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# A case of justified discrimination?

Law firms may be allowed to enforce a compulsory retirement age policy in certain circumstances – but in doing so they must navigate a legal minefield

Partnerships may be able, in their own particular circumstances, to justify the adoption of a compulsory retirement age for partners. However, City and national firms which are run primarily on modern corporate, performance-based models would be unwise to rely too heavily on the reasons cited in the recent Employment Appeal Tribunal (EAT) decision in *Seldon v Clarkson Wright & Jakes* to justify their compulsory retirement age rule.

Instead firms need to identify whether they have, in their own particular circumstances, a legitimate business reason which their own compulsory retirement age is designed to achieve; whether they have identified the right retirement age to achieve it; whether there is, in fact, evidence to support it; whether there are less discriminatory ways of achieving the objective which they should adopt instead; and whether they have excluded all stereotyping judgments from their assessment.

In the *Seldon* case, Mr Seldon had argued that a compulsory retirement age of 65 in the CWJ partnership agreement amounted to unlawful age discrimination against partners. The Employment Tribunal, at first instance, decided that that compulsory retirement age was a proportionate means of achieving the firm's legitimate aims of:

1. Ensuring associates were given the opportunity of partnership after a reasonable period so they do not leave.
2. Facilitating planning of partnership and workforce by having a realistic expectation as to when partnership vacancies will arise.
3. Limiting the need to expel partners by performance management thus contributing to the congenial and supportive culture of the firm.

These aims were justifiable in the tribunal's opinion, in the particular CWJ circumstances.

And this is an important point – they were specifically relevant to that firm's particular model and culture.

The very traditional nature of the CJW partnership meant that forced partner exit for underperformance was not an option (their partnership agreement did not, in fact, allow it). Younger lawyers apparently believed they would usually just need to bide their time to step into the shoes of older retiring partners. Collegiality was regarded as the absolute cornerstone of the partnership relationship. A compulsory retirement age was,

therefore, regarded by the firm as a way of maintaining congenial relations between partners as an alternative to proactive, and most likely contentious, partner performance management.

However, at the EAT, in relation to the firm's third (and initially winning) objective of ensuring firm congeniality, Mr Seldon successfully argued that the firm's assertion that partner performance dropped off at 65 (thus justifying compulsory retirement at that age) was not supported by any evidence and involved stereotyping.

Most City and national firms operate on a very different model these days to that of CWJ: one of shorter partner tenure, proactive performance management and greater emphasis on ability to build one's own practice rather than just acquiring that of an older partner.

Such firms are likely to struggle to show that having a compulsory partner retirement date is a way of ensuring a congenial and supportive culture, where performance exits are in fact a common feature of their partnership landscape. However,



if they were able to justify such a rule on the basis of perceived older partner underperformance, they are perhaps more likely to have access to necessary forensic financial data which identifies the actual age at which their own partners' performance tends to decline. But surely tracking declining partner performance on the basis of age would be as unpalatable and inappropriate as tracking performance on the basis of, for example, gender.

Turning to the other objectives referred to in *Seldon*, the first – ensuring associates are given the opportunity of partnership after a reasonable period so they do not leave – again seems less likely to play out well as justification for a compulsory retirement age in modern partnerships. These days, reaching partnership status is no longer a given and is now more than ever likely to be achieved by a diminishing proportion of associates.

Facilitating planning of partnership and workforce by having a realistic expectation as to when partner vacancies will arise – the third *Seldon* reason

– is again suggestive of the more traditional type of partnership where associates are more likely to take over a retiring partner's slice of the partnership profit pie, rather than the modern firm approach of helping make the pie bigger and creating their own new slice along the way.

The EAT has sent the *Seldon* case back to the original employment tribunal to decide if, in the absence of the congeniality argument, the other two grounds by themselves would have been regarded in the CWJ partnership circumstances as sufficient to justify the retirement age of 65.

It is arguable that modern firms, which are so financially focused and PEP-oriented that they dispatch any partner (regardless of age) for consistently failing to achieve target, will find it difficult to justify a compulsory retirement rule at any age.

For those firms that review their current arrangements and decide to keep a compulsory retirement age, it would be advisable to maintain records detailing partners' discussions on the retirement requirement and the age set. It is important that these show partners' clear knowledge of potential age discriminatory implications and that they are, as far as possible, adopting the least discriminatory means of achieving their objective. The fact that any retirement rule is agreed by partners of equal bargaining power for the mutual benefit of all may go some way to assist the firm's justification, though legally a partner cannot contract out of their discrimination protections.

Ultimately, a firm's prospects of success in defending a compulsory retirement age are likely to come down to its particular circumstances: the model, the culture, the priorities of the firm and the basis on which partners can otherwise be asked to leave.

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