Changes to the retirement age: legal aspects and implications

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No retirement age- you worked til you dropped

- no protection against unfair dismissal or for a redundancy payment
- employers could discriminate against workers on whatever grounds they wanted and could sack women when they got married

unfair dismissal law

employee who was either:

- above the normal retirement age for the employer or
- over 65 could not bring a claim of unfair dismissal

ERA 1996 (section 109).

Before introduction of Age Regs in 2006 there was no protection for older (or younger) employees in the workplace.

LIFO (which can indirectly discriminate vs younger or newer workers) widely used as means of selecting for redundancy

EU Equal Treatment Framework Directive 2000

From 1 October 2006

unlawful to discriminate on grounds of age

unless employer could establish objective justification

Uniquely for discrimination law both direct and indirect age discrimination can be justified

Significant exception for retirement – not age discrimination to dismiss a relevant worker at or over 65 if the reason for dismissal is retirement

Byzantine rules – if someone 65 or over, and is retired, then retirement dismissal

Also right to request working beyond retirement age – not affect whether dismissal discriminatory but will affect fairness of dismissal under section 98 of ERA.

As long as employee was dismissed on or after 65th birthday and employer followed the obligation to give six month's notice of an intention to retire and followed the right to request procedure, the dismissal

If reason for dismissal was retirement, but employer got procedure wrong, the dismissal would usually be unfair but with limited compensation.

Heyday challenge – went to ECJ and High Court whether reg 30 which required retirement at 65 lawful.

HighCourt held Govt justified in 2006. Heavily influenced by fact Govt had said they were reviewing age discrimination and retirement?

Government announced intended to abolish comp retirement with effect from 1 October 2011

And no new notifications of intentions to retire could be served post 6 April 2011

Objective Justification in Discrimination Cases

- *An employer has a defence to 'discrimination arising from disability' and 'indirect discrimination' if he can show that the discriminatory practice was:*
- ***'a proportionate means of achieving a legitimate aim'** (s.15 and s.19 EqA 2010)*
- The objective justification defence under the Equality Act 2010 (EqA 2010) for discrimination on or after 1st October 2010 applies to indirect discrimination under s.19 EqA 2010, and to discrimination arising from a disability under s.15 EqA 2010. It does not apply to other types of discrimination, including direct discrimination.

Burden of proof on employer

- To be valid the justification put forward must be capable of objective assessment; the view of the employer alone (however honestly held) is insufficient to amount to a defence.
- The EHRC Employment Code of Practice - guidance on what will amount to ‘a proportionate means of achieving a legitimate aim’.
- In summary, the Code states that a 'legitimate aim' should be legal, not be discriminatory in itself, and must represent a real, objective consideration (para 4.28 - 4.29).

- Whether the means used to achieve the legitimate aim are ‘proportionate’ involves a balancing exercise (para 4.30). The reasonable business needs of the employer (e.g. economic or administrative efficiency) must be considered against the discriminatory impact. Clearly the more discriminatory the impact the greater the business need will have to be in order to be able to justify it. Contemporaneous consideration of the issue is helpful, but not essential.

Race and sex discrimination cases

- employer proved that a job needed a full-time member of staff (*Greater Glasgow Health Board* v. *Carey* [1987] IRLR 484, EAT) and

- where the employer based redundancy payments on length of service (*Barry* v. *Midland Bank Plc* [1999] IRLR 581, HL).

- The ECJ has held that indirect sex discrimination against part-timers can be justifiable if the employer can show that part-timers generally take longer than full-time staff to acquire relevant job-related skills (*Gerster* v. *Freistaat Bayern* [1998] ICR 327)

Age discrimination

The age discrimination provisions provide a defence of justification where there is what would otherwise be direct age discrimination (EqA 2010, s.13).

[The justification provisions do not cover unlawful victimisation, instructions to discriminate, or harassment on grounds of age].

Legitimate aim

- the 'dead man's shoes' argument: promoting recruitment and retention by ensuring there is a clearly defined career path caused by the compulsory retirement of older workers;
- collegiality: limiting the need to dismiss employees based on diminishing performance, and allowing people to retire with dignity. In *Seldon* v. *Clarkson, Wright & James* [2011] 1 All E.R. 770, the Court of Appeal commented that it might be better to have a cut-off age in force rather than an assessment of a person's diminishing performance as they get older.
- facilitating long-term employment planning; and
- reducing the extra cost of employing older workers (whether cost considerations alone are sufficient remains unclear, but they certainly constitute a relevant consideration).

Proportionate means of achieving aim ?

- In *Wolf* v. *Stadt Frankfurt am Main* [2010] IRLR 244 the ECJ held that a rule restricting applications to join the German fire service to those under 30 was justified, due to evidence showing few over-45s had the high physical stamina needed.

- In *Petersen* v. *Berufungsausschuss fur Zahnartze fur den Bezirk Westfalen-Lippe* [2010] IRLR 254 a German law setting a maximum age of 68 for dentists to be accredited to work in the German NHS was found to be lawful, as the rule was an appropriate one for giving younger generations the opportunity of working.

- *Rosenbladt* v. *Oellerking Gebaudereinigungsges mBh* [2011] IRLR 51 the

ECJ held that a compulsory retirement age of 65 in a contract of employment - whilst prima facie discriminatory on grounds of age - is justified if the following conditions are met:

a) the contract (ie the retirement age) has been collectively negotiated with a union,

b) the employee will receive a pension so that they have replacement income, and

c) compulsory retirement has been in widespread use in the relevant country for a long time without having had any effect on the levels of employment.

N.B. (a) not a threshold criterion, so arguably an EJRA can be justified even if the compulsory retirement age had not been agreed with a union.

UK cases

- In *Martin* v. *Professional Game Match Officials* (2010, ET/2802438/09), a tribunal found a retirement age of 48 could not be justified for football referees.
- In *Hampton* v. *Lord Chancellor* [2008] IRLR 258 a tribunal held that a compulsory retirement age of 65 for Recorders could not be justified.
- In *Baker* v. *National Air Traffic Services* (2009, ET/2203501/07) a tribunal held that an absolute age limit on trainee Air Traffic Controllers of 35 was not justifiable.
- In *Seldon* the Court of Appeal did uphold a retirement age of 65 as justified for law firm partners, but the rationale included that the government considered a compulsory retirement age of 65 acceptable for employees generally, which as of 1 April 2011 no longer the case

Costs +?

- In *Woodcock v Cumbria Primary Care NHS Trust* [2011] IRLR 119, the President of the EAT cast doubt on *Cross* and commented that a search for 'costs plus' led to artificial and unreal distinctions.
- In *Cherfi v G4S Security* (EAT/0379/10), a different division of the EAT also doubted *Cross* and said it preferred the reasoning in *Woodcock*. It is believed that the ECJ is due to hand down a decision, probably in late 2012, which will resolve this point (*Fuchs v Land Hessen C159-10*).

Conclusion

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