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Supreme Court rejects key challenge to partner retirement policies

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The Supreme Court has dismissed a challenge to an attempt by a law firm to enforce a compulsory retirement age against a partner, in a key ruling for the legal profession and employers in general.

The Court today (25 April) handed down its judgement in the high-profile *Seldon vs Clarkson Wright & Jakes* (CWJ) age discrimination case, dismissing the appeal by Leslie Seldon.

The judgment is expected to reinforce the rights of law firms to manage their partnerships via compulsory retirement policies, although the ruling has been interpreted by some employment advisers as having narrowed the scope for employers to justify age discrimination.

The ruling is the culmination of a legal battle launched in 2007 by Seldon, a partner in CWJ, who argued that a compulsory retirement age of 65 constituted age discrimination. Seldon originally took the case to an employment tribunal before it reached the Court of Appeal last year, which also rejected his claim.

Seldon's request to remain with the firm as a salaried partner or consultant was rejected and he was ousted from the partnership in 2006, the year he turned 65.

The case turned on whether age discrimination inherent in a mandatory retirement policies can be justified under the law as a proportionate means of achieving a legitimate business aim. The

case has attracted additional attention given last year's legal abolition of the default retirement age.

CWJ argued a list of six business aims as justification for the policy, focused on making way for associates and junior partners to advance in the firm.

The case was heard by Justices Lady Hale and Lords Hope, Brown, Mance and Kerr, with Hale (*pictured*) delivering the lead judgment.

Despite finding that CWJ was justified in having a broadly applied policy on age discrimination, Hale warned that businesses should carefully consider their polices, stating: "There is... a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified."

Despite unanimously rejecting Seldon's appeal, the court referred the case back to the Employment Tribunal to consider whether the choice of a retirement age at 65 was justified.

The case was also considered alongside a claim involving indirect discrimination - *Homer v Chief Constable of West Yorkshire Police* - which saw an appeal by an older worker who had not been considered for promotion upheld. However, the court sent the case back to the Employment Tribunal to reconsider the justification for the appellant's treatment.

Seldon, whose case was supported by the Equality and Human Rights Commission, instructed Cloisters' Robin Allen.

CWJ instructed Thomas Croxford of Blackstone Chambers. The case also saw arguments put forward by Age UK and the UK Government, which instructed Cloisters' Declan O'Dempsey and Blackstone silk Dinah Rose respectively.

***Seldon v Clarkson* - legal reaction**

"It is tragic that *Seldon* (and *Homer* too) have been all the way up to the Supreme Court only for the decisions to be remitted back to the Employment Tribunal. The Employment Tribunal will have to decide whether on the specific facts a mandatory retirement age of 65 was a proportionate means of achieving a legitimate aim. Employers will just have to wait and see what the tribunal decides. How much simpler it was when the law permitted a default retirement age! On the positive side, the Supreme Court has given some guidance. In future it will be harder for employees and partners who are required to retire at a compulsory retirement age to argue that they have been discriminated against if the reasons behind the compulsory retirement policy have been well thought out, carefully explained and alternative ages considered." **Ronnie Fox, Fox Lawyers (pictured)**

"The Supreme Court decision in *Seldon* is disappointing given the recent abolition of the forced retirement of employees, since it upheld that a partner at a law firm could, in principle, be forced to retire at a given age. This would appear to undermine the Government's decision to abolish retirement ages in the first place. However, employers should not form the view that this means it will be lawful to force staff to retire at 65 up and down the country. There were specific factors which applied to this small law firm in Kent, which will not be relevant to every organisation." **Clive Howard, employment partner, Russell Jones & Walker**

"The judgments remind employers that a worker's age is not shorthand for their competence and should never be used in that way. An employee's ability to do a job should not be based on out of date assumptions about what people can do as they get older.
John Wadham, general counsel of the Equality and Human Rights Commission

"The judgment of the Supreme Court in *Seldon* provides some clarity that where businesses are seeking to maintain reliance on a particular retirement age for some or all of their employees, their objectives must be readily identifiable and of a public interest nature, which would include sharing out professional employment opportunities fairly between the generations. Unfortunately, the judgment leaves open the big question of whether 65, 70 or any other age would be a justifiable retirement age. The reality for many businesses is that they have abolished any fixed retirement age and are instead choosing to rely on performance management procedures. Today's judgment does not give a green light to move away from this practice.**"**
Arpita Dutt, employment partner, Stewarts Law

"This is an eagerly awaited judgment as the outcome provides businesses with clearer guidance in relation to their own retirement policies after the default retirement age (DRA) as abolished in October 2011. The Supreme Court has required what looks like a more restrictive interpretation of those issues, which means that an employer can have its own DRA, but only if its legitimate aim satisfies public policy objectives, as well as its own internal ones, and it is prepared to gather sufficient evidence in order to justify the means of achieving it. I would not be surprised to see a large increase in age discrimination cases, at least for two or three years, until employers can show, if they can, that the ‘new' performance management processes are applied evenly across the whole workforce."
Tom Flanagan, head of employment, Irwin Mitchell