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By Carly Chynoweth 25 July 2012

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Age and retirement: Means to an end

How can an organisation manage the exit of older employees now that the default retirement age has gone? And what can we learn from the Seldon case?



Age discrimination: means to an end

When the default retirement age (DRA) was scrapped in October, employers remained able to set their own retirement age, provided they could justify it. And when [Leslie Seldon](#) lost his high-profile age discrimination claim in the Supreme Court earlier this year, they could have been fooled into thinking compulsory retirement was back from the brink.

But employers should not be confused by the media hoo-ha into thinking Seldon has "let them off the hook" on retirement, says CIPD diversity adviser, Dianah Worman. "Reports suggested the law was being changed but that is not the case."

Denise Keating, chief executive of the Employers' Network for Equality and Inclusion, says the Seldon decision signals that justification will involve proving businesses are pursuing "legitimate broader social policy aims".

"Companies seeking to justify a compulsory retirement age will not be able to rely on generalised aims," she says. "Employment tribunals will be required to dig deeper in examining whether an employer's aims are legitimate. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce is, in principle, a legitimate aim. But if there is, in fact, no problem in recruiting the young and the problem is in retaining the older and more experienced workers, then it may not be a legitimate aim for the business concerned."

The University of Cambridge is among the minority of employers who have set a fixed retirement age. Its academics retire at 67 but have the right to request a three-year extension. The university's reasons for this include the need to ensure enough career opportunities at Cambridge for younger people to stop them going elsewhere. HR director Indi Seehra is relying on winning academics' hearts, rather than creating a water-tight legal defence. Consultation was a central part of the change.

"We have not dashed into it," he says. "There was a good 15 months of consultation, during which time the debate has moved from 'doing this is age discrimination' to 'for the longer term health of the university this makes sense'.

"I hope that academics will not feel inclined to want to take it to tribunal... and each individual will understand that, despite personally preferring to stay, as a group we have come to a decision," he says.

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Age-old questions

Those employers who have decided to set a fixed retirement age will find some additional guidance in the Seldon decision, but it is unlikely to affect the majority of employers, since lawyers and experts say few have chosen the employer-justified retirement age route since the DRA went. These employers have other issues to grapple with.

"When the DRA was repealed, most organisations decided to operate without a retirement age, so from that point of view Seldon is not significant," says Audrey Williams, an employment partner and head of discrimination law at Eversheds. She believes that while Seldon offers some clarification on how employers can objectively justify setting a default age, it leaves other questions – notably the age itself – up in the air.

"I have been telling the organisations I advise that they should not just opt for 65 (if they choose the employer-justified age route) because that is where it has always been. They need to make sure they have good grounds for choosing that age," she says.

What, then, of the majority of employers who have decided to operate without a fixed age? They should see it as a chance to strengthen the way they look at talent management rather than another potential legal pitfall, Dianah Worman suggests. She argues that employers who claim that the abolition of the DRA makes workforce planning harder or reduces their ability to hire young people into entry-level positions are taking the wrong approach. "There is an opportunity here for HR to consider the way they look at talent and talent management," she says. "Don't be scared of it, get hold of it."

Discussing the future

There is still plenty of uncertainty among employers about what exactly they can say to staff, and when they can say it. For example, the managing director of one manufacturing firm told People Management that a colleague told him he could not talk to a 64-year-old man about his retirement plans. The managing director, who asked not to be named, decided this approach was "absolutely stupid" and ignored his advice. "I had to talk to him," he said, "because I had a business to run and I needed to know his plans. What if the day after he turned 65 he didn't come in to work? So I had an informal conversation and asked him what he was thinking of doing." The result was satisfactory to both sides: the employee wanted to stay on full time, and the managing director managed to keep an experienced, capable worker.

Many employers worry that they cannot talk to employees about retirement. Acas guidelines indicate it is fine to ask staff about their plans as long as it's handled properly, says Matt Flynn, a lecturer at Middlesex University. "If an organisation has done regular performance reviews and appraisals, having a discussion about older workers' retirement plans is no different to having a discussion about career development plans with other workers," he says. "But a word of caution: if the first time you talk about retirement is 10 minutes before someone is due to retire, you could be in trouble. You should be talking about it with people in their 50s or even 40s. It should be part of long-term planning."

Boost the appraisal process

Law at Work has taken this approach, says Donald MacKinnon, a director at the company. The firm has no fixed retirement age and relies on conversations held with staff as part of its performance management system. "What we did was revisit our performance management and appraisal processes to make them more robust," he says. "When we had a retirement age, it was very easy to avoid addressing these issues: you could say that people would only be here a short time and then they would leave." The new system has the added benefit of giving all staff more clarity about what is expected of them, he adds.

"Providing that you performance manage all your staff, no particular age group can claim it is being treated less favourably than another," says Marc Jones, a partner at Turbervilles Solicitors. "But you do need to have the paper trail and the policies in place."

But it is not simply retirement that presents a potential trap when it comes to age, Flynn points out: employers need to be sure that other aspects of their HR policies are also in line with legislation.

"Some organisations give younger workers more opportunities for training and development in an effort to keep them, while older workers get less because they are seen as more stable and less likely to move. That is not good practice from a legal or an HR perspective." –Benefits that reward length of service rather than skill or ability could be another problem area, added Alex Bearman, a partner at Russell-Cooke solicitors.

There are other risks around inconsistent treatment, according to Eversheds' Audrey Williams, such as letting older workers coast or adjusting their targets because of their age, which could lead to complaints from younger workers. And if disability-related adjustments are needed, make it absolutely clear that they are related to the disability and not to age, adds Jones.

He has seen few cases based on retirement since the DRA was repealed. "It's

more issues around things like selection for redundancy being tainted by age discrimination, or where performance or conduct issues are a mask for age discrimination," he says. A typical scenario would be a redundancy pool with three people under 40 and one aged 64, who is selected without any objective justification.

The best way to avoid age-related claims when dismissing people is the same as avoiding any other discrimination claim, he says – use a transparent process with objective, justifiable criteria.

Retaining critical skills: Sussex Community NHS Trust

Changing attitudes to retirement at Sussex Community NHS Trust meant reducing bureaucracy as well as scrapping the default retirement age, says Kate Paxton, the trust's head of resourcing.

"We used to have a process where people had to request to stay on, then get checked by occupational health – it was archaic, really," she says.

But with demand for skilled, experienced employees outstripping supply, removing barriers for people who wanted to stay was simple business sense. "We found that we had areas of difficulty in recruitment and that in some cases we were losing staff that we needed," Paxton says.

"Now if staff want to carry on working they are at liberty to do so. We don't put barriers in place, and we don't require them to be health assessed unless they have some kind of health issue."

Paxton has little truck with organisations that argued against the DRA's removal by claiming they needed to get rid of people to save money, and that a fixed retirement age was a necessary tool. "The people you lose to retirement are not necessarily the ones you want to go, so automatically setting age as a criteria does not seem to make good business sense."

Instead, she says, good performance management throughout people's careers is a much better option for both individuals, who get the development and support they need whatever their age, and for the organisation, which does not have to carry underperforming staff. Retirement is discussed as just another aspect of individuals' plans, and this allows time for individuals and their managers to prepare for it.

"We also have options for people who want to adjust what they do as they approach retirement. Some people would like to keep on working but with fewer hours or at a lower level, or maybe someone who was a manager wants to return to hands-on patient care. Having early discussions means that we can prepare for this and look for roles that match their goals."

The Seldon Case

'Employers can force retirement', a BBC headline read on 25 April, writes Jill Evans, – apparently reassuring news for employers following Leslie Seldon's long-running battle against the law firm where he had once been managing partner. In 2007, he claimed the firms' practice of compulsorily retiring partners at age 65 was a breach of the 2006 age regulations (now covered by the Equality Act 2010). Initially his claim failed, but the decision was partially overturned in the EAT. At the next stage, the Court of Appeal sent out a mixed message about how easily employers could justify a fixed retirement age. Now, the Supreme Court has confirmed it is possible for employers to justify a retirement age – it just didn't say with any clarity how this should be done or what that age should be.

bit.ly/SeldonPM



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