OUT WITH THE OLD

Two major age discrimination cases are set to be heard in the US Supreme Court; they may offer a glimpse into the future for both US and UK employment law, say James Cox and Eugene Scalia

The 2007-08 term of the United States Supreme Court promises to be one of the most important in years, in the area of labour and employment law. The court has agreed to hear 10 labour and employment cases this term, more than in any recent year. Some of the cases are likely to become leading precedents with important long-term implications — these include cases on states' ability to restrict employer opposition to union organising campaigns, and on retaliation or victimisation of employees who report discriminatory conduct.

Two of the more important US cases this term involve age discrimination. There are a number of significant differences between age discrimination laws in the US and the UK, the most notable being that US law only protects workers over the age of 40, whereas the UK age regulations protect workers of all ages. But both of these Supreme Court cases present questions of interest in both jurisdictions, and may provide a glimpse of future developments in an area of UK law that today is relatively unexplored.

The first of the age discrimination cases, *Kentucky Retirement Systems v EEOC*, is a suit by the federal government challenging the retirement plan for employees of the State of Kentucky. Under the plan, normal retirement is available after 20 years of service, or at age 55 with five years of service. A retiree's benefit equals 2.5% of his final annual compensation multiplied by his total years of service — akin to a final salary pension scheme in the UK.

For employees who become disabled, the plan offers a special 'disability retirement' that treats the employee as if he had worked until the first available retirement milestone, and determines the amount of his benefit accordingly. The effect is that under Kentucky's plan, a 46-year-old with 10 years of service who becomes disabled is credited with nine additional years of service, which gives him 19 years' service for the purposes of determining the amount of his benefit. By contrast, a 55-year-old with 10 years of service who becomes disabled is credited with no more service, since he is already eligible for retirement.

In the case before the Supreme Court, the federal government is suing Kentucky and claiming that its retirement plan discriminates on its face against older workers: if you are retirement age and become disabled you are credited with no additional years of service and are ineligible for disability retirement. By contrast, a younger worker who started the same day as you can be credited with many years' service and could receive a much larger retirement benefit.

Kentucky responds that its plan is not intended to discriminate against older workers, but merely to provide a safety net that ensures that no worker is prohibited from qualifying for retirement because of disability. Moreover, Kentucky argues, it is reasonable to assume that a 45-year-old employee would have worked for 10 more years if not for his disability, whereas it is far less likely that a 55-year-old worker would have stayed in the workforce until age 65. The law prohibits arbitrary discrimination, Kentucky says, and the policies underlying its retirement plan are eminently reasonable.

The *Kentucky* case illustrates one of the challenges of age discrimination laws in both the US and the UK. There is widespread acceptance in both countries that legitimate reasons virtually never exist for treating male workers more favourably than women, or whites more favourably than blacks. But there are numerous circumstances where age is allowed to be considered under US law — including in benefit plans that require employees to reach a certain age before they retire. Can the principle of non-discrimination be applied in precisely the same way in age cases as in cases under other discrimination laws? In *Kentucky Retirement Systems*, the US Supreme Court may venture an answer.

The UK age regulations already recognise some of the tensions with which the US Supreme Court is wrestling. In contrast to other UK discrimination laws, the age regulations contain a broadly worked 'objective justification' defence to acts of direct discrimination, under which employers may acknowledge that they applied different rules to different age groups but can argue that doing so was objectively justified. Similarly, the regulations contain specific exemptions for practices that could have a correlation with age but that are nonetheless permitted. Many of these exemptions are in the area of pensions — including an exemption for enhanced or actuarially unreduced 'ill health' pensions comparable to the disability benefit at issue in the *Kentucky* case.

As experience with the age regulations develops in the UK, the objective justification defence is likely to present businesses and courts with conundrums similar to the one currently before the US Supreme Court. How the Supreme Court addresses it may provide insight into the approach ultimately taken in the UK.

The second age discrimination case before the Supreme Court this Term — *Meacham v Knolls Atomic Power Laboratory* — involves litigation arising out of an employer's layoff of 31 employees, all but one of whom were over 40. Under US law, as in the UK, employers who do not intend to discriminate can still be liable for employment practices that have a disproportionate impact on older workers without sufficient business justification — this is known as disparate impact discrimination in the US and indirect discrimination in the UK. When these claims are litigated in the US, plaintiffs first attempt to establish that the practice — typically, a reduction-in-force — disproportionately affected older workers. The company then defends itself by showing that the layoffs were based on a reasonable factor other than age.

The question in Meacham is, who bears the burden of showing that these other factors are 'reasonable'? At trial, the company identified criteria for picking employees for layoff that it said were the factors other than age that resulted in the employees' separation; the lower court said it was then plaintiffs' responsibility to show that these criteria were not reasonable. Before the Supreme Court, plaintiffs are arguing that it is the employer's initial burden to show both what the non-age factors were, and that they were in fact reasonable.

In the UK, the age regulations may have anticipated some of the difficulties reflected in cases like Meacham by expressly exempting certain business practices that are considered legitimate but could correlate with age. This may reduce the extent to which litigants and the courts must resolve which employer practices are permissible and which are not. However, what business practices are 'reasonable,' in the words of US law — or are a "proportionate means of achieving a legitimate aim" to quote the UK age regulations — is certain to be among the most important questions in UK age discrimination cases also.

The US Age Discrimination in Employment Act became law more than 40 years ago. As the UK awaits its first appellate decisions under its age regulations, the US experience suggests that it may be decades before some of the most significant questions under the regulations are resolved. The two cases also confirm that the rules UK courts have developed under other discrimination laws may not prove to be a perfect predictor of the rules ultimately found to be appropriate in age discrimination cases. ■

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