Proskauer

newsletter


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*A monthly newsletter covering the latest developments in UK Employment Law.*



**Daniel Ornstein**
44.20.7539.0604
dornstein@proskauer.com

**Jennifer C. Wheater**
44.20.7539.0647
jwheater@proskauer.com

**Peta-Anne Barrow**
44.20.7539.0638
pbarrow@proskauer.com

## Case Update

### MANDATORY RETIREMENT AND AGE DISCRIMINATION

Under the Equality Act 2010, direct age discrimination is unlawful unless the discrimination can be objectively justified. The test for objective justification is whether the discriminatory act is a proportionate means of achieving a legitimate aim. In *Seldon v Clarkson Wright and Jakes* ("**CWJ**"), the Supreme Court considered the issue of mandatory retirement ages. These are directly discriminatory on the grounds of age and therefore, the lawfulness of a mandatory retirement age depends on whether or not it can be objectively justified. This decision provides important guidance as to the relevant factors for determining whether a mandatory retirement age is justified.

The case was decided under the now repealed Age Regulations. However, in the decision, Lady Hale (who delivered the leading judgment) expressly acknowledged that the principles she identified would apply equally to age discrimination under the Equality Act. The provisions of the Equality Act apply to partners as well as employees and, therefore, although the case relates to a partner, the reasoning in the decision applies just as much to employees.

**The facts:**

Mr. Seldon was a partner in CWJ. A clause in CWJ's partnership deed (agreed by Mr. Seldon) provided for the compulsory retirement of partners at the end of the calendar year that they reach the age of 65. When Mr. Seldon approached 65, he asked not to retire. However, he was required to do so by CWJ, who relied upon the compulsory retirement provision in the partnership deed. Mr. Seldon argued that notwithstanding the partnership deed, forcing him to retire constituted unjustified direct age discrimination. CWJ accepted that the retirement clause was directly discriminatory but asserted that both the mandatory retirement provision and requiring Mr. Seldon to retire could be objectively justified as a proportionate means of achieving a number of legitimate aims, including the following three aims:

- ensuring senior solicitors are given the opportunity of partnership;
- facilitating partnership and workforce planning; and
- creating a congenial and supportive firm culture by limiting the need to expel partners by way of performance management.

**The claim:**

The Employment Tribunal held that a retirement age of 65 was a proportionate means of achieving these aims and rejected Mr. Seldon's claim of direct discrimination. After various appeals before the Employment Appeal Tribunal and the Court of Appeal, three questions came before the Supreme Court:

- whether the three aims of the retirement clause were capable of being legitimate aims for the purpose of justifying direct age discrimination;
- whether CWJ had to justify both the retirement clause generally and its application to Mr. Seldon; and
- whether the Employment Tribunal was correct to conclude that the clause was a proportionate means of achieving any of the three aims.

**The decision:**

The Supreme Court dismissed Mr. Seldon's appeal and the three questions before it were decided as follows:

**Legitimate aims for direct age discrimination**

The three aims of the retirement clause were capable of being legitimate aims for the purpose of justifying direct age discrimination. On this issue, and following recent decisions of the European Court of Justice (the "**ECJ**"), the Supreme Court affirmed that the justification test for direct discrimination is narrower than for indirect discrimination because "*If it is sought to justify direct age discrimination…the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is…distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness*…". In contrast, indirect discrimination can be justified by purely individual reasons particular to an employer's situation.

However, even applying this narrower test, the Supreme Court held that the mandatory retirement age clause was justified by reference to two broad categories of legitimate social policy objective identified by the ECJ, "inter-generational fairness" and "dignity". Lady Hale held that two of the three aims, staff retention and workforce planning, fell within the category of "inter-generational fairness" and were not, as Mr. Seldon contended, merely individual aims of the business. In addition, the third aim – limiting the need to use performance management to expel partners – was deemed to fall within the "dignity" category of legitimate aim. As a result, all three aims were of a public interest nature and were therefore legitimate.

**Justification needed both generally and in relation to a particular individual**

On this issue, Lady Hale held that "*where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it*." In other words, if the rule is justified, its purpose would be negated if a business had to justify the rule every time it is applied. However, Lady Hale also distinguished between not having to justify a rule when it is applied and the need to justify a general rule in the particular circumstances of the business. Indeed, in relation to general rules, she made clear that

"*all businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified* " .

In relation to justification, Lady Hale also noted that the fact that the retirement age provision had been relatively recently re-negotiated could not *"be entirely irrelevant"* to the issue of whether the rule is justified. Lord Hope expressed similar views. This is important given the indication that consent to a rule (especially after consultation) can be a factor that assists in showing an otherwise discriminatory provision is justified.

**Proportionality**

On the question of proportionality, Lady Hale stressed that this requires a business to demonstrate that that the means adopted to achieve a legitimate aim are both appropriate and reasonably necessary. Noting that the case (as a result of other appeals) was already being remitted to the Employment Tribunal on whether or not a particular retirement age of 65 (rather than a different age) was a proportionate means of the performance management aim, Lady Hale stated she would not rule out the same Employment Tribunal considering whether a mandatory retirement age of 65 was a proportionate means of achieving the other two aims (i.e., ensuring senior solicitors are given the opportunity of partnership and facilitating partnership and workforce planning), noting "*there is a difference between justifying a retirement age and justifying this retirement age*".

**Comment**

*This is an extremely important decision in relation to the difficult issue of mandatory retirement ages. In practical terms, it illustrates that any business wishing to maintain an existing mandatory retirement age (or implement a new one):*

- *must have objectives for a mandatory retirement age that both fit within public policy as well as apply to a particular business;*
- *must be able to demonstrate why a specific retirement age has been selected in order to comply with the stated objectives;*
- *where possible, consult about and obtain consent to the implementation of a mandatory retirement age.*

*Having documentary evidence showing the rational and procedure for implementing a mandatory retirement age that is in keeping with the above guidelines will be very valuable in defending any challenges to a mandatory retirement age.*

## COLLECTIVE REDUNDANCY CONSULTATION: ADVOCATE GENERAL'S OPINION

When an employer is "proposing" to dismiss as redundant 20 or more employees at any one establishment within 90 days or less, the employer has a legal duty to consult with representatives of the affected employees (such as representatives from a recognised trade union or specially elected employees). Consultation must be in "good time" and at least 90 or 30 days before the first dismissals take effect (depending on the number of

employees to be made redundant). If an employer fails to comply with this requirement, it is liable for a "protective award", which is effectively a penal award for failure to comply with the legislation in respect of which (broadly): the maximum liability is 90 days' pay per affected employee; and the onus falls upon an employer to show why the award should be less than 90 days' pay.

The U.K. legislation, section188 of the Trade Union and Labour Relations (Consolidation) Act, implements the E.U. Directive on collective redundancies (the "**Directive**"). The Directive imposes obligations to consult collectively when an employer is "contemplating" collective redundancies.

The case of *U.S.A. v Nolan* addresses the issue of the precise point of the redundancy decision making process at which the duty to consult is actually triggered.

**The Facts:**

The U.S. Army made a decision to close a military base located in Hampshire, U.K. with effect from 13 March 2006. This was reported in the U.K. press on 21 April 2006 prior to any military employees having been notified. Three days later, on 24 April 2006, the commanding officer called a meeting to inform the civilian workforce that the base would close in September 2006. Following consultation, on 30 June 2006, 200 employees including Mrs. Nolan, were given notice that their employment would terminate at the end of September 2006.

**The Claim:**

Mrs. Nolan brought a claim in the Employment Tribunal that her employer had failed to consult in "good time" under section 188 about the decision to close the base in Hampshire and avoid redundancies primarily because the U.S. Army had only started the consultation process after the decision to close the base had been made.

**The Decision:**

Mrs. Nolan's claim was upheld by the Employment Tribunal and the U.S.A. was ordered to pay a protective award of 30 days' pay. The U.S.A. appealed to the Employment Appeal Tribunal and then the Court of Appeal. The Court of Appeal referred a question to the European Court for a preliminary ruling.

> *"Does the employer's obligation to consult about collective redundancy pursuant to [the Directive], arise (i) when the employer is proposing but has not yet made a strategic business or operational decision that will foreseeably or inevitably lead to collective redundancy; or (ii) only when the decision has actually been made and it is proposing consequential redundancies."*

**The Attorney General's Opinion**

The Attorney General has suggested the decision to consult does not arise in either of the options put forward by the U.K. Court of Appeal. Rather, it suggests that the obligation to consult is triggered when a strategic or operational decision is taken which compels the employer to contemplate or plan collective redundancies. Consultation under the first option proposed by the Court of Appeal would be premature, whilst consultation under the Court of Appeal's second option would be too late (because if a decision has

already been made which makes redundancies necessary it means that it would be too late to consult about alternate options in order to avoid redundancies).

The case of *U.K. Coal Mining v National Union of Mineworkers* has already considered and determined that where an employer is contemplating collective redundancies, it is required to consult about the business decision underlying the redundancies (in this case, the decision to close the military base). Whilst the Attorney General did not comment on the correctness of that decision, it may in time be that the UK Coal Mining case is wrong and inconsistent with the Directive, if the Attorney General's suggestion that consulting under the Court of Appeal's first option is premature, is correct.

**Comment:**

*The ECJ will now consider the Attorney General's opinion and provide its judgment on when collective consultation obligations are triggered. The ECJ is not bound by the Attorney-General's opinion, but in most cases it follows it. From a practical perspective, it is hoped that the ECJ will provide clarity on precisely when the obligation to consult in collective redundancies is triggered.*

## COSTS ALONE CANNOT JUSTIFY DISCRIMINATION

Generally, employers cannot justify direct discrimination. Age discrimination can however be justified if the employer can show a legitimate aim and the means of achieving the aim are proportionate. The case of *Cross & Others v British Airways Plc* has been interpreted as authority that an employer cannot rely solely on cost to justify a discriminatory provision, criterion or practice (the "costs alone" approach), but that costs together with some other factor (the so-called "costs plus" approach) can justify discrimination that would otherwise be unlawful. The distinction between the inability to justify discrimination based on costs alone in contrast to the "costs plus" approach has been criticised as being highly artificial and was addressed in the case of *Woodcock v Cumbria Primary Care Trust.*

**Facts:**

Mr. Woodcock was made redundant after a re-organisation of the Cumbria Primary Care Trust (the "**Trust**"). He benefited from a contractual provision which provided that an employee dismissed when over 50 years of age was entitled to enhanced pension benefits. In Mr Woodcock's case, the difference in cost between him being dismissed at age 49 or at age 50 would have cost the Trust approximately £500,000.

To avoid paying the enhanced pension benefits to Mr. Woodcock, the Trust gave him notice to terminate his employment before consulting on his redundancy associated with the re-organisation of the Trust. The notice of termination expired shortly before Mr. Woodcock's 50$^{th}$ birthday. Had the Trust delayed delivering the notice until after consultation, the notice of termination would have expired after Mr. Woodcock's 50$^{th}$ birthday. In addition, it was noted that a series of accidents had delayed the process and that in the ordinary course, the consultation process would have commenced long before Mr. Woodcock's 49$^{th}$ birthday.

**The Claim:**

Mr. Woodcock claimed that giving him notice without first consulting with him constituted direct discrimination based on age. The Trust argued that any discrimination was justified because not consulting with Mr. Woodcock prior to giving him notice was a proportionate means of achieving a legitimate aim, namely dismissing Mr. Woodcock in a cost effective manner that prevented him from benefitting from a windfall. Mr. Woodcock argued that the Trust's justification was based on costs alone and, therefore, based on the decision in *Cross*, could not justify discrimination.

**The Decision:**

The Employment Tribunal held that the Trust's decision to issue Mr Woodcock's notice of termination on 27 May 2007, before consulting on the date scheduled, 6 June 2007, was less favourable treatment based on age. However, the Employment Tribunal then held that the action of the Trust to avoid the additional costs was justifiable as being a proportionate means of achieving a legitimate aim and therefore the less favourable treatment was lawful. Mr. Woodcock appealed against this decision. The Employment Appeal Tribunal dismissed the appeal and Mr. Woodcock then appealed further to the Court of Appeal.

The Court of Appeal rejected Mr. Woodcock's appeal and, in particular, his argument that his treatment could not be justified because it was based solely on the grounds of costs. Rather, the Court of Appeal held that the way in which Mr. Woodcock was treated was not in fact based solely on the grounds of costs. The notice of termination was not simply to save costs but to give effect to the genuine decision to make Mr. Woodcock redundant. The Court of Appeal also held that giving notice before consulting was a proportionate means of the Trust achieving its legitimate aim.

In addition, the Court of Appeal provided guidance suggesting that the distinction between "costs alone" and "costs plus" was artificial, noting that almost every decision taken by an employer will have regard to cost. Rather, the Court of Appeal stated that where there is a legitimate aim, the focus should be on the primary statutory question, namely whether or not the treatment complained of is a proportionate means of achieving that aim.

## EFFECTIVE DATE OF TERMINATION WAS DATE A LETTER OF RESIGNATION WAS OPENED

In *Horwood v Lincolnshire County Council*, the Employment Appeal Tribunal has upheld an Employment Tribunal's finding that the effective date of termination of an employee's employment was the date that her letter of resignation was received and opened at the Lincolnshire County Council (the "**Council**") office.

**Facts:**

Ms. Horwood tendered her resignation to the Council which was expressed to be with immediate effect, on 27 January 2010 by sending a resignation letter to three members of the Council. The Council received the letter on 29 January 2010 and it was opened and date-stamped that day. One of the members only read the resignation letter on

1 February 2010 and then sent Ms. Horwood a confirmatory letter on 2 February quoting her effective date of termination ("**EDT**") as being 2 February 2010. At no time did Ms. Horwood query her EDT of 2 February 2010.

**The Claim:**

Ms. Horwood lodged claims for unfair dismissal and unlawful deduction of wages at the Employment Tribunal on 29 April 2010. There is a general rule that such claims must be lodged within three months of the acts complained of (such as in this case, the date of Ms. Horwood's resignation). The Council argued that the EDT was 29 January 2010, the date her resignation letter was date-stamped and therefore her claim was out of time. Ms. Horwood argued that her EDT was 2 February 2010, the date referred to in the confirmatory letter and that her claim was within the three-month time limit.

**The Decision:**

The ET held that Ms. Horwood's claim was out of time, and further held that the EDT had not been amended by the confirmatory letter. Ms. Horwood appealed to the EAT which ultimately held that the ET was correct to conclude on the facts that the EDT was 29 January 2010. The ET's finding that no agreement was concluded between the Council and Ms. Horwood to amend the EDT was upheld.

**Comment:**

*When an employee decides to resign from an employer, the date of termination is when the employee's communication of their resignation is received by an employer (which in this case was when Ms. Horwood's letter was date-stamped).*

## News Update

### DUAL CONTRACTS

HMRC has published guidance on two aspects of dual-contract arrangements. These are: HMRC's view of when duties in the U.K. are merely incidental to duties outside the U.K. and the documents HMRC expects employees and employers to make available in response to an HMRC dual-contract enquiry. These documents demonstrate that HMRC takes the view that dual contract arrangements are of limited scope and that they will investigate them on a frequent basis. Such investigations will involve examination of such things as email traffic to ascertain exactly what work is being carried out in the UK.

### U.K. EXTENDS E.C. REGULATION ON SOCIAL SECURITY CONTRIBUTIONS TO SWITZERLAND

From 1 April 2012 E.C. Regulation 883/2004 will be extended to cover Switzerland. HMRC will now treat Switzerland as being another E.U. Member State for Social Security purposes. This means that if an individual goes to live or work in Switzerland from 1 April 2012 then the new rules will apply to them and their employer. The impact of this depends upon the circumstances of the employment but it may result in U.K. nationals continuing to pay U.K. National Insurance contributions during their time in Switzerland or in Swiss employers having to contribute to the U.K. system if they have employees living and working in the U.K. and paying U.K. contributions.

The new rules also apply to self-employed people moving between the U.K. and Switzerland.

There are special transitional rules that apply to the new regime. The previous rules were, in fact, very similar but if the new rules would result in any change to an individual's circumstances then they may be able to continue with existing arrangements until there is a change in their circumstances.

## HMRC NOW EMPOWERED TO DEMAND A SECURITY DEPOSIT FOR PAYE AND NATIONAL INSURANCE CONTRIBUTIONS

In circumstances were there is serious risk that income tax and National Insurance contributions withheld by U.K. employers will not be remitted, HMRC is now empowered to require a security deposit be made for such payments. Guidance has been published indicating when this will apply but it is limited to specific circumstances of significant risk and compliant employers should have little cause for concern.

## GENDER DIVERSITY ON BOARDS

The European Commission has launched a public consultation to identify appropriate measures for addressing the lack of gender diversity on boards of listed companies in Europe. The Commission is seeking views on possible action at E.U. level, including legislative measures, to redress the gender imbalance on company boards. The public consultation will run until 28 May 2012. Following this input, the Commission will take a decision on further action later this year.

There is some evidence to indicate that change is occurring in the U.K. Lord Davies First Report has been published and shows that that within the FTSE 100, women now hold 15.6% of all directorships (up from 12.5% a year ago). Where there were previously 21 all-male boards that number has now dropped to 11. The Report recommends that FTSE 100 boards should aim for a minimum of 25% female representation by 2015.

## DISMISSAL PROCESS

The Department for Business, Innovation and Skills ("**BIS**") has issued a call for evidence seeking views on: (i) whether existing dismissal processes might be made simpler, quicker and clearer as they are often perceived as being lengthy and unfair to both employers and employees; and (ii) the concept of 'compensated no-fault dismissal' for businesses with fewer than 10 employees, i.e., whether a business would be able to dismiss an employee where no fault was identified on the part of the employee, provided it paid a set amount of compensation. The call for evidence closes on 8 June 2012.

## EMPLOYMENT LAW REVIEW

The Government also published the annual update on the Employment Law Review. This includes an update to the Employer's Charter, which now includes pointers on sickness absence and recruitment. The Charter aims to counter the misconception that employment protections are all one-way - towards the employee. It gives greater clarity to employers on what they can already do to deal with issues in the workplaces, on subjects such as performance, sick leave, maternity leave, requests for flexible working and redundancy.

## FINANCIAL SERVICES REMUNERATION IN EUROPE

This month, Members of the European Parliament proposed to introduce further restrictions on bonus payments in the financial services industry through the imposition of a fixed one-to-one ratio between salary and bonus (meaning a bonus could never exceed base salary). For any such provisions to be enacted, they would have to be agreed to by the European Council and the European Commission as well as the European Parliament. Accordingly, despite a number of reports about the proposed changes, they do not appear to be imminent. We will keep you informed of any further developments on this subject.

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Proskauer's International Labor and Employment Law Practice Group counsels companies doing business globally in connection with the employment issues they face in their workplaces around the world.

For more information about this practice, click here.

Please feel free to contact your regular Proskauer lawyer or any member of our International Labor & Employment Group if you have any questions or need any assistance in evaluating this important newsletter. In addition, if you have any questions regarding the matters discussed herein, please contact either of the lawyers listed below:

**LONDON**

**Daniel Ornstein**
44.20.7539.0604 — dornstein@proskauer.com

**Jennifer C. Wheater**
44.20.7539.0647— jwheater@proskauer.com

**Peta-Anne Barrow**
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