

Will you still need me when I'm 65?

Older solicitors may want to work beyond retirement age and it may be possible to balance their wishes with the firm's succession plans, says **John Gould**



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Before the Employment Equality (Age) Regulations 2006, the age at which a partner in a solicitors firm could choose (or be forced) to retire was, legally, a matter of what was set out in the partnership agreement.

Now, although a lingering partner of advanced age may be seen as an impediment to the progress of an ambitious younger generation, the days of an unjustified automatic retirement age are gone.

Financial reasons

Mr Seldon, a partner of Clarkson Wright & Jakes, was required by the partnership deed to retire at the end of the year following his 65th birthday. However, he wished to continue to work in some capacity for a further three years for financial reasons.

His partners rejected his proposal and the litigation that followed reached the Supreme Court (*Seldon v Clarkson, Wright*

& Jakes [2012] UKSC 16).

There was no doubt that the requirement to retire at 65 was discriminatory, but it would still have been permissible if the identified aims of the retirement clause were legitimate and a proportionate means of achieving any of those aims.

Legitimate aims had to be related to broader social policy objectives and might include intergenerational fairness and the individual's dignity. It was necessary to establish whether the aim was, in fact, being pursued.

This did not mean, however, that the aim had to have been made clear or even identified at the time an agreement was signed. The legitimacy of the aim had to be established in the particular circumstances and it had to be shown that the means chosen (the compulsory retirement age of 65) was both necessary and appropriate to achieve the objective.

A mandatory retirement age for partners could be directly linked to the social policy objective of sharing out opportunities fairly between the generations. At an earlier stage, a partner may have benefitted from the retirement of older colleagues. Avoiding the need for performance-based expulsion was consistent with an aim of preserving the dignity of an individual of advanced years.

As ever, however, the

particular circumstances and facts matter. It may be difficult to explain the selection of 65 for the pursuit of the legitimate aims. Why not 60 or 70?

Dividing control

It does not necessarily follow that the continued presence of an older partner blocks opportunity for younger ones. That may depend on how remuneration and control are divided between the generations. The significance of the link between age and performance or capability will be dependent on the challenges of an individual's role. There may be a commercial justification for a reducing role provided remuneration is also adjusted.

It is a sad fact, however, that in many smaller firms the issue is not an unwillingness to retire but an inability to do so. The lack of successors, the difficulty of obtaining the repayment of capital and the costs of closure may leave individuals with no option but to keep working. A strategy of waiting for something to turn up may eventually succeed – it did for Mr Micawber – but it would be disappointing if it turned out to be payment under a life insurance policy.

Partner retirement can turn into a very contentious issue. It is possible to plan arrangements that give a fair opportunity to younger partners and maintain the dignity of elders. **SJ**



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