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Law firms still confused over age laws

Eighteen months and two cases on, lawyers are still unsure how age discrimination rules apply to them

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Eighteen months and two cases on, the age discrimination laws are a mess. Lawyers are crying out for authoritative guidance on how they affect their own profession. Managing partners cannot afford to bury their heads in the sand: they must act now to minimise the risk of being sued.

Since October 2006, discrimination in the workplace on the grounds of age has been illegal unless it can be “objectively justified as a proportionate means of achieving a legitimate aim”. In other words, you can treat people less favourably purely on the grounds of their age as long it helps the business to overcome a genuine obstacle.

The issue that has kept lawyers guessing since the legislation was introduced is what constitutes a “proportionate" – a vague term undefined in statute and left to the courts to clarify.

Ironically, while lawyers have been busy advising their clients in other sectors about how to keep on side of the regulations, they have been struggling to grasp what they mean for their own profession.

With age discrimination laws in effect, individual law firms must decide whether partners should be subject to a mandatory retirement age and if so, what age it should be. These specifications are set out in the partnership deed, a legal document governing the way a particular partnership works that all partners must sign.

The law is clear that an arbitrary partnership retirement age - whether 55, 60 or 90 – is unlawful unless it satisfies the test of being a proportionate means of achieving a legitimate aim. The crucial question according to Ronnie Fox, principal of Fox Solicitors, is what firms can and cannot justify under this test.

But with only two cases involving partners suing their firms having come before employment tribunals so far, lawyers say there is a dire shortage of authoritative guidance necessary for other firms to solve the issue confidently.

This problem is exacerbated, they say, because the first case - in which Peter Bloxham, a former head of restructuring at Freshfields Bruckhaus Deringer, sued the firm for age discrimination - focused on a very specific set of circumstances relating to changes in the firm's pension scheme.

The second case – Leslie Seldon v Clarkson Wright and Jakes (CWJ) – is potentially more relevant because Seldon sued CWJ for forcing him to retire at 65 (the firm's predetermined age) by directly challenging the firm's partnership deed.

However, as with Bloxham, the case turned on specific facts. The tribunal was careful to point out that the Seldon judgment should not necessarily be seen as a blueprint for other firms, especially those larger than CWJ's 10-man partnership.

Anthony Fincham of CMS Cameron McKenna says: "Bloxham and Seldon are two fact specific cases decided in an employment tribunal whose rulings are not binding. What we need is some authoritative and binding guidance from the Employment Appeal Tribunal or the Court of Appeal on the key points of age discrimination."

Fincham adds: "At the moment, the picture is no clearer than when the regulations were first produced."

Employment lawyers welcomed news that Seldon is apppealing to the Employment Appeal Tribunal, whose rulings bind lower Tribunals. But until then, as Fox points out: "Bloxham and Seldon might not be ideal but they are all we've got and law firms cannot afford to ignore the problem until something better comes along."

So despite their limited and non-binding status, lawyers have been scrutinising the two decisions for guidance. In Bloxham, the tribunal accepted that although the changes to Freshfields' pension scheme affected partners differently according to their age and were therefore discriminatory, the firm was in an impossible position. It had to push through reforms. Dismissing Bloxham's case, the tribunal accepted that Freshfields had made great efforts to study alternative plans but said the changes were ultimately fair in the circumstances.

Guy Guinan, an employment partner at Halliwells, says: "Bloxham suggests that if the partners deal with a discriminatory issue in a common sense and commercial way and plough sufficient resources into solving it, then they should be safe."

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The tribubal was also impressed by Freshfields' efforts to consult partners on the pension changes from an early stage and to remain in touch with them throughout the process.

Roger Byand, an employment partner at Cripps Harries Hall, says: "Bloxham tells us that if you consult thoroughly and make genuine efforts to identify the least discriminatory way of solving a problem (as Freshfields did by appointing actuaries and taking outside counsel) then firms should be in the clear."

Whatever the outcome of Seldon's appeal (Bloxham is not appealing), lawyers insist firms must begin to consider the issue.

Fox says: "It may be that at one particular firm partners have always retired at 60 and it has always worked and no one has complained. But we now operate in a different world and this is no defence if someone brings a claim: law firms must be ready to justify why they introduced a mandatory retirement age and why they chose the age they did."

Guinan agrees. "The two cases we have had might not provide firm guidance but they certainly warn firms against simply ignoring the issue," he says.

The first step, lawyers agree, is for all firms – no matter how friendly its partners and how vague the possibility of litigation may seem – is to dust off their partnership deed and discuss why they have a mandatory retirement age (most do) and how they chose it.