

# The abolishment of the default retirement age law employment essay

[Law](#)



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I will first touch upon the development of equality within Employment law and the impact it has had in the removal of discrimination. This will lead me to discuss the abolishment of the Default Retirement Age and the methods in which employers continue to regulate the employment of the older generation. Throughout the essay I will use case law to analyse and evaluate whether the change of law has made a difference or whether age discrimination is still on going. Age discrimination is a protected characteristic under the Equality Act 2010 (" EqA 2010"). The EqA 2010 was put into effect to incorporate all Employment legislation that impedes discriminatory behaviour, victimisation or harassment against applicants, trainees or employees. The aim was to make the system more coherent and simple. Age discrimination is a protected characteristic of this Act and is regulated by the Employment Rights Act 1996 (" ERA 1996"), the Council Directive 2000/78/EC (Equal Treatment in Employment) (" 2000 Directive") and the Employment Equality (Age) Regulations 2006 (" 2006 Age Regulations"). The 2000 Directive was founded in regards to Article 6 of the Treaty on European Union and established a framework for states to ensure that no person is treated unfairly within the workplace[1]. The 2006 Age Regulations derived from the 2000 Directive to impede discriminatory behaviour, victimisation or harassment against applicants, trainees or employees due to age; age is defined as being of a particular age or being a part of an age group[2]. There are two types of discrimination. The EqA 2010 s13 (2) states that it is prejudiced to treat an individual less favourably than he would treat another due to their age[3]. To treat a person less favourably means to place them at a disadvantage. This is known as Direct

Discrimination. However, the decision in *Incorporated Trustees of the National Council on Aging v Secretary of State for Business* [2009] held that States were permitted to disregard the 2000 Directive if the discrimination could be justified by "legitimate social objectives, including matters of employment policy, the labour market or vocational training"[4]; legitimate reasons is to be determined by national courts. Indirect discrimination is explained in s19 of the EqA 2010. It states that it is unlawful to place provisions, criteria or practice that places certain age groups at a disadvantage[5]. The case of *Homer v Chief Constable of West Yorkshire Police* [2010] held that employment legislation was not established to prohibit barriers that stem from retirement. The claimant was unable to obtain a promotion without a law degree and claimed this was indirect discrimination. The Court held that this was not a barrier due to age itself, but due to him being four years from retirement age[6]. Although the 2006 Age Regulations were said to be implemented to inhibit discrimination, ss98ZA-98ZH of the Regulations introduced a Default Retirement Age ("DRA") of sixty five. This meant that six months prior to an employee's sixty fifth birthday the employer could inform the employee of the termination of his contract. However, employees did have the right to request to work beyond the retirement age, and this application would have to be considered by the employer. If the request was refused then the employer would have to inform the employee of the date of his termination and notify him of the appeals procedure. If the appeal was denied, the employer would confirm the employee's date of retirement. If the procedure was not followed accordingly, the employee would have had a claim for automatic unfair

dismissal.[7]October 1st 2011 saw the abolishment of the DRA with the implementation of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011. This arose due to the vigorous campaigning by Age UK who felt that the introduction of the DRA, ss98ZA-98ZH of the 2006 Age Regulations, was itself discriminatory. This change in law now provided individuals aged 65 and over with full employment protection rights as they could no longer be dismissed due to their age. Although the DRA was removed the Government permitted employers to introduce their own Employer Justified Retirement Age (EJRA). An EJRA enables an employer to continue to dismiss employees on retirement grounds if it is a proportionate response to a legitimate aim. For instance, an ERJA will be lawful if its purpose is to (1) maintain the health and safety of the individual concerned, co-workers or the public, or for work place planning; this means that there is a need for a retirement age so businesses can continue to recruit new employees, offer promotion opportunities in order to keep skilled staff and (2) effectively manage succession[8]. These two examples of what constitutes as a legitimate aim demonstrates the power that a business holds to continue the use of a retirement age. With the aims accepted for an ERJA, it could be said that the abolishment of the DRA has not caused much disturbance for a business to maintain a retirement policy. It was the case of *Seldon v Clarkson Wright & Jakes* [2012] that provided a guideline for Courts to determine when an ERJA is justified. As Mr Seldon was a partner of the firm, rather than an employee, the DRA was not applicable. Seldon claimed that his retirement fell under direct discrimination. The business claimed that his retirement was justified under its retirement policy; an ERJA which was a

proportionate means of achieving legitimate aims.[9] This case identified the issues in regards to a compulsory retirement age and stated, in regards to the importance of determining when a retirement is justified, that: "... "Differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited." [10] Mr Seldon was a partner in a law firm and had been compulsorily retired at the age of 65 years in accordance to the company's retirement policy. Mr Seldon argued that his dismissal was direct age discrimination. The tribunal found that Mr Seldon had suffered less favourable treatment due to his age; however, it was justified due to the retirement policy and the reasoning behind the policy. The retirement policy was enacted to ensure that promotions could be offered to current solicitors of the firm, enabling new positions for the younger generation. This was to encourage continuous high standards of work and commitment; the ability to offer employees a partnership ensured the firm would keep their skilled employees without losing them to other firms in order to progress in their career [11] (to name a few). This case made it to the Supreme Courts, although the Employment Tribunal had already held that the retirement policy was justified, and dismissed Seldon's case. The Supreme Court identified three issues to be assessed: "It was important to examine whether the purpose of the retirement policy identified by the Employment Tribunal were in fact

legitimate aims for the purpose of justifying direct discrimination; Whether the firm had to justify how they applied the policy to all employees and the individual concerned; And whether the Employment Tribunal had made the right decision in upholding that the retirement policy was a proportionate means of achieving legitimate aims, or whether it could have found less discriminatory means"[12]The Court held that the test for direct discrimination and indirect discrimination were different, and in order to justify direct discrimination there must be social policy objectives, rather than for the simple benefit of the business. Article 6 of the 2000 Directive stated that discrimination can be justified within the context of national law, and the 2006 Age Regulations were enacted to implement the Directive into Domestic Law. It was held that reg. 3 of the 2006 Age Regulations should be read as it is written. S3 states that under these regulations, discrimination will only be unlawful if " A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim"[13]. This gave scope for employers to establish reasonable objectives for a compulsory retirement age as long as it corresponded with the 2000 Directive. Using the case of *Age UK v Secretary of State for Business, Innovation and Skills* [2010] (" Age UK") the court were able to identify what would amount to legitimate aims and what would be unlawful. It was decided that aims that related to " employment policy, the labour market or vocational training" were legitimate, and " purely individual reasons particular to the employers situation" were unlawful[14]. It appears that the 2006 Age Regulations gave employers the flexibility to determine their own objectives. However, the objectives must be made in the nature of

public interest as required by the Directive, must be consistent with the social policy aims of the state and use means that are proportionate[15]. The Luxembourg Court has identified two types of legitimate objectives: Inter-Generational Fairness and Dignity. Inter-Generational Fairness has a variety of meanings dependent on the business concerned. It can mean ensuring that young people have access to entry of employment; keeping the older generation in employment; and dividing promotion opportunity between both generations[16]. Dignity has been previously defined as avoiding the dismissal of an older worker on the grounds of capability to preserve their self-worth and avoid humiliation[17]. Employees are expected to have the capability to perform all the requirements of the job, and if it is apparent that an employee no longer has the competence to do this, retirement saves the humiliation of dismissal due to underperformance. Preserving a person's dignity and saving them from humiliation has been found to be a legitimate aim for retirement, therefore retiring an individual based on their capability to do the job is justified. The Court had to also examine whether an age of 65 years for compulsory retirement was a proportionate means of achieving legitimate aims, or whether the firm could have found less discriminatory means. The Court held that having a mandatory retirement age is not appropriate or necessary as retirement should be based on capability to perform the job. As different roles require different capabilities, a specific age cannot be justified. This taken into consideration it is clear that businesses will need to examine the requirements of the job role to examine whether other less discriminatory measures can be taken to meet the same objectives[18]. In respect to issue 2, the Court held that once a policy is

justified the application will generally be justified also:" Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue." [19] Thus, it would be extremely rare for the application of a policy to be unlawful whilst a policy itself is lawful. What the Seldon case has done Conclusion Since the Employment Equality (Repeal of Retirement Age Provision) Regulations 2011, it is clear that employers can still have a retirement age if it can be objectively justified. " Objectively justified" offers flexibility for employers enabling them much scope when determining their aims. The decisions held in Seldon will prove much difficulty for employers to However, the decision in Seldon will prove much difficulty for employers to implement an EJRA as the age for retirement is much wider and will be determined by many factors.