

Business of Law

Business of Law: Time to Retire?

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Jurisdiction
UK

Related Legislation
Equality Act 2010; Employment Equality (Age) Regulations 2006, SI 2006/1031

Related Cases

Seldon v Clarkson Wright & Jakes [2010] EWCA Civ 899, [2011] 1 All ER 770, [2010] IRLR 865, [2010] All ER (D) 309 (Jul)

Related Digests

New Retirement Regime--A Legal Quagmire? LNB News 11/03/2011 82; New Retirement Rules Leave Loophole, LNB News 24/02/2011 5; Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, LNB News 21/02/2011 119; Forcible Retirement Can Still be Justified in Certain Circumstances, LNB News 22/02/2011 55; Default Retirement Age--Being Retired Too Early? LNB News 25/01/2011 73; The Start of a New Age? LNB News 19/01/2011 44

Abstract

The changes to the default retirement age brought into force from 6 April 2011 are likely to mean law firms are required to give more consideration to partner retirement. Diana Bentley talks to Tony Williams, principal of Jomati Consultants, Linda Farrell, Head of Employment Law at Bristows, and Nicholas Lakeland, Head of Employment Law at Silverman Sherkler, about the key issues law firms may need to consider as a result of the changes

Analysis

Growing older seems to have a few more advantages these days. One is that the discrimination against older workers is no longer tolerated as it once was. New rules concerning the retirement age will soon come into effect, and while a distinction between salaried and equity partners has applied in law, firms will have to consider the management and retirement of older partners in a much broader way.

"There hasn't been a lot of discussion in the profession around this issue. But firms will have to focus on partner retirement much more clearly," says Tony Williams, principal of Jomati Consultants.

Discrimination on the grounds of age was brought within the fold of discrimination law by the Employment Equality (Age) Regulations 2006, SI 2006/1031, and became part of the Equality Act 2010. Under its provisions, employers could retire employees aged 65 or over if a prescribed procedure was followed. Now this procedure will be phased out in a transitional period that will run from April 2011 until October 2011 when the new rules will become fully operational bringing to an end the default retirement age of 65.

The regime will apply to salaried partners along with other employees of firms. Whilst the existing regime

has not applied to equity partners who are self-employed, they have been able to contest their forced retirement under the age discrimination rules of the 2006 Regulations.

"The new regime will put salaried partners and equity partners essentially on the same footing from this October--as the retirement of all partners will have to be objectively justified," says Linda Farrell, Head of Employment Law at Bristows. Several actions were taken against firms by partners under the 2006 Regulations, the most notable of which was *Seldon v Clarkson Wright and Jakes*, Farrell points out. "Last year the Court of Appeal confirmed in the *Seldon* case that there were two legitimate business aims that could be relied on by firms in retiring partners. One was the 'dead men's shoes' aim which included taking into account the promotion prospects of younger lawyers in the firm and ensuring there were realistic expectations as to when there would be vacancies in the partnership. The other was the prospect of collegiality--limiting the need to expel under-performing older partners, thus contributing to a supportive culture in the firm."

The Court upheld the decision of the Employment Appeal Tribunal that both were legitimate aims, but that the evidential basis for the assumption made in this case that performance would decline at 65 had not been established. However, leave has now been granted, she notes, for the case to be heard by the Supreme Court although no date has yet been set for the hearing.

Both the government and Acas have admitted it will not be easy to prove justification for retiring someone of 65 or over under the new rules that are coming into effect. Nicholas Lakeland, Head of Employment Law at Silverman Sherliker, says: "There's not much guidance on this subject yet but it will be much more important for firms to have clear management of all older workers. Firms will need to have clear performance management schemes in place and to apply them consistently and clearly to all employees and all partners. They won't be able to suddenly say a partner isn't performing." Whilst employers in the past may have applied a light touch to performance management as staff get older they will no longer be able to do so--a fact all older workers, including partners--will have to accept if they want to be treated equally to their younger colleagues.

What is evident is a career in a law firm will no longer be the clear conveyor belt it once was says Tony Williams. "Large international firms in particular have been known for encouraging partners to retire in their early to mid 50s to make way for hard working younger associates. Retirement age considerations will be more of an issue for firms that have 'lock-step' remuneration systems under which senior partners earn the greatest amount and stay on that remuneration plateau until they retire," Williams notes. "If senior partners don't retire until later they're not freeing up units in the system and if there are more partners it lowers the remuneration for everyone. This is alright in a period of growth but in a period of profit decline it isn't good. The danger is younger employees will take longer to become partners and this can be a dangerous position for firms to be in."

What is not clear either is how many partners want to work past 65. "Their earnings may be high but the pressure is immense so in reality many will have had enough by 65," comments Tony Williams. "But they have to bear in mind now that if they retire at 60 or 65 they may have 20 more years to live. They have to work out what they need to live on."

Cultural attitudes to age are also relevant. "Here, older people have often been considered a nuisance," says Nicholas Lakeland noting this view is not shared in other jurisdictions. Tony Williams agrees. "In the UK a limited number of partners work past 65. In many other countries partners work much longer. In the US, continental Europe and in many other countries partners keep on working although it may be in a different role as firms recognise the benefits of senior partners with great experience, contacts and credibility. Many lawyers in the US take time out to work in government. But there partner reward is based more on merit so it's a more flexible system that can accommodate partners who want to stay on longer."

Part of the intention of the new age discrimination system no doubt is to force people to be more flexible--and this approach will be felt in relation to both salaried and equity partners and will avoid arbitrary cut off points says Tony Williams. "Warren Buffet is still going strong. The one size fits all approach is no longer appropriate." Flexibility is no doubt exactly what more British firms will need. "More firms will probably

have to be creative about the roles that can be offered to senior partners," says Linda Farrell. "They could have more consultants or business development or knowledge development roles. This could be a good thing as the experience of older partners could be used in different ways."

Nicholas Lakeland notes however, that this approach could be a bigger problem for larger firms. "They've traditionally culled partners at a younger age to make way for younger partners--so it may be harder for them to think about how they will find and remunerate more consulting or marketing work for older partners." Lakeland predicts there will be more litigation as a result of the new age regime. "10 years ago I never got a call from a lawyer wanting me to represent them. It wasn't the done thing to sue your own firm. Now they don't care--especially if they are 65. More lawyers are taking action and firms will need to construct a very good argument for getting rid of older partners using objective criteria."

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