



The decision in Seldon -v- Clarkson, Wright and Jakes is imminent from the Supreme Court. Will it change the law on age discrimination under the Equality Act and set guidelines for the future of justification arguments in 'retirement' dismissals?

### **The Statutory Background**

The EU Equal Treatment Framework Directive (2000/78/EC) required member states to enact legislation to prohibit discrimination on the grounds of age. As a result, the Employment Equality (Age) Regulations 2006 came into force on 1<sup>st</sup> October 2006. Within them, regulation 30 enables employers to fairly dismiss employees by reason of retirement if they were 65 or over. Consequential amendments were made to the laws of unfair dismissal to introduce this new, fair type of dismissal.

The Employment Equality (Repeal of Retirement Age Provisions) Regs 2011 (SI 2011/1069) came into force on 6<sup>th</sup> April 2011. They did exactly what they said on the tin! The default retirement age of 65 was abolished and 'retirement' at or over that age is no longer an exception to the protection against age discrimination (paragraph 8 of Schedule 9 of the Equality Act has been repealed).

A 'retired' employee will now bring a claim of direct discrimination for the protected characteristic of age under s.13 (2) of the Equality Act 2010. This is the *only* situation in which direct discrimination can be justified under the Act. Accordingly, these claims are going to have to focus upon the competing arguments of justification; the '*legitimate aim*' of the employer. One third of employers are still thought to have a retirement age of 65 written into their contracts. Unless all of those terms are removed, they will need to be justified.

### **The employer's argument; justification**

ACAS Guidance ('*Working Without the Default Retirement Age*') includes the following examples of what *might* be legitimate aims;

- Workforce planning (the need to provide promotion opportunities and manage succession);
- Health and Safety.

The Guide states that '*the test of objective justification is not an easy one to pass...it requires evidence. Assertions alone will not be enough*'. See also the BIS Guidance; '*Phasing out the Default Retirement Age; Government Response to Consultation*' and the associated Impact Assessment. Neither of these have statutory force but, in the absence of a statutory Code, these are likely to be important documents\guides that may assist at least in the short term.



The most common arguments of justification considered by the courts both here and abroad, and with mixed success, have been;

- Blocking; the dead man's shoes argument or the need to make space for younger employees rising up through the workforce;
- Deteriorating performance; the justification of a dismissal instead of the inception of a performance management process to address deterioration;
- Health and safety; an employee's deteriorating performance in the context of a hazardous environment;
- Cost; the saving of money by dismissing before an employee earns increased remuneration rights;
- Receipt of pension; can dismissal be justified if, as part of the argument, an employee is of pensionable age?

And the case in which those have been examined most closely in the domestic context has been probably Seldon -v- Clarkson, Wright and Jakes [2010] EWCA Civ 899 which has now been heard by the Supreme Court and in which judgment is now awaited.

This article aims to equip you with the background and context to the decision and its potential relevance going forward.

### **Seldon -v- Clarkson, Wright and Jakes**

The case concerns a 'retired' equity partner in a solicitors' firm whose partnership agreement includes a provision for retirement at 65. The three '*legitimate aims*' for the retirement age which were run by the Firm in the Employment Tribunal were;

- i. Ensuring associates were given the opportunity of partnership after a reasonable period;
- ii. Facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise;

(i) and (ii) together were effectively the '*dead man's shoes*' arguments;

- iii. Limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm. Referred to as the '*collegiality*' argument;



Mr Seldon lost in the ET. The ET accepted all three arguments on justification.

In the EAT; the Appellant relied upon the differences between the wording of the articles in the Directive which refer to “*objective and reasonable*” reasons to escape a direct discrimination and that which merely refers to a “*reasonable aim*”. The EAT thought that that was too ‘*formalistic*’.

The Appellant also argued, since there was no youngster waiting in the wings to fill his shoes, that the justification arguments were not actually supported by the facts, the Respondent having run the more general argument that clearing out the top end of the Firm by the use of a retirement age was a good thing. But that was also rejected in the EAT; if ‘snapshots’ were to be used, a justification defence could unfairly change on a daily basis.

The Appellant had actually argued that an alternative provision in the Partnership Deed would have overcome the discriminatory effect of the provision that there was; namely that a partner could be required to retire after his 65<sup>th</sup> birthday if there was a junior who was prepared to (and successful in applying to) fill his shoes. That was also rejected by the EAT. It could be said that it substituted its own view in that respect (!)

The Appellant *did* succeed in one respect; the EHRC which supported the appeal, produced evidence that showed that there was no basis for an assumption that performance tailed off at 65. The statistical evidence showed that it did not really start until 70, thus undermining the ‘collegiality’ argument.

Therefore, In the EAT he lost on (i) and (ii), but won on (iii). It was remitted to the ET in light of those findings.

Rather than be remitted, however, Mr. Seldon appealed to the CA on (i) and (ii). This is where it gets a little more complicated because of Mr. Robin Allen QC’s involvement and the Heyday appeal (Age Concern’s challenge to the Government’s creation of the original default retirement age) which he was also handling. Without confusing matters here, suffice it to say that Mr. Seldon also lost in the Court of Appeal on the same points.

In relation to (i) & (ii) (the ‘dead man’s shoes’ argument), Waller LJ said this;



20. *When Blake J. says "reliance on that social aim" in paragraph 97 [of the decision in the Heyday appeal] quoted above I do not understand him to be saying that an employer's aims are limited strictly to "a social aim". An employer or partnership may have slightly mixed motives but if its aim is to provide employment prospects for young people and encourage young people to seek employment by holding out good promotion prospects that is at least consistent with the government's social policy and that is what I believe he had in mind. The legislation can as the ECJ said give "some discretionary powers or a degree of flexibility" to employers but their actions must (I suggest) be consistent with the social or labour policy of the United Kingdom which justified the Regulations and that is what in my view Blake J had in mind.*
21. *It is right to recognise that there is a margin of appreciation available to a national government which is not available to an employer or to parties entering into a partnership deed. But where a partnership is acting consistently with the social aim which has justified the legislative provision, it would be (as I have already said) to contradict that aim to render such a provision unlawful if the clause was a proportionate means of achieving the aim.*
22. *Accordingly in my view Mr Allen's first point directed at the legitimacy of the "dead men's shoes" aims clearly fails.*

In relation to (iii), the 'collegiality' argument, he said this;

*It also in my view equally clearly fails in relation to the "collegiality" aim. It seems to me that an aim intended 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 that 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.*

23. *I have not read all the evidence put in by the Government in the Age UK litigation, but 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.*
24. *There is a very great difference between employees or partners who are under-performing but not by reason of age, and employees or partners who are doing their best but it is no longer*



*good enough because old age has caught up on them. Thus the fact that a negotiated retirement has been achieved with partners in the former category does not begin to demonstrate that a cut-off age for retirement is not justified."*

In other words, a less 'humane' end to a working relationship (in lieu of any means of expulsion under the Deed for performance issues which might have been demeaning and demoralising for all concerned!). The retirement age enabled the partners to dodge the issue of an underperforming colleague and simply let him 'coast' to 65.

However, although it was *possible* to justify a 65 year-old being retired for 'collegiality' reasons, the Firm had not produced sufficient evidence to justify it in that case on that ground.

As to the choice of 65 as the cut off;

*38. There is a distinction between a cut-off date in relation to the "dead men's shoes" aims, and the "collegiality aim". Under performance as a result of age is not relevant to 65 being chosen as a cut-off to encourage recruitment or long term planning. That being so it seems to me that the mere fact that the firm might have chosen some other age in relation to those aims cannot automatically lead to the conclusion that the rule which provides for retirement at 65 is not justified. A rule which adopts 66 is less discriminatory to partners aged 65, but is now more discriminatory to partners aged 66. The selection of any age is going to be more discriminatory to that age. If that makes the rule unlawful, it would simply be impossible to justify a retirement age introduced with those aims. The directive (recital 14) seems to contemplate the legitimacy of a retirement age and it cannot thus have envisaged that it would be impossible to justify one age because a different age would be less discriminatory to persons of the age chosen.*

*39. The question is whether the clause introduced with the legitimate aims is a proportionate means of achieving those aims. If it is proportionate to choose 65, the fact it would be less discriminatory to some to have chosen 66 cannot in my view render the clause unlawful. It is true there was no evidence as to whether it would have made any difference to associates or others whether the age chosen had been 68, 65 or 63. But in my view the fact the firm might have justified anyone of those ages does not mean that it is unable to choose one at all. The choice of 65 when Regulation 30 actually renders lawful 65 in the employer/employee context must support the choice of 65 as a fair and proportionate cut-off point."*



### **Seldon in the Supreme Court**

What effect will the Supreme Court decision, whatever it maybe, have? Now that employers are only left with justification arguments to defend 'retirement' dismissals, surely any analysis of those arguments by the Supreme Court will be very helpful as a litmus test going forward? Yes.....and no. Of course, any decision on the issue of justification and any analysis of the competing arguments by the Supreme Court will be at least persuasive of future arguments that may arise under the Equality Act in the months and years to come, but arguably not determinative for two reasons.

First, arguments on justification are always going to be fact sensitive and dependent upon the nature of the work, the structure of the workplace, the reasonableness of the aim behind the alleged discrimination and many other features. What might or might not have been a proportionate means of achieving a legitimate aim in Seldon may not necessarily be as reasonable in another context. Secondly, Seldon was a case decided before the Repeal Regulations. In other words, when there was a wider social policy justification which was enforced through the means of what was then the fair 'retirement' dismissal in the Employment Rights Act. The fact that an employer could have dismissed an employee aged 65 fairly then obviously assisted a partnership 'dismissing' a partner for the same reason, but the policy that underpinned the legislation can no longer be relied upon and, if the employer in Seldon succeeds, this should not be seen as a green light to employers that the same arguments will necessarily work in the new, post-default retirement age world.

Seldon as a game changer? Unlikely. Interesting and persuasive? Certainly.

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