

AGE DISCRIMINATION AND PARTNERSHIPS – THE SELDON APPEAL

Judgment has now been given on the Appeal by Mr Seldon who was a partner who was compulsorily retired from his legal practice. The judgment of the Court of Appeal on appeal of the earlier Employment Appeal Tribunal decision was given on 28 July 2010.

The Appeal Judgment takes up a number of pages dealing with what many firms who have been following this case would consider to be technical issues as to the Government policy behind law relating to age discrimination. However, of key importance is the legal and commercial rationale which the law firm in Mr Seldon's case had for having a compulsory retirement age at 65 in its partnership agreement which the Court of Appeal largely supports most of the judgment of the Employment Appeal Tribunal on which we previously reported.

The conclusion you can make from the case is that for small firms at least, having a compulsory retirement age included as part of their partnership arrangements is not unlawful and will be upheld if the firm can persuade the Court that there are genuine reasons for such a provision and those reasons are similar to those which are used in the case of Mr Seldon's legal practice.

The EAT and the Court of Appeal concluded that the following were legitimate aims of a compulsory retirement clause:

1. promoting succession: i.e. ensuring that associates were given the opportunity of partnership after a reasonable period;
2. succession planning: facilitating the planning of the partnership and workforce across individual departments by creating a realistic long term expectation as to when vacancies among the partners will arise;
3. promoting collegiality: limiting the need to expel partners by way of performance management and thus creating a congenial and supportive culture within the firm.

There are some useful observations made by Sir Mark Waller who gave the leading judgment in the Court of Appeal that some firms may want to use in support of their partnership provisions requiring compulsory retirement. For example, *"It seems to me that an aim intending to produce a happy work place has to be within or consistent with the Government's social policy justification for the Regulations. It is not just within partnerships, but it may be thought better to have a cut off age, rather than force an assessment of a person's falling off in performance as they get older"*. He went on to add *"My experience would tell me that it is a justification for having a cut off age that people will be allowed to retire with dignity. To have such a policy requires a cut off age which some, when they reach it, will think too low, but it does not follow that it is not justified to have a cut off age"*.

This is how the Court of Appeal also dealt with some of the other arguments put forward by Mr Seldon that the requirement to retire at 65 was discriminatory and unlawful:

1. **Can a firm come up with justification at the time when the clause needs to be enforced, when that justification was not in the firm's mind when the clause was originally drafted?**

This argument arose because the provision had historically been in a succession of partnership agreements in Mr Seldon's firm. It was therefore very difficult for the firm to say what was in the mind of the original draftsman of or signatories to that clause. This argument has encouraged commentators, including ourselves, to suggest that firms should examine any potentially discriminatory provisions in their partnership agreements and, when the agreements are renewed, discuss them amongst the partners so that the rationale for those provisions is agreed consciously.

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The Court of Appeal, however also indicated that justification could be made “ex post facto” relying on the case for *Schonheit Daft v Frankfurt Ohman* [2004] IRLR 983 as approved in *Crossley v British Airways* [2005] IRLR 423.

This is not quite the same as suggesting that an entirely new aim can be claimed for the provision. It simply means that, even if there is no specific articulation of the aim when the clause was drafted or the agreement signed, it was open to the Court to find that the partnership did have the aim claimed. This therefore is a matter of credibility of evidence and we would therefore continue with our recommendation that the aims of such potentially discriminatory clauses are reviewed and discussed amongst partners before signing. It goes to make the evidence more persuasive if those aims claimed for the provision were indeed ones intended.

2. Is the partner who willingly signed an agreement with such a provision (and also thus taking the benefit in respect of other partners who would retire in accordance with that provision) prevented from arguing against its enforceability?

The Court of Appeal considered that the agreement was signed by partners who were of equal bargaining power and agreed with the EAT that it was permissible to take into account the perception that the partner now challenging the clause had at one time. In other words, if you agreed the retirement clause when it was not relevant to you, but only disagreed with it when it was relevant, it is appropriate for the Court to take this into account when considering if the clause was justified.

3. What if the retirement clause could have been drafted differently so as to be less discriminatory?

Various suggestions had been put forward on behalf of Mr Seldon, for example, a clause requiring a partner over a certain age to be given notice (e.g. 12 months) if there was a prospective partner in the wings ready to take over, or a clause where the retirement age chosen was not 65 but a later age. So it was argued, if the aims of the firm could be achieved in a less discriminatory way, then the clause should not be enforced.

Mr Seldon’s counsel asked the Court of Appeal to note that there was no evidence that there was a prospective partner in the wings waiting for Mr Seldon to retire; there was no reason to put forward 65 as the chosen age either, instead of perhaps a later age. But there was evidence that some partners in the firm had left and this it was argued undermined the claimed principle of collegiality.

The Court of Appeal decided that it was legitimate for the firm to set a rule and to enforce that rule, whether or not when the time came the circumstances existed which had motivated the firm to have a compulsory retirement clause in their agreement in the first place. The Court appreciated that a firm could not leave the matter open to be decided at the time. The clause itself, in seeking to encourage succession, had a longer term effect and brought certainty.

The Court also looked at different ages and noted that even by taking a different age, discrimination would be exactly the same for those attaining that age. There was a hint, however, that if the age is too low, it might not be considered to be a fair and proportionate cut off point. The Court referred to 63 as being justified. It is less clear whether an age of 60 or below would equally be considered justifiable. It would depend on the evidence.

4. Did the firm need to prove that at 65 there was a fall off in performance generally?

The Court considered that this is not a matter on which the firm itself needs to adduce evidence. Instead, the Court considered that Mr Seldon, as the wronged party, might want to adduce evidence from other firms that showed that the performance of 65 year olds did not fall off. It is thought that this research is unlikely to be one that either an individual partner or a firm would find it easy to undertake

and it is useful that the Court did not consider that it is an issue of relevance in cases of this sort (although the Court did not actually make the point in this way).

Summary

The decision therefore is helpful to firms having a compulsory retirement age in their partnership and LLP agreements. But it should be not be assumed that in every case, a firm will be able to demonstrate that it is proportionate and justifiable. The firm will need to have identified the aims that it wants to achieve by having such a clause. If it is not a similar firm to Mr Seldon's which wished to promote succession within the practice and a collegiate environment between the partners, there would have to be other good reasons advanced for its enforceability. It is probably true to say that the larger the firm, the less likely it is that the same aims can be claimed.

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