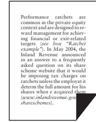
Employment briefing



Age limits in the boardroom

Can they achieve gender diversity?

As Lord Davies reported in February 2011, at the current rate of change it will take over 70 years to achieve gender-balanced boardrooms in the UK (*www.practicallaw.com/0-505-3069*) (*see box "Weblinks"*). Almost a decade ago, the Higgs review of the role and effectiveness of non-executive directors called for greater diversity among board directors, but the response on this front has been poor. Given that encouragement has failed, it is no wonder that plans are afoot to prod listed companies into increasing the number of women on their boards.

In practice, it is difficult to see how companies will be able to achieve recommendations such as 25% female board representation for FTSE 100 companies by 2015, in light of the slow rate at which vacancies arise at that level. Could a possible solution be to introduce compulsory upper age limits for directors in order to force out older individuals, which would create space for new, possibly female, directors?

Weblinks

Women in economic decision-making in the EU: Progress report,
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http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women_on_board_progress_report_en.pdf

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www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf

Women on boards, March 2012, Lord Davies,
www.bis.gov.uk/assets/biscore/business-law/docs/w/12-p135-women-on-boards-2012.pdf

UK Response to the European Commission Consultation on gender imbalance in corporate boards in the EU,
Department for Business Innovation & Skills, May 2012,
www.bis.gov.uk/policies/business-law/corporate-governance/women-on-boards

Consultation on gender imbalance in corporate boards in the EU,
European Commission, May 2012,
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Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms, Equality and Human Rights Commission, May 2012,
www.equalityhumanrights.com/uploaded_files/research/rr85_final.pdf

2011 Board of Directors Survey, Dr Boris Groyberg, Harvard Business School,
www.heidrick.com/PublicationsReports/PublicationsReports/2011BoardofDirectorsSurvey.pdf

Pressure for change

Changes to the UK Corporate Governance Code mean that, from 1 October 2012, all listed companies will have to report on any measurable objectives they have set to increase diversity, and on their progress against those objectives. But it is not likely to stop there. There has been robust criticism from Viviane Reding, Vice-President of the European Commission (the Commission), who launched a public consultation on options to redress the continuing gender imbalance on corporate boards in Europe in May 2012, and commented that self-regulation so far has "not brought about satisfactory results" (*see News brief "Women on boards: stepping up the pressure", www.practicallaw.com/2-518-6407*). The Commission will take a decision on further action later this year.

One of the options that the Commission is considering is gender quotas, which have already been introduced in Belgium, France, Italy, the Netherlands and Spain. In its response to the Commission consultation, the UK government strongly resisted legislative intervention, but even if quotas are not introduced, the pressure on companies to step up the pace at which they increase female representation on their boards is likely to grow. This is not just as a result of concerns about equality generally, but also because of calls from investors, who will be aware of the

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increasing body of empirical evidence that companies with a critical mass of at least one-third women at board level outperform their rivals with as much as a 42% higher return in sales, 66% higher return on invested capital and 53% higher return on equity.

Moreover, where a company is involved in tendering for public procurement work, diversity is sometimes used as a measure to rank possible service providers, so there may be additional commercial reasons to improve female representation for certain organisations.

Introducing age limits

In 2010, there were only 135 new appointees to FTSE 100 boards (12.5% turnover), of which only 18 (13.3%) were women. In addition, the current trend is for smaller boardrooms. Indeed, within the FTSE 100, the number of directorships fell from 1,255 in 1999 to 1,076 in 2010. If Lord Davies' recommendations are to be met, it would seem that turnover in the boardroom has to increase in order for female representation to reach anywhere near the minimum one-third "critical mass" point.

But there may be an alternative: companies could instead introduce compulsory upper age limits for directors. Relevant statistics on the relationship between gender and age in the boardroom are limited, but given that the average age of the 3,302 directors who sit on the FTSE 350's boards is 58, an upper age limit could be a useful tool for some companies to meet the need for boardroom diversity as it might create the opportunities sorely needed for women to progress. (Although, ultimately, the effectiveness of such a measure will depend on the age profile of directors and would-be directors in the relevant business sector.) But how might that sit with the prohibition on age discrimination in the workplace and boardroom?

Sections 13, 39 and 49 of the Equality Act 2010 (2010 Act) prohibit direct age discrimination against directors in their capacity as office-holders and, if applicable, also in their capacity as employees (*see box "Age discrimination claim"*). On the face of it, a compulsory upper age limit would fall foul of this rule. However, there is an exception where a company can show that its discriminatory treatment of a director is a proportionate means of achieving a legitimate aim.

Age discrimination claim

A director who is forcibly ejected from a boardroom in circumstances which amount to age discrimination will be able to bring proceedings for age discrimination under the Equality Act 2010. These claims are frequently complex and expensive to defend especially in an area where there is no judicial guidance as yet.

If successful, his compensation will be damages for:

- Injury to feelings.

- Loss of remuneration and benefits for the period of time that he can prove he would have remained an employee/director but for the discrimination, subject to his duty to mitigate (this may typically mean loss of remuneration and benefits over an 18-month period).

Such an action would also present a reputational risk for the employer.

(*For more information, see PLCEmployment practice note "Age discrimination (EqA 2010)", www.practicallaw.com/6-502-7096.*)

The nature of this exception was considered by the Supreme Court in *Seldon v Clarkson Wright and Jakes [2012] UKSC 16* (*for more information, see Briefing "Age discrimination: when can it be objectively justified?", www.practicallaw.com/7-519-6343*). *Seldon* concerned an upper age limit for partners in a law firm, but it has been interpreted more generally as meaning that justifying compulsory upper age limits is likely to be more difficult. Indeed, Lady Hale commented: "All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified".

So, applying *Seldon*, is capping the age of directors justifiable where the aim behind such a measure is to encourage boardroom diversity?

Legitimate aim. *Seldon* states that a legitimate aim is one which:

- Has a public interest nature as defined by the Equality Directive (*2000/78/EC*), which essentially means that it relates to employment policy, labour market or vocational training objectives.

- Is consistent with the social policy aims of the UK.

The government does not have a stated position on the relationship between age, gender and the boardroom. However, in light of the diversity issues at boardroom level identified by the government, it should not be difficult for a company to demonstrate that it was pursuing a legitimate aim by introducing an upper age limit for directors so as to create opportunities to appoint women.

Necessity of aim. *Seldon* further explains that the aim which underpins a discriminatory measure must be necessary as well as legitimate. That is, when seeking to achieve diversity targets, the company must, as a matter of fact, be having difficulties ensuring that a sufficient number of its directors are women. In light of the statistics outlined above, it is reasonable to assume that most companies will have little difficulty demonstrating necessity in this context.

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Proportionality. *Seldon* is clear that the final stage when analysing the extent to which an age-based rule will fall foul of the 2010 Act is to consider whether the measure is proportionate, which means that it must be both appropriate and necessary. The analysis at this stage is likely to be determinative of whether an upper age limit for directors is acceptable, and as such it requires careful unpicking.

There is a tricky passage in *Seldon* which appears to suggest that where a discriminatory measure takes the form of a generalised rule (that is, no director can be over a certain age) as opposed to a personalised rule (that is, a certain director is singled out as being too old), then the test of proportionality need only focus on the business as a whole and in the abstract, provided that the use of a generalised rule is justifiable in the circumstances.

There is limited guidance in *Seldon* as to when, and in what circumstances, it would be justifiable to use a generalised rule. However, it is our view that it would almost certainly be appropriate to use a generalised rule (that is, no director can be over a certain age) where the measure is intended to address a long-term and systemic problem such as diversity in the boardroom.

Accordingly, we consider it likely that a company which introduced an upper age limit for directors would only be required to demonstrate that the measure was proportionate in the abstract without recourse to consideration of the particular circumstances of the business at the time that the measure was exercised (for example, whether actually there are any women waiting in the wings) or any consideration of the impact of the measure on the age-barred director (for example, any significant financial hardship).

Ultimately, whether an upper age limit is appropriate and necessary in any given boardroom is going to be highly fact-specific. At present, there has been no judicial consideration of the interplay between direct age discrimination and directors, let alone in the context of boardroom diversity. However, we consider that the two questions which are likely to be determinative of the test of proportionality in this context are as follows:

- Are there means of achieving the aim of boardroom diversity without resorting to direct age discrimination?
- Is the upper age limit selected by the company the least discriminatory available?

In *Chief Constable of West Yorkshire Police v Homer*, which was handed down at the same time as *Seldon*, the Supreme Court was clear that the existence of a less or non-discriminatory means of achieving the legitimate aim in question was fatal to the question of proportionality (*[2012] UKSC 15; www.practicallaw.com/7-519-6343*). In other words, an age limit will not be proportionate if there are non-discriminatory alternatives that are as effective at increasing turnover in the boardroom.

Non-discriminatory alternatives. Theoretically, boardroom turnover could be increased by using a maximum period of tenure (say, six years), as most directors tend to sit for longer than this period. Alternatively, companies could impose caps on the number of times a director can be re-elected, which would achieve the same effect.

However, our view is that these theoretical alternatives to an upper age limit might be unattractive to investors and so lack viability. That is, we understand that it is often considered that the effectiveness of a director increases with exposure to a business and that the first few years of a directorship represent a period of learning. This would tend to suggest that limiting the period of tenure or the number of times that a director can be re-elected would be unattractive.

A different solution would be to increase the number of directorships, which would avoid the need to increase turnover as a means of creating vacancies. However, again, this will be a business decision and we consider it unlikely that investors will support excessively large boardrooms unless there are compelling commercial reasons.

So, the extent to which there are non-discriminatory alternatives to an upper age limit will ultimately be dictated by the business, but there are certainly other options which any organisation should consider and discount before moving to an upper age limit.

Selecting the appropriate limit. Assuming that a company chooses to move forward with an upper age limit, it must select an age which ensures that the aim of the measure is met (that is, the creation of vacancies) but in such a way that discrimination is minimised. The appropriate upper age limit will ultimately depend on the typical age profile of its boardroom.

For example, Company A has directors aged 65, 62, 60, 55, 35 and 33. In this scenario, an upper age limit of 65 would be the least discriminatory means of creating vacancies in the immediate present as well as over a five-year horizon. In contrast, an upper age limit of 55 would arguably be too drastic. So, in theory, it should always be possible to select a sensible upper age limit which will achieve the aim in question while also ensuring that it is not overly restrictive and discriminatory.

Taking the plunge

Whether introducing an upper age limit for directors is compatible with the 2010 Act is always going to be highly fact-specific. However, we consider that in the right commercial circumstances it will be possible to introduce these types of measures in order to create opportunities for more women to join boardrooms.

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