

*Age Discrimination – the controversy over
declining employee performance and
avoiding forced retirement*

HISTORY

Our legislation relating to age discrimination was conceived in Europe in November 2000, the date of the Equal Treatment Directive¹. The Directive required member states to put in place legislation designed to protect against discrimination on a number of grounds, including age. It is important to remember age discrimination's European roots: the European Court of Justice has had as much to do with the growth and development of the legislation as have the domestic courts.

The legislation had a relatively long gestation period, and arrived in the UK some six years later in October 2006, the date the Employment Equality (Age) Regulations 2006 came into force. These Regulations provided the basis for the rules on age discrimination which are in force today, but the legislation came of age on 1 October 2010, with the advent of the Equality Act 2010.

Forms of discrimination

There are a number of different types of age discrimination, but one thing to note in particular is that employees and workers do not need to have reached a certain age in order to bring claims under this legislation. Indeed, the only thing that a person must have in order to be potentially protected is a birthday.

There have been claims brought by 18 year olds, dismissed because their employer had made various stereotypical comments about their ability, based on their age², as well as by 65 year old lawyers who complained about being forced to retire from their partnerships³.

As an employer, you may be found liable if you:

1. **directly** discriminate (that is, treat someone less favourably on the grounds of age),
2. **indirectly** discriminate (by putting in place a provision, criterion or practice which disadvantages a particular age group),
3. **harass** someone for a reason relating to age, or
4. **victimise** someone for complaining about your unlawful treatment of them.

If you are found liable, the damages available are unlimited (but are based primarily on the loss suffered) and the employee can claim an injury to feelings award. One 42 year old employee managed to get an injury to feelings award of £2,000 when his manager suggested that he may not be

¹ In 1978, age discrimination's sibling, sex discrimination, had played a part in the life story of age discrimination: the Employment Appeal Tribunal held that it was unlawful on the grounds of sex discrimination to set an age limit of 28 for applicants for a particular role. It would have excluded a disproportionate number of women, due to their childcare responsibilities. (*Price v Civil Service Commission* 1978)

² *Wilkinson v Springwell Engineering Limited* (2008)

³ *Seldon v Clarkson, Wright & Jakes*

up to working nightshifts and hinted that he thought the employee's life was over when he said 'life begins at 40, what do you say about that?'⁴.

A few things to note here. First, not only workers and employees, but even applicants for jobs may claim age discrimination – businesses have been found liable for posting adverts containing phrases such as 'youthful enthusiasm'⁵, or '[this position] would suit candidates in the first five years of their career'⁶. Even adverts requiring a certain number of years' experience could be found to be discriminatory.

Secondly, the Equality Act does not require the claimant to be of a certain age group in order to claim: the definition of direct discrimination covers any less favourable treatment on the grounds of age. Therefore, anyone who **looks** particularly old or young may bring a claim, even if their treatment is based on a misapprehension of their actual age.

Thirdly, and unlike all other types of discrimination, **direct** age discrimination may be objectively justified. I will deal with this in more detail a bit later.

Exceptions

There are some exceptions to the rules on discrimination. If you can show that there is a genuine occupational requirement for workers to be of a certain age, this will get round any direct or indirect discrimination issues. But under UK law, you have to show that there is an occupational requirement for a certain age group, which is usually a tough test to meet.

You may also use age as a determinative factor when choosing between two candidates of similar skills and experience, **if** you have identified that your workforce is underrepresented in that category. This is known as positive action; it is different from the unlawful practice of positive discrimination, whereby you set out to hire someone from a particular age group to address a shortfall and don't consider workers of other age groups.

There are also some specific exceptions. For example, the national minimum wage in this country is lower for younger workers than for older ones. Also, statutory redundancy pay takes into account a person's age (less for younger workers, more for those over 41). Since the Equality Act came into force, it is lawful to stop providing certain risk benefits when the worker reaches a certain age (currently 65). It is also lawful to provide service related benefits to staff members, provided the qualifying period does not exceed five years (after this, you have to justify the reason for the longer service period).

Until April of this year, the biggest exception came in the form of retirement. It was lawful for an employer to dismiss someone at the 'default' retirement age of 65. Provided the employer followed an (albeit quite technical) procedure, the dismissal would not be unfair (a peculiar statutory concept we have in this country), nor would it be discriminatory. The concept of forced retirement was questioned by one of the big charities, Age Concern (which was renamed Age UK), in a case known as

⁴ Acheampong v National Car Parks Ltd (2007)

⁵ McCoy v James McGregor & Sons Ltd & others (2007, Northern Ireland)

⁶ Rainbow v Milton Keynes Council (2007)

the *Heyday* case⁷. Age Concern argued that the UK government had failed properly to justify the basis on which it was discriminating against older people. However, the ECJ disagreed.

Abolition of the DRA

In April this year, however, the default retirement age was abolished, and it no longer became possible to start the statutory, 'bullet proof', procedure. Now, an employer may still dismiss an employee by reason of retirement, but they must show that they had a legitimate aim when doing so, and that setting the retirement age at the particular level is a proportionate means of achieving that aim.

And it is here, in identifying what constitutes a proportionate means of achieving a legitimate aim, that the law gets tricky.

There is little to go on by way of case law, as most employers have, in the past, relied on the default retirement age. The case law that exists comes from Europe as well as the UK, and it is difficult to extrapolate any hard and fast rules from this.

All eyes at present are on the case of *Seldon*, in which a partner in a law firm was forced to retire at 65. As he was a partner, and not an employee, he was not subject to the exemption relating to the default retirement age. This case has been through the Court of Appeal, which found that the partnership had not been discriminatory. It held that the following were legitimate reasons for imposing a retirement age:

1. Opportunities for promotion (and recruitment);
2. Succession planning; and
3. Limiting the need for performance management.

It also went on to find that if you could justify a mandatory rule, it would be rarely unjustified if applied to an individual (even if that individual's performance, say, is demonstrably good). However, *Seldon* was decided before the abolition of the default retirement age, so not much consideration was given to whether 65 was proportionate or not. The Court of Appeal did note, however, that no evidence had been given to show a significant drop off in performance at age 65.

In January next year, the case is due to be heard by the Supreme Court (our old House of Lords), which may, hopefully, give practitioners more guidance as to how employers should approach the issue of compulsory retirement.

In the meantime, in addition to the findings in *Seldon*, (the so-called 'dead men's shoes' and 'collegiate' arguments), prevention of a windfall in severance payments⁸, high quality of service and continued competence have also been found to constitute legitimate aims. At present, it is not possible to state that the desire to cut costs is sufficient in itself to constitute a legitimate aim in any form of discrimination: while costs can be taken into

⁷ *R (Age UK) v Secretary of State for Business Innovation & Skills*

⁸ *Loxely v BAE Systems Land Systems (Munitions & Ordnance) Ltd; Kraft Foods UK Ltd v Hastie*

account by the Tribunal, something more must also be pleaded. This view, however, is being increasingly questioned⁹, and it is possible that cost alone may soon justify discrimination.

Part of the problem when trying to put in place a contractual retirement age, however, is that the European court has taken a more generous view when deciding whether the justification test has been met. In *Rosenblatt*, the ECJ was comfortable with the German government's decision to set a retirement age of 65 in the commercial cleaning sector, seemingly purely on the basis that it had been negotiated with the unions. Providing the legitimate aim can be identified, it does not seem to worry too much about the proportionality of the provision.

I think it's fair to say that our domestic courts have taken a more forensic approach to the proportionality arm of the test. For instance, in *Petersen*¹⁰ (I won't attempt to give the full case citation), the ECJ found that the provision in Germany requiring dentists in the national health service to retire at 68 was lawful, on the basis that it allowed younger dentists to practice and also protected the public from declining performance. Contrast this with the case in the UK relating to professional football referees¹¹, where similar arguments were run, but the Tribunal held that insufficient evidence had been put to establish 48 as the justified retirement age, rather than 47 or 49.

So what next?

Even if employers take the brave step of setting a retirement age, and go for (say) 65, this may need to change as the state pension age rises to 66.

Alternatives to retirement

If employers don't want to dismiss by reason of retirement, they will have to be more proactive and manage performance more effectively. And that's not just older employees' performance: all staff will have to be treated the same way.

It's true that older workers present a higher risk profile. They are potentially more likely to bring age as well as disability claims. However, they do bring a wealth of skills and experience that employers need to learn how to harness. As the age demographic of the developed world continues to increase, we need to be more creative when deciding how to deal with an aging working population. Making them retire will put a strain on the state which is unsustainable, and simply shifts the unemployment figures around. The sad fact is that retirement may well become a luxury that only a few can afford - maybe not in our lifetimes, but soon.

It's hard not to see discrimination and prejudice in some of the justification arguments that have been accepted. For instance, there is no evidence at all that older people block the way for younger people, particularly on a macro economic scale (in fact, there is some pretty strong evidence to show that older people help to grow the economy in order to create more youth job

⁹ Eg *Woodcock v Cumbria Primary Care Trust*

¹⁰ *Petersen v Berufungsausschuss für Zahn für den Bezirk Westfalen-Lippe (C-341/08)*. Also in *Fuchs v Land Hessen* (2011), where a civil servant was retired at 65 on a generous pension

¹¹ *Martin & Others v Professional Match Game Officials*

opportunities¹²). Similarly, there is very little evidence to suggest that performance drops off significantly between, say, 65 and 70. Beyond 70? We don't have the necessary data, as people don't tend to work that long. Clearly, some industries may be more affected than others.

However, consider this: forty years ago, it was much more common for employers to ask 'how will I know whether this employee will still be around in five years' time? I can't employ her' when talking about women of child bearing age. Similarly, few employers nowadays would say 'I can't employ them: they're deaf' when talking about a person with a disability, but we seem to have no problem using age as an excuse for not employing an older worker.

While age discrimination in the UK has now arrived, it has not yet come of age. My view is that we've got quite a way to go.

¹² *IMF Working Paper: The Effects Of Early Retirement On Youth Unemployment: The Case Of Belgium*, Alain Jouten & others, 2008; *Ageing, Health and Innovation: Policy Reforms to Facilitate Healthy and Active Ageing in OECD Countries*, Rebecca Taylor, International Longevity Centre – UK for OECD, 9/6/11; *IMF Working Paper: The Effects Of Early Retirement On Youth Unemployment: The Case Of Belgium*, Alain Jouten & others, 2008