

An age-old problem

A recent decision by an employment tribunal offers useful guidance to law firms on how to review their retirement-age provisions in partnership deeds. Anne Parkinson and Ronnie Fox explain

High on the 'to do' list of managing partners of law firms is to review the retirement age provisions in their partnership deeds in the light of age discrimination law. Often we see this item in the 'too difficult' category.

Helpful guidance has emerged from the decision in an employment tribunal case decided last month. Leslie Seldon, a former partner in Kent law firm Clarkson Wright & Jakes, was required by his firm's partnership deed to retire at 65. He claimed that this was an act of direct age discrimination contrary to the Employment Equality (Age) Regulations 2006. The firm accepted that his compulsory retirement was an act of less-favourable treatment on the grounds of age. Therefore it would be unlawful unless objectively justified.

Discriminatory treatment is objectively justified, and therefore lawful, if the treatment is 'a proportionate means of achieving a legitimate aim'. The aims the firm relied on were:

- Ensuring that associates were given the opportunity of partnership after a reasonable period (thereby discouraging associates from leaving). The tribunal was satisfied that this was a legitimate aim.
- Avoiding the need to expel partners for performance management reasons (thereby contributing to the congenial and supportive culture in the firm). The tribunal decided that in the circumstances this too was a legitimate aim.
- Facilitating the planning of the partnership and workforce across individual departments by creating realistic long-term expectations as to future vacancies. The tribunal was satisfied that this was a legitimate aim of the firm. The tribunal was persuaded that it was inevitable that a solicitor would consider when the partners in his department were due to retire and therefore when vacancies were likely to occur. If a solicitor was not reasonably confident that a vacancy in the partnership would arise, he might move to another firm.
- Ensuring partner turnover such that any partner could expect to become senior partner. The tribunal said that, even if it had been con-

vinced that this was an aim of the firm (which it was not), it was age-related and therefore discriminatory in itself.

- Enabling and encouraging staff and partners to make adequate financial provision for retirement. The tribunal did not believe that this was really an aim of the firm. There must be a genuine connection between a stated aim and the business of the partnership. There was no evidence that the firm encouraged or assisted partners to make financial provision for retirement.

- Protecting the firm's partnership model – if equity partners could not be forced to retire at 65 but employees (including salaried partners) could be, it would be preferable to keep lawyers as employees. The tribunal held that this aim would not be consistent with the stated aim of the partners to ensure progression through the firm to maintain its strategy of growth and providing high-quality legal services. The tribunal did not accept that protection of the partnership model was a legitimate aim of the firm.

The tribunal concluded that compulsory retirement did achieve the legitimate aims identified in the first three points above. The claimant argued that the removal of underperforming partners aged 65 could be achieved by introducing performance management for which the ultimate sanction would be expulsion. On the evidence, the tribunal concluded that such performance management would be difficult and the outcome uncertain. The tribunal rejected this as a feasible alternative and concluded that none of the aims identified as legitimate could be achieved by alternative non-discriminatory means.

Finally, the tribunal concluded that, taking into account the impact and effect of the compulsory retirement age on the partner concerned, the compulsory retirement rule was a proportionate means of achieving legitimate aims and therefore the compulsory retirement was objectively justified.

The tribunal stressed that its determination as to the objective justification defence in this case did not lay down any general rule in relation to



partnerships; different considerations apply in every case.

This decision is more likely to be followed in cases involving similar types of firm. Clarkson Wright & Jakes had ten partners. Great emphasis was put on its friendly, collegiate and supportive culture. The tribunal accepted evidence that performance management of partners is particularly difficult in this size of firm. A few years earlier, the partners had deliberately decided not to include a power in the partnership deed to expel a partner on the ground of under-performance because that power was felt to conflict with the culture of the firm. The same objective justification arguments might not succeed if raised by a larger firm with a more competitive culture and a corporate style of management.

The tribunal took into account the fact that although Mr Seldon had been senior and managing partner for many years, he had never previously suggested that the retirement age should be reviewed. Here the claimant was in a position where he presumably had a reasonable bargaining position with his partners. It might have been different if he had less bargaining power, for example a junior partner joining a large international firm who had simply been asked to sign the partnership deed if he wished to become a partner without being given any real chance to negotiate terms.

There was no evidence that the aims relied upon had been discussed or debated by the partners before agreement on the retirement age. The retirement clause had always been a term of the partnership so far as the partners could remember. Moreover, the partners re-affirmed their agreement to the clause when they signed an amended deed on 31 December 2005.

We are advising firms to move this issue out of the 'too difficult' category and, where appropriate, to set out in partnership documents why a particular retirement age is justified.

Anne Parkinson and Ronnie Fox specialise in partnership, discrimination and employment law at City law firm Fox

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