

Partnerships and Age Discrimination

Compulsory Retirement Provisions – The Justification Arguments After The Case Of *Seldon V Clarkson Wright & Jakes* (19.12.08)

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The Employment Appeal Tribunal gave its judgment on the case of *Seldon v Clarkson Wright & Jakes* on 19 December 2008. This case concerns the application of the Age Discrimination law to a Partnership where a Partner (Mr Seldon) had been required to retire at 65 by virtue of his Partnership Agreement.

The case had originally come to the Employment Tribunal which had found that, although the provision in the Partnership Agreement that all Partners should retire at 65 constituted direct Age Discrimination, it was justified in the case of that firm. Seldon subsequently appealed.

By way of background, Age Discrimination law relates to Partnerships and LLPs. Whereas employees can be subject to a compulsory retirement age of 65, no such age limit applies to Partners, with the result that any requirement to retire from the firm, contained in a Partnership or LLP Agreement, irrespective of the age chosen, will potentially be discriminatory and unlawful. The issue then is whether the requirement to retire at the age selected by the firm can be justified by a legitimate aim. Even if it is, the provision will still be discriminatory if the aim could have been achieved by virtue of a less discriminatory provision. Thus, if it is shown that it was not necessary to include a compulsory retirement age at that age, but that some other general rule could have applied which was less discriminatory, the compulsory retirement clause will be unlawful.

The case is of great significance to Partnerships and LLPs who have similar compulsory retirement provisions. A number of arguments were raised in the case, some of which were accepted by the EAT, some of which were rejected. In this article we review the Tribunal's comments on those arguments that failed and those that succeeded. We will also look at the grounds for justification which were found to exist.

Although the conclusion from the decision was that the case was remitted back to the Employment Tribunal, this does not mean that a compulsory retirement age in a Partnership Agreement cannot be justified. In fact, on the contrary, two out of the three grounds found by the Employment Tribunal for upholding the compulsory retirement provision were approved by the EAT. These grounds emphasised the aims of "succession planning" i.e. encouraging younger associates to commit their future to the firm in the knowledge that they might become Partners when some of the existing Partners retired. The third was found by the EAT to be a legitimate aim were it to have been supported by evidence. This third argument was that the firm wanted an automatic retirement date to avoid having Partners removed following a performance review, as a review mechanism such as this could undermine the collegiate culture between Partners in the firm. The firm did not provide any evidence that performance of Partners dropped off at 65 and that therefore such a provision was necessary for that reason.

The EAT concluded that it would not be appropriate for them to decide whether the two grounds which they had successfully upheld were sufficient to provide justification and this should be a matter reconsidered by the original tribunal. The EAT did however give a strong indication that the two grounds on their own would be significant enough and that the third ground which was not supported by evidence nevertheless did provide some additional "support" to having a compulsory retirement provision at some age.

In this article, Michael Archer of Beale and Company Solicitors reviews the EAT's analysis of the arguments presented by the parties both for and against the retirement clause, to see which found favour and which did not.

In favour:

The EAT agreed with the Tribunal that the following two arguments succeeded in demonstrating a legitimate aim:

1. **Succession** – Ensuring that Associates are given the opportunity of Partnership or else they might leave. The EAT noted that enabling younger employees to achieve advancement in their careers is a legitimate business objective and that this had been found in the case of *Secretary of State for the Trading Industry v Rutherford (2005)*. It goes without saying however that in order to be an encouragement to Associates in the firm, they will need to know that there is a compulsory retirement provision, when it might apply and that it is enforceable and will be enforced by the firm. Although the EAT said that it would not need evidence from the Associates as to whether it did have an effect on them as the Tribunal could make this deduction, it would be inadvisable not to present some evidence that the retirement provision was widely known in the firm, did have this effect and was used by the firm to encourage their Associates to consider their future Partnership prospects. If the Partnership Agreement remains private, or could be subject to variation when circumstances change, this aim will be undermined.
2. **Facilitating Workforce Planning** - Both in individual departments and the firm, as Associates will look at their prospects and work out when their advancement will occur. This works both from the firm's and the Associate's point of view. The firm needs to know when to put in place a successor which is a process that begins early and cannot be left until a Partner serves notice to retire.
3. **Collegiality** - Preserving the ethos of the firm and the relationship between Partners by avoiding a performance management process to remove an "older" non-performing partner, as that would run contrary to the firm's congenial and supportive culture.

This third argument as explained by the EAT was that the relationship between Partners was regarded by them as more important than the achievement of business targets. In a congenial and supportive atmosphere Partners may be able to achieve a better work/life balance. This was a legitimate aim as it was directly connected to the professional practice being run by the firm. Plainly, the firm would need to adduce evidence about what the collegiate culture comprised which they did in this case. But the problem with this argument is that, according to the EAT, it relied on the assumption that at the age selected (65 in this case), a Partner would be performing less effectively and so that is why an automatic retirement was needed, so as to avoid upsetting the culture of the firm by removing that Partner compulsorily due to a decline in performance. The EAT decided that this required actual evidence that the performance of a 65 year old would decline or had declined.

There will of course always be a problem for any firm wanting to rely on such a ground in finding satisfactory evidence, particularly after a claim has been made. If, historically, Partners had retired at 65, there will be no examples of Partners in the firm having stayed on longer and demonstrated the decline in their performance. It might also be said that those who did retire at 65 will have geared down deliberately so as to hand over work, or because their role by necessity changed. Any deterioration in financial performance may well have been deliberate and have come from their planning to retire, rather than their inability to perform. If it is technical ability that is to be questioned, how in practice can a Partner be appraised? Even in a firm with a performance appraisal system operating to trigger the forced retirement of an under-performing Partner, it is not easy to point to a decline in technical ability – it is usually limited to financial performance. Firms with such processes will still find it hard to remove an "older" partner in this way. They will always be met with the counter that all Partners, even younger ones, have to be treated in the same way; that a decline in performance does not justify retirement when a

reduction in profit share might be more appropriate, or that their perceived technical inability existed when they were much younger and was never then an issue (and thus the decision to expel in fact must have been based on age).

The EAT pointed out that the evidence required would not be available in a new firm. But it is unlikely to be available in a long established firm either. Even if there is evidence of a past “older” Partner whose performance had declined by reason of age, is it any less discriminatory an assumption that all “older” Partners may well suffer in the same way? Although it is not expressed in these terms by the EAT, the requirement to have evidence of this nature may have arisen because the collegiality argument was brought up only when defending the case and does not seem to have been one which the Partners of that firm had consciously discussed between themselves as being part of their justification before signing their agreement. Had this been done, it might well have influenced the EAT.

The other difficulty about choosing one age is that it is specific. Why 65? Why not 55, 60, 70, or any age in between? One answer to this may be to invite each Partner when they become a Partner, or say at the age of 50, to select the age at which they wish the firm to plan for their retirement. But while this may achieve a more certain succession plan, it does not address the concern which this third argument sought to address which is that some Partners will be inclined to stay in work too long when their performance might be impaired and the firm would prefer to have a means of ensuring that a Partner would retire long before the impairment became an issue and the firm had to take action. It will necessarily be arbitrary to choose just one age, but if Partners in their discussions on choosing the age for retirement in their Agreement decide that this must be before the risk of impairment may occur that will help.

In the Seldon case evidence was needed, according to the EAT, to justify the actual age specified in the compulsory retirement clause. In other words, the EAT were asking why 65? What evidence did the firm have that 65 was the right age? There was certain evidence that by the age of 70 performance would fall off. The EAT indicated that it might be right to have a compulsory retirement age, it might be higher, it could be lower, but the actual age chosen would need to be supported by something more than an assumption that, at a given age, Partners would perform less well.

Does every argument for justification need evidence? The EAT explained that they did not need to see evidence for every argument. Matters that are self-evident do not need evidence. They gave the example that they could well understand Associates being encouraged by knowing when the Partners would retire without necessarily hearing evidence from the Associates directly. But where there appears to be a stereotypical assumption, e.g. that a Partner would be less able to perform when they reach the age of 65, evidence would be needed to support this. It should be said that the EAT did see merit in the desire of a firm to maintain its ethos of collegiality and did emphasise that this might be sustained as a legitimate aim provided the firm is able to give a considered and reasoned explanation as to why that particular age had been chosen. Where a Partnership has plainly given careful thought to this and has taken a view (of the particular age that it feels is appropriate to select) in the light of its or other similar firms’ experience, from reasons it can rationally explain, it will carry considerable weight with the tribunal. The EAT also warned tribunals that Partnerships may be very different to their own experience but they need to accept that that is the case and that Partnerships may not necessarily be run along strict commercial lines. The EAT also emphasised that if an age was chosen that could be justified, there may well still be examples of Partners whose performance has not dropped off but that does not undermine the Partnership’s requirement that Partners comply with the compulsory retirement provision.

The EAT also found that specifying a compulsory retirement age of 65 was undermined by two factors. One was that it would appear that in the firm Partners were retiring at 65 or earlier voluntarily so it may not have been necessary to have had a compulsory provision. In addition, the Partnership were able, under the Partnership Agreement, to agree to a Partner continuing as a Partner. If this was needed because of the Partner finishing off a particular piece of business, that

would be fine said the EAT, but a general provision in the Partnership Agreement allowing the firm to treat one Partner differently from another (e.g. by looking at the Partner's actual performance at that time) undermined the justification argument. If you are going to have a general rule, then you must stick to it.

Helpfully, the EAT considered a number of the arguments raised on Mr Seldon's behalf that the compulsory retirement age provision was not justified:

1. It was argued that justification of a potentially discriminatory provision must be based on "weighty considerations" because you are dealing with direct age discrimination. This was disapproved by the EAT. The burden was no higher than in other cases of discrimination.
2. The argument that the firm should not be able to rely on justification which was not in the minds of the Partners when they agreed the provision in the first place was also disagreed by the EAT. It would however improve the credibility of the argument if the justification for the clause had been considered by all the Partners (and a record kept that this consideration had taken place).
3. It is wrong the EAT said to look at the specific affect that the particular provision has on the Claimant. The EAT emphasised that it is a general rule applying to all and so justification is looked at on that basis. This would give the clause predictability and consistency (even though one Partner may be able to demonstrate that it operates in his case more unfairly).
4. In the same way, it is not an argument to say that you should not have a general rule as to retirement but should look at the circumstances at the time and invite a Partner to retire so as to facilitate promotion if that was required at the time. The EAT emphasised you should not look at the specifics when creating a general rule of retirement. If exceptions are made to the rule, it will undermine the rule itself. It is the rule that needs justifying, not the application of the rule in a particular case. You can have a general exception however that allows a generally less discriminatory rule to apply, but not an exception based on individual circumstances.
5. It is not an argument to say that the individual positions of Partners could be negotiated at the time to find a solution as may be done with younger Partners and thus it was not necessary, so it was argued, to have a performance management system. The EAT rejected this point. A solution may not actually be achieved by negotiation.
6. The legitimate aim does not need to be linked to "business efficiency". It can relate to "culture" provided it related to running of the practice. Wanting to maintain a collegiate culture was, according to the EAT, a manifestly legitimate objective. If you have a charitable or environmental objective, the EAT added, these can also be legitimate. You do not need to show that your aim has a "commercial purpose". The argument on ethos is enough.
7. It is a legitimate consideration that parties all have equal bargaining power prior to consenting to the provisions. Also, as it benefits the firm as a whole, the Claimant Partner may have derived some advantage from the provision during the period when he was an Equity Partner. The same principle as was discussed in the case of *Bridge v Deacons* on restrictive covenants applied – as a Partner you received the benefit by the restriction being imposed on other Partners, so you can take into account that the provision was considered to be in their collective interest. Also, it was agreed as part of "collective bargaining". This helps justification argument. This is supported by the case of *Palacios De La Villa v Sofitel Servicios SA*. Weight can be given to the Partners' own perceptions of their interest as reflected in the Partnership Agreement.

Summary

The two successful grounds were based on succession where there is significance in they being certainty so that appropriate planning and expectation can occur. It remains to be seen whether the tribunal once the case has been remitted agrees that this is enough to justify compulsory retirement provisions.

Firms relying on the collegiality argument need to think further about this. The difficulty of the argument is that performance management upsets the ethos of the firm and therefore you need a compulsory age in that you have to choose an age and you then have to support that choice by evidence indicating that at that age, there is a concern that performance of a Partner may decline.

This does not mean that collegiality cannot be included as an objective but it just cannot stand on its own. The EAT did indicate that having it was a legitimate objective, albeit discriminatory and unjustified, yet it can still add some weight to the other grounds on which the firm will need to rely to justify the compulsory retirement provision.

Finally, once you create the rule, in this case, so as to emphasise that you should not undermine it by allowing exceptions in particular cases - the ability to create exceptions should no longer be included in the provisions of your Partnership Agreement.

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