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Supreme Court Clarifies Age Discrimination Provisions

The Supreme Court has ruled on two recent high profile age discrimination cases of general importance.

In *Seldon v Clarkson Wright and Jakes*, a partner in a law firm was forcibly retired at 65 in accordance with the provisions of the partnership deed. The Supreme Court held that the provision amounted to direct age discrimination but that it could be justified on social policy aims (in this case, intergenerational fairness and the dignity of the employee). Business aims such as cost reduction or improving competitiveness were not adequate social policy aims in this context.

However, we must wait for another day for a conclusion to the story as the Supreme Court remitted the matter back to the employment tribunal to decide whether the specific age of 65 was a proportionate means of achieving the social aims in the context of the particular business.

In *Homer v Chief Constable of West Yorkshire*, Homer, who was 62, was informed that it was a new requirement for further promotion that he obtain a law degree taking at least 4 years part time. The case was brought when retirement at 65 could be compulsory which meant that he was effectively precluded from obtaining the promotion he sought.

The Supreme Court held that Homer was put to a disadvantage because of a reason directly related to his age (i.e. his retirement at 65). However, the matter was remitted to an employment tribunal to decide, in the circumstances, whether the discrimination was capable of being justified.

Lap Dancers Were Employed

Lap dancers working for Stringfellows who were generally understood in the industry to have been self employed have been held to be employees by the EAT.

Dancers were entitled to work when on the rota and the Employer had control over what dancers did when they were working. They were also paid 'Heavenly Money' - a money substitute on which deductions were made by the Employer.

There was sufficient mutuality of obligation and an expectation of continued employment to establish an employment relationship.

These notes are for guidance purposes only. We believe the contents to be correct but it should not be taken as sufficiently accurate or full to apply in any specific situation without first referring to us. We would be pleased to advise on any specific issues or problems.

Lying Employee Not Harassed

An employee who was accused of lying about a salary agreement was not discriminated against or harassed under the Sex Discrimination Act 1975 (now substantially re-enacted in the Equality Act 2010) when her manager also accused her of lying about a miscarriage says the EAT.

Although the EAT accepted that the manager's comments were upsetting and offensive, it held that the Tribunal was entitled to conclude, on the facts, that the primary reason for the manager's comments were not because of the employee's pregnancy but to emphasise the employee's dishonesty.

Unsuccessful Job Applicants

The European Court of Justice has held that unsuccessful job applicants are not automatically entitled to a successful candidate's application details to establish whether they have been discriminated against in the application process.

However, that does not give complete protection to employers as the Court then went on to state that a refusal to provide details of successful applicants *might* create an inference of direct or indirect discrimination in certain cases.

Effective Date of Termination

The EAT has held that employees who unequivocally resign with immediate effect on a particular date have an effective date of termination (EDT) that day.

In *Horwood v Lincoln County Council*, a later EDT was mentioned by the employer and which was relied upon by the employee who then brought her claim within 3 months of the employers EDT but one day after the actual EDT.

The EAT held that the EDT is a statutory date and cannot be varied by agreement.

EAT Costs Ruling

The EAT has refused to make a cost order against an unsuccessful employee who had brought a misconceived claim because no letter had been sent to him before the hearing warning him that an application for costs would be made against him if he proceeded with his claim.

The EAT has also held that the employee had not received a schedule of costs claimed by the employer before the hearing and therefore the employee would have had no reasonable opportunity to properly assess the costs claimed.

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