entitlement to a remedy are clearer and its range of remedial tools more helpful (Scots are confined to capital awards). But the greater flexibility of the Scottish legislation in shaping the quantum of the remedy is beneficial.

As Lady Hale remarked, there was in fact never any need to evaluate the Scottish experience to justify reform south of the border. But sadly it seems that the judges' increasingly compelling calls for a statutory rescue of Mrs Burns and her ilk from the uncertainty and unfairness of the law of trusts, and to replace that with a fairness-based regime directly focused on the demands and realities of the family context, will remain unanswered for some time yet.

JO MILES

UNFINISHED BUSINESS IN COMPULSORY RETIREMENT AGES

IN 2011 the Coalition government changed the face of UK retirement policy almost overnight by abolishing the national default retirement age ("DRA"). While this has left many employers in a state of limbo, employers may still adopt an Employer-Justified Retirement Age ("EJRA") to manage the end of the employment relationship. The case of *Seldon v Clarkson Wright & Jakes (A Partnership)* [2012] UKSC 16, [2012] I.C.R. 716 is one of the first to provide some indication of what will be sufficient to justify an EJRA.

In *Seldon* the Supreme Court considered the appeal of a lawyer who claimed he was subjected to direct age discrimination when compulsorily retired from his partnership at age 65, in accordance with the partnership deed. Lady Hale, with whom the members of the court agreed, concluded that the retirement provision could be a justified form of age discrimination. The court referred the case back to the Employment Tribunal ("ET") to ascertain whether the particular retirement age adopted was proportionate.

Under the Employment Equality (Age) Regulations 2006, SI 2006/1031 (since replaced in similar terms by the Equality Act 2010), both direct and indirect age discrimination may be objectively justified if they can be shown to be a "proportionate means of achieving a legitimate aim". Prior to 2011 the Regulations also allowed employees at or over the age of 65 to be dismissed on the basis of retirement: reg. 30. Consequently, 65 became the DRA under that regime. In the *Seldon* case, however, this DRA did not apply, as the firm's partnership deed applied to partners and not to employees. The retirement provision therefore needed to be justified as necessary and proportionate in the interests of the partnership.

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The issues to be considered by the Supreme Court included: (1) whether the aims identified by the ET were capable of being legitimate aims; (2) whether the firm had to justify the application of the retirement clause in this particular case; and (3) whether relying on the retirement clause in this case was a proportionate means of achieving those aims.

In relation to point (1), the court concluded that the UK had decided to give employers and partnerships the flexibility to choose which objectives to pursue, so long as these objectives: (a) could count as "legitimate objectives of a public interest nature"; (b) were consistent with the state's social policy aims; and (c) the means used to achieve the objectives were proportionate. This implies that while it is for states to identify broad social policy aims, employers may articulate and apply those aims as they relate to their particular circumstances. It is unclear whether this interpretation of "legitimate aims" is consistent with Article 6(1) of Directive 2000/78/EC which provides that *member states*, as opposed to employers, may provide that differences of treatment on the grounds of age shall not constitute discrimination in certain circumstances (see further Barnard, [2011] C.L.J. 304).

In relation to the actual aims identified by the ET as justifying the retirement provision in this case – ensuring associates were given the opportunity of partnership after a reasonable period; facilitating workforce planning; and limiting the need to use performance management to remove partners, thereby contributing to the firm's "congenial and supportive culture" – the court noted that each of these aims had been recognised by Luxembourg as legitimate social policy aims. The aims could also be related to the circumstances of the firm, making them legitimate in this particular case. In his additional comments, Lord Hope noted that while the aims were directed to the firm's own best interests, this did not prevent them being legitimate social policy aims. This implies that employers will be able to identify fairly readily their legitimate aims to support a retirement policy.

In considering point (2), the court held that where a general rule is justified, the application of the rule to a specific case would also generally be justified. This appears to imply that a rule will only need to be justified in the particular circumstances of the business, not upon each application of the rule. As a result, the firm did not need to justify the application of the retirement rule to Mr. Seldon personally.

Finally, in relation to point (3), the court noted that the ET had not considered whether a retirement age of 65 was proportionate, as opposed to a retirement age more broadly: "there is a difference between justifying *a* retirement age and justifying *this* retirement age" (at [68]). As a result, the case was referred back to the ET to consider this question.

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Since the passage of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069 and abolition of the DRA, employers may only implement an EJRA if it can be objectively justified. As a result, the decision in *Seldon* has implications for a large number of employers, as it is likely to guide the treatment of employee retirement ages more broadly going forward, a point Lady Hale expressly recognised.

As it stands, *Seldon* indicates that employers will be able to justify an EJRA with relative ease. It appears that employers will be easily able to identify legitimate aims to justify a retirement age, so long as these aims can be proved to be relevant to the employer's particular circumstances. This will be particularly straightforward where the organisation has a hierarchy with limited senior positions, as is the case in a law firm. However, it may be more challenging to prove that the actual retirement age adopted is a proportionate means of achieving these aims. Following the abolition of the DRA, employers may find it more difficult to justify 65 as a proportionate retirement age given the government has deemed a DRA of 65 to no longer be appropriate for the general workforce. The ET's further consideration of the *Seldon* case is unlikely to provide guidance on this issue, given the DRA was still in place at the time of Mr. Seldon's retirement.

The *Seldon* judgment appears consistent with the existing Luxembourg jurisprudence and, in fact, went to great lengths to show that it was on all fours with this case law. However, in considering whether preserving employees' dignity was a legitimate objective, the court expressed its concern that using the aim might perpetuate stereotypical ideas of the capacity of older workers (at [57]). The court appeared to feel constrained by the Luxembourg jurisprudence, which has endorsed preserving dignity as a legitimate objective (at [58]). As a result, the judgment did not pursue this concern further.

Similarly, the Supreme Court failed to engage with some of the other, broader issues raised on appeal. In argument, the court itself raised concerns that the proportionality test was very fact sensitive, necessitating an ET determination before individuals could "know where they stand". While some general guidance on how the test might operate was obviously desirable, the court noted that it was unsure how to give general guidance and, indeed, failed to provide any guidance in its final judgment. By narrowing the issues to be considered in this way, the court has missed an opportunity to clarify the law in a way that might assist employers and workers. As a result, it is unlikely that the *Seldon* judgment will resolve the on-going uncertainty in this area, making future challenges to retirement ages practically inevitable.

At a more fundamental level, the judgment proceeded from the assumption that "age is different" to other protected characteristics

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(at [4]; see also *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] I.C.R. 704), on the basis that age is not an unchanging or acquired attribute. Rather, age changes over time since it is a universal and temporal phenomenon. While this assumption is reasonable and well-recognised, the court concluded from this assumption that younger and older workers would benefit from the same laws over time, reducing the discriminatory impact of age-specific employment measures. However, there is increasing recognition that younger and older workers are unlikely to be subject to the same provisions over the course of their working lives as laws continue to change and evolve. Further, the same laws may affect generations differently due to the historical and cultural differences between age groups. By failing to engage with these critiques, the *Seldon* judgment relies on unstable assumptions that may serve to undermine the Court's reasoning.

The *Seldon* case suggests that employers will be able to justify an EJRA fairly readily, seeming to indicate that default retirement ages will remain a feature of UK employment law. However, anecdotal evidence appears to indicate that some employers are abandoning fixed retirement ages, instead dealing with employees on a case-by-case basis. Given the limited guidance provided by the *Seldon* judgment regarding when a fixed retirement age will be proportionate, it remains to be seen whether employers are willing to take the risk of continuing to rely on fixed retirement ages. The *Seldon* judgment leaves the law in an uncertain and ambiguous state, probably requiring further judicial intervention to resolve the Court's unfinished business.

ALYSIA BLACKHAM

PARAMOUNTCY AND THE ECHR: A CONFLICT RESOLVED?

FOR over a decade now, questions have been raised as to the compatibility of the paramountcy of children's interests under the Children Act 1989 and the Adoption and Children Act 2002, as interpreted by the English courts, and the requirements of article 8 of the European Convention on Human Rights (ECHR).

As many commentators have argued, the approach to decision-making, the method of reasoning and potentially the result are fundamentally different under these laws. The English law requires the judge to start from the premise that the child's welfare will be the "sole consideration" and thus will determine the outcome (*J v C* [1970] A.C. 688), and consider the rights of other parties only as far as they contribute to promoting the child's best interests. On the other hand,

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