

Hotly anticipated (by employment lawyers at least!) the UK Supreme Court has today given its decision in the controversial age discrimination case, **Seldon v Clarkson Wright & Jakes**, involving solicitor Mr Seldon being obliged to retire as a Partner in law firm CWJ at age 65.

The good news for employers is that the Supreme Court confirmed that the following are all capable of being legitimate reasons for having a contractual retirement age: staff retention, workforce planning and limiting the need to expel older Partners by way of demeaning and undignified performance management. It was however keen to stress that much will depend on the particular facts of the case – improving the recruitment or retention of young people may be a legitimate aim, but not if the business concerned does not have a problem in recruiting or retaining the young, for example. The slightly trickier question (and the bit we were most interested in) of whether the employer's actions in forcing Mr Seldon to retire when he turned 65 (as opposed to some other age) were a proportionate means of achieving those aims has been referred back to the Employment Tribunal to consider.

This decision does not give the green light to contractual retirement ages. All employers should still give careful consideration to whether any mandatory retirement age could be justified. This case may however be slightly academic in light of recent surveys which suggest that most employers have already scrapped their mandatory retirement ages following the abolition of the statutory Default Retirement Age last year. In addition, the rigid progression structure of many law firms distinguishes them from other employers and there are likely to be significant evidential problems in establishing at anything more than a generic level that removing the senior people at a specific age does positively impact on staff recruitment and retention.

To a certain extent the dismissal of Mr Seldon's appeal just confirms what we already knew, namely that staff retention, workforce planning and getting rid of older staff with their dignity intact are all capable of constituting legitimate reasons for having a contractual retirement age (but being capable of does not mean that they will necessarily do so in every case). We are, however, still not clear on whether using 65 is a proportionate means of achieving such aims.

If the thrust of recent ECJ case law is anything to go by, it would seem that in the vast majority of situations this should be the case, but it is not by any means a foregone conclusion. The Supreme Court, for example, was keen to point out that there is a difference between justifying a retirement age and justifying a particular retirement age. Yes, it is okay to have a rule that says employees can be forced to retire at some age in pursuit of those aims – but why should it be at 65 as opposed to 66, 70, 75, etc?

The Supreme Court also handed down judgment today in another age discrimination case, **Homer v Chief Constable of West Yorkshire Police**, which concerned the scope for justifying indirect discrimination on the ground of age.

Mr Homer claimed he was indirectly discriminated against when he was turned down for promotion because he did not have a law degree. As he was 62 years old and was due (of his own volition) to retire at 65 he did not have enough time to complete such a degree. He argued that he was thereby being discriminated against on the ground of his age. The Chief Constable argued that proximity to the termination of employment (and hence insufficient time to do a degree) was not a product solely of age, but could arise equally through an intention to leave for other reasons. Dismissing this argument Lady Justice Hale produced the striking comparison of a role which required employees to have a beard. She took the view that this would put women at a particular disadvantage because "very few of them" are able to grow a beard. The argument does not deal with those who can!

The net effect of these cases is that the position remains unclear. Lady Justice Hale agreed that "it was important to establish the principles in a new area which many still find counter-intuitive". But as she wisely said, "we all have a lot of learning to do".

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