

Increase in age discrimination cases has City firms scratching their heads

Older partners are suddenly less keen to retire at 65, writes **Neil Rose**. Lawyers need to change the way they see older partners

IT'S not much fun being an older partner at a City law firm right now. Though you are coming up to what you thought was going to be your retirement, you have taken a big hit with Equitable Life, while your stock market investments, property portfolio and annuities are not looking too healthy. With life expectancy on the increase, swapping your timesheets for sailing around the Caribbean is on hold and you could do with working for a few more years.

Especially as you are a modern kind of chap (because in all likelihood you are a chap), meaning you are on your second marriage, and there are still years of private school fees, top-up fees, maintenance costs and so on ahead of you.

But with your firm suffering in the recession, the management committee wants to reduce the size of the partnership so as to maintain the impressive PEP (profits per equity partner) figures that look so good in the law firm league tables. It also wants to attract big hitters from other firms who can bring in some much-needed new clients. And as a result of the lockstep remuneration system – which rewards length of service – older partners like you are in the firing line.

Until recently, this was a rare scenario. Law firms included a retirement age in their partnership deeds more as a matter of form than anything else. As Tony Williams, former managing partner of Clifford Chance, explains, it was not particularly relevant: partners retired at some point in their 50s – well set for a very comfortable retirement and probably feeling that it was more than deserved after 30 years of hard slog in the City.

AGE DISCRIMINATION

But now that clause is suddenly being scrutinised – and it is vulnerable to a claim under age discrimination laws that did not exist at the time it was drafted. Strangely, two cases involving law firm partnerships have tested the legislation. In 2007, Peter Bloxham, a former partner of Freshfields Bruckhaus Deringer, failed in age discrimination claims over changes the firm had made to its partners' pension scheme. One of the reasons for the changes was that the scheme worked unfairly in relation to younger partners and this was held to justify the less favourable treatment the former partner received.

More recent was a claim of age discrimination brought by Leslie Seldon, the former senior partner of 18-partner Kent practice Clarkson Wright & Jakes. Here

the tribunal again found in favour of the firm, ruling that a fixed retirement age (in this case 65) was a proportionate means of achieving three legitimate aims with which any law firm can identify. One: ensuring that associates are given the opportunity of partnership after a reasonable period, with the object of discouraging them from leaving; two: facilitating partnership and workforce planning by having realistic long-term expectations as to when vacancies in the partnership will arise; and three: avoiding the need to expel partners for performance reasons, thus contributing to the congenial and supportive culture of the firm.

IMPLICIT ASSUMPTION

On appeal, the first two grounds were found to be legitimate and justified. However, the Employment Appeal Tribunal said the third rested on an implicit assumption that performance dropped off at 65, which was not supported by any evidence and involved stereotyping. If there are no further appeals, the case will go back to the original tribunal to decide whether those first two grounds are enough to justify the retirement age.

Partnership law expert Ronnie Fox of City firm Fox Lawyers, who advises many law partnerships, says firms have expressed surprise and disappointment at the ruling: 65 is the default retirement age for employees, so why not also for partners? Be that as it may, the case provides valuable pointers, he says. "The starting point is to have a full discussion within

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the partnership of the reasons for adopting a particular retirement age. In Seldon it was said that the aims relied upon by Clarkson's had never been discussed or debated by the partners. Even though the tribunal said that this did not necessarily prevent the firm from establishing the defence, the lack of debate made it more difficult. By contrast, one of the reasons why Peter Bloxham failed in his proceedings against Freshfields was that there had been a very full discussion within the partnership of the particular pension problems faced by Freshfields."

James Davies, joint head of employment



Older partners are having to think hard about their futures

Picture:
GETTY

at Lewis Silkin and an age discrimination specialist, adds that some of the reasons that saved Clarkson's may not work so well for larger City practices. "The partnership opportunity argument will be less relevant in larger firms, where promotion depends less on a partner leaving to create a vacancy than on prospective partners demonstrating a business case contributing to the firm's development," he explains.

The broader issue that really rings alarm bells is the way that London-based firms ease out partners (of all ages) on grounds of performance. Many firms have never addressed the issue of properly managing partners' performance, but Davies says it is imperative they have the same robust and transparent system in place for partners as non-partners. "Firms know that if they are going to be challenged on anything [in this context], it's age discrimination," he says.

For Tony Williams, who now runs law firm consultancy Jomati, the problems are partly a result of lockstep systems, because partners are paid a certain level regardless of performance. "Firms have got to be much clearer about what's expected from them," he advises.

Ronnie Fox says there are two ways to get rid of older partners you do not want: simply push them out once their performance starts to drop off, or help them to find new careers, ideally in a location

where they can still be of assistance to their old firm. But only a few savvy firms do this.

USING TALENTS

Another option, of course, is to let them stay. Both Fox and Davies say American law firms are generally happy to let partners work as long as they want while they are delivering results. "One of the reasons American firms have been so successful in London is because they are better at using the talents of older partners," says Fox.

Davies says that that the US having age discrimination laws since 1967 is part of the story, but culturally America has great respect for maturity, gravitas and experience. "In England the perception is that young equals dynamic equals energetic."

Age discrimination issues hang over the legal profession. As well as compulsory retirement ages, it potentially affects recruitment by reference to post-qualification experience, lockstep systems and performance management, says Fox. "Managing partners are pulling these issues out of the 'too difficult' pile."

And that may simply be because they have to. Imagine, says Davies, that you are a partner on £300,000 a year and can prove you would have worked another five years had you not been forced to retire. If nothing else, the £1.5m payout should at least cover those school fees.