

Justified retirement provisions

Most employers have long since removed any enforced retirement provisions from their standard terms and conditions. This was in response to section 13 of the Equality Act 2010, which made it directly discriminatory to have any provision for enforced retirement. This is however subject to an exception, in that an enforced retirement clause can be allowed if the provision can be objectively justified as a justified retirement age. In the higher education sector, there are only three universities that have default justified retirement ages in place- The University of Oxford, The University of Cambridge and University of St Andrews.

If an employer wishes to have a fixed retirement age, it must be able to show that:

- It is intended to meet a legitimate aim.
- Having the particular retirement age meets that aim.
- It is proportionate to use that retirement age as a means of meeting that aim.

In terms of what can amount to a legitimate aim, The Supplement to the EHRC Code states that legitimate aims should "promote inter-generational fairness and dignity" and provides the following examples:

- Promoting access to employment for younger people.
- The efficient planning of the departure and recruitment of staff.
- Sharing out employment opportunities fairly between the generations.
- Ensuring the mix of generations of staff so as to promote the exchange of experience and new ideas.
- Rewarding experience.
- Cushioning the blow for long-serving employees who may find it hard to find new employment if dismissed.
- Facilitating the participation of older workers in the workforce.

Case law on retirement claims has also provided that the following aims may be deemed to be legitimate for the purpose of justifying a compulsory retirement age: avoiding performance management procedures for older workers; having an age balanced workforce; workforce planning; and helping to increase the diversity of the workforce. It was this last aim of increasing the diversity of its academic staff that was the focus of a recent claim against The University of

Oxford. Professor Pitcher, an authority on Elizabethan and Jacobean drama and poetry, brought a claim against the University of Oxford in relation to the decision by the University to end his contract on the grounds on retirement (Pitcher v Chancellors, Masters and Scholars of the University of Oxford and another ET3323858/2016). Professor Pitcher alleged that he had had to "satisfy an unreasonably high threshold test" by establishing that he is "virtually indispensable to the university". At the time that Professor Pitcher brought his claim, the default retirement age for the University was 67. This has now been raised to 68.

In defending the claim, Oxford stated that its retirement age for senior academics was for the purpose of promoting "inter-generational fairness and improvements in diversity". Oxford also highlighted that academics can apply to the university to work beyond this in "exceptional circumstances". Judge Bedeau said that the Professor Pitcher case addresses the "much vexed question" for employers of how to create opportunities "for the advancement of those in its workforce from different backgrounds to achieve their full potential" whilst at the same "balancing the needs and interests of those in senior positions who desire to remain employed".

In analysing this decision, it is firstly important to note that each case is of course dependent on its facts, and so universities should not just assume that they will also be successful with such arguments or justifications for implementing an enforced retirement provision.

Oxford had carried out an exhaustive consultation process that involved assessing the potential impact of a compulsory retirement provision before implementing the retirement age. Further, it had specifically done so with the aim of increasing the diversity of its academic staff and promoting access to employment for younger people. Oxford argued that a default retirement age helps to create a more diverse workforce in that the younger academics are more likely to be female or BME, whereas the older academics are overwhelmingly white and male.

It remains to be seen as to whether other universities will follow suit in implementing a justified retirement age now that there is a high-profile decision to draw from, but Oxford's experience undoubtedly provides some guidance for the sector.