equitable and common law mistake may require deeper consideration than was necessary in this case.

MATTHEW CONAGLEN

RETIRING GRACEFULLY

AT a time when unemployment has reached the highest level for 17 years and youth unemployment stands at nearly one million, the government decided to abolish the statutory default retirement age (DRA) of 65 for reasons of "the health and social benefits many people gain from working later into life", "demographic change; [and] the financial benefits to both the individual and the wider economy". It did so in considerable haste: the consultation paper was published in July 2010, the draft Regulations (with mistakes) were published in February 2011, and the new regime, The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069) adopted under s.2(2) European Communities Act 1972, were made on the 5th April 2011 and came into force on the 6 April 2011 (with transitional provisions). All of this has generated huge uncertainty for both employers and employees.

How can employers respond to this change? There are two main options: (1) abandon any attempt at prescribing a DRA and rely on individuals deciding when to retire. Where (older) workers are underperforming, performance management tools can be used to remove them from the workplace; (2) replace the statutory DRA with an employer-justified retirement age (EJRA). While the first option is unpalatable and difficult in practice to carry out, the second is legally difficult. However, the Court of Appeal's decision in *Seldon* v. *Clarkson Wight & Jakes* [2010] EWCA Civ 899 may encourage employers to adopt the second route. While this would provide younger employees some hope of decent employment and promotion prospects it would not help older employees wishing to launch a "major onslaught" (Mr Seldon's words) on the age discriminatory features of a system based on a DRA.

Mr Seldon was a partner in a solicitor's firm who was forced to retire at 65. Had he been an *employee* a dismissal on the grounds of retirement would have been exempted from the then age discrimination legislation (contained in Schedule 9 of the Equality Act (EqA) 2010 but subsequently repeated by SI 2011/1069), provided that the "duty to consider" procedure (whereby an employer considers a request by the employee to carry on working beyond the DRA) had been followed by the employer. His dismissal would also have been automatically fair for the purposes of the Employment Rights Act 1996. But Mr Seldon was

not an employee but a partner, and so the law firm had to defend a direct discrimination claim on the basis of an EJRA under what is now section 13 EqA 2010.

Section 13(1) EqA 2010 prohibits direct discrimination on the grounds of age. Section 13(2) adds that "If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim." The Employment Tribunal (ET) in *Seldon* identified three legitimate aims for a EJRA of 65: the first two were based on "dead men's shoes" (ensuring associates were given the opportunity of partnership after a reasonable period; and facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise); the third was based on "collegiality" (limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm).

The Court of Appeal agreed with the ET that an EJRA was a proportionate means of achieving a legitimate aim. Sir Mark Waller said "…an aim intended to produce a happy work place has to be within or consistent with the government's social policy justification for the regulations. It is not just within partnerships that it may be thought better to have a cut-off age rather than force an assessment of a person's falling off in performance as they get older". Then, with scant regard for the CJEU's (intermittent) requirement for an evidence-based assessment, Sir Mark Waller added "my experience would tell me that it is a justification for having a cut-off age that people will be allowed to retire with dignity".

In this way, the Court of Appeal's conclusion broadly coincides with the case law of the CJEU. For example, in Case C-45/09 *Rosenbladt* [2010] E.C.R. I-000 the Court said that automatic termination of employment contracts of employees reaching age 68 and entitled to a pension, could be justified on the grounds of sharing employment between generations and the balance struck between political, economic, social, demographic or budgetary considerations. Further, given that the age set was sufficiently high, and retirement was combined with a pension entitlement, the measure was proportionate.

So far so good. But in both *Seldon* and *Rosenbladt* the employer's conduct was underpinned by statutory or collectively agreed rules. What happens when the statutory underpinning is kicked away, as is the case in the UK following the adoption of SI 2011/1069? Under s.13(2) EqA 2010 an EJRA is justified so long as it pursues a legitimate aim (e.g. the three reasons (1)–(3) in *Seldon*) and is proportionate (e.g. it is combined with payment of a pension and some flexibility is incorporated into the system). But if s.13(2) is intended to give effect to Article 6(1)

of Directive 2000/78 prohibiting *inter alia* age discrimination, the criteria laid down in Article 6(1) might not be satisfied by section 13(2). Article 6(1) is a derogation from the principle of equal treatment and so should be narrowly construed (cf Case C-236/09 *Van Vugt* [2011] ECR I-000). It provides that (i) *Member States may provide* that differences of treatment on grounds of age shall not constitute discrimination, if, (ii) *within the context of national law*, (iii) they are objectively and reasonably justified by a legitimate aim, including *legitimate employment policy*, *labour market and vocational training objectives*, and (iv) if the measures are proportionate. The statutory DRA of 65 appeared to satisfy this test, as the CJEU indicated in Case C-388/07 *Heyday* [2009] ECR I-000. However, with the repeal of the DRA and the related legislation by SI 2011/1069, are criteria (i) and (ii) still satisfied? More generally, are "legitimate employment policy" objectives (criteria (iii)) something that an *employer* (as opposed to the state) can invoke?

Now it may well be that the repeated references by the UK government to an EJRA in the July 2010 consultation paper, the impact assessment and ACAS's Guide are enough to satisfy criteria (i) and (ii), providing the "general context" of the EJRA (Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 57 although *cf*. AG Mazak who thought some national legislation was actually needed, para. 82). For many employers, it is crucial that this argument works. Take, for example, the university environment. Budgetary cuts and a recruitment freeze have meant that departments do not enjoy the luxury of one out, one in. Rather, it is a case of one out and two or three years later another one in. In the absence of an EJRA, there will be even fewer "out" and so even fewer "in" (as in the US where at Harvard, for example, faculty over 60 outnumber those under 50). For those not wishing to retire voluntarily, performance management would be the only solution in order to secure renewal of the academic population; and this would be both resource-intensive and unpopular. It might also contravene notions of academic freedom. An EJRA, combined with a more flexible "duty to consider" procedure, seems the only solution, at least in the short to medium term, while employers have a chance to adapt their systems to the demands of the new, hastily introduced, legal order. The Court of Appeal's decision in *Seldon* is therefore crucial in facilitating this transition.

CATHERINE BARNARD

IT IS TIME, CHARTER, RISE AND SHINE

MORE than ten years ago, the European Council set the task of endowing the Union with a written bill of rights in order to make these