



## How congenial?

### *Justifying direct age discrimination*

By Tom Richards

For many years, Mr Seldon was a partner in a law firm. At the end of the year following his sixty-fifth birthday, in accordance with the partnership deed, his fellow partners forced him to retire. Mr Seldon sued the firm for age discrimination.

The firm sought to justify its direct age discrimination against Mr Seldon on several grounds. Three the Employment Tribunal accepted as legitimate aims towards which the mandatory retirement rule was a proportionate means: creating promotion prospects, facilitating partnership planning, and contributing to the 'congenial and supportive culture of the firm' by avoiding the need to expel partners by performance management.

Giving judgment on Mr Seldon's appeal (*Seldon v Clarkson Wright & Jakes* UKEAT/0063/08, 19 December 2008), the EAT confirmed the following. First, there is no principled difference between the tests for justification of direct and indirect age discrimination: the ordinary principles of legitimate aim and proportionality apply. Next, in discrimination law in general a legitimate aim need not be consciously recognised by the respondent at the time, and ordinarily the general rule must be justified, rather than its effect. Also, it could be relevant that all the partners, including Mr Seldon, had consented to the forced retirement rule, not only because of the special nature of partnerships, but because the fact that rules are produced by collective bargaining may generally weigh in their favour in a proportionality analysis.

Mr Seldon succeeded on one important ground, the congeniality argument assumed ageing partners would underperform. While the EAT accepted maintaining congeniality was a legitimate aim, there was no evidence that partners' performance "tailed off" at sixty-five. Respondents drawing links between age and performance need convincing supporting evidence.

But should "congeniality" be a legitimate aim at all? Forcing people out of their jobs by performance management can be unpleasant, but so can forcing them out on grounds of age. Can it be right that treating people adversely on grounds of age should be permissible in the name of preserving congeniality? The EAT will not have the last word: Mr Seldon is appealing to the Court of Appeal.

The ECJ's judgment in the Age Concern case, Case C-388/07 R (*Incorporated Trustees of the National Council on Ageing*) v *Secretary of State for BERR* (5 March 2009), shows the EAT was right, EU law does not require a more stringent justification test for direct discrimination. Confirming AG Mazák's Opinion delivered on 23 September 2008 (see *Focus Dec 2008*), the ECJ also held a general justification defence to direct age discrimination, as adopted by the UK in reg. 3 of the Age Regulations, is not objectionable in principle under the Equal Treatment Directive. It remains for our High Court to determine whether the Government can in the circumstances justify the defence's availability.

*Tom Croxford appeared for the respondent in Seldon. Dinah Rose QC acts for the Secretary of State in the Age Concern case.*