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Legal and regulatory developments in Employment/Employee Benefits

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Cases round-up

Seldon: Compulsory retirement age of 65 for partners was justified

A mandatory retirement age of 65 for partners in a law firm did not constitute unlawful age discrimination, as it was objectively justified. The chosen age of 65 could not be challenged on the basis that a higher age would be less discriminatory, according to the latest EAT decision in the long-running case of *Seldon v Clarkson Wright & Jakes*.

Compulsory retirement at 65: S was a senior equity partner in the partnership of CWJ. The partnership deed contained a mandatory retirement age of 65. S sought to work beyond 65, but was refused. He issued proceedings claiming direct age discrimination.

Legitimate aims: The case went all the way to the Supreme Court, which confirmed that the compulsory retirement could be justified on the basis of the legitimate aims of retention of associates and succession planning.

…but at age 65? On remission, the Tribunal determined that the chosen compulsory retirement age of 65 was a proportionate means of achieving these legitimate aims. S appealed, arguing that a higher age such as 68 or 70 could have been chosen, and that as this would have been less discriminatory, it was not possible to justify the chosen age of 65.

Within a proportionate range: The EAT dismissed S's appeal. It held that the fact that a higher or lower retirement age could have been agreed does not mean that the age selected was not proportionate. The retirement age needed to be not so high as to discourage associates from leaving, and not so low that associates are concerned about partners retiring too early or going elsewhere, or there being insufficient time to make proper provision for retirement.

The Tribunal had found that there was a narrow range of ages which it identified as proportionate (64 – 66), and the EAT upheld this "range" approach. It also noted that whatever age was chosen would benefit some partners but not others; this gave rise to a need to balance their respective interests with that of the firm. It commented that this balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than another particular point.

Relevant factors: The EAT also confirmed that it was appropriate to take account of factors such as: (i) the consent of the partners; (ii) the fact that the chosen retirement age was the same for associates; (iii) the state pension age; (iv) the default retirement age of 65 for employees, which was in force at the time; and (v) the fact that several ECJ cases have upheld a retirement age of 65.

Approach with caution: Although the compulsory retirement age was justified in this case, it largely turns on its particular facts. Employers should not view this as a green light for justifying compulsory retirement ages more generally, as this remains very difficult. The "range" approach endorsed by the EAT may however be useful for employers attempting to justify other forms of direct age discrimination.

French "burka ban" upheld

A French ban on the wearing (in public) of clothing designed to conceal the face has been found not to breach the European Convention on Human Rights (ECHR), following a challenge by a Muslim woman in the European Court of Human Rights (*S.A.S. v France*).

Muslim woman wearing burqa / niqab: S is a French national and a practising Muslim. She maintained that she chose to wear the burqa and niqab (both of which cover her face) in accordance with her religious faith, culture and personal convictions. Her evidence was that she was content not to wear the niqab in certain circumstances, but wished to be able to wear it when she chose to do so. She emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner.

French law: On 11 April 2011 France enacted a law prohibiting the concealment of one's face in public places (the "Law"). Failure to comply with the Law risked criminal sanctions, in the form of a maximum fine of EUR150 and/or a requirement to follow a citizenship course. S brought a challenge to the Law, claiming that it violated her rights under the ECHR.

Interference with rights: The Court found that the Law resulted in an interference with S's rights under Articles 8 (right to private life) and 9 (freedom of religion) of the ECHR. However, it found that the interference pursued two of the legitimate aims listed in those Articles: "public safety" and the "protection of the rights and freedoms of others".

Public safety arguments failed: France relied on the need to identify individuals in order to prevent danger to persons and property, and to combat identity fraud. While this was a legitimate aim, the Court found that it could not be applied in this case to justify a blanket ban on clothing covering the face. It would have been sufficient to require individuals to show their face if circumstances demanded it.

Respect for the conditions of "living together": France also relied on the need to ensure respect for what it called the minimum requirements of life in society (or of "living together"). The Court accepted that the barrier raised by a veil concealing the face could undermine this notion. It took into account France's submission that the face played a significant role in social interaction, and that a veil concealing the face was perceived by France as breaching the right of others to live in a space of socialisation which made living together easier.

Proportionality: The Court acknowledged that the Law had a significant negative impact on the situation of women like S who chose to wear the full-face veil for reasons related to their beliefs, and that Amnesty and Liberty were among the human rights organisations which intervened in the case in opposition to the Law. Nonetheless, the Court found that the ban was not expressly based on the religious connotation of the clothing in question, and that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face. Finally, the Court stressed that France had a wide margin of appreciation. The Law could therefore be regarded as proportionate to the aim of preserving the conditions of "living together". As such, there had not been a violation of the ECHR.

Approach in other European countries: To date, Belgium is the only other European country to pass a similar law. However, it seems that a ban may yet be implemented in other member states. A Bill to that effect has been tabled in Italy, and it is also being discussed in Switzerland and the Netherlands. Spain has also introduced a power for specific by-laws to ban full-face coverings, a measure which was also upheld by the Spanish Supreme Court.

Journalist was not dismissed because of his 'philosophical belief' in BBC values

A journalist who was dismissed from his role with the BBC has failed in his latest bid to establish that his treatment was discriminatory. Although his belief in the higher purpose of public sector broadcasting was protected as a philosophical belief, the alleged discriminators did not know of his 'belief', and did not act on that basis (*Maistry v BBC*).

Philosophical belief in 'BBC values': M was a journalist employed by the BBC, until his dismissal on grounds of poor performance. He claimed that the real reason for his dismissal was his philosophical belief in 'BBC values'. M gave evidence about his belief that public service broadcasting had a higher purpose of cultural interchange, social cohesion and debating important issues. The Tribunal accepted that M had a genuine and strongly held belief in public service broadcasting and that his belief in BBC values was a protected philosophical belief.

…but no discrimination: However, M's claim was rejected by the Tribunal. It found that some of the 28 acts of alleged discrimination had not taken place, and those that had were not because of M's philosophical belief (and were in fact due to concerns

about his poor performance). The EAT refused M permission to appeal.

No knowledge of 'belief': The Court of Appeal refused M's renewed application for permission to appeal, finding that it had no real prospect of success. It upheld the Tribunal's finding that M's colleagues could not discriminate against him because of his philosophical belief if they were unaware of it. M's argument that his colleagues must have been aware of the BBC values could not be converted, without more, into their knowledge of M's philosophical belief. The Court noted that BBC values might have had a similar status to a religion for M, but for another employee they might be no more than a mission statement. Taking action against M because of a disagreement about whether a course of action was consistent with BBC values did not constitute taking action against him because of his philosophical belief. It concluded that even if M was motivated by BBC values, that could not be relied on by him in this context unless it had been articulated.

Employer can rely on earlier warning based on subsequent events

The nature of a disciplinary warning has been considered by the EAT, which found the employer had been entitled to dismiss an employee for misconduct, taking account of a prior warning even though it was based on subsequent events (*Sweeney v Strathclyde Fire Board*).

The timeline: The case concerned an employee who was dismissed because he had been convicted of criminal offences of domestic violence and breach of bail. The employer admitted that it would have issued a final written warning rather than dismissing, in light of all the circumstances, had it not been for a final written warning which it had given the employee for other misconduct, after the criminal acts had taken place, but before the conviction and the related disciplinary procedure. The employer's policy was that disciplinary action is cumulative, and so the employee was dismissed. The Tribunal found the dismissal to be fair. The employee argued that the warning should have been ignored, as it did not exist when the criminal acts took place.

Dismissal was fair: The EAT dismissed the appeal, finding that the employer was entitled to take the warning into account in deciding to dismiss. It rejected the employee's argument that a warning should be construed as referring only to misconduct taking place after the date of the warning. It found that a warning is also a recording of the commission of misconduct in the mind of both employer and employee. The EAT commented that a warning is "*'Janus like', in that it looks both ways*". The employer in this case dealt with the matters as it became aware of them; the employee did not object to this approach at the time. The employer was entitled to abide by its disciplinary policy unless there was good reason why it should not.

Useful for employers: Although this case is on unusual facts, it is useful from an employer's perspective in providing authority for the circumstances in which a warning can be taken into account.

Points in practice

Trends in public M&A (first half of 2014): employment aspects

PLC has published its latest report on public M&A trends and highlights, covering the 22 firm takeover offers announced in first half of 2014. The main employment aspects of interest are:

- *Plans for Target company's employees and business (Rule 24.2(a))*: The majority of offers involved a negative statement or the bidder 'hedging its bets' until after completion, although the report observes a continuing trend towards more focussed, and slightly less generic, employee disclosures:
  - In 41% of offers the bidder made a negative statement to the effect that it had no plans to make any material changes to the terms and conditions of employment of the target company's employees and/or that its strategic plans would have no repercussions on employment.

- In 45% of offers, the bidder made a statement that it would be carrying out some form of strategic or operational review of the target's business, management and employees (typically, following completion of the offer). In a number of these offers the bidder provided further detail such as the potential for headcount reductions, relocation of certain employees, and/or the combination of the target's business with the business of another company.

- The vast majority of the offers included a generic statement that the bidder had given assurances to the target company's directors that the existing employment rights (and, in many cases, the pension rights) of all target employees would be safeguarded.

- *Employee representative opinions (Rule 25.9)*: There were no opinions published by target's employee representatives in the first half of 2014. This follows an initial spike in employee engagement by employee representatives in 2012, following the amendments to Rule 25.9 to promote the practice of giving opinions. In that year, 14% of offers included an opinion from employee representatives.

CII guidance on whistleblowing in financial services sector

The Chartered Insurance Institute (CII) has published new guidance on whistleblowing, aimed at regulated firms in the financial services sector. It contains information about how to report concerns, explains what whistleblowing is and the law and regulations connected to it, and sets out what individuals should weigh up when preparing to blow the whistle.

This guide is supplemented by two other papers:

- A guidance paper for supervisors and managers on how best to respond to someone blowing the whistle to them; and

- A guidance paper for directors with responsibilities for running or overseeing their firm's whistleblowing programme, which explains how to design and implement effective whistleblowing arrangements, and provides a checklist for assessing the effectiveness of arrangements.

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