

## November 2009 in this issue

*A monthly "best practices" alert for multinationals confronting the challenges of the global workplace.*

### This Month's Challenge

*Recent decisions in the UK have highlighted significant differences between US and UK law in the area of mandatory retirement -- and signal that important changes in the UK regulations are on the horizon*

### Best Practice Tip of the Month

*Multinational employers with UK operations need to assure that they are in compliance with current UK regulations regarding mandatory retirement, and start thinking now about the potential increase in, or elimination of, the default retirement age of 65.*

## Tip of the Month

### Age Discrimination and Retirement in the UK

The UK implemented age discrimination legislation just over three years ago. During those three years, there has been a steady increase in the number of claims, rising from just under 3,000 in the year ending March 2008 to nearly 4,000 in the year ending March 2009.

This upward trend, especially in combination with some recent high-profile cases relating to retirement and an expectation that retirement ages will be increased, means that, more than ever, organizations with UK workforces need to be sure that their practices and policies are not discriminatory on the grounds of age.

Superficially, the prohibition on age discrimination sounds familiar to an American manager, but there are important differences between the UK and US laws.

#### Key concepts of UK age discrimination law

The main source of age discrimination law in the UK is the Employment Equality (Age) Regulations (the "Regulations") which implements underlying European legislation. The UK is currently in the process of implementing a new piece of umbrella legislation – known as the Equality Bill – covering all forms of unlawful discrimination (e.g., sex, race, disability, sexual orientation, religion or belief, as well as age) and which currently is anticipated to take effect in October 2010. However, the expectation is that this new legislation will not substantively change the law relating to age discrimination.

The Regulations apply to all aspects of workplace relationships and vocational training, such as recruitment, terms and conditions of employment, promotions, training and dismissals.

Unlike the US ADEA, age discrimination in the UK does not just apply to those who are 40 and over. Rather, under UK law, people of any age can seek redress for age discrimination, and discrimination against an individual because he or she is younger than others also is prohibited.

UK law prohibits "direct" and "indirect" discrimination (what Americans refer to as disparate treatment and disparate impact), harassment and "victimisation" (retaliation). Discrimination is defined as treating a person less favorably because of his or her age, or applying a provision, criterion or practice that disadvantages those of a particular age,

where such treatment cannot be justified objectively as “a proportionate means of achieving a legitimate aim.”

As well as being lawful where it can be objectively justified, age discrimination also is permissible in other limited circumstances.

One of the most important of these circumstances is mandatory retirement, which is generally prohibited under US law. Under UK law, it is lawful to require an employee to retire at the statutory “default retirement age” – currently 65 – provided that the employer complies with some relatively complex procedural requirements. The employer may establish a retirement age above age 65 or, if it can be justified objectively, below 65. However, if such a lower age cannot be justified objectively, any contract term permitting the employer to retire an employee at an age below 65 will be unenforceable against that particular employee.

### **Recent cases**

In September of this year, the UK courts handed down a much anticipated judgment in a case commonly known as *Heyday* (officially, *Age UK v. Secretary of State for Business, Innovation & Skills*). Following a decision by the European Court of Justice in March 2009 holding that the UK law’s retirement provision was not prohibited by the EU’s antidiscrimination directive if it could be justified by important considerations of social policy, the *Heyday* case returned to the UK high court for a determination whether the government had such a justification. The plaintiffs argued that there should not be a default retirement age in the UK or, if there is one, it should be higher than 65. Ultimately, the challenge was not successful, and the default retirement age of 65 was deemed lawful. However, the court indicated that if a default retirement age of 65 had been introduced in 2009, rather than 2006, it would not have found it to be lawful, but accepted that, as a matter of law, the challenge to the Regulations had to be judged as of the date the law was adopted. In reaching this decision, the court relied on the fact that in the consultations on the Regulations before they came into force, the vast majority of those consulted supported 65 as the default retirement age. However, and highly significantly, the judge commented that he might have reached a different conclusion about the lawfulness of a retirement age of 65 if the government had not moved up its review of the Regulations to 2010 (from 2011). He also noted that he presently could not see how 65 could remain as the default retirement age after the review.

Another recent case is that of *Seldon v Clarkson Wright & Jakes*. This related to the forced retirement of Mr. Seldon at the age of 65 from the law firm in which he was a partner, in accordance with the partnership deed he had signed. (It is of note that in the case of partners, in contrast to employees, there is no ability to require people to retire when they reach 65 – the opposite of the situation in the US.) Mr. Seldon sued the firm for age discrimination. The firm defended the claim on the basis that the discrimination was objectively justified in pursuit of six aims. The case is being appealed currently, but in the decisions to date, the Employment Appeal Tribunal has accepted the principle that retention of associates, facilitating long-range planning, and maintaining collegiality by avoiding the need to review and criticize the performance of older partners are legitimate grounds for maintaining a mandatory retirement age, though they do not necessarily suffice to justify the selection of 65 as that age.

### Practical tips

The Heyday decision, and its criticism of a default retirement age of 65, especially in the context of the pending review of the Regulations in 2010, makes it highly likely that the default retirement age in the UK will at least be increased beyond 65 and may be abolished entirely.

Accordingly, businesses with UK operations need to start giving thought now as to how a higher default retirement age (or even no default retirement age) would impact them, particularly in relation to issues such as costs, succession planning and retaining talent. In addition, if a higher default retirement age is unattractive, it will be increasingly important for a UK business to assess why, and ascertain whether or not there is objective justification for imposing a retirement age that is lower than the default retirement age.

In this regard, the Seldon and Heyday decisions provide helpful practical guidance for determining whether a lower retirement age can be justified objectively, which have general application beyond the issue of retirement:

- Any reason advanced should not itself be tainted by discriminatory factors or based on unsubstantiated stereotyping. In the Seldon case, one reason advanced to support compulsory retirement at 65 was that it maintained a turnover of partners, allowing any partner to aspire to become senior partner in due course. However, this argument was rejected as it made the age discriminatory assumption that the partner best suited to the senior partner role would be an older partner.
- Any reason put forward needs to be supported by evidence. A mere assertion, however plausible, risks being rejected by the courts if it is not backed by hard facts. In the Seldon case, it was accepted (somewhat controversially) that maintaining a congenial atmosphere by avoiding the need for performance management could, in principle, be a legitimate aim. However, no evidence was adduced that the performance of partners tailed off at age 65. It was held that no matter how laudable and legitimate the aim is in theory, a justification will fail if there is an insufficient basis for showing that the measure in question is a proportionate means of achieving it. While it was accepted that it is not necessary for a court to have “concrete evidence, neatly weighed, to support each assertion,” there at least needs to be some evidential basis for any assertion that is made. Notably, the court indicated that there might be such evidentiary support for a mandatory retirement age of 70.
- The fact that a measure has been consented to may assist in showing it can be justified. In Seldon, Mr. Seldon’s agreement to the retirement rules he was now challenging contributed to the court holding that they were justified. As such, consulting with employees or their representatives about policies, and having them agree to them, will assist in showing that the policies are justifiable. However, despite the ruling in Seldon, consent may be of greater assistance in cases where policies have been agreed after consultation with partners, senior employees or employee representative bodies. Where standard policies have been agreed with more junior employees without any consultation, the perception is that there is a greater inequality in bargaining positions such that any consent is less meaningful and therefore less influential as a means of justifying a policy.

- The Heyday decision suggests that it would be a high-risk strategy for a company to rely on cost alone as a legitimate reason for justifying age discrimination. In other words, a business would be unable to justify a discriminatory practice, such as a lower retirement age, on the sole basis of cost. However, cost may be one factor that is relevant to determining whether a legitimate aim is proportionate. For example, if a business is reviewing a number of different retirement ages, the relative costs of the different options may be a factor that can be accounted for in order to show that the option chosen was a proportionate one.

More generally, when considering these issues, other tips to bear in mind in relation to justifying policies that have the potential to be discriminatory on the grounds of age include the following:

- where a policy has the potential to be age discriminatory, a failure to have considered properly its age discriminatory impact is likely to increase the difficulties of showing it is justified objectively;
- as far as possible, have a clear paper trail demonstrating the reasoning behind any policy or practice; for example, document and retain any analysis carried out in support of a policy;
- ensure that any reasons for a policy are coherent and consistent and will stand up to critical scrutiny; and
- if appropriate and practical, consult with workers about policies in order to obtain their agreement to such policies.

### **Government consultation**

As part of the consultation process involved in reviewing the Regulations, the government has asked businesses and individuals to submit evidence on the default retirement age, including on: the operation of the default retirement age in practice; the reasons that businesses use mandatory retirement ages; the impact on businesses, individuals and the economy of raising or removing the default retirement age; the experience of businesses operating without a default retirement age; and how any costs of raising or removing the default retirement age may be mitigated and benefits realized. Any evidence must be submitted by 1 February 2010. We would be happy to assist in any submissions you may wish to make.

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