ALL ABOUT AGE: DISCRIMINATION AND BENEFITS

28 March 2019

In this All About Age webinar, our HR law experts will look at the issue of age discrimination and benefits, with a particular focus on:

- The risks of introducing tapering or transitional arrangements when making pension scheme changes; these are often intended to cushion the blow of the changes but can risk age discrimination claims. This has been thrown into stark relief by the recent (December 2018) Court of Appeal decision which found that the Government's transitional pensions arrangements put in place to protect older Judges and Firefighters constituted unlawful age discrimination because of the impact on younger scheme members;
- How best to structure share schemes' good leaver/bad leaver provisions to minimise the risk of successful age discrimination claims; and
- A reminder on how insured benefits can be provided to employees in a way that doesn't fall foul of the age discrimination legislation.

During the webinar, we will help you to identify the actions you need to take as an employer in light of recent case law decisions, issues to watch out for when pension scheme changes are made, top tips on getting it right when providing benefits and how to mitigate risk in this area for your business.
Roughly one in four people born today can expect to live until they are 90. As well as living for longer, people are increasingly working longer. People over the age of 50 now make up a third of the UK workforce and well over a million people aged 65 and over are in the workforce. As a result, employers are having to navigate the legal issues around an older workforce and age discrimination.

In terms of general societal trends, the employment market has for a long time been operating with astonishingly low levels of unemployment. There was a record high in 2018 with 32.4 million people in employment equating in the lowest rate of unemployment since 1975.

With a greater demand for workers regardless of age, and a trend of reduced workers coming to work in the UK from the European Union, it would appear to be only a matter of time before the experience and skillsets of older workers can be truly harnessed.

Indeed in 2018, there was a record number of people aged 50 and older in employment. Age awareness charities have called for employers to ensure that working practices cater for the needs of older people.

Age discrimination claims can be brought by individuals of any age and because of this there is a need to ensure that practices do not discriminate against workers on age grounds more widely. Recent age discrimination cases continue to establish boundaries around acceptable and unacceptable employment practices in age discrimination terms.

**Why is it important to consider age discrimination issues?**

Age discrimination claims are expensive to litigate as a starting point - considerable time and costs can be spent in defending claims. Claims can also be brought in a range of situations - in relation to recruitment practices, throughout an employee's working life and
through to their departure from the business.

They are likely to be unwanted from a PR and HR perspective. No employer wants to be a high profile example of discriminatory practices. Age discrimination claims can be very complicated and costly to untangle when changes are needed to deal with past practices.

**General principles of age discrimination legislation in the UK**

The Equality Act generally outlaws age discrimination amongst the other protective characteristics such as sex, race, disability discrimination and so on.

There are four main types of age discrimination: direct and indirect age discrimination as well as harassment and victimisation relating to age discrimination. This article will focus on direct and indirect age discrimination as they are much more common.

Direct discrimination can be the clearest type of discrimination to spot. It takes place where an individual, so an employee or a member, is treated less favourably because of their age or perceived age.

A good example is where an older person might not be shortlisted for a promotion because they are assumed to be of an age where they might not want that level of stress or responsibility or might not be adaptable enough or because an assumption is made that they might not want to work for many more years.

Similarly someone might also not be shortlisted for a job because they are considered to be too young and inexperienced so in all these cases assumptions or stereotypes are being made on their behalf which are based on their age and amount to less favourable treatment. The discrimination here means each of those two employees simply will not be given the opportunity to go for the promotion.

Indirect discrimination can often be harder to identify. This is where an employer’s practice criterion provision, a PCP, applies in the same way across a group of employees but where the impact would put people of a certain age at a disadvantage when compared with the impact on others of a different age or age group.

A PCP can be anything from a policy, a practice, a treatment, a procedure, a requirement, a rule, an arrangement. We have recently found out in the Court of Appeal’s decision in United First Partners Research v Carreras [United First Partners Research v Carreras [2018] EWCA Civ 323] is that even an expectation can amount to a PCP.
An example of indirect age discrimination would be a requirement that a job applicant has held a driving licence for a minimum period, say, for example, for five years. This apparently neutral practice can apply across the board but impact more on younger job applicants, for example, 20 year olds because they would be unable to meet that requirement.

**When is age discrimination lawful?**

There are some specific situations where age discrimination is lawful. The Equality Act 2010 sets out a number of specific exemptions that allow employers to provide different treatment in employment on age grounds.

For example, there are limited circumstances where a genuine occupational requirement exists meaning that someone of a certain age can be chosen for a job, for example, hiring a girl to act a part in Annie.

In broad terms, it is possible for employers to offer different pay and benefits based on an employee’s length of service. For example, additional holiday for longer serving employees. If differences in pay and benefits exist for employees with up to five years’ service, this is covered by a specific exemption under the Equality Act 2010 and so it is not unlawful.

When more generous pay and benefits are offered by reference to periods of service of five years or more, the employer must be in a position to show that it fulfils a business need, for example rewarding loyalty.

There are also a number of specific pensions exceptions to the general principle that differences in treatment based on age are unlawful. This is because many pension benefits are formulated, calculated and paid when an employee reaches a certain age. There are certain ways in which pension schemes can continue to operate without constantly running the risk of age discrimination claims.

However, there are many practices which are not covered by the specific exemptions in the Equality Act 2010 and underlying regulations and, in these cases, employers will need to be able to objectively justify the treatment.

**When is age discrimination not lawful?**

Age discrimination is not unlawful where it can be objectively justified by an employer. The
PCP, the provision, criterion or practice, will not be unlawful where it is shown as a proportionate means of achieving a legitimate aim.

The employer needs to show that the PCP in question is proportionate - it is appropriate as a means of achieving the aim of the employer - but it is also necessary. Usually the objective justification is about showing a business need for the treatment and showing that that business need, that legitimate aim does not have a disproportionate impact on the employee claiming age discrimination (persuading a court or tribunal that, judged objectively, the act is justified, the end justifies the means). Consider this as a balancing act, the employer’s aims on one hand but the impact on the employee on the other.

It is also possible for direct discrimination to be objectively justified. In principle, this means that the same thought process would need to be followed by an employer when defending itself against a claim of direct age discrimination. However, case law has established that the objective justification which needs to be shown when direct age discrimination is alleged must be linked to legitimate aims such as social policy objectives.

Essentially this creates a slightly higher bar as you are looking to defend yourself against claims of direct age discrimination. This was explained in the leading Supreme Court decision of Seldon [Seldon v Clarkson Wright and Jakes (A Partnership) [2012] UKSC 16 (25 April 2012)] in 2012.

In that decision, the Supreme Court said that when you are defending a claim of direct age discrimination, an employer must put forward legitimate aims that have social policy objectives in nature.

Examples of social policy aims include aims relating to employment policy, the labour market and vocational training. There cannot be purely individual reasons specific to the employer so, for example, cost reduction or improving competitiveness because these are not going to satisfy that public interest test.

Examples we have seen in case law as successful legitimate aims have tended to focus on inter-generational fairness:

- access to employment for younger people;
- helping the movement of different generations though the workforce;
- efficient planning for departure and recruitment of staff; and
- inter-generational fairness in employment opportunities.

What we have also seen in the case law is that aims based on dignity are less likely to get traction as a defence. Even if an employer establishes legitimate aims, they still must be
proportionate, they must go no further than necessary. Again this comes back to weighing the discriminatory impact on the employees as against the stated legitimate aims.

**New ACAS Guidance**

The ACAS guidance came out in February 2019 on age discrimination and sets out some really helpful reminders of key points around age discrimination.

It explains various types of age discrimination (direct, indirect harassment and victimisation) and runs through the various scenarios where age discrimination may happen (recruitment, training, promotion, pay, terms and conditions of employment, performance management, redundancy, retirement, dismissal and flexible working).

But, in terms of what we are specifically looking at in this article, the ACAS guidance is a useful reminder that employers must not have different terms and conditions of employment because of an employee's age or perceived age. But also recognising that there are circumstances where different pay, redundancy pay and benefits are allowed, for example the national minimum wage or redundancy payments that follow the statutory redundancy payment scheme.

The standard or default retirement age was removed in 2011 so an employer cannot, for example, dismiss someone simply on the grounds of reaching a certain age.

Employers can retain a normal retirement age, but to do so must in itself be objectively justifiable and these are, in our experience, very rare and very employer specific. As such, employers should assume that employees will remain in the workforce for longer so benefits should not be removed for employees who remain with the business when they reach a certain age unless there are strong objective justification grounds to do so.

**Judges and Firefighters Discrimination Cases**

While we are going to use judges and firefighters in the same instance, that is not because they all participate in the same pension scheme but because the specific cases, because they involved similar issues, were eventually heard together and looked at together by the Court of Appeal.

The Court of Appeal decision in judges and firefighters came out just before Christmas 2018. The Government decided across the board to reduce pension costs across the public sector. That was in response to a review of public sector pension provision in 2011.
by Lord Hutton which made recommendations for pension arrangements that were more sustainable and affordable in the long term.

In response to that report, a number of changes were made across public sector schemes. In the case of judges from the 31 March 2015, the Judicial Pension Scheme was closed and replaced with a New Judicial Pension Scheme.

At the same time, the Firefighters' Pension Scheme was closed and replaced with the New Firefighters' Pension Scheme.

In both cases the new arrangements that were replacing the old ones were less generous. For example, they included lower accrual rates (so people built up less pension in them), they had a higher normal pension age and pension was calculated on a career average basis rather than final salary which is generally less generous for people.

In both instances, transitional protections were put in place to protect some scheme members from the impacts of these changes. In both cases, younger pension scheme members (i.e. those who are further off from retirement) were not offered any protection against the impact of the reforms and this resulted in a lot of them being very unhappy.

More than 200 judges and 6,000 firefighters brought claims before the Employment Tribunal saying that they were treated less favourably than those who were offered protection on the grounds of age and that this less favourable treatment could not be objectively justified.

Interestingly, in these cases, female claimants also made a claim for equal pay under the sex equality rule on the basis that the transitional provisions disproportionately adversely affected women.

Certain claimants brought claims of indirect sex and race discrimination on the basis that these transitional protections put women and black and minority ethnic claimants at a particular disadvantage. That is essentially because they have entered the profession later so were generally younger.

This is interesting because it does not really occur very much in the pensions world in particular. There was not a final conclusion on this issue and there did not really need to be because, as we will come on to see, they were successful in their age discrimination claims.

We now need to consider what were the transitional protections, as the challenge really was on these rather than on the change as a whole?
Broadly, the transitional provisions put in place in both schemes gave some active members of the existing and more generous scheme full or partial protection under that scheme by reference to the member's age.

Older members who were closer to retirement had full protection in terms of their pension rights. What that meant was that they were allowed to remain in their current and more generous pension arrangements and they continued to build up benefits on that basis up to retirement.

Members who were slightly younger had some protection which reduced year on year and that was known as the ‘tapered protection group’.

Members who were younger still (and who would reach normal retirement age after a certain cut off) were offered no protection at all.

The claims came from the unprotected and the tapered protection groups, who argued that the decision to exclude them from either the tapered or the full protection group was age discrimination.

There was a huge financial impact of this different treatment for younger pension scheme members. It was estimated that, for a firefighter who was too young to benefit from the transitional protection, they would need to invest approximately £16,000 to £19,000 a year to provide the same benefits as older members who had been given the same protection.

For judges, because of the combination of the fact that the younger members had no protection, but also the fact that the new pension arrangement offered to them was on a different and less generous tax basis, the costs were estimated to be around £30,000 a year for them to be able to provide similar benefits.

Clearly quite a huge financial impact and, as in many cases involving age, the key question here was whether those transitional protections were objectively justified (i.e. were they a proportionate means of achieving a legitimate aim)?

The Government, the Ministry of Justice and the Secretary of State, argued that the transitional protections were designed to protect those who were closest to retirement from the financial effects of the reform. There was speculation that older judges would be more likely to have fixed or concrete plans for retirement which would be difficult to change.

There was also an element of treating all public pensions people consistently because there had been a ten year protective period incorporated into other agreements with trade
unions and other public sector workforces.

There was also talk of a 'moral and political aim' of being fair to those closest to retirement. In the firefighters' case, they argued that the moral and political arguments simply 'felt fair'.

When these cases first went to the Employment Tribunal there were actually contradictory outcomes.

The Employment Tribunal in the judges' case found in favour of the judges and said 'yes, this is age discrimination'.

Whereas, in the firefighters' case, they came to an opposite conclusion (i.e. different tribunal judges making these two decisions). They concluded that actually there was a legitimate aim, it was objectively justified - therefore it was fine in the case of the firefighters.

Both decisions were appealed to the Employment Appeal Tribunal who found in favour of the judges and the firefighters (but for different reasons than the Court of Appeal).

The Court of Appeal held that that the transitional protections were unlawful - they could not be objectively justified and, in both cases, the failure was on legitimate aims (i.e. establishing the first part of the objective justification test).

There are some interesting comments in the Court of Appeal judgment on the margin of discretion. These cover the correct approach that should be taken when looking at objective justification where the state has a legitimate interest in the issues (i.e. where you have got a public policy interest - so that a margin of discretion is not completely open and does not just allow them to name whatever legitimate aim they want with no evidence behind it).

Both younger judges and firefighters had been discriminated against in this instance.

Key was the fact that there had not been sufficient evidence to support the rationale for these provisions. In the case of judges, the court found that there was just no evidence that older judges need more protection in terms of their pension than younger judges.

It could very much be argued the other way - that the older judges have had the more generous benefit rule for longer, they may need less protection that the younger judges.

In the case of firefighters, although there had been claims that it felt right to protect older firefighters and that the decision to do so was a moral decision, the court said 'no, that is
not good enough - you just do not have the evidence here’.

Having failed at that first hurdle of the objective justification test, the court only actually looked at the issue of proportionality pretty briefly. In relation to judges, it commented that, in fact, the younger judges were worse off because they had no protection but also worse off because of the tax status of the new scheme was in itself a disproportionate means of business achieving any legitimate intended aim.

The key message here is do not assume your legitimate aim will be taken as read by a Tribunal. Can you show evidence behind why that legitimate aim is important and why it actually applies to your business?

The Government is now seeking leave to appeal the Court of Appeal's decision to the Supreme Court.

If they are unsuccessful ([in proceedings before the Supreme Court] if they are granted appeal) then there will be some serious cost implications. One estimate I have seen says that this could cost the Government in the region of £4 billion per year to sort out.

They will need to compensate those who are in the non-protected or tapered groups for the less favourable treatment that they have received as well as working out what they are going to do going forwards - how do they sort this out going forward? Do they level up or level down the benefits?

There will need to be more consultation presumably with the workforces so it is all potentially very messy.

And what about if you are a private sector employer? Some might think that while the public sector is a bit of a mess it does not affect them, but this is probably incorrect.

You may have a broadly comparable scheme in place that is based on a public sector scheme where you may have put in transitional provisions to mirror those that exist in the public sector scheme. If those public sector scheme transitions fall down, then you will need to revisit your own broadly comparable scheme.

Equally, you may have just done a past closure exercise on a completely private scheme and had transitional provisions going into that exercise and some of the arguments that have been applied in the judges' and firefighters' decision will also impact you. They may be opened up to scrutiny.

**What about future benefit liability management**
There has been a bit of a trend in the past of compensating older workers - looking at cushioning the blow for those who are closest to retirement, making sure they are not too badly affected because they have really started to focus on and look at their retirement.

If you introduce transition provisions for one particular category based on their age are you just opening yourself up to unnecessary risk on an age discrimination basis?

The Court of Appeal has given guidance on a situation where invested share options are lost or retained depending on the employee's age. This may sound like quite a specific point but the decision is also a very helpful reminder of how best to defend yourself against allegations of direct age discrimination.

Mr Cockram was a long standing employee of Air Products plc. He retired from the company and he was aged 50 at the time of his departure.

Whilst in employment with Air Products he had been a member of the company's Long Term Incentive Plan (the LTIP). Under this [plan] he was offered stock options.

At the time of his departure from the company he had unvested options. These options were forfeited because he left the company at age 50. Now, had he retired aged 55 or over, he would not have lost those unvested options and this was because there was a retirement exception in the LTIP's rules which said that unvested stock options would not be forfeited had the employee left employment on or after the customary retirement age and, for the company, the customary retirement age was age 55.

Mr Cockram bought a claim of direct age discrimination. In particular he was not happy because he personally had a protected pension age of 50 in his defined benefit pension scheme with the company. He felt that he should have still had those share scheme options available to him when he left at age 50 from the company.

Air Products accepted that the rule in the LTIP was direct discrimination. It was direct discrimination because an employee in the same position as Mr Cockram but aged 55 at the time of his departure rather than age 50 would not have forfeited the unvested stock options under the retirement exception. But Air Products sought to objectively justify the award such that it was not unlawful. It was relying on two main reasons.

The first was inter-generational fairness and consistency. Air Products wanted consistent treatment between employees in its defined benefit scheme and its separate defined contribution (DC) scheme.
Air Products said that members of the defined benefit scheme were already in a more favourable position than the DC members because, firstly the defined benefit pension was more generous and also a number of the defined benefit members could already take their pension at age 50 rather than 55 which was the case for the defined contribution members.

If employees who were in the defined benefit scheme were also able to retain their unvested LTIP awards when they left the company at age 50 (rather than 55 as with the rest of the workforce) this would be increasing their advantage over defined contribution members and the inter-generational unfairness already existing.

To keep the retirement exception applicable to all employees assuming a customary retirement age of 55 promoted this intergenerational fairness.

The second reason that Air Products put forward was rewarding loyalty and experience.

It said the purpose of the LTIP (and this particular provision) was to strike a balance between encouraging retention of employees up to a point but then providing an incentive to retire in order to create opportunities for younger employees so there is that social policy element that I was talking about earlier.

Air Products said the cut-off point was legitimately age 55 and that was the customary retirement age.

The Employment Tribunal rejected Mr Cockram's claim. It accepted that the discriminatory effect was objectively justified taking into account those stated aims of the employer.

Mr Cockram then appealed to the Employment Appeal Tribunal and it said the Tribunal's decision was wrong and sent it back to be reheard by a differently constituted Tribunal. It then went up to the Court of Appeal. The Court of Appeal agreed with the original Tribunal decision and dismissed Mr Cockram's complaint.

Importantly, the Court looked at that guidance previously mentioned in the earlier decision of Seldon in considering whether social policy objectives existed when the employer was looking to objectively justify its direct discrimination.

The Court of Appeal accepted that those 'good leaver' provisions could be objectively justified. It accepted that the employer's legitimate aims of achieving inter-generational fairness and consistency were legitimate aims.

Inter-generational fairness is a broad objective, it can be framed in lots of different ways.
depending on the circumstances. The Court of Appeal accepted that limiting advantage enjoyed by one age group over another is a legitimate social policy aspect of inter-generational fairness.

The consistency point was important because the Court of Appeal also agreed that although Mr Cockram personally had a protected pension age of 50, which meant he could take pension scheme benefits at that time, most members of the scheme of the defined contribution scheme could only take their pension from age 55. It was fine for the employer to take a consistent approach to the LTIPs’ customary retirement age.

The Court of Appeal also accepted that the submission around rewarding experience and loyalty was also appropriate and it wasn’t disproportionate in its application here. The Employment Appeal Tribunal had been wrong to overturn the Tribunal's original decision.

Although the decision in Cockram was looking at the very specific terms of one employer’s share scheme, the Court’s guidance was really helpful to reassure employers that well thought out rationale of the practices can be a solid defence to an allegation of age discrimination.

In particular, as we have seen Cockram provides a helpful reminder of the potentially legitimate aims when an employer is faced with a claim of age discrimination and many of those aims such as creating a balanced workforce, promoting recruitment of younger workers can be summarised as inter-generational fairness.

On the other hand, cost saving alone is not a legitimate aim. Employers do need to look at other reasons as to why it's put in place that practice.

If they do have a legitimate aim, employers need to show that their actions are proportionate. It comes back to that balancing exercise and evidence will be important to demonstrate this and support the employer’s defence.

**How can insured benefits be provided to employees in a way that doesn't fall foul of the age discrimination legislation?**

When the default retirement age was removed in October 2011, there was lobbying from employers who feared that they would be exposed to age discrimination claims because they said it was just simply too expensive to provide continued health, medical and life insurance cover to employees who were older than 65.
There was a wider concern from the Government that an employer could simply withdraw these types of benefits wholesale across the workforce because of the increased cost in offering them to older employees.

As a result, we had changes in 2011 to the legislation, and there is a very specific exemption which allows employers to withdraw insurance or a related financial service to employees aged 65 or over state pension age, if greater.

What this means, essentially, is that an employer can stop offering group risk insured benefits when provided through a third party insurer to employees once they reach age 65 or state pension age (if greater). There are some quirks you should be aware of in the exemption.

Firstly, unless the employer is itself an insurer, the exemption only applies where the insurance is provided by way of arrangement with a third party. So the exemption only bites where the employer has taken out those benefits through a third party insurer.

If the employer self-insures, it covers the cost of the death benefit itself, it wouldn't be covered by this specific exemption. If it chose to stop offering a self-insured benefit to an employee, it won't get the benefit of the exemptions protection and it would need to objectively justify any decision to stop them applying the benefit if this was connected to the employee's age.

Secondly, a separate quirk of the exemption is that it is only framed by reference to the employer stopping providing the benefit. It is relatively common in our experience that employers offer these types of benefits through occupational pension schemes which may have their own insurance policies underwriting these benefits.

The exemption doesn't refer to trustees holding insurance and so it's never been clear whether trustees of a pension scheme would also benefit from the exemption. But, in our view, if a trustee board was faced with a claim of age discrimination by a scheme member in relation to a decision to stop providing this type of benefit because of the member's age, we would expect that the trustees would be able to piggy-back or rely on employer's objective justification defence in order to defend themselves.

Finally, the exemption doesn't protect an employer if it chooses to stop providing the insured benefit at an older age that is not the employee's state pension age or 65, so for example, at age 70. At that point again, the employer would need to look at those objective justification grounds to stop providing the benefit at that age.

If an employer doesn't have objective justification grounds for withdrawing the benefit at
that age, an alternative option may be to choose to self-insure in respect of the employee from age 70 rather than run the risk of age discrimination claims.

**What can employers take away and learn from age discrimination case law?**

Hopefully, you will consider age discrimination if you're making any changes to benefit structures within your workforce and don't forget about indirect age discrimination as well as direct.

Check the exemptions, there are some contained in the Equality Act (which Liz covered earlier) and there's also a specific set of exemptions that applies to pension schemes. But don't be fooled into thinking that that can therefore apply to anything you're doing in relation to your pension scheme because, as I demonstrated through the analysis on the judges and firefighters, it will not necessarily apply to transitional provisions when you are changing your pension scheme.

Consider objective justification and remember there are two limbs to this test, so you need to satisfy both in order to show that a practice is objectively justified.

Case law really spells out that you need to test your legitimate aims - so what evidence do you have? Are they specific to you as an employer. If it's direct discrimination, do you have a wider social policy objective?

Although you can articulate or come up with your objective justification after the event, it's probably preferable to do it when you're thinking about the actual practice so that you know what evidence you might have in relation to it.

In conclusion, think through your legitimate aim - will it stand up to scrutiny?

Don't just pick a legitimate aim that you've seen in a case that looked and so it was very persuasive because it needs to be in relation to you and your workforce.

Think about proportionality. Consider whether there's a less discriminatory way of achieving that aim. In the judges' and firefighters' case, the fact that there was such a huge financial impact can't have helped at all.

Finally, think about whether or not something's just feeling just a little bit too easy? When you're looking at benefit restructures or changes, don't be fooled into selecting an easy option by listening to one particular group of the workforce who might be particularly vocal.
and say it’s unfair, if you actually have no evidence behind that so don't go for a short-term gain which could result in long-term pain in terms of having to defend an age discrimination later down the line.

NOT LEGAL ADVICE. Information made available on this website in any form is for information purposes only. It is not, and should not be taken as, legal advice. You should not rely on, or take or fail to take any action based upon this information. Never disregard professional legal advice or delay in seeking legal advice because of something you have read on this website. Gowling WLG professionals will be pleased to discuss resolutions to specific legal concerns you may have.