

## Age discrimination – 18 months on

The Employment Equality (Age) Regulations 2006 (“the Regulations”) came into force on 1 October 2006. The purpose of the Regulations is to make discrimination unlawful on the grounds of age.

The Regulations follow the language of other discrimination legislation i.e. that of race, sex, disability, religion or belief, and sexual orientation. Accordingly, direct and indirect discrimination are unlawful, as are victimisation and harassment. The Regulations provide that discrimination may be justified if it is a proportionate means of achieving a legitimate aim. This will apply equally to direct and indirect discrimination.

It was envisaged that employers would be inundated with claims, particularly in relation to the recruitment process. Surprisingly, it has been relatively quiet, however there have been a few cases which provide some guidance as to how Tribunals are interpreting the defence of justification. Sejal Raja reports on the implications of these decisions.

The first case was *Bloxham –v- Freshfields Bruckhaus Deringer*.

The claim was brought by a former partner of Freshfields (solicitors) who claimed that changes in the pension scheme amounted to age discrimination. Freshfields paid partners’ pensions out of the firm’s annual profit from the same fund that active partners received their share of the profits. There were a number of individuals who were disgruntled by this as there was a perception that there was unfairness in this

arrangement. It was felt that older partners would receive more generous pensions funded by younger partners, who would eventually receive less. After consultation and to deal with these concerns, Freshfields replaced the scheme and a new scheme came into force in May 2006. This included transitional arrangements, where partners over 50 could retire under the old scheme provided they did so before 31 October 2006. However, under the old scheme, partners retiring before 55 received a reduced pension, the discount for retiring at 54 was 20%. Mr Bloxham had planned to retire at 55 in March 2007 but, as a result of these changes, he retired on 31 October 2006 at age 54 to retain benefits under the original scheme. His pension was reduced by 20% in line with the scheme rules.

The Employment Tribunal agreed with Mr Bloxham that Freshfields had discriminated against him on the grounds of his age in applying the 20% reduction to his pension as this constituted less favourable treatment compared to partners aged 55 or over. However, the Employment Tribunal held that Freshfields had objectively justified the discrimination.

The Tribunal held that Freshfields had comfortably passed the threshold of showing the retention of the discount was a proportionate means of achieving a legitimate aim.

The legitimate aim in this case was balancing the fairness between the parties and, as such, Freshfields did not rely upon costs as its defence. Costs reasons alone cannot justify discrimination. However, employers

seeking to change pension and other benefit schemes will often have no reason for doing so other than cost and it remains to be seen how Tribunals will approach the cost defence in future age discrimination cases.

The next two cases dealt with the issue of retirement.

The age regulations allow employers to retire employees lawfully at 65, but this does not apply to non-employees such as workers, partners, directors and other office holders such as judges.

In the second case of *Seldon -v- Clarkson Wright and Jakes*, the Employment Tribunal held that the compulsory retirement of a partner in a law firm was a proportionate means of achieving a legitimate aim and therefore justified discrimination on the grounds of age.

The Seldon case involved the compulsory retirement of a law firm's senior partner at 65.

To establish the objective justification defence, the firm had to show the discriminatory treatment was a proportionate means of achieving a legitimate aim.

The Tribunal held that a retirement age of 65 for partners in a small partnership was a proportionate means of achieving the following legitimate aims:

- to provide partnership prospects for associates to aid their retention,
- to facilitate succession planning, and
- to avoid the need to expel partners by performance management thus contributing to a congenial and supportive culture.

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The Employment Tribunal emphasised that the decision was particular to the firm concerned and the specific facts of the case.

In contrast, in the third case of *Hampton -v- Ministry of Justice*, an Employment Tribunal held that the compulsory retirement of a Recorder at age 65, a part-time judge who is an office holder, was not objectively justified and therefore amounted to unlawful age discrimination.

Mr Hampton was retired from the role of Recorder in March 2007, the reason given by the Ministry of Justice was that he attained age 65. The Ministry of Justice agreed that the decision to retire him amounted to less favourable treatment but that the decision was objectively justified because it needed to introduce younger Recorders and provide sufficient experience to them. However, the Ministry of Justice failed to produce any evidence which confirms that permitting Recorders to continue until the age of 70 would affect its ability to produce sufficient suitable candidates for the judiciary.

The decision highlights the importance of considering whether any less discriminatory means can be used to achieve the same aims and of producing evidence to support the rationale for a decision.

What is clear from the above cases is that until the Employment Appeal Tribunal provides clear guidance each case is going to turn on its own facts and evidence will be required to support the defence of objective justification.

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