PARTNERSHIPS

DAVID LYTTLETON

Old age tension

With age joining the multitude of discrimination laws, firms should strive to put in place fair and effective dismissal procedures or risk having their dirty washing aired in public, say Clive Greenwood and Fergus Payne

Forcing an individual to retire against their will has always required very careful handling, but the recent age discrimination legislation means it may be even more difficult, and potentially far more public.

Over time we have seen a widespread trend to include 'no fault' or compulsory retirement provisions in the partnership and limited-liability partnership (LLP) members' agreements of professional service firms. Conventionally, this would be in addition to normal expulsion provisions for misconduct and the like, but would entitle the outgoing partner or member to a period of notice.

The agreement may or may not provide for the right to a fair hearing, although in practice things may work out differently. Issues of good faith will undoubtedly arise where the firm is a partnership and, in the case of an LLP, it is possible that the court may imply rules of natural justice, even if there is no contractual duty of good faith owed by the LLP to its members.

The purpose of such retirement provisions is, generally speaking, to enable the firm to deal with an unproductive or difficult partner. Clearly a firm needs to be wary of discrimination issues when exercising the power to require a partner to leave, not least because of the age discrimination laws.

Compulsory retirement ages

The Employment Equality (Age) Regulations 2006, which come into force on 1 October, outlaw unjustified retirement through age. Under the regulations it may be discriminatory to force a partner to retire at, say, 55 or 60 if they do not wish to go.

A retirement age may be lawful if its aim is legitimate and proportionate, but there will no doubt be arguments about the difficulty of showing that a compulsory retirement age will satisfy that test, and firms may be very reluctant to have those arguments in public. It will be interesting to see whether there are any successful claims where the mandatory retirement age is 65, given that employees, as distinguished from partners and members, can legitimately be required to retire at that age.

Professional service firms are going to need to think about removing compulsory retirement provisions at a specified age, particularly where the number in their current agreement begins with a five.

For the outgoing partner, they will usually be concerned about the relaxation of any restrictions on dealing with clients following departure and the financial consequences. Experience suggests that this is best dealt with through negotiation where sufficient goodwill survives. It would be unusual for any relaxation of a restriction in relation to the firm's partners/members and staff. The financial concerns will revolve around the speed with which unpaid profit and capital contributions are paid and the entitlement to profit during the contractual notice period.

Arbitrations

Focusing on the new right of individuals not to be discriminated against on the grounds of age also provides a timely reminder that the jurisdiction to determine discrimination claims cannot be controlled by contract so as to prevent disputes being dealt with in a public forum.

Partnership and LLP agreements invariably include a clause providing that disputes between partners, members and a member and the LLP will be determined by arbitration. Even though some of the original benefits that made arbitration an attractive alternative to court proceedings have been eroded over time, arbitration remains attractive for the vast

continued

PARTNERSHIPS

◀ *continued*

majority of professional service firms. This is due in part to a perception that the parties can appoint an arbitrator familiar with, and expert in, the business sector or area of dispute, but is more likely to be because arbitrations are held in private. It remains the case that most professional service firms do not want the adverse publicity and potential damage to their reputations that may result in them having their dirty laundry washed in public.

Where an arbitration agreement exists and the Arbitration Act 1996 applies (as it will to all domestic arbitrations), Section 9 provides that, where proceedings are commenced before the court upon application by one party, the court shall stay the court proceedings.

That is not the position in discrimination claims, and partnerships and LLPs need to recognise that an arbitration clause will not prevent an aggrieved individual from having their claim resolved in a public forum.

The right of partners and LLP members not to be discriminated against on the grounds of sex, marital status, gender reassignment, pregnancy, maternity, race, disability, sexual orientation, religious or other similar beliefs, and now age, emanate from various statutes. Careful attention needs to be paid to the precise terms of those statutes since they prevent (save in limited circumstances) those rights from being excluded by contract, including the right to bring a claim in an employment tribunal.

Going public

In relation to the tension between an arbitration agreement for the resolution of disputes and the statutory right of an aggrieved individual to bring a claim before an employment tribunal, Section 1(3) of Part 1 of Schedule 5 of the regulations makes it clear that any term in a contract that purports to exclude or limit any provision of the regulations is unenforceable. Accordingly, an arbitration agreement in a partnership or LLP agreement will not be enforceable to prevent an individual from presenting a claim in an employment tribunal and having that complaint dealt within that public forum.

There are very limited exceptions to the effect of Section 1(3) of Part 1 of Schedule 5, but it is highly unlikely that a professional service firm will, by reference to a partnership or LLP agreement, ever fall within the exceptions.

It is possible to exclude Section 36 of the regulations by way of a compromise agreement, but to create a valid compromise agreement it must relate to the compromise of a particular complaint. Consequently, the aggrieved partner or member must have identified their complaint and, as a matter of tactics, it must be anticipated that the individual will only agree to enter into a compromise agreement if it deals with the complaint in its entirety, rather than merely the forum in which the complaint will be resolved.

Given that the media is quick to publicise disputes between well-remunerated individuals in professional service firms and the potential embarrassment and PR damage that may flow from such publicity, one might reasonably anticipate that threats to launch discrimination claims in an employment tribunal will become a tactical weapon for partners or members in partnership and LLP disputes. Time will tell, but professional service firms should remember that the regulations apply to everyone, not just a particular group of people. Therefore the potential for claims is significantly greater. ■

Clive Greenwood and Fergus Payne are joint heads of partnerships and LLPs at Lewis Silkin