



BARBADOS

IN THE EMPLOYMENT RIGHTS TRIBUNAL

Case No. ERT/2018/019

Norman Grant

CLAIMANT

AND

Barbados Beach Club

RESPONDENT

DATES: October 26th, 2020

BEFORE:	Christopher Blackman Esq, GCM; Q.C	Chairman
	John Williams	Member
	Frederick Forde, Esq.	Member

APPEARANCES:

Mrs. Sally Comissiong for the Claimant; and
Ms. Tamisha Bryan with Mr. Roger Forde Q.C for
The Respondent

DECISION

1. The issue in this matter is whether termination of employment consequent to the attainment of the retirement age fixed by an employer, amounted to unfair dismissal or was a matter of age discrimination.
2. Mr. Grant, the Claimant worked with the Respondent from 1996 until 2009 when he resigned to take up other employment. On 6 December, 2010 Mr. Grant was re-employed by the Respondent in the position of Duty Manager at a salary of \$5,000.00 on an oral contract. Mr. Felix Broome, the Managing Director of the Respondent, stated both in his Witness Statement and evidence in chief before the Tribunal that he advised Mr. Grant at the time of his re-engagement, that the age of retirement in the company was 65 years. The parties are agreed that there was an understanding that the engagement would be for a period of 2 years. However, without any further formalities, Mr. Grant continued to work until October 30th, 2017.
3. On the coming in to force of the Employment Rights Act 2012 (the Act) on January 1, 2013 the Respondent hired a Human Resources Consultant to advise on the implications of the legislation. The Consultant advised among other things, that contracts of employment for the employees of the Company should be in writing.
4. According to the Witness Statement of Mr. Broome, the Claimant was sent a contract on May 12, 2014 which stated at paragraph 1.1 **“Your employment with us commenced on 6th December 2010.”** Paragraph 11 of

that document said in part ***“the official retirement age of all employees is 65 years of age.”*** The Claimant was requested to indicate his acceptance and agreement to the contract, by signing and returning it.

5. While it has been contended by the Claimant that he never received the letter of May 12, 2014, there is an acknowledgement that a letter dated 31st August, 2014 was received by him, and that paragraph 10 of that letter is in similar terms to that shown in paragraph 11 of the 12th May 2014, reproduced above, namely ***“the official retirement age of all employees is 65 years of age.”***
6. Mr. Grant admitted that he did not sign the letter of 31st August, as he had concerns about the provisions relating to the retirement age and with paragraph 14, which dealt with disciplinary and grievance procedures. He further admitted that he did not communicate any of these concerns to Mr. Broome or to anyone else in the Company.
7. According to Mr. Grant’s Witness Statement he was abruptly terminated on October 30, 2017 at about 9.15 pm. He said that Mr. Broome informed him at that time, that he understood that on October 20th, he Grant had reached the retirement age of 65 and as that was the company’s retirement age, he should then leave. The only payment made to the Claimant on termination was his accrued vacation pay.

8. Mr. Grant's claim of unfair dismissal made on November 1, 2017 was referred by the Chief Labour Officer to the Tribunal on March 20, 2018.
9. At the hearing before the Tribunal, the Claimant confirmed the accuracy of the contents of his Witness Statement. Under cross-examination, when asked about a number of employees who had left the Company in the years preceding 2017, Mr. Grant stated that with the exception of a Mr. O'Brien Edghill, he had no recall of them and further, that he was unaware of why they had left the Company.
10. Mr. Felix Broome in his evidence-in-chief said that the several persons who had left the Company in the years 2013, 2014 and 2015, had all done so when they had reached the age of 65. No evidence was led to contradict this statement.

THE LAW

11. Two seemingly contrasting provisions in the Act fall to be considered by the Tribunal. The first is that of Section 29 (1) which provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:-
 - (a) The reason, or if more than one, the principal reason, for the dismissal;
and
 - (b) That it is either a reason falling within Subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

12. By contrast, Section 30 (1) (c) (xi) provides that a dismissal of an employee contravenes the right conferred on the employee by Section 27 where the reason for the dismissal is a reason that relates to (A) the race, colour, gender, **age**,.....of the employee (**Age Discrimination**).

13. In the text on **Employment Law** 5th Edition, by John Bowers Q.C, at page 212 the learned author observed that UK legislators went to some lengths not to treat retirement as unfair dismissal. Section 109 of the UK Employment Rights Act 1996, therefore introduced the concept of 'normal retiring age' to take account of widely varying retiring ages in different occupations. In the context of Barbados, the term 'normal retiring age' is used in the **Occupational Pension Benefits Act, Cap. 350B** to mean the age specified in a pension plan as the normal retirement age of members. Section 29 (1) of that Act provides that the normal retirement age under a pension plan submitted for registration after the commencement date of the Act shall not be earlier than 55 or later than the year in which the member attains the retirement age specified in the **National Insurance and Social Security Act, Cap. 47**.

14. A quick overview of the legislation in Barbados relating to retirement makes it clear that there is not a one size fit all structure for persons in the public sector, and certainly there is none governing the private sector. For example in the Defence Force, the retirement age is related to the length of service of the member of the Force, and may also relate to the rank held by an officer at a particular time.

15. Counsel for the Claimant, Mrs. Sally Comissiong in her Written Submissions, has submitted that it was an implied term of his employment that he would be terminated only for good cause or until reaching ‘the official retirement age.’ Moreover, she contended that having regard to his managerial capacity, there was a reasonable expectation that Mr. Grant, unless dismissed for conduct, would have retired at ‘the official retirement age.’
16. Mrs. Comissiong submitted that ‘the official retirement age’ is provided for by the **Pensions (Miscellaneous Provisions) Act, Cap.25**. However, as she herself noted at paragraph 7 of her Written Submissions that legislation refers to public officers whose compulsory retirement age was standardised with the pensionable age in the 2002 amendment to **National Insurance and Social Security Act, Cap. 47** fixed at 67 years.
17. It was further contended by Counsel for the Claimant that the 2014 draft contract which purported to fix a retirement age of 65 was not binding on the Claimant as he had not signed it and therefore was not a party to it. Counsel further submitted that the **Age Discrimination** provisions of the Act were applicable in the instant case as management of the Respondent gave the Claimant notice terminating his employment because of his age. As a consequence, the dismissal was unfair.
18. Senior Counsel for the Respondent, Mr. Roger Forde Q.C. in his written submissions has however contended that the Respondent acted reasonably

in treating the attainment of the age of 65 as a sufficient reason for dismissing the Claimant, as this was in accord with the terms of the contract provided to the Claimant, and the custom and course of dealings with other employees.

19. In relation to the **Age Discrimination** provisions of the Act, Mr. Forde submitted that Section 30 of the Act is not applicable to the facts of the instant case as the evidence does not support a finding that the primary reason for dismissal was based on the age of the Claimant.
20. Mr. Forde has cited to the Tribunal the September 16, 2003 decision of the Court of Appeal of Antigua, *E. Alex Benjamin Limited v. St. Lawrence Defreitas, Civil Court of Appeal [No. 12 of 2002]* by *Saunders JA* (as he then was) that the implementation of a retirement policy by an employer, was neither unreasonable nor unfair.
21. The dichotomy reflected in the provisions of the Act considered in paragraphs 12 and 13 above, were considered in a relatively recent Supreme Court decision of the United Kingdom, *Seldon v. Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16. The issue there was a mandatory retirement age of 65 in a partnership agreement, to which Mr. Seldon was a party. However, when required to retire in accordance with the partnership deed, Mr. Seldon in March 2007 instituted proceedings before an employment tribunal alleging (inter alia) that his expulsion from the firm was an act of direct age discrimination.

22. Mr. Seldon lost his claim before the Employment Tribunal, and the Employment Appeal Tribunal and his appeal to the Court of Appeal was dismissed. The Employment Tribunal in its judgment accepted that compulsory retirement was an appropriate means of achieving the firm's legitimate aims of staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify his departure and damage his dignity. As a consequence, the Employment Tribunal in balancing the needs of the firm against the impact of the retirement provision upon the partners, concluded that it was "***a proportionate means of achieving a congenial and supportive culture and encouraging professional staff to remain with the firm.***" The discrimination claim therefore failed.
23. The Supreme Court Justices in dismissing *Seldon's* appeal, held that the aims which the Employment Tribunal accepted as legitimate, and shown in the preceding paragraph of this decision, were sound and indeed, legitimate. Their Lordships directed that the case should go back to the Employment Tribunal on the issue as to whether the choice of a mandatory age of 65 at the end of the calendar year for a retiring partner, could be lawfully and properly chosen rather than some other less discriminatory age.
24. On the re-hearing, the Tribunal concluded that the selection of the age of 65 was appropriate and was an age that none of the partners had expressed any disagreement with. This decision was appealed. However,

Langstaff J. President of the Employment Appeal Tribunal in *Seldon [No. 2]* [2014] ICR 1275 in dismissing this further appeal, noted that the Tribunal had noted that the age of 65 had been in the partnership deed for as long as could be remembered and the clause had been retained in the most recent partnership deed without discussion.

25. In the more recent UK Employment Tribunal case of *Professor John Pitcher v. Chancellor, Masters and Scholars of the University of Oxford and Saint John the Baptist College in the University of Oxford*, Case 3323858 of 2016, dated 16 May, 2019 the principles enunciated in *Seldon* above, were applied. Professor Pitcher's retirement age was 67 but he sought to extend his employment by four years to September 2020 but this request was denied. **Professor Pitcher's** claims of direct age discrimination and of unfair dismissal, were deemed not well founded and consequently were dismissed.

DISCUSSION AND DISPOSITION

26. The Tribunal is obliged to observe that the legislation relied upon by the Claimant is not applicable to the factual circumstances of this matter. The legislation relied upon refers to the public sector and this is very much a relationship between private individuals.
27. In the context of the instant case, the Claimant knew in 2010 of the Respondent's views as to retirement and which were reinforced by the letters sent in 2014. In our view the Claimant had the responsibility to

initiate the discussion on the issue of the retirement age if he had a contrary opinion as to when retirement ought to be. The position may well have been different if there had never been a written document given to the Claimant, as the hire in 2010, was done orally. The principles enunciated in *Seldon* have provided useful guidance in determining the disposition of this matter. Just as Mr. Grant knew of the Respondent's views as to retirement, similarly in *Seldon*, the age of 65 had been in the partnership deed from the time Mr. Seldon became an equity partner in 1972.

28. In the premises, the Tribunal holds that the Claimant was not unfairly dismissed. On the facts of the case, there has been no Age Discrimination. However, the Tribunal would observe that the Respondent was less than generous in giving notice to the Claimant of the intention to rely on the attainment of the age of 65 as a sufficient reason for dismissal. The Claimant was entitled to one month's salary in lieu of notice, and accordingly, the Tribunal awards the Claimant the sum of \$5,000.00 and directs that this amount be paid within 30 days of this decision.

Dated this 10th day of December, 2020.

Christopher Blackman

Chairman

John Williams

Member

Frederick Forde

Member