until aged 70 was wrong.

The EAT rejected the argument that if the number of vacancies for recorders were reduced this would lead to a reduction in the calibre of newly appointed recorders.

On the contrary this would increase the calibre of applicants because it would increase competition and thereby increase the quality of those appointed.

Legitimate aims after *Seldon*

Discrimination remains difficult to prove because it is to be found in the actions of individuals rather than in what is spoken. Liability can be avoided by the employer if the discrimination can be justified on the grounds that it is a proportionate means of achieving a legitimate aim.

Employment tribunals have had great difficulty in deciding what a legitimate aim is and what is proportionate, so much so that employment appeal tribunals have already remitted many of these cases back to employment tribunals for them to reconsider this question.

The question is whether employers can justify their actions as legitimate, and what will be the permitted circumstances and parameters within which they may do so? For law firms the Supreme Court's ruling in *Seldon* – the hearing is scheduled for January 2012 – will determine in what circumstances a solicitor partner may be forcibly retired. This becomes particularly acute for solicitor partners following the abolition of the default retirement age, because law firms will have to fall back on a defence of justification in the case of enforced retirement of a solicitor partner.



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