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Recruitment, Retention, Reward and Retirement: Age Discrimination in the Workplace

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drafting ACAS guidance on putting default retirement ages.

Introduction

1. During the last year (2009-2010), age discrimination claims in the Employment Tribunals rose by some 36%. With the removal of the default retirement age on the (near) horizon, it can fairly safely be assumed that this figure will continue to increase.

2. The introduction of protection from age discrimination – initially through the Employment Equality (Age) Regulations 2006 and now through the Equality Act 2010 – has presented a number of challenges to employers. Whether it is a public broadcasting corporation finding itself under the spotlight in the Employment Tribunal[1] or a firm of Solicitors that finds itself making new law in the appeal courts[2], the issues raised often test long-established practices and assumptions: the desirability of bringing in 'fresh' faces to front a programme or the need to have a set retirement age.

> *An Ageing Workforce - The Employer's Perspective*, by Helen Barnes, Deborah Smeaton and Rebecca Taylor, IES Report 468, October 2009: just a half of employing organisations have a formal pro-age recruitment policy; many employers are nervous of discussing age issues with workers approaching retirement; (albeit that many organisations are willing to make adjustments to the workplace in order to help retain employees when the issue is raised informally).

3. Moreover, given that we are all "people of age", this is a form of protection in which we all have a personal interest; all the more so as the removal of the default retirement age neatly coincides with proposed changes to the state pension age. And there are particular challenges to be faced by both the younger and older potential members of the labour force in the current economic climate (note ONS statistics for last year showing an increase in the numbers of

[1] *Miriam O'Reilly v BBC and anor* (2011) ET Case No. 2200423/2010
[2] *Seldon V Clarkson, Wright and Jakes* [2010] EWCA Civ 899

those under 65 'forced' into retirement). 'Age' is a protected characteristic that is likely to see each of us on both 'sides' of the fence: as potential discriminator *and* possible victim.

> In a survey conducted by the Chartered Management Institute and the Chartered Institute of Personnel and Development, 59% of respondents said that they had been personally disadvantaged at work because of their age, whilst 22% admitted that age has an impact on their own recruitment decisions. The survey also found that nearly half (48%) had suffered age discrimination when applying for jobs and 39% believe their chances of promotion had been affected by age discrimination. 63% of respondents believed that employees aged 30-39 years had the best promotion prospects. Just 2% cited 50 year-olds or above.
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> Demonstrating a potential double whammy for older female workers, the survey found that perception of how old is an 'older worker' had changed. Ten years ago, respondents cited 48 as the mean age for a female 'older employee' compared with 55 in 2005. But the perception remained that women get 'older' at a younger age. The mean age for an 'older' male employee was given as 57 in the survey, compared with 51 a decade earlier.

Age Discriminatory Recruitment

4. Certainly some of the case law demonstrates that the culture change required by the prohibition on age discrimination may take some time to establish. In *Canadian Imperial Bank of Commerce v Beck* UKEAT/0141/10, [2010] EqLR 120, the EAT upheld a finding of unlawful age discrimination where the employer had used the phrase "seeking younger, entrepreneurial profile (not a headline profile rainmaker)" notwithstanding specific advice not to use this terminology. In such a case, the EAT concluded that the language used raised, in itself, a prima facie case of age discrimination such as to place the burden of proof (i.e. that decisions taken in respect of the claimant were unrelated to his age) on the respondent.

5. On the other hand, where such language is used in an advertisement or person specification, an employer might still be able to meet the

burden of proving that – as a matter of fact – the actual recruitment process was not age discriminatory. See, *Montgomery v Sellar Property Group and ors* ET Case No. 2201918/08, where Mr Montgomery (age 53) had applied for a position advertised as being for a "dynamic young accountant" but was not short-listed. The firm was able to call evidence to demonstrate that others, older than Mr Montgomery, had applied for the post notwithstanding the advertisement *and* it had gone on to short-list one candidate who was 58 years' old. In the circumstances – however ill-advised the language that had been used in the advert – the ET concluded the decision not to short-list Mr Montgomery was unrelated to his age.

6. Ultimately, the success of any challenge in the ET will depend on the particular circumstances of the case and the credibility of the evidence called by the employer. Thus, seeking 'hands on experience' was held not to be age discriminatory in *Rains v CRE* ET Case No. 2306496/06, whereas requiring that a candidate be 'in first five years' of career' was (indirectly so), see *Rainbow v Milton Keynes Council* ET Case No. 1200104/07, as was the requirement that a candidate should show 'youthful enthusiasm ' in *McCoy v McGregor and Sons Ltd* EY Case No. 00237/07IT.

7. Finally, however, it is not enough to simply claim age discrimination in respect of job adverts referring to "school leaver" or "recent graduate" when the complainant has no actual interest in obtaining the posts in question. Where such claims are pursued by a claimant simply in the hope of being paid off, the EAT has advised that it may well be appropriate for an award of costs to be made, see *Berry v Recruitment Revolution and ors* UKEAT/0190/10/LA[3].

8. The international viewpoint may give some indication of where we can expect the case law to go. In the US, by way of example, there has

[3] And see, to like effect, *Keane v Investigo and ors* UKEAT/0389/09/SM, where it was held that this type of case could be distinguished from that under consideration by the ECJ in *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] IRLR 732.

been some recent controversy over what are said to be age-related performance problems amongst members of the federal judiciary where there is neither a mandatory retirement age nor a performance management process. On a less serious level, a 56 year old waitress in a strip bar obtained a well-publicised $60,000 settlement of her age discrimination claim related to her dismissal.

Age as a Genuine Occupational Requirement

9. As with other protected characteristics, 'age' is recognised as constituting a genuine occupational requirement in certain – limited – circumstances[4]. Under Art 4(1) of the Framework Directive, it is provided that there is no discrimination where there is a 'genuine and determining occupational requirement', which has a legitimate object and is a proportional method of achieving that objective. The issue was put under the spotlight in the German case *Wolf v Stadt Frankfurt am Main* C-229/08, where the ECJ was asked to rule on whether a German law restricting applications to join the fire service to those under 30 was compatible with the Directive.

10. The German government had submitted evidence showing that possession of 'high physical capacities' may be regarded as a 'genuine and determining occupational requirement' for employment as a fire fighter and argued that physical characteristics are related to age; it was accepted that very few people over the age of 45 would have the exceptionally high physical capacity to fight fires.

11. The legitimate object in this case was identified as being to ensure the proper functioning of the emergency services. Indeed, the Preamble to the Directive expressly records that the emergency services are not required to recruit those who do not have the capacity to carry out the full range of functions required for the particular job.

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[4] See Sched 9 para 1 Equality Act 2010.

12. The ECJ then considered the question whether the requirement met the test of proportionality. It was accepted that if fire fighters were recruited at an older age then insufficient numbers could be assigned to the most physically demanding duties and/or to those duties for a sufficiently long period of service. It is to be noted that the issue was not that all firefighters needed to be capable of such duties but rather that the overall employee profile of the fire service needed to be such that as firefighters aged in employment, they could be moved to less physically demanding roles. This profile could only be maintained if all recruits were capable of the most physically demanding roles.

13. In the circumstances, the ECJ ruled that a genuine occupational requirement had been established for the purposes of Art 4(1) and there was no need to go on to consider the question of justification for the purposes of Art 6(1).

14. The ruling in *Wolf* can be contrasted with the outcome in the ET 'justification for direct discrimination' case of *Baker v National Air Travel Service Ltd* ET Case No. 2203501/2007, where a challenge was made to the NATS imposition of an age limit for would-be recruits of 36. Mr Baker applied to be trained as an air traffic controller when he was 50, i.e. failing the age bar, although he otherwise met all the conditions. It was accepted that the age bar was directly discriminatory; the issue was whether it was justified. NATS argued that it met the following legitimate aims: ensuring that a high success rate in training was achieved; providing an adequate number of recruits; securing a reasonable period of service after qualification; and ensuring safety was not compromised. The ET was, however, unconvinced, ruling that NATS' principal objective had in fact been to maintain an age bar – something that was not a legitimate aim. Moreover, the ET held that NATS' evidence fell short of what was required to demonstrate justification. Although it accepted that NATS' decision to impose an age bar was founded upon very genuinely held beliefs as to the potential of older candidates, it held that this was simply supported by assumptions

and assertions, not evidence-based facts. The tribunal did not find that the views of the Service were necessarily wrong but that there was no or insufficient evidence to support them: *"... [NATS] may well be right. Unfortunately it does not know whether it is right or not."*

15. Although testing different 'defences' to a directly age discriminatory measure ('genuine occupational requirement' on the one hand, justification for direct age discrimination on the other), the tests applied were essentially the same. The different outcomes can be explained by the apparent quality of the evidence in one case (*Wolf*) and the absence of evidence in the other (*Baker*). It provides a salutary lesson for employers who have failed to test the assumptions that underlie potentially age discriminatory policies.

16. The GOR applied in the ECJ highlights one of the differences that applies only to age discrimination: age changes and is a continuum. The GOR (or its relatives under the old statutes and regulations) related to a role rather than a moment in time – a restaurant waiter or an actor might be required to be of a particular race or sex for authenticity reasons.

17. However, a great deal more circumspection would have been thought appropriate before attempting to use statistics in relation to a GOR as occurred in *Wolf*. One might have thought that an assertion that, for example, women were less strong than men and bricklayers needed to be strong would not have amounted to a GOR justifying discriminatory recruitment.

18. The answer may lie in the very curious approach adopted in *Wolf*. To domestic eyes, what was described as a GOR in that case was nothing more than an objectively justified instance of direct discrimination. To regard such a recruitment policy as a GOR that is outside the scope of the requirement for objective justification is an approach that is most unlikely to be replicated in a domestic court.

Age Discrimination or Simply the Realities of Life?

19. One of the (conceptual) difficulties in age discrimination cases often arises in defining the real cause of the treatment complained of. The point is illustrated by the case of *Homer v Chief Constable of West Yorkshire Police* [2010] IRLR 619, CA, in which Mr Homer – a 61 year old legal adviser – sought to challenge the introduction of a criterion that, in order to be the top grade of legal adviser (and to be paid as such), an employee had to have a law degree. Mr Homer's complaint was not that this had a disproportionately adverse effect on all employees in his age group (60-65) but that such employees were placed at a 'particular disadvantage' as they would not have time to complete the degree course on a part-time basis before they reached their employer's retirement age.

- Supreme Court appeal this year
- Key case on indirect discrimination

20. If adverse impact is to be measured by its effect in practice then it might seem that Mr Homer's complaint was well-founded. Whether or not it was theoretically possible that those in the age group 60-65 might meet the criterion, in practice those employed by the respondent who fell within that category would be unable to obtain a qualification (and, therefore, promotion), which would have been open to younger employees.

21. The Court of Appeal, however, saw the position differently. Like the EAT before it, the appeal court concluded that it was not the PCP that was the obstacle but the proximity of his impending retirement.

- Also questions about group raised.

22. We can all understand the decision but arguably it avoids the real question: retirement is inextricably linked with age; Mr Homer's impending retirement (pursuant to the mandatory retirement age maintained by his employer) was purely a consequence of his age. How was his inability to complete the necessary course not similarly so linked?

23. Looked at in another way, it becomes an issue of causation: unless the detriment arises from the application PCP rather than age, there is no indirect discrimination.

24. Perhaps the argument would have been very different if the DRA had already been abolished: in such circumstances, there would have been no particular disadvantage because Mr Homer could have carried on working till 80 thus giving him time to complete his degree. This gives credence to the Respondent's argument that it was not his age, per se, that was the problem.

25. *Homer* has been appealed to the Supreme Court and is supported by the EHRC.

Removal of the Default Retirement Age

26. In July 2010, the Government commenced consulation on the abolition of the Default Retirement Age. This Consultation proposed abolition of all of the mechanisms surrounding the DRA and phased abolition of the DRA itself from April 2011.

27. In a Response of January 2011, BIS have announced that it is following through on its proposals.

28. In short, the approach is to be as follows.

29. The mechanism for notifying employees of impending retirement may be used until 6 April 2011 (but any notification after 1 April 2011 will be at best futile).

30. From that point onwards, the mechanisms in Schedule 6 of the EE(A)R (which were left in place by the Equality Act) will be abolished and no notifications after that date will be pursuant to the statutory scheme.

31. Any dismissal occurring by reason of a prior notification will be capable of being a fair dismissal and will not amount to age discrimination if takes effect before 1 October 2011.

32. Thereafter, retirement will cease to be a potentially fair reason for dismissal, but the use of an objectively justified mandatory retirement age will amount to SOSR.

33. The short notice retirement notifications pursuant to Schedule 6, paragraph 4 will cease to b a means of avoiding age discrimination with effect from 6 April 2011.

34. In addition, the right to refuse to employ somebody over the age of 64 and 6 months is to be abolished.

35. However, group risk insured benefits (e.g. life cover, PHI, health insurance) are to be subject to a carve out from the Age Regulations. It is proposed that employers will be entitled to refuse to provide such benefits to employees over the age of 65, with that age rising in line with the state pension age.

36. Conversely, no such alterations are to be made to shares schemes or occupational schemes but for very different reasons.

37. In relation to share schemes, most now provide for retirement to render one a good leaver. The Government simply states that it is for employers to define when someone is a good and bad leaver and otherwise ensure that the schemes are not discriminatory and it is not for it to interfere. It may not be straightforward to deal with the increasingly common situation of an employee "retiring" as a good leaver and then commencing in competition or otherwise create age-related accelerated vesting or retention provisions.

38. In relation to pension schemes, the Government has expressed the view that the definition of pensionable age does not give rise to discrimination issues and thus no changes need to be made.

39. The Government Consultation assumes that *Seldon* in the Court of Appeal is the last word in relation to justification of mandatory

retirement ages. It provides that employers may be able to justify such provisions.

Reward and Retention

40. For many employers – particularly in the public sector - length of service provides a useful means for determining reward, whether in respect of pay (a traditional characteristic of public sector pay) or other benefits (common amongst public and private sector employers). It is already established that this can have a gender discriminatory effect that requires some kind of justification (see the lead cases on the point, *Cadman v UK* Case C-17/05 [2006] ICR 1623 and *HSE v Wilson* [2009] EWCA Civ 1074) and this impact is likely to be all the more so in terms of age. During the consultation process leading to the Age Regulations it became apparent that requiring employers to objectively justify all forms of service related forms of remuneration would be immensely unpopular and may in fact lead to the withdrawal of many such benefits. These considerations led the government to introduce a different test for justifying service-related benefits, which sets a lower standard for employers to meet - see Equality Act 2010 Sched 9 para 10[5] – and which was the subject of an attempted challenge before the Cardiff ET in *Harrison and ors v MoD and ors* ET Case No. 2403651/08.

41. In *Harrison*, the ET held that the test of justification in such cases had both subjective and objective elements, following the approach taken by the Court of Appeal in *Rolls Royce v Unite.*, and was less arduous than that to be applied when seeking to justify other forms of age discrimination. It further held – agreeing with the MoD in these respects - that the test was compatible with the Directive as it was itself objectively justified in the circumstances (the requirement of objective justification being imposed on the Member State as legislator and not on employers, even if public sector)

[5] Formerly reg 32(2) Age Regs.

42. Although length of service benefits may be used by employers for many good reasons – e.g. to reward loyalty, encourage retention or to protect independence – such pay systems will still come under scrutiny where they have a discriminatory effect. The point is illustrated in the Austrian case of *Hütter v Technische Universität Graz*, in which the ECJ ruled that a rule that led to lower pay for younger civil servants was not proportionate and was therefore not justifiable age discrimination.

43. Problems may also arise where pay protection arrangements lead to indirect age discrimination, see *Pulham v London Borough Barking and Dagenham* UKEAT/0516/08. In that case, whilst the EAT was prepared to distinguish between the use of pay protection arrangements in age discrimination cases from those in equal pay cases, it held that the Tribunal still has to consider whether the arrangements were proportionate and remitted the case to the ET on this point.

44. Key to determining whether a potentially discriminatory reward scheme might be justified is the proper identification of the purpose behind it. So, in *Kraft Foods Ltd v Hastie* [2010] UKEAT/0024/10/ZT, the EAT considered a cap on the employer's ('exceptionally generous') redundancy scheme was justified given that the purpose of a redundancy payment was to compensate for loss of the earnings that would otherwise have been received by staying in the employment. Given this, it followed that it was a legitimate aim to impose a cap on redundancy payments to ensure that employees did not receive more than they would have earned had they remained in that employment. In Mr Hastie's case, as he was 62 when he applied for voluntary redundancy, that meant a reduction in his redundancy payment under the scheme: he was around 2 ½ years away from normal retirement, so his award was reduced by some £13,600 as this was the amount by which it would otherwise have exceeded the sum that he could have earned by not being made redundant.

Justifying Age Discrimination Without the DRA[6]

45. Currently, of course, the big issue in age discrimination is that of the removal of the default retirement age. Many have predicted very challenging times ahead as employers can no longer rely on retirement as a means of avoiding difficult (and possibly undignified) performance issues with older members of the workforce. Can any comfort be derived from the availability of a defence of justification to direct age discrimination?

46. The point arises head on in the case of *Seldon v Clarkson, Wright and Jakes* [2010] EWCA Civ 899, [2010] IRLR 865, CA. Mr Seldon was a partner in a firm of solicitors and had signed up to a partnership deed that provided for a retirement age of 65 – something Mr Seldon's partners held him to when he reached that age. Mr Seldon complained to the Employment Tribunal of age discrimination. The Tribunal found against him, a decision broadly approved by the EAT, which identified three legitimate aims upon which the firm could rely: ensuring the creation of opportunities for associates to make partner (a retention issue); facilitating workforce planning, and congeniality (i.e. maintaining a congenial environment by avoiding the need for performance management). The EAT considered, however, that the Employment Tribunal had insufficiently considered the question of proportionality in respect of the last of these possible justifications and therefore remitted the case back for further consideration on that issue, the problem being that advancement of that aim was predicated on an enhanced risk of low performance amongst workers over the age of 65 and that premise was not justified by evidence.

47. Mr Seldon appealed to the Court of Appeal, where his case took a different turn. He now argued that the firm's objectives were illegitimate as – in the light of the decisions of the ECJ and of Blake J in the *Age*

[6] In so far as viewpoints are expressed in this paper on the correctness or desirability of the decision in *Seldon*, they are the views of Jenny Eady and not of Tom Croxford. Tom Croxford's input on this aspect has been limited to identifying the principal issues which arise or are likely to arise.

UK (formerly Heyday) litigation[7] - justificatory aims had to be of a 'social policy/public interest nature' and it was simply insufficient to rely on the particular business aims of the employer.

48. The argument is founded upon Article 6 of the Equal Treatment Directive (2000/78/EC), which provides:

> Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonable justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

49. One might think that the language of Art 6 makes plain that it is directed at the Member States, which are – within these terms – permitted to legislate so as to allow employers to justify age discrimination on individually justified grounds. Mr Seldon's argument contends otherwise[8], relying in particular on a passage in the Judgment of Blake J in *Age UK*, as follows:

> "... the social aims that the government relies on are ones in which the state enjoys a wide margin of appreciation. Whereas the individual employer justifying particular practices or treatment in reliance upon that social aim has a much more rigorous task ...".

50. Although it is to be noted that, earlier on in his Judgment, Blake J had stated:

> "there is no reason to believe that in the special context of age discrimination, the kind of business practice reasons that can justify indirect discrimination are fundamentally different from those that can justify direct discrimination".

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[7] [2009] ECR I-1569, ECJ and [2009] EWHC 2336 (Admin).

[8] An argument that was taken for the PCS-backed Claimants in the challenge to reg 32(2) Age Regs in *Harrison and ors v MoD and ors* before the Cardiff ET. The argument was unsuccessful and the ET held that reg 32(2) was compatible with EU law.

51. In the event, the Court of Appeal rejected Mr Seldon's appeal, holding that his arguments confused the justification of direct age discrimination in particular cases (i.e. as would be applicable to the employer or partnership) with the justification of national legislation. It would be unnecessary for an employer or partnership to invoke social policy aims in individual cases; it would be sufficient that the aim relied on is within or consistent with the social policy that justifies regulation 3 of the Age Regs; as were all three of the aims identified by the EAT in this case.

> "an aim intended to produce a happy work place has to be within or consistent with the Government's social policy justification for the regulations"

52. In seeking to pursue the point to the Supreme Court, Mr Seldon is supported by Age UK, which has placed reliance on the ECJ's decision in case *C-45/09 Rosenbladt v Oellerking Gebaudereinigungsges mbH,* 12 Oct 2010. It is argued that *Rosenbladt* demonstrates that justification of a general rule for retirement requires:

- Evidence and not assumptions as to the promotion of the aim relied on.
- Evidence and not mere assertions as to the risk that an employer states it has to avoid.
- Evidence of a proper balance in any negotiations leading to an agreement relating to retirement.

53. The issues identified on the putative appeal fall into a number of different categories but all resolve to a fundamental point: how hard should it be for an employer to justify direct age discrimination?

54. The legitimate aims issue resolves in one of three ways:

(1) a private employers' aims must be high level state or social policy aims. This is difficult for an employer to show in any event, and it would be most unlikely for an employer to need any particular policy to advance such aims;

(2) a private employers' aims must be consistent with the Government's social policy in enacting/retaining the general justification provision (this was the approach adopted by the Court of Appeal);

(3) a private employers' aims need be no different to those of an employer justifying an indirectly discriminatory PCP. This approach seems rather closer to the views expressed in *Woodcock.*

55. If the first view on legitimate aims were to be accepted, it would have a radical affect on the ability of employers to deal with schemes where there is existing intergenerational unfairness. Much of the argument in the Court of Appeal revolved around the revision to the Freshfield's partners' pension scheme that formed the subject of the case of *Bloxham v Freshfields Bruckhaus Deringer Case No 2205086/2006.*

56. Freshfields did not have a formal pension scheme but rather a percentage of profits were granted to each retired partner with a cap on the overall percentage of profits that were payable to retired partners. The effect on the present and projected pension entitlements was thus affected by the age profile of the existing and retired partners. Because of the dramatic change to the size of Freshfields (which moved from 21 partners in 1971 to 511 in March 2006), younger partners could see that existing pensioners were in receipt of far more generous pensions than they could expect to receive because of the future effect of the overall cap on payments to pensioners. This was viewed as intergenerational unfairness.

57. As a result, the firm sought to alter its pension arrangements to reduce the degree of intergenerational unfairness. Mr Bloxham was one of the older existing partners whose prospective pension entitlements were to be amended, as a result of which he would receive less than he would have done under the old arrangements but, as an individual in a transitional age-based cohort, more than the younger partners could expect to receive when they retired. He brought a claim alleging unlawful age discrimination which was unsuccessful before the Employment Tribunal and not the subject of appeal.

58. The relevance to the dispute on legitimate aims is as follows:

(1) Freshfields had no aim which could be seen as a state-level social policy aim when seeking to amend its pension arrangements;

(2) Its aims were private and aimed at reducing intergenerational unfairness within the partnership and, thereby, recruiting and retaining younger partners;

(3) Mr. Seldon in the Court of Appeal accepted that Freshfields had no social policy aims as defined by him. For that reason, it was asserted that Freshfields could not justify any amendments to the pension arrangements even where they were necessary to remedy intergenerational unfairness;

(4) It was asserted on behalf of Mr. Seldon that Freshfields had two options under the Regulations as implemented: either

i. Implement the alterations to the pension scheme prior to the coming into force of the Regulations in October 2006; or

ii. Dissolve the entire partnership and recommence it on different terms.

(5) This was said to be the fault of the Government in enacting Regulation 3 in the way that it did.

59. It was submitted by Clarkson Wright & Jakes and by the Government as intervener that such propositions were both unreal and unnecessary:

(1) Many pension arrangements and many other benefits depend upon, in essence, the sharing of a "pie" of a fixed or limited size. Amendments to such schemes of sharing may be necessary to reflect and reduce intergenerational unfairness;

(2) Such an alteration to the means by which a "pie" is shared will often result in direct discrimination against particular age groups who have been in receipt of relatively advantageous terms;

(3) To suggest that no such variation is possible is to condemn groups of people to continued unfairness;

(4) The wording of Regulation 3 required no such conclusion;

(5) Thus, to be made good, the principle needed to be derived from European Law as an overriding principle;

(6) No such principle could be so derived.

60. If *Seldon* is accepted by the Supreme Court, much argument on legitimate aims is likely to centre on *Rosenbladt v Oellerking Gmbh, Case C-45/09*, in which the ECJ handed down judgment on 12 October 2010, after submission by *Seldon* of his application for permission to appeal but before, as stated above, Age UK lodged its application to in intervene with the Supreme Court.

TC: Out of line with other ECJ judgments. Mangold Palacios

61. In that case, Mrs Rosenbladt worked as a cleaner for a private company, Oellerking. She was forced to retire at the age of 65 pursuant to a contractual term incorporated into her contract by virtue

of a collective agreement of general effect within the commercial cleaning sector.

62. The central part of the ECJ's judgment is on one view seen in Question 2 of the referring court and the ECJ's answer:

> *Does national legislation that permits the State, the parties to a collective agreement and the parties to an individual employment contract to provide for the automatic termination of an employment relationship upon reaching a specific fixed age (in this case: 65), contravene the prohibition of age discrimination laid down in Article 1 and Article 2(1) of [Directive 2000/78] if, according to established practice in place for several decades in the Member State, clauses of this type have consistently applied to the employment relationships of nearly all workers, regardless of the economic, social and demographic situation and the situation actually prevailing on the employment market?*
>
> *... the answer to the second question is that Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national provision such as Paragraph 10(5) of the AGG, under which clauses on automatic termination of employment contracts on the ground that the employee has reached the age of retirement are considered to be valid, in so far as, first, that provision is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, second, the means of achieving that aim are appropriate and necessary. The implementation of that authorisation by means of a collective agreement is not, as such, exempt from any review by the courts but, in accordance with the requirements of Article 6(1) of that directive, must itself pursue a legitimate aim in an appropriate and necessary manner.*

63. In answering that question, the ECJ noted and stated as follows:

surprising in light of Palacios. ECJ backing away from member state retirement

(1) "The authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age cannot, generally, be regarded as unduly prejudicing the legitimate interests of the workers concerned." – paragraph 47;

(2) The relevant clause of the collective agreement, according to the employers, "was intended to give priority to appropriate and foreseeable planning of personnel and recruitment management over the interest of employees in maintaining their financial position" – paragraph 59;

(3) The referring court had found that the clause had "the aims of facilitating employment for young people, planning recruitment and allowing good management of a firm's personnel, in a balanced manner according to age." – paragraph 60;

(4) These objectives were "legitimate" within the meaning of the directive –paragraph 62;

(5) "By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus the reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment." – paragraph 68;

(6) Without any specific evidence being put forward to the ECJ as to why 65 was chosen rather than some other age, other than the fact that a state pension was available at that age, the ECJ held that a compulsory retirement age of 65 was justified – paragraph 77.

64. It is also to be noted that the German Government submitted to the ECJ in *Rosenbladt* (as noted at the end of paragraph 43 of the judgment) that mandatory retirement avoided the need for humiliating performance management processes for older workers. The ECJ did not seek to repudiate the views of the German Government in this regard. In this respect, as in the belief that mandatory retirement mitigates youth unemployment, the German Government is firmly out of line with the views of the Coalition Government as expressed in the consultation response on the abolition of the DRA.

- Accepted now, in this case + Palacios
- Would future gov take different view?

65. The other critical issues raised in *Seldon* are as follows:

(1) to what extent is it necessary to show that the application of a mandatory retirement age to an individual is necessary? The EAT and the CA were of the view that once there is a rule that is justified little more needs be shown. Mr Seldon argues that it is necessary to show that the application of that particular rule to that particular individual at that particular moment must also be justified by individual reasons rather than by reasons related to the benefit of having such a rule;

(2) what level of evidence is necessary when identifying the particular age of retirement? In particular, is it necessary to show by evidence that 66 would be markedly worse for the employer than 65?

66. On this latter point, the ECJ have acepted the justifiability of mandatory retirement at 65 in a number of cases: *Palacios de la Villa, Age Concern* and *Rosenbladt* all being significant and oft-cited parts of its jurisprudence.

67. One could argue that the approach adopted by the ECJ in retirement cases is markedly less interventionist than in other age discrimination cases of which perhaps the best recent example is *Kücükdeveci v Swedex* [2010] IRLR 346 in which the ECJ held that statutory minimum notice periods that were service related but accorded no weight to

service prior to the age of 25 were unjustified. It seems to have given relatively short shrift to the arguments that young workers were less affected by dismissal and were more flexible and that making it easier to dismiss young workers assisted in recruitment.

68. A decision on the application for permission to appeal to the Supreme Court is awaited.

Justifying Age Discrimination: Cost

69. As with complaints of sex discriminatory pay, very often the 'solution' to the problem of age discriminatory terms and conditions might lie in finding the funding to extend the benefit to those in the disadvantaged group. Inevitably this is not a 'solution' for most employers as the funds are simply not available. Indeed, the cost implications of widening the membership of the advantaged group are often the real reason for the continuing disparity in indirect discrimination cases. The difficulty is that admitting this does the employer no favours.

70. Simply relying on 'cost' as the justification for the gender based pay differential is essentially just to re-state the problem and it is for this reason that cost alone is generally seen as not providing a good defence[9].

71. That has particularly been the case for public bodies, where it has been said that the government – from which funding is derived – has a "notionally bottomless purse", *Cross v British Airways plc* [2005] IRLR 423. On the other hand, the EAT in *Cross* allowed that there might still be scope for relying on cost as a contributing factor, i.e. 'cost plus'.

72. This was the approach adopted in *Redcar and Cleveland Borough Council v Bainbridge* [2007] IRLR 91[10], where the EAT ruled that the Employment Tribunal had been entitled to find that the employers were

[9] And see the ECJ approach to this question in ***Kutz-Bauer v Freie Und Hansestadt Hamburg*** C-187/00 [2003] IRLR 368 and ***Steinicke v Bundesanstalt Fur Arbeit*** C-77/02 [2003] IRLR 892).

[10] And see the discussion in *Armstrong No.1* [2006] IRLR 124 and *Tyne and Wear Passenger Transport Executive v Best* [2007] ICR 523.

justified in not applying a productivity scheme that was enjoyed by the advantaged – predominantly male – group (refuse collectors) to the disadvantaged – predominantly female – group (caterers), on grounds that included the financial costs involved.

73. But, can such a defence be permissible in circumstances in which it is known that ring-fencing a particular benefit for the advantaged group and not extending it to the disadvantaged group will maintain a discriminatory pay differential? See *Middlesbrough Borough Council v Surtees (No.1)* [2009] ICR 133, CA, in which pay protection arrangements for the advantaged group for a transitional period could not be justified as they had not been extended to the disadvantaged group notwithstanding the fact that they perpetuated an unjustified discriminatory pay differential. An Employment Tribunal has, however, concluded that an employer's inability to afford to extend pay protection arrangements to the (predominantly female) disadvantaged group can amount to a good defence notwithstanding the fact that it effectively entailed "sanctioning the continued discrimination against women", see *Nichols v Coventry City Council* Birmingham ET, 23 Sep 2010 [2010] EqLR 252. For the Tribunal, the cost of extending pay protection - some £20 million over five years - was obviously relevant, as was the fact that the pay protection arrangements enabled the Council to secure a non-discriminatory pay structure for all its employees for the future.

74. Moreover, the current President of the EAT has raised the question whether *Cross* was actually correctly decided on the issue as to whether cost alone might not be an objectively justified explanation for an otherwise discriminatory course of conduct (see *Woodcock v Cumbria PCT* UKEAT/0489/09/RN, 12 November 2010).

75. This latter point has long been raised as a specific point in relation to age discrimination because it arises in rather starker form in relation to age related benefits. As is noted above in relation to the abolition of the DRA, providing life cover to an 85 year old employee is rather more

expensive than providing the same cover to a 35 year old employee. If the employer is obliged to provide them on equal terms it will provide the benefit to neither party.

76. On the arguments presently being advanced by the EHRC and Age UK in the proposed appeal to the Supreme Court, it would be arguable that an attempt to amend the general level of benefit provision granted to employees because of the costs of providing those benefits to older workers would be incapable of being justified.

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OLD SQUARE CHAMBERS

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