Supreme Court hands down age discrimination judgments

Employment Update
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The Supreme Court has today handed down judgment in two cases dealing with age discrimination, *Seldon v Clarkson, Wright & Jakes* and *Homer v Chief Constable of West Yorkshire Police*. The cases provide guidance on the types of aims which may provide objective justification for direct and indirect age discrimination. Seldon in particular will assist those employers who have either retained or are considering imposing a mandatory retirement age following the repeal of the default retirement age.

*Seldon v Clarkson, Wright & Jakes*

Mr Seldon was a partner in a law firm. In accordance with the partnership deed, the firm required him to retire when he reached age 65. He brought a claim for direct age discrimination. At that time, although the default retirement age (DRA) applied to employees, it did not apply to partners. The decision is now of wider interest as the DRA has been repealed for employees.

The ET held that the mandatory retirement age was directly discriminatory on grounds of age but accepted that the retirement policy pursued three legitimate aims:

(i) giving associates an opportunity of partnership within a reasonable time and thus encouraging retention

(ii) facilitating workforce planning (together, the 'dead men's shoes' aims) and

(iii) limiting the need to expel underperforming partners, contributing to a congenial and supportive culture (the 'collegiality' aim).

The ET accepted that the mandatory retirement age of 65 was a proportionate means of achieving these aims. On appeal the Employment Appeal Tribunal (EAT) said that the collegiality aim could not be a legitimate aim, but upheld the other two aims and remitted the case to the ET to determine proportionality. Mr Seldon appealed. The Court of Appeal (CA) dismissed Mr Seldon's appeal. Mr Seldon appealed to the Supreme Court.

The Supreme Court unanimously upheld the decision of the CA and remitted the case to the ET to determine whether a mandatory retirement age of 65 was proportionate.

The issues before the Supreme Court were:

- Whether any or all of the three aims identified by the ET were capable of being legitimate aims for the purpose
of justifying age discrimination

- Whether the firm had to justify not only the retirement clause generally but their application of it to Mr Seldon, and
- Whether the ET was right to conclude that retirement in this case was a proportionate means of achieving any or all of the legitimate aims.

Mr Seldon sought to argue that the Equal Treatment Directive (which was implemented in the UK by the Employment Equality (Age) Regulations 2006) required that the justification for direct age discrimination should be the broad social and economic policy objectives of the state and not the individual business needs of particular employers. The Supreme Court disagreed. Whilst it is clear that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect age discrimination, employers have the flexibility to choose which objectives to pursue provided those objectives count as legitimate objectives of a public interest nature. The ECJ has identified two such legitimate objectives; inter-generational fairness (eg facilitating access to employment for younger workers, sharing opportunities for work) and dignity (avoiding the need to dismiss older workers on the grounds of incapacity or performance).

The Supreme Court held that the dead men's shoes aims and the collegiality aim identified by the ET in Seldon were directly related to the legitimate social policy aims of inter-generational fairness and dignity.

The Supreme Court accepted that where it is justified to have a general rule (eg mandatory retirement) the existence of that rule will usually justify the treatment that results from it. The rule must be justified in the particular circumstances of the business, but it is not necessary to justify its application to a particular individual.

However, it had not been shown that the choice of 65 was a proportionate means of achieving the collegiality aim and that question alone was remitted to the ET, although the Supreme Court did not rule out consideration of whether the specific retirement age of 65 (rather than any retirement age) was a proportionate means of achieving the dead men's shoes aims. The ET will have to consider this issue in the context of the law as it was in 2006, ie when the DRA was still in force for employees.

**Homer v Chief Constable of West Yorkshire Police**

*Homer* was concerned with indirect rather than direct age discrimination. Mr Homer was employed by the Police National Legal Database (PNLD) as a legal advisor. When he joined the role did not require a law degree. Subsequently the PNLD introduced a requirement that in order to reach the top pay grade legal advisors had to have a law degree. Mr Homer was 62 and due to retire at 65 (the normal, although not mandatory, retirement age) so would not have time to complete the degree and reach the top pay grade before leaving employment. Mr Homer brought a claim for indirect age discrimination. The ET found that Mr Homer had been indirectly discriminated against, but the EAT and CA disagreed. The EAT and the CA both considered that Mr Homer was put at a disadvantage not by his age but by his impending retirement. What put him at a particular disadvantage was not his age as such but the fact he was leaving employment within four years and his position was comparable with other employees leaving employment for whatever reason.

The Supreme Court disagreed with the CA and upheld Mr Homer's appeal. The CA's approach involved taking the particular disadvantage which is suffered by a particular age group which is related to age and equating it to a similar disadvantage suffered by others for a completely different reason unrelated to age. In any event, it could not be right to equate leaving work because of impending retirement with other reasons for leaving. A person who leaves work for other reasons generally has some choice in the matter. It was not a question of asking for more favourable treatment for people of the age group in question; the problem could be overcome by making arrangements for employees appointed before the new pay grade criterion was introduced.

The Supreme Court went on to consider whether the indirect discrimination was objectively justified and noted that the range of aims which can justify indirect discrimination is wider than the aims which can justify direct age discrimination and is not limited to social policy objectives. Part of the assessment of whether the discriminatory criterion can be justified involves comparison of the impact on the affected group with the importance of the aim to the employer (essentially, a balancing exercise). To some extent that depends on whether non-discriminatory
alternatives are available. The Supreme Court held that the ET had not adequately considered this question, so the Supreme Court remitted the case on that point.

Implications

Age is the only protected characteristic in respect of which direct discrimination can be justified. This is because age is recognised as being different to the other characteristics (sex, race, sexual orientation etc) in that it changes over time; younger employees may eventually benefit from a provision which favours older workers, older workers may have already benefited from a provision which favours younger workers. However, there are limits on the ability to justify direct discrimination.

*Seldon* does not give carte blanche to employers to impose a mandatory retirement age but it does make it easier for employers to justify the adoption or continuation of mandatory retirement. Most organisations will be able to identify legitimate aims which are fulfilled by having mandatory retirement and which relate to either inter-generational fairness or dignity. The difficulty, however, remains in demonstrating that the particular age chosen is a proportionate means of achieving those aims, and that they could not be achieved in a non-discriminatory way.

The decision in *Homer* that a requirement which works to the comparative disadvantage of a person approaching retirement age is indirectly discriminatory on grounds of age may be of limited application as many employers have abolished mandatory retirement following the phasing out of the DRA. However, employers who have retained or are considering imposing a mandatory retirement age will need to consider whether there are arrangements in place which disadvantage older employees approaching retirement.