

A justified end?

Is a retirement age of 65 now lawful?

Sejal Raja reports

Since the government abolished the mandatory retirement age last month, many employers have erred on the side of caution and removed the contractual retirement age for their employees. However, the recent Supreme Court decision in *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, [2012] All ER (D) 121 (Apr) could provide the certainty employers need before adopting a contractual retirement age of 65.

Seldon provides some clarity in that it identifies and confirms that the legitimate aims put forward by the law firm, Clarkson Wright and Jakes, are justified, namely: giving associates an opportunity of partnership within a reasonable time and thereby an incentive to remain with the firm; facilitating workforce planning by knowing when vacancies are to be expected; and limiting the need to expel under-performing partners, thus contributing to a congenial and supportive attitude within the firm.

Discriminatory test

The test to determine discriminatory conduct, in this case direct age discrimination, is set out in reg 3 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031) (which is now repealed and set out in s 13(1) and (2) of the Equality Act 2010): “For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if, on the grounds of B’s age, A treats B less favourably than he treats or would treat other persons, . . . and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.” Accordingly, not only do employers have to identify a legitimate aim, but it also has to show that the discriminatory conduct, which in this case is age 65, is a proportionate means of achieving that aim.

Lady Justice Hale stated “[T]he means chosen have to be appropriate and necessary. It is one thing to say that the

aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another thing to say that a mandatory retirement age is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not any other, less discriminatory, measures which would do so.”

The case has been remitted to the employment tribunal to consider just this point.

“The issue as to whether the retirement age of 65 amounts to age discrimination is far from clear”

Previous case law

It may be worth highlighting that in the case of *Hampton v Lord Chancellor and the Ministry of Justice* [2008] IRLR 258. Mr Hampton held the judicial office of Recorder. He was retired because he attained the age of 65. Recorders are fee-paid judicial office holders appointed pursuant to the Courts Act 1971, and accordingly, the statutory retirement age was 70. The Ministry of Justice (MoJ) brought forward the retirement age to age 65 to create additional opportunities for the appointment of salaried judges. The MoJ failed to convince the employment tribunal that the compulsory retirement of Recorders at age 65 was justified. The tribunal was of the view that the evidence provided by the MoJ did not support its argument that the retirement age of 65 was a proportionate way of meeting that aim.



- *Seldon* clarifies that setting the retirement age at 65 requires a legitimate aim.
- Issues arise around proving that the legitimate aim is proportionate.

Tribunal considerations

When deciding whether a particular retirement age is justified, an employment tribunal is likely to consider:

- why a particular retirement age chosen by the employer is considered proportionate, for example, is there evidence that the recruitment or the retention of employees is subject to the age profile of the partners; and
- whether the employer has considered an alternative retirement age and whether this would have an effect on the legitimate aims.

Seldon highlights the need for employers to thoroughly explore with an open mind other less discriminatory means of achieving its aims rather than merely seeking evidence to justify its preferred approach. Therefore, the starting point should not be “we want a retirement age of 65 how can we achieve it?” but instead “we are having difficulty in retaining younger associates and the reason provided by an associate at exit interview was that there were no promotion prospects”. The evidence that should be obtained should be clear and unequivocal. Furthermore, employers should not rely on generalised assumptions, namely that there is an impact on retaining individuals because of the absence of a contractual retirement age.

Lack of clarity

The issue as to whether the retirement age of 65 amounts to age discrimination is far from clear. The first step, namely establishing a legitimate aim, has been clarified. In addition to establishing the legitimate aims, organisations will have had to obtain evidence to substantiate that the chosen legitimate aims are a proportionate means of achieving that aim. This specific issue of proportionality will undoubtedly lead to further litigation in the appellate courts. NLJ

Sejal Raja is a partner in the law firm RadcliffesLeBrasseur.
E-mail: sejal.raja@rlb-law.com
Website: www.rlb-law.com