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UK: Employment Update

This May Update reviews two key decisions of the Supreme Court in relation to age discrimination. This Update also examines a case that illustrates the importance of ensuring adequate post-termination restrictive covenants in employment contracts. Finally this briefing also reports on a decision that clarifies the interaction between overlapping Employment Tribunal and High Court Proceedings and outlines the employment law related items in the Queen's Speech.

How to justify direct age discrimination

Following the repeal of the default retirement age regime can an employer still "retire" its employees at the company's compulsory retirement age? Yes, if the employer can objectively justify the compulsory retirement age; failing which the employee will have a claim of direct age discrimination.

A recent Supreme Court decision examined the compulsory retirement age of a law firm and what the firm needed to demonstrate to justify retiring partners at the age of 65. This decision provides some key guidance on the test for justifying direct age discrimination whether in the context of exercising a compulsory retirement age or otherwise.

S was an equity partner in his law firm. The partnership deed provided that unless agreed otherwise, partners who attained the age of 65 had to retire by the following December. Shortly before he reached 65 S asked the other partners whether he could continue working beyond 65. When his request was rejected S brought direct age discrimination proceedings against the firm.

Key issues

The Employment Tribunal concluded that the firm's mandatory retirement age of 65 was intended to achieve three legitimate aims:

- giving associates an opportunity of partnership within a reasonable time and thereby an incentive to remain with the firm;
- facilitating workforce planning by knowing when vacancies were to be expected;
- limiting the need to expel underperforming partners, thus contributing to a congenial and supportive culture within the firm.

It held that the retirement age of 65 was a proportionate means of achieving those three aims and rejected the age discrimination claim.

The Supreme Court had to consider whether these three aims were legitimate, and, whether or not the firm had to justify the retirement age generally, or, specifically in relation to its application to S.

It ruled that although it is possible to objectively justify acts of direct and indirect age discrimination different justification tests apply. If an employer wishes to objectively justify an act of direct age discrimination it has the flexibility to choose which objectives to pursue provided that the objectives are legitimate objectives of a public interest nature.

The Court identified two public interest objectives: first inter-generational fairness, for example, facilitating access to employment by young people, enabling older people to remain in the workforce, sharing limited opportunities to work in a profession fairly between the generations, promoting diversity and the inter-change of ideas between younger and older workers.

The second public interest objective identified was the aim of achieving dignity. The Court described this aim as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance thereby preserving their dignity and avoiding humiliation and the need for costly advice in disputes about capacity or underperformance.

An employer who wishes to justify a policy or practice that directly discriminates on the grounds of age must be able to point to such a social policy objective rather than a purely internal business need on its part.

The Court clarified that an employer can identify its aim after the [potentially] discriminatory policy, practice etc has come into being. The mere fact that the legitimate aim was not identified at the time that the practice in question was implemented does not render the practice incapable of justification, however, it may make it harder to do so.

Once the aim in question has been identified it is then necessary to examine whether it is legitimate in the particular circumstances of the employment concerned. For example, if the aim is to improve the recruitment of young people in order to achieve a balanced and diverse workforce, whilst in principle this is clearly a legitimate aim, if, on the facts there is in fact no problem in recruiting young employees but there is a problem in retaining older and more experienced workers then it may not be a legitimate aim for the business concerned. The case was remitted back to the Employment Tribunal to consider whether the compulsory retirement age of 65 was a proportionate means of achieving the three legitimate aims identified.

Finally the Court clarified that justification of the practice in issue is to be considered from a general perspective rather than that of the particular individual.

The Supreme Court stressed that modern businesses should give careful consideration to whether mandatory retirement rules can now be justified.

Action points

- Review policies, procedures and practices to determine whether they are directly discriminatory on the grounds of age.
- If so, identify the underlying aims of the policy, practice etc.
- Consider whether the aim falls within one of the social policy objectives i.e. inter-generational fairness and/or dignity?
- Assess whether there is a more proportionate (and less discriminatory) means of achieving the aim in question.
- If a compulsory retirement age has been retained assess whether it is appropriate to continue to do so and, if not, amend documentation (staff handbook, service agreements etc) accordingly.

[Seldon v Clarkson Wright and Jakes]

Indirect Age discrimination: was a law degree requirement indirectly discriminatory?

Although the legislation outlawing age discrimination is six years old, there continues to be uncertainty on how the courts should approach the question of whether a provision, criterion or practice (PCP) is indirectly discriminatory. Indirect age discrimination will arise where an apparently neutral PCP puts employees of a particular age group at a particular disadvantage when compared with employees not in that age group and the employer cannot show that the PCP is a proportionate means of achieving a legitimate aim.

H worked for P as a legal adviser for many years. When he was appointed, the role did not require a law degree if, as H had, the post holder had exceptional experience or skills in criminal law combined with a lesser qualification in law. Because of problems attracting suitable people for the role of legal adviser P decided to introduce a new grading structure to improve

career progression and offer more competitive salaries. The new structure provided for three promotion "thresholds" above the starting wage, the third and final of which required a law degree. In 2006 H was graded under the new system as reaching the first and second thresholds but not the third.

Under the old grading structure H was effectively at the top grade. However, under the new structure H would have had to study for a law degree part-time alongside his work and this would have taken four years to complete. At the time the new structure was introduced H was 62 and due to retire at 65 and would therefore have been unable to reach or benefit from being at the third threshold before leaving employment. Following an unsuccessful internal grievance H brought an indirect age discrimination claim.

The Tribunal held that H had been indirectly discriminated against on the grounds of age and that it was not objectively justifiable on the facts. The EAT and the Court of Appeal however held that there had been no indirect discrimination because H had been put at a disadvantage not by his age but by his impending retirement; H's retirement was what prevented him from gaining any real benefit from acquiring a law degree, it was not H's age as such.

The Supreme Court however held that H had been indirectly discriminated against on the grounds of age. It considered that a requirement which worked to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age because the reason for the disadvantage was that people in this age group did not have time to acquire a law degree and the reason why they did not have time was that they were soon to reach the age of retirement.

Having regard to an employer's ability to objectively justify an indirectly discriminatory PCP the Supreme Court confirmed that the range of aims which can justify indirect age discrimination is wider than the aims which can justify direct age discrimination. The underlying aim of the PCP can relate exclusively to the employer's business needs and does not have to include social policy objectives.

To justify the 'law degree requirement' P had to identify a legitimate aim and show that the law degree requirement was a proportionate means of achieving that aim. It was accepted that the requirement for a law degree was to facilitate the recruitment and retention of staff of appropriate calibre and that this was a legitimate aim.

The question of the proportionality of the law degree requirement was however remitted to the Tribunal. The Supreme Court held that to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.

An Employment Tribunal's assessment of whether a PCP can be justified is likely to entail:

- A comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.
- Assessing whether it was reasonably necessary in order to achieve each of the legitimate aims identified.
- Assessing whether there were non-discriminatory alternatives available.

[Homer v Chief Constable of West Yorkshire Police]

Restrictive covenants: is a confidentiality clause alone sufficient protection?

To what extent is an employer protected if a departing employee's contract contains a confidentiality clause but no restrictive covenants prohibiting the solicitation of, and dealings with, the employer's customers and clients? The Court of Appeal has explored whether an employer can obtain an injunction preventing its employee working for a new employer because the employee could deliberately or inadvertently disclose confidential information in the new job.

CLS provided logistics services to QH, a key customer. D was a salaried employee of CLS and following a promotion her new duties involved operational aspects of the QH/CLS agreement. D's contract did not contain any restrictive covenants she had, however, signed a confidentiality agreement.

D applied for, and accepted, the role of General Manager with QH. This prompted CLS to bring proceedings seeking two forms of injunctive relief: (i) an order preventing D from being involved in any way with the agreement between CLS and QH (barring out relief); and (ii) an order prohibiting the use of CLS's confidential information during D's new employment.

CLS argued that D had come into the possession of confidential information during her employment and this made it appropriate for barring out relief to be granted. It also argued that the alternative risk of inadvertent, if not deliberate, misuse of confidential information required injunctive relief.

This is the first case in which a barring out injunction has been sought against a former employee. The Court of Appeal rejected the application holding that a barring out injunction would only be granted against an employee in the most exceptional circumstances, if at all, and there was nothing exceptional in this case. In addition, the Court considered that if CLS had wanted to impose a non-compete covenant on D such a covenant could have been included in D's contract. It had only required her to enter into a confidentiality undertaking and therefore was not entitled to non-compete protection in this round-about way.

The Court of Appeal emphasised that if a company wished to protect its confidential information and was worried that a former employee would carry that away in their head, then the proper way to protect itself would be to seek post-termination restrictive covenants, not to ask the Court to extend the confidentiality provision beyond reasonable bounds.

The application for the injunction to restrain the misuse of confidential information was also rejected, on the simple grounds that CLS had not established any arguable case that D had broken or intended to break, or that there was even a real risk that she would break, the terms of the confidentiality agreement. In addition the injunction CLS sought was hopelessly wide and vague and did not specify the confidential information to be the subject of restriction with any certainty. The Court commented that an employer is not entitled to injunctive relief simply because he seeks it.

The Court was also highly critical of CLS's decision to bring proceedings against D without any prior complaint or attempt to see whether there was the basis of an amicable solution to its concerns. It considered that it was particularly appropriate for such a solution to be explored where there was on one side a large corporation and on the other, a former employee whose annual salary would be a small fraction of the costs of litigation.

Action Points

- Audit the existing restrictive covenants of senior employees to assess whether the level of post-termination protection is adequate.
- When promoting employees consider whether new covenants are necessary or whether existing covenants should be revised.
- Do not initiate legal proceedings before attempting to negotiate an amicable resolution.

[Caterpillar Logistic Services (UK) Limited v De Crean]

No stay – threat of High Court claim should not delay Tribunal claim

It is not unusual for an individual to bring proceedings in the Employment Tribunal and in the High Court in relation to matters arising out of their employment and/or its termination. Often, the Tribunal and High Court claims will have features in common and may overlap. The Employment Appeal Tribunal (EAT) has established the principle that where High Court and Tribunal proceedings deal with substantially the same or overlapping issues then the Tribunal proceedings should be stayed pending the High Court 's determination of the claim before it. This is based on the principle that the High Court is better placed to determine complex factual and legal issues and it would be potentially embarrassed by prior findings of the Employment Tribunal.

Does the requirement to stay Tribunal proceedings apply where a claimant has indicated that he will bring High Court proceedings via a letter before action? This was the question before the Court of Appeal.

Last year the EAT held that a letter before action attaching a draft High Court claim was enough to invoke the "stay principle" and therefore the Employment Tribunal proceedings should be stayed pending the final determination by the High Court of the proceedings that had not yet been issued.

The Court of Appeal has overturned this decision holding that the stay principle only applied where there are concurrent proceedings; that is proceedings do actually have to be issued. A claimant could not be deprived of his right to bring an Employment Tribunal claim, by first being required to pursue a High Court claim. In the case in question the claimant had only sent a letter before action but had not issued proceedings accordingly he was entitled to proceed with his Employment Tribunal claim.

[Halstead v Payment Shield Holdings Group Limited]

Queen's Speech

Two Bills outlined in the Queen's Speech include items of interest for employers. The Enterprise and Regulatory Reform Bill will address workplace dispute resolution with a view to overhauling the employment tribunal system by increasing flexibility and encouraging employer compliance. Early consultation of disputes will also be facilitated via a new ACAS led process.

The Children and Families Bill will legislate for shared, flexible parental leave. The detail of all these proposals is still being ironed out with no indicative timeframe on when draft legislation will be published.

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