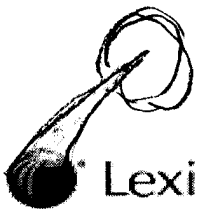

AGE DISCRIMINATION

MWB Regent St, Liberty House, 222 Regent St, London

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DRA ABOLITION – WHAT LIES AHEAD?

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ROBIN ALLEN QC[1]

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Introduction

1. Under the Age Regulations 2006,[2] provided they followed a simple procedure, employers were able to retire employees at 65 and above, without fearing that they would be made subject to proceedings for age discrimination or unfair dismissal. As a result 65 became known as the Default Retirement Age ("DRA").

2. The DRA is now being abolished by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011(SI 2011 No. 1069) ("the Abolition Regs.").[3]

3. The Equality Act 2010 will now become the source of the new age discrimination law relating to employment.[4] This paper will address what lies ahead for employers and employees and their advisers.

The transition from 65 as the DRA to a new policy context

4. The choice of 65 as the age for the DRA was a direct result of a long-established national employment policy. It was connected to the age at which men were able to access a state pension, and flowed directly from

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[1] Head of Cloisters Barristers' Chambers, 1 Pump Court, Temple, London EC4Y 7AA United Kingdom. Telephone: 020 7827 4000; Fax: 020 7827 4100; DX LDE 452; Email: ra@cloisters.com Member of the editorial committee of the Equality Law Reports.

[2] Employment Equality (Age) Regulations 2006 (S.I. 2006 No. 1031)

[3] http://www.legislation.gov.uk/uksi/2011/1069/contents/made In Northern Ireland the repeal takes effect through The Employment Equality (Repeal of Retirement Age Provisions) Regulations (Northern Ireland) 2011 (SI 2011 No. 168).

[4] See http://www.legislation.gov.uk/2010?title=equality

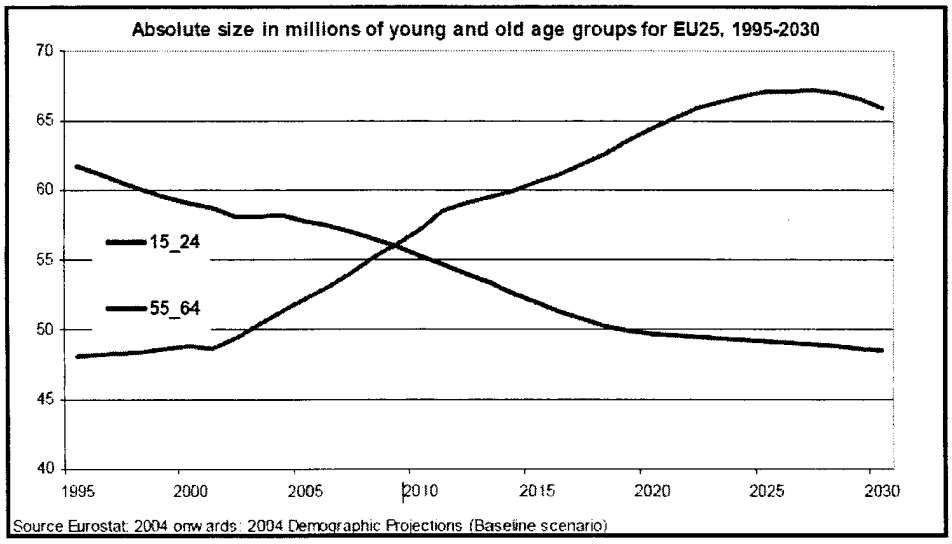
what had been the default maximum age at which men and women could claim protection from unfair dismissal and redundancy payments.

5. These policies were formulated at a time at which it was not well understood that average expected longevity at 65 was increasing and would accelerate, and that the demography of the UK would change profoundly. In other European countries similar choices of national retirement ages had been made for the same reasons. However these certainties have now gone.

6. Across Europe it is now increasingly well recognised that there is a need for older workers, even in an age of unemployment. This is because the workforce of the Union is aging rapidly and the relationship between the generations is altering fast.

7. This point was made recently by the European Commission in a Green Paper which looked at the policy consequences of this demographic change.[5] This chart – taken from the Green Paper – summarises the wider policy context. It looks at what are sometimes called the first and last ordinary cohorts of working age showing how 2009 was a transition year –

GRAPH 5: SIZE OF THE YOUNGEST (15-24) AND OLDEST (55-64) WORKING AGE GROUPS



8. The Commission's Green Paper explained that –

> In 2050 there are expected to be 66 million persons of 55-64 and only 48 million of 15-24. This means that the working age population will start declining soon after 2010 and that the labour market will increasingly

[5.5] "Confronting demographic change: a new solidarity between the generations", Brussels, 16.3.2005 COM(2005) 94 final.

have to rely on older workers.

9. This fact, above all else, explains why giving substantive effect to the law against age discrimination is going to be increasingly important.

10. Fortunately there is another point that is also reflected in this chart. This is that across Europe average longevity is increasing very fast, so that there is a pool of older workers on which member states can call but whose economic well being must also be underpinned.

11. This increase in longevity is happening incredibly fast. In the UK a person celebrating their 65th birthday today is, on average, going to live more than 2 months longer than a person who was 65 on the same day one year previously! So at this rate during a current expected working life of say 30 - 40 years expected longevity of retirees has increased by 6 or more years.

12. It is the economic consequences of these facts which ultimately have caused the Government to legislate for the state pension age for women to be equal to that for men by November 2018, with an expedited increase from April 2016. Moreover state pension age will rise to 66 years in the period from December 2018 to April 2020 and thereafter it is proposed that it will rise to 67 and 68.[6]

13. It is also these facts that had caused some of us to see the abolition of the DRA at 65 as a necessary and appropriate inevitability. It has been discussed for years, was contemplated from before the Age Regulations 2006 were made, and promised by politicians during the last election. I am delighted to say that it is now a reality not because it creates work for lawyers, but because unless we work longer we shall all suffer economically, and the abolition of the DRA makes this easier to achieve.[7]

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[6] These changes are set out in schedule 3 to the Pensions Act 2007 at http://www.legislation.gov.uk/ukpga/2007/22/schedule/3. See also the discussion at the AGEUK website at http://www.ageuk.org.uk/money-matters/pensions/how-the-pensions-bill-will-affect-you/?ito=2255&itc=0&gclid=CJuk5ab1m6kCFQoa4QodxRsiuA "Under the current rules, the State Pension Age for women is in the process of rising from 60 to 65 to equalise with men; and then state pension age for both men and women was due to increase from 65 to 66 between 2024 and 2026. The Pensions Bill is bringing forward the timing of equalisation and the rise in the State Pension Age from 65 to 66 for both men and women. •Under the new legislation, women's state pension age will reach 65 by November 2018. •The rise from 65 for both men and women will begin in December 2018 and reach 66 by April 2020."

[7] The proposed changes to the default retirement age are particularly dear to me having been involved in litigation designed to bring this about for ten years or so: *Harvest Town Circle Ltd v Rutherford* [2001] IRLR 599, [2002] ICR 123, EAT, *Secretary of State for Trade and Industry v Rutherford (No 2)* [2006] IRLR 551, [2006] ICR 785, (Case C-388/07) *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory*

14. However its implications are only just beginning to become clear to those who have to consider them. The DRA did not just reflect state retirement age it was also widely used as a "proxy" for health and competence.

15. Once the DRA is fully abolished an employer has to decide whether he or she still wants to use a specific age as a proxy for anything. Some may not and may simply decide that they will ignore age and let their employees chose when and how they wish to retire. Others may not and may decide that they will wish to keep a specific retirement age for various reasons. As I explain below if they do it will have to be justified. It will become what we will learn to call an Employer Justified Retirement Ages ("EJRA").

16. Even where a business does not have a specific universally applied retirement age, an employer may sometimes wish to make *ad hoc* decisions to retire employees and want to know what it can do lawfully to force an individual to retire at some point.

17. It is interesting that there seems to be some strong evidence to suggest that employers are responding very quickly to the new legal landscape - post the abolition of the DRA - by doing away with retirement ages.

18. Thus John Eccleston reported in Personnel Today[8] on the 31 May 2011 that -

> **More than two-thirds of employers responding to the 2011 XpertHR retirement survey intend to allow their employees to retire whenever they wish, following the abolition of the default retirement age (DRA).**
>
> The survey also found that, out of 157 organisations surveyed, only one will use an employer-justified retirement age, using succession planning as the legal justification.
>
> A quarter of those surveyed took action to retire employees whom it would previously have allowed to continue working, during the transitional period prior to the abolition of the DRA. The action, sparked by fears relating to the departure of older workers under the new legislative regime, affected a total of 242 employees from 41 organisations in the survey sample.
>
> Other findings included:

Reform [2009] IRLR 373, [2009] ICR 1080 and *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] IRLR 1017, [2010] ICR 260.

[8] http://www.personneltoday.com/articles/2011/05/31/57663/majority-of-employers-will-allow-workers-to-choose-retirement.html

- 32% of respondents are as yet undecided as to the form their retirement policy will take;
- 38% of the organisations have been reviewing other policy areas that need amending as a result of the change in retirement law; and
- performance management and capability procedures have been reviewed or changed at 23% of the organisations, pension and benefits at 17%, and succession planning at 12%.

The survey also looked at which communication tools employers use to facilitate dialogue with employees on the subject of retirement. The most popular method is a one-to-one discussion between individual employees and line managers, which is already in place at 31% of organisations, and will be introduced at a further 33%.

Some 31% of the employers will be introducing training for line managers on communicating with employees about retirement plans. Just 4% already have this type of training in place.

19. In my presentation I shall aim to share with you the insights that I have gained from talking to employers, employees and trade unions about these issues and so what the abolition of the DRA means. I shall look at the law and where help can be found and explain what more we might expect from Europe!

20. More change is on the way; the Government is currently considering the results of a formal consultation on a much wider range of prohibitions on age discrimination in relation to the delivery of goods and services that are expected to become law early next year.[9]

21. To start however it is necessary to explain the transition to the new post DRA era and to put the prohibitions on age discrimination into its wider legal context.

The age provisions of the Equality Act 2010

22. The old Age Regulations 2006 ceased to have force from the 1st October 2010 and will only apply to cases of discrimination occurring before then.

23. "Age" is now defined in section 5 of the Equality Act 2010[10] -

> (1) In relation to the protected characteristic of age—

[9] See http://www.equalities.gov.uk/equality_act_2010/age_consultation_2011.aspx
[10] For a guide to the Act see ed Wadham and others, Blackstone's Guide to the Equality Act 2010, OUP 2010.

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

24. Direct age discrimination is defined by section 13 thus -

13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

25. Thus the Equality Act permits employers to seek to justify direct age discrimination. This is unlike any other ground of discrimination. Age has been treated like this because the government has derogated from European law. The effect and scope of that derogation has been litigated as I explain below and is still somewhat controversial.

26. Indirect age discrimination is defined in the same way as for all other grounds by section 19, harassment by section 26 and victimisation by section 27.

27. At present only age discrimination in the employment field is unlawful.[11] The Equality Act includes provisions enabling a ban on age discrimination in the provision of services to be introduced, however those provisions were not commenced on the 1st October 2010.

28. The DRA established by the Age Regulations 2006 was initially continued in the Equality Act by Part 2 of Schedule 9.

How the default retirement age is being abolished

29. From the start the new government in its Coalition Agreement underlined the importance that equality issues are to have in the new

[11] Provision is of course made for genuine occupational qualifications which may include age to be required lawfully. This needs to be considered in any case in which age discrimination is alleged: see Part 1 of Schedule 9 to the Equality Act.

administration.[12] One chapter of the Coalition Agreement contained a specific employment related equality promise to be rid of the default retirement age ("DRA") though it linked it to its proposals in relation to pensions -

> **23. PENSIONS AND OLDER PEOPLE**
>
> ...
>
> We will phase out the default retirement age and hold a review to set the date at which the state pension age starts to rise to 66, although it will not be sooner than 2016 for men and 2020 for women.

30. After a period of consultation the Department of Business Innovation and Skills announced what the government intended to do in *Phasing out the default retirement age: January 2011.*[13]

31. Despite a good deal of lobbying from business groups the government decided to move to a swift abolition. The effect of the Abolition Regs is that from the 1st October 2011 there will be no more DRA. The only concession of any substance that has been made has been that certain kinds of benefits will be outside the scope of age discrimination legislation.

32. These are

    a. insured benefits for income protection, life assurance, and sickness, and

    b. accident insurance, including private medical cover.[14]

33. Concern was also expressed about the difficulty of identifying "good" and "bad" leavers for the purposes of employee share schemes. However

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[12] See my key note speech to the ILS Oxford Conference 2010 - "The Equality Act 2010: Exploring The Limits To The New Consensus On Equality"

[13] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11-536-phasing-out-default-retirement-age-government-response.pdf

[14] See paragraph 14 of schedule 9 to the Equality Act as amended by the Abolition Regulations which says "Insurance etc. 14.—(1) It is not an age contravention for an employer to make arrangements for, or afford access to, the provision of insurance or a related financial service to or in respect of an employee for a period ending when the employee attains whichever is the greater of—(a)the age of 65, and (b) the state pensionable age. (2) It is not an age contravention for an employer to make arrangements for, or afford access to, the provision of insurance or a related financial service to or in respect of only such employees as have not attained whichever is the greater of— (a) the age of 65, and (b) the state pensionable age. (3) Sub-paragraphs (1) and (2) apply only where the insurance or related financial service is, or is to be, provided to the employer's employees or a class of those employees— (a)in pursuance of an arrangement between the employer and another person, or (b) where the employer's business includes the provision of insurance or financial services of the description in question, by the employer. (4) The state pensionable age is the pensionable age determined in accordance with the rules in paragraph 1 of Schedule 4 to the Pensions Act 1995."

the government has said that it has no plans to make any exception in relation to these.

Key points about the new post DRA era

34. The key points are

- The new regulations take effect from 6 April 2011.
- From this date, employers are no longer able to issue notifications of retirement using the DRA procedure.
- Where notifications have already been made prior to 6 April, employers will be able to continue with the retirement process as long as the retirement is due to take place before 1 October 2011.[15]
- No retirements using DRA procedure will be possible after 1 October 2011.
- Employers can still have their own retirement ages which if justified will not be age discrimination (i.e. EJRAs).
- The removal of the DRA will also involve the removal of the current rule which allows employers to refuse to employ an applicant for a job vacancy who is aged 64 years and 6 months or more.
- Employers will need to objectively justify any maximum recruitment ages, including where these relate to an objectively justified retirement age.
- An employer who dismissed an employee in consequence of the employer's own retirement age which is justified so that it is not unlawfully discriminatory will not *automatically* be fair.
- This will however be a potentially fair reason on the basis of being some other substantial reason ("SOSR")
- However the fairness of relying on such a reason as a SOSR will need to be established.

Official guidance

35. There is now a wealth of guidance from state agencies on dealing with the new post DRA era -

- A starting point to access this guidance is the "Employing Older Workers" page on the DWP's Business Link website.[16]
- The DWP also published *"Good practice case studies: Managing without a fixed retirement age"*[17] in January 2011 aiming to provide guidance by reference to practice developed by different companies that had already committed to employing older workers.

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[15] See Regulations 5 - 9 of the Abolition Regulations.

[16] http://www.businesslink.gov.uk/bdotg/action/layer?r.l1=1073858787&topicId=1082249786&r.lc=en&r.l2=1079568262&r.s=tl

[17] http://www.dwp.gov.uk/docs/good-practice-managing-without-fixed-retirement-age.pdf

- ACAS has a website dedicated to retirement process and the removal of the DRA.[18]
- ACAS has also published an Advisory booklet *"Working without the DRA - Guidance for employers"*.[19]
- Guidance for individuals is also available through Directgov.[20]

36. ACAS has issued a useful chart which shows how the transition from the DRA to post DRA era works for employers who have purported to dismiss employees using the DRA provisions.

How easy will it be to have an EJRA?

37. Under the old Age Regulations 2006 it was not a requirement to have a DRA. An employer could have a policy of retiring employees at an earlier or later age. If the age was earlier it would be necessary for the employer to seek to justify the retirement age and he or she would not automatically be protected from unfair dismissal claims.

38. The test that the domestic law applied was as set out in section 13(2) of the Equality Act. The treatment of the employee had to be shown to be a proportionate means of achieving a legitimate aim of the employer.

The Age Concern – Heyday litigation

39. However there was a challenge to the compatibility of this provision with European law.

40. All UK age discrimination law relating to employment has to conform to Union law.[21] This is because our domestic age discrimination law is derived from and must conform to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Employment Equality Directive").[22]

41. By Article 2, the Employment Equality Directive outlawed direct and indirect age discrimination in employment and occupation, however it permitted member states to legislate to permit justified direct age discrimination in certain circumstances

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[18] http://www.acas.org.uk/index.aspx?articleid=3203

[19] http://www.acas.org.uk/media/pdf/d/4/Working_wtihout_the_DRA_Employer_guidance_-_MARCH_2011.pdf

[20] http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026429

[21] From now on as a result of the Lisbon Treaty coming into effect what we used to call Community or European law we will need to learn to call "Union law".

[22] This Directive is sometimes called the Framework Directive but as there is more than one Framework Directive this can be confusing.

42. The Employment Equality Directive does not however permit member states to permit *any* direct age discrimination to be justified. A member state has to make a positive decision to derogate from the general rule and it has to make that decision on permitted grounds. Thus Article 6(1) says -

> ... 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 reasonably 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.
>
> Such differences of treatment may include, among others:
>
> (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
>
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.
>
> ...

43. The predecessor to what is now "Age UK" challenged the compatibility of the Age Regulations which permitted employers to justify direct age discrimination in a case which went first to the European Court of Justice ("ECJ") and then was heard by the Administrative Court.[23]

44. One basis of the challenge was that Article 6 gave only limited powers for a state to derogate from the Employment Equality Directive and that the UK had not stated explicitly on what basis it had acted in the legislation. The ECJ held that it was not necessary to state, explicitly in the legislaton, how the state relied on Article 6 when it derogated, provided the basis was clear from a wider legislative context.

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[23] See (Case C-388/07) *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373, [2009] ICR 1080 and *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] IRLR 1017, [2010] ICR 260.

45. The ECJ said the ECJ had said -

> 42. The transposition of a directive into domestic law does not moreover always require that its provisions be incorporated formally in express, specific legislation. Thus, the Court has held that the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts (see, to that effect, Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, and Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7). A directive may also be implemented by way of a general measure provided that it satisfies the same conditions.
>
> 43 In accordance with those principles, Article 6(1) of Directive 2000/78 cannot be interpreted as requiring Member States to draw up, in their measures of transposition, a specific list of the differences in treatment which may be justified by a legitimate aim. Moreover, it is clear from the words of that provision that the legitimate aims and the differences in treatment referred to therein are purely illustrative, as evidenced by the Community legislature's use of the word 'include'.
>
> 44 Consequently, it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision (see, to that effect, *Palacios de la Villa*, paragraph 56).
>
> 45 *In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary* (*Palacios de la Villa*, paragraph 57). (Emphasis added)

46. The ECJ went on delimit the aims that could be invoked as the reason for a Member State to derogate in relation to age from the usual principle that direct discrimination could not be justified. It stated that a Member State must have "social policy" aims in using Article 6 to derogate. Thus at [46] it said -

> 46 It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. *By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.* (Emphasis added)

47. In the Administrative Court the UK explained the basis for permitting employers to justify direct age discrimination further. Blake J. said -

> 86...[The UK argued that] the social policy behind both the capacity of private employers to justify [direct age discrimination] as preserving the confidence and integrity of the labour market and providing sufficient clarity to the workforce and employers to prevent that confidence being damaged with detrimental consequences to employment and the terms on which employment is offered in the UK.
>
> 87. [It was] submitted that that aim was sufficiently clear and precise as to comply with the requirements of the Directive and enabled employers to justify particular treatments and practices as necessary and proportionate to their business needs without infringing the distinction between public policy and private needs.
>
> 88. In my judgment, this refined submission has considerably more force than the approach indicated earlier by the defendant in its skeleton argument. Whilst the Directive permits the Member State to make derogations from the equal treatment principle in pursuit of legitimate social aims, I conclude that the Regulations must spell out what derogations have been made. The legislative context needs to identify the social policy aims that have led to the derogation. The court needs to ensure that the aims are legitimate and the means for giving effect to them are reasonable, necessary and appropriate.
>
> ...
>
> 92. I consider that ... there is a distinction between the social aim of confidence in the labour market and the application of that aim in the particular Regulations that permit employers to discriminate where they can show it is necessary and proportionate to do so in the interests of their business. The private employer is not afforded the wider margin of

discretion in the application of the regulation that the state is. The flexibility shown to the employer in permitting it to endeavour to justify discriminatory treatment is not an aim in itself, but a means of advancing the social policy aim of confidence in the labour market. 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. If they were the ECJ would have made this clear in its answer to question five in the reference

93. There is, however, a clear distinction between the government as a public body being concerned about the social cost to competitiveness of UK employment in the early phase of implementing the new principles and policies of the Directive, and individual business saying it is cheaper to discriminate than to address the issues that the Directive requires to be addressed.

48. So an employer has in effect no higher hurdle in justifying the treatment of an employee who he discriminates on age grounds than he would in relation to an ordinary case of indirect discrimination.

Homer and Seldon – the Supreme Court

49. How direct and indirect age discrimination will be treated in the UK will be determined to a significant extent by two cases which are are on their way to the Supreme Court in January 2012: *Homer v Chief Constable of West Yorkshire Police* [2010] IRLR 619 and *Seldon v. Clarkson Wright & Jakes* [2010] IRLR 865.[24]

Homer

50. In *Homer* the Court of Appeal considered the introduction of a requirement by West Yorkshire Police that to be in the top grade as a legal adviser on certain matters, a civilian employee had to have obtained a law degree. They held that this did not cause any particular disadvantage for existing employees without law degrees who were aged between 60 and 65 even though they were close to retirement which was normally at 65. This was because whatever the employee's age was when the provision, criterion or practice was introduced, he would have failed to achieve the top grade until he obtained the degree.

[24] I am instructed in both.

51. This case highlights some of the effects of a retirement rule though it might have been possible for Mr. Homer to continue he had worked at the highest level without complaint and wished to retire at the normal age.

52. The judgment of the CA simply ignored that for a younger person getting the degree would serve some purpose while for an older person such as Mr. Homer it would not. The case therefore considers the effects of a changing rule at work where an employee wishes to go at the normal retirement age even though it might have been possible for him to continue to work.

53. Although the ET had held that the rule in question was not justified and the CA dismissed a cross – appeal on this issue the Police Force will raise the issue of justification in their case to the Supreme Court.

54. This will raise again the extent to which proportionality requires transitional arrangements since the new rule designed to assist the force to increase the quality of its staff ignored the fact that Mr Homer was accepted to be working at the maximum level.

Seldon

55. Seldon was not a case about an employee but about a partner in a solicitor's partnership where the deed had a retirement age of 65. The old DRA rule in the Age Regulations 2006 did not apply to solicitors. A partnership was always required to justify its retirement rule. So the final determination of this case may give some insight into how Employment Tribunals are to deal with EJRAs.

56. Mr Seldon did not wish to retire at the partnership's retirement age set out in its deed. The partnership sought to justify the retirement provision generically, that is to say without specific reference to him. They argued that the retirement age was justified because it avoided the indignity of forced retirement of those who were under-performing and the improved staff retention by encouraging them to think that there would be jobs to which they might aspire.

57. However it was not argued that there was any person who would fill Mr. Seldon's post at the time of his retirement nor that he was underperforming.

58. The case is therefore particularly interesting in considering the extent to which a policy which is written to have general effect needs to be justified in its particular application.

59. The case also concerned the extent to which the policy of the partnership must relate to the policy of the government in enacting provisions which

permitted direct age discrimination to be justified. So the judgment of Blake J. set out above will be revisited.

60. As to this the Court of Appeal held that in order to justify a mandatory retirement age provision, a partnership does not need to have a "social policy objective". It held that it would be inconsistent with upholding what it found to be the justification for the derogation from the Employment Equality Directive - that it is in the interests of young would-be employees and/or actual employees that employers should have a retirement age providing a greater likelihood of employment for young persons and reasonable prospects of promotion - to hold that a compulsory retirement age whose aim was consistent with that social policy was not legitimate.

61. It held that if an employer's aim is to provide employment prospects for young people and encourage young people to seek employment by holding out good promotion prospects, that is consistent with the Government's social policy.

62. The CA added that a discriminatory measure may be justified by a legitimate aim other than that which was specified at the time when the measure was introduced. There is no difference in principle in this respect between indirect discrimination which can be justified and direct discrimination which in the context of age can also be justified.

63. It also held that an aim intended to produce a happy workplace is consistent with the Government's social policy objective for the Regulations. It may be thought better to have a cut-off age rather than force an assessment of a person's falling off in performance as they get older. It is a justification for having a cutoff age that people will be allowed to retire with dignity.

64. The Court noted that Recital 14 of the Employment Equality Directive contemplates the legitimacy of a retirement age and held that therefore it cannot have envisaged that it would be impossible to justify one age because a different age would be less discriminatory to persons of the age chosen. If it is proportionate to choose age 65, the fact that it would be less discriminatory to some to have chosen 66 cannot render the clause unlawful.

65. It has to be said that this last conclusion is entirely contrary to the approach taken by Blake J in the *Age Concern* case. It also seems to tear up the normal rules on proportionality.

66. All these conclusions will be under the spotlight in the Supreme Court. To hear how these arguments have fared in the Supreme Court you will need to come to this lecture next year! It is obvious that as well as considering

the extent to which an employer has a free hand in setting the aims of the business when choosing a retirement age and the way in which different generational aspirations may be taken into account will have to be considered.

67. It is also interesting since it will bring before the Supreme Court an aspect of the dignity argument that is often raised to justify retirement ages. It is said it is more dignified to be able to retire a person who is underperforming than to have to challenge their performance. The converse is that it is very undignified for a person who is still performing well to be told that he or she must cease work, so that a person who is not, may be sacked under the dignified fig leaf of the label "retirement".

68. It will be readily seen how the increasing longevity of older workers is a key aspect of this debate at the interface of law and policy.

Pulham

69. Cost is often raised in discrimination cases. Whether it should be, in an age context, was considered in *Pulham v London Borough of Barking & Dagenham* [2010] IRLR 184 where the EAT were confronted with the difficulties of transitioning from an old sex discriminatory pay system to a new system. It was argued that the cost of transitioning could be taken into account in the process when it was possible that the transition would discriminate on grounds of age.

70. The EAT held that the task of any tribunal in attempting to weigh the discriminatory impact of a particular measure against the cost of eliminating that impact is not an easy one, particularly since there is no objective measure common to both elements in the equation. The employer's budget is a relevant factor, but employers cannot automatically justify a failure to eliminate discrimination by allocating the costs of doing so to a particular budget and then declaring that budget to be exhausted.

71. The extent to which budgetary considerations can be taken into account is in issue in a number of cases. So it is worth noting that the Court of Justice has recently been very clear about the non-relevance of budgetary matters in the field of sex discrimination. In Case C-486/08 *Zentralbetriebsrat Der Landeskrankenhäuser Tirols v. Land Tirol* [2010] IRLR 631 it said at that -

> ..., rigorous personnel management is a budgetary consideration and cannot therefore justify discrimination (see, to that effect, joined cases C-4/02 and C-5/02 *Schönheit and Becker* [2004] IRLR 983, paragraph 85).

72. The rigorous personnel management there referred to was the cost of administration of part – time workers. It seems hard to see why the same approach should not also apply in an age case.

Kraft

73. I should also mention *Kraft Foods UK Ltd v Hastie* [2010] EqLR 18 where the EAT held that a cap on awards made pursuant to a voluntary redundancy scheme was justified, notwithstanding that it disproportionately adversely affected employees closer to retirement. The cap prevented employees from recovering more than they would have earned if they had remained in employment until retirement age, thereby preventing a windfall. A provision which prevents an employee recovering more than they would have been entitled to earn is necessarily justifiable whether the amount of the windfall is large or small.

74. As a justification this would seem to be simply a matter of fairness but it may deserve further analysis. After all it depends to some extent on how much longer a worker wished to go on working. After the abolition of the DRA this could be much longer!

A short look at some of the recent age issues determined (or to be determined) by the ECJ

Kücüdeveci v Swedex

75. In Case C-555/07 *Kücüdeveci v Swedex GmbH & Co LG* [2010] IRLR 346 2010 the ECJ held that the principle of non-discrimination on grounds of age is a general principle of EU law. This is consistent with Article 21 of the European Charter of Fundamental Rights which his now part of the substantive law of the Union as a result of the Lisbon Treaty.

76. The ECJ held that the Employment Equality Directive merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation.

77. Accordingly, it was for the national court, faced with a national provision falling within the scope of EU law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, to disapply that provision.

78. This highlights the importance of understanding what the Directive requires since the Equality Act will have to be interpreted so as to comply with it.

79. The Court went on to hold that Union law precluded Swedish national legislation which provided that periods of employment completed by an

employee before reaching the age of 25 were not taken into account in calculating the notice period for dismissal.

80. Although the aim of the legislation was to afford employers greater flexibility in dismissing young workers, the legislation was not appropriate for achieving that aim since it applied to all employees who joined the undertaking before the age of 24, whatever their age at the time of dismissal.

Andersen

81. In Case C-555/07 *Ingeniørforeningen i Danmark (acting for Andersen) v Region Syddanmark* [2010] EqLR 345 the ECJ held that a national law that excluded workers from receipt of a severance allowance on dismissal in circumstances where they were entitled to claim a pension was incompatible with the Employment Equality Directive because it entailed an unjustifiable difference of treatment directly on grounds of age.

82. The key to understanding the decision lies in its approach to justification. Although the aim pursued by the severance allowance of protecting workers with many years of service and helping them to find new employment fell within the category of legitimate labour markets objectives, the measure was held to go beyond what was necessary to attain the objective pursued in that it treated those who would actually receive an old-age pension from their employer in the same way as those who were merely eligible for such a pension.

83. The measure actually made it more difficult for workers who were eligible for an old-age pension to exercise their right to work because they were not entitled to the severance allowance when seeking new employment. So where if in the UK state pension is in any part means tested this may be particularly relevant.

Rosenbladt

84. In Case C-45/09 *Rosenbladt v Gebaüdereinigungsges mbH* [2010] EqLR 365 the ECJ had to construe legislation derived from a collective agreement concerning the cleaning industry in a part of Germany. It held that Article 6(1) of the Employment Equality Directive did not preclude legislation which provided for automatic termination of employment contracts at age 65, the age at which an employee was eligible to retire and claim a retirement pension.

85. The case is interesting because of the wide range of aims of the legislation but requires care because of the rather thin reasoning.

86. The Court held that aims described by the German Government, based on the notion of sharing employment between generations, must, in

principle, be regarded as "objectively and reasonably justifying" a difference in treatment on grounds of age such as that in this case.

87. Those aims included the fact that the automatic termination of the employment contracts on reaching retirement age were said to benefit young workers directly by making it easier for them to find work.

88. This proposition as a generality is highly contentious. By some commentators it is sometimes called the myth of "job blocking". Certainly it can be the case that for a particular sector of employment there may be a limited number of posts but it would not be accepted by UK labour market economists that this is true of the cleaning industry, nor of the labour market in general.

89. You should be aware that the Government has said that it considers that job blocking as a generality is a myth in *Phasing out the default retirement age: January 2011*. In that document it said that the government -

> ... does not believe that the abolition of the DRA will have a negative impact on opportunities for younger workers. As set out in the impact assessment, the effect on economic activity and labour supply of removing the DRA is likely to increase economic activity in the economy as a whole. Furthermore, it is not often the case that younger and older workers are direct substitutes. Where there are genuine succession planning considerations (perhaps involving particular training requirements) employers could consider retaining a retirement age if it can be objectively justified.

90. The Regulatory Impact Assessment published with that document provides a much more detailed set of reasons for that conclusion.[25] In that document the Government has said -

> ...although there is a persistent assumption that older people in work 'block' younger people from finding work, evidence suggests this is incorrect. The number of jobs in the economy is not fixed, but depends on Government and private spending (when spending increases the number of jobs increases). Evidence suggests the employment rate of older people has little effect on the employment of younger people, and if anything a higher employment rate of older people tends to slightly increase the employment rate of younger people. Gruber et al. (2009)[26]

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[25] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p/11-634-phasing-out-default-retirement-age-impact-assessment.pdf

[26] Gruber J, Milligan K, Wise D (2009) Social Security Programs and Retirement Around the World: The Relationship to Youth Employment, Introduction and Summary, National Bureau of Economic Research Working Paper No. 14647, January 2009

considered a variety of evidence from 12 countries and follows a number of analytical estimated techniques, coming to the conclusion that "the overwhelming weight of the evidence, as well as the evidence from each of the several different methods of estimation, is contrary to the fixed job theory. We find no evidence that increasing the employment of older persons will reduce the employment opportunities of youth" (Gruber et al., 2009). The same paper found that attempts in Denmark to raise youth employment by encouraging older employees to retire had the opposite effect – youth employment fell and unemployment rose.

91. So the basis for the approach taken by this case should not be accepted here without much more analysis of the UK position.

92. There was a second basis for the ECJ accepting the rule as justified. It noted that the rights of older workers are adequately protected as most of them wished to stop working as soon as they are able to retire and the pension they received served as a replacement income once they lost their salary. This too emphasises the need for consideration of the economic consequences for employees who are to be retired in the future.

93. The Court also considered the dignity argument again without any very obvious evidence. It held that the automatic termination of employment contracts also had the advantage of not requiring employers to dismiss employees on the ground that they were no longer capable of working, which might be humiliating for those who had reached an advanced age.

94. Here again it is significant that it did not consider the opposite issue that it can be and indeed often is thought to be humiliating for those who wish to work on and who are able to do so to be told that they are too old.

95. Again the view in the UK has to be contrasted. Here the policy of the UK Government is to the opposite effect. The Regulatory Impact Assessment on the abolition of the DRA said -

Wider aims of Government policy
This measure [the abolition of the DRA] is one of the steps that the Government is taking to enable and encourage people to work for longer, alongside raising the State Pension Age (SPA) to 66 faster than currently scheduled and ensuring there is effective support for those out of work to find work. There are a wide variety of reasons for pursuing these policies, including demographic change; the financial benefits to both the individual and the wider economy; and the health and social benefits many gain from working later in life.

The Government announced on 3 November 2010 that the State Pension Age for men and women will be increased to 66 between April 2018 and April 2020, following equalisation of women's state pension age with men's in 2018 (Command Paper: A sustainable State Pension: when the State Pension age will increase to 66 www.dwp.gov.uk/spa-66-review.

96. The UK the Regulatory Impact Assessment on the Abolition Regs. has commented that -

> *Reasons for retiring*
> Recent survey findings show that the reasons employees currently aged 50+ are planning to retire later are mostly financial in nature. Fifty one per cent say that they cannot afford to retire. Others mention savings and pensions not being high enough or still supporting children financially.[27] In the same way that financial necessity is the main reason for wishing to retire later, financial reasons are the most commonly mentioned explanation for retiring at or before 65.[28]
> Despite the high demand for staying on work it is unlikely that all who intend or would like to continue working will do so. Research shows that for some it may be blocked by ill-health. Studies show that this is the primary reason for leaving the labour market before State Pension Age.[29]

97. In *Rosennbladt* the Court of Justice held that it was not unreasonable for the German Government to take the view that the measure was appropriate and necessary to achieve these legitimate aims. However for the reasons given great care must be taken with applying this case here.

Petersen

98. Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] IRLR 254 concerned retirement ages for dentists. Some of the same thinking about job blocking can be seen in this case but it does emphasise the differences between the private and public sectors. There were a number of points in the case.

99. Firstly the ECJ held that a national measure setting a maximum age of 68 for practising as a panel dentist did not fall within the scope of Article 2(5)

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[27] Smeaton D, Vegeris S & Sahin-Dikmen M (2010) Older workers: employment preferences, barriers and solutions, Equality and Human Rights Report 43. Manchester: EHRC
[28] McKay S (2010) Never too old? Attitudes towards longer working lives in Park et al (Eds) British Social Attitudes 26th Report, Sage, London
[29] Meadows P (2003) Retirement ages in the UK: a review of the literature on key issues, DTI Employment Relations Research series No 18; Smeaton D, Vegeris S & Sahin-Dikmen M (2010) ibid

of the Framework Employment Equality Directive 2000/78, which provides that the Directive is without prejudice to measures which are "necessary ... for the protection of health", notwithstanding that the aim of the measure was to protect the health of patients against the decline in performance of those dentists after that age, in circumstances in which the age limit did not apply to dentists practising outside the panel system.

100. This conclusion will not be directly relevant in the UK since the Government has not invoked Article 2(5). However it does perhaps give an indication as to how health related arguments may be considered.

101. More directly relevant is the conclusion of the Court on the application of Article 6 of the Employment Equality Directive. It held that Article 6(1) of the Employment Equality Directive does not preclude a national measure in Germany setting a maximum age of 68 for practising as a panel dentist where its aim was to share out employment opportunities among the generations, if, taking into account the situation in the labour market concerned, the measure was appropriate and necessary for achieving that aim.

102. The reference here to the "situation in the labour market" is plainly very important. The comments in the Regulatory Impact Assessment which I have highlighted above would have to be considered before this reasoning could be applied here.

103. The Court went on to say that the difference in treatment on grounds of age resulting from such an aim may be regarded as objectively and reasonably justified by that aim, and the means of achieving that aim as appropriate and necessary, provided that there was a situation in which there was an excessive number of panel dentists or a latent risk that such a situation would occur.

104. This emphasises that intergenerational fairness arguments require evidence. It went on to hold that such a retirement age outside the panel (equivalent to the NHS) was not justified.

Georgiev

105. At the end of last year the European Court of Justice gave its ruling in a case about academic posts. This is a subject which has caused much discussion in America where professors who never retire are sometimes accused of preventing the development of new academic thinking. The case is known as Joined Cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv* and judgment was given on the 18 November 2010.

106. The ruling of the Court was that the Employment Equality Directive -

> ... does not preclude national legislation, such as that at issue in the main proceedings, under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked inter alia to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it possible to achieve that aim by appropriate and necessary means. It is for the national court to determine whether those conditions are satisfied.

107. It will be seen that the judgment did not rule definitively on the issue of justification. What is important is that it considered the delivery of quality teaching and allocation of posts as potentially good aims. In this way it has offered Europe an escape route from some of the worst problems that have been encountered in America.

108. The Court noted however that it could only comment to a limited extent since the reference from the domestic court contained little or no information on the basis for the aims of the legislation. The Court stated it was essential to identify "precisely the aim which it pursues". This may well be very important in the UK whenever the aim of the provisions permitting justification of direct discrimination are in issue as they were in the *Age Concern* litigation[30] and also in *Seldon v. Clarkson Wright & Jakes* [2010] IRLR 865.

109. The Court therefore proceeded carefully stating -

> 45. In that regard, the training and employment of teaching staff and the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, put forward by the University and the Bulgarian Government, may be consonant with the intention of allocating the posts for professors in the best possible way between the generations, in particular by appointing young professors. As regards the latter aim, the Court has already held that encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy (*Palacios de la Villa*, paragraph 65), in particular when the promotion of access of young people to a profession is involved (see, to that effect, *Petersen*, paragraph 68). Consequently, encouragement of recruitment in higher education by means of the offer

[30] See footnote 3.

of posts as professors to younger people may constitute such a legitimate aim.

46 Furthermore, as the Advocate General pointed out in point 34 of his Opinion, the mix of different generations of teaching staff and researchers is such as to promote an exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities.

47 However, the case-file does not permit the finding that the aims mentioned by the German and Slovak Governments and the Commission correspond to those of the Bulgarian legislature. A doubt exists in particular in the light of Mr Georgiev's remarks in his written observations. Mr Georgiev submits that the University and the Bulgarian Government merely make assertions and maintains that the legislation at issue in the main proceedings is not aligned to the reality of the labour market concerned. He submits that the average age of university professors is 58 and that there are not more than 1 000 of them, a situation which is explained by the absence of interest on the part of young people in a career as a professor. The legislation at issue in the main proceedings does not, in his view, therefore encourage the recruitment of young people.

48 In that regard it is for the national court to examine the facts and determine whether the aims asserted by the University and the Bulgarian Government correspond to the facts.

Maximum recruitment ages

110. One of the key areas of age discrimination in the past has been maximum recruitment ages. These used to be seen regularly in job advertisements in the last century though since the making of the Employment Equality Directive they have been much less common.

111. Some litigation has already taken place in the UK in relation to these. Particular concern has been with jobs having very special requirements that are thought to be more commonly age connected.

112. In Case C-229/08 *Wolf v Stadt Frankfurt am Main* [2010] IRLR 244 the ECJ was concerned with German provisions in relation to firemen. It held that German national legislation which sets a maximum age of 30 for recruitment to intermediate career posts in the fire service was justifiable

as a genuine and determining occupational requirement under Article 4(1) of the Employment Equality Directive.

113. The Court of Justice held that the maximum age was appropriate to the objective of ensuring the operational capacity and proper functioning of the fire service and did not go beyond what was necessary to achieve that objective.

114. This was because it accepted that the possession of especially high physical capacities was a genuine and determining occupational requirement for such a post in the fire service and that this need is related to age in that some of the tasks, such as fighting fires or rescuing persons, can be performed only by young employees. Scientific data shows that respiratory capacity, musculature and endurance diminish with age. Very few employees over the age of 45 have sufficient physical capacity to perform fire-fighting duties. Accordingly, recruitment at an older age than 30 would have the consequence that too large a number of employees could not be assigned to the most physically demanding duties. Similarly, such recruitment would not allow the employees thus recruited to be assigned to those duties for a sufficiently long period.

115. The principles in play in the assessment of justification in a case such as this are not controversial but the extent to which the evidence met the tests might seem surprising. This may say more about the forensic examination of the issues in Germany than anything else. However it is also an important case in that it is concerned with the justification of decisions taken on a policy basis where there are very few exceptions.

116. It is plain that if there were a significant number of persons who would be able to meet the requirements as to physical capacity in their 40s a different result might well have been reached.[31]

117. Before relying too heavily on this case it should also be noted that in Advocate – Pedro Cruz Villalòn's Opinion in Case C-447/09 *Prigge and others v. Deutsche Lufthansa AG* (given on the 19 May 2011 and currently only available in French) he finesses the general application of *Wolf* in a case where in a limited context the German airline required some but not all its air crew to retire at 60 as a result of a collective agreement.

New references

118. There are some new references that are currently outstanding.[32] Firstly in Case C-297/10 *Sabine Hennigs v. Eisenbahn-Bundesamt* the German

[31] It is interesting to compare this case with *Baker v National Air Traffic Services Limited* 20 February 2009; case no.5596/60 see Equal Opportunities Review No 196.

Bundesarbeitsgerichhas asked the ECJ important questions about transitional arrangements from previously discriminatory collective agreements-

> Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter of Fundamental Rights of the European Union, 'CFREU'), does a collective pay agreement for public sector employees, which, as in Paragraph 27 of the Bundesangestelltentarifvertrag (Federal collective agreement for contractual public sector employees, 'BAT') in conjunction with the Vergütungstarifvertrag (collective pay agreement) No 35 under the BAT, determines basic pay in individual salary groups by age categories, infringe the primary-law prohibition of age discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?1
> If question 1 is answered in the affirmative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the ruling of the Court of Justice in the preliminary reference proceedings:
> Does the right to collective bargaining give the parties to a collective agreement the discretion to eliminate such discrimination by transferring the employees to a new collective pay structure based on job, performance and professional experience, whilst preserving the entitlements they acquired in the old tariff structure?
> Must question 2 a) in any event be answered in the affirmative if the final assignment of the transferred employees to the grades within a pay group of the new collective pay structure does not depend solely on the age category attained in the old tariff structure and if the employees who are admitted to a higher grade of the new structure typically have more professional experience than the employees assigned to a lower grade?
> 3. If questions 2 (a) and (b) are answered in the negative by the Court of

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[32] There is one cases that I do not discuss since it seems too general for this paper. It is a reference by the Austrian Oberlandesgericht Innsbruck in Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*: "oes European Union law as currently applicable, in particular in Article 21 of the Charter of Fundamental Rights (in conjunction with Article 6(1) TEU), the general legal principle of European Law (Article 6(3) TEU) relating to the prohibition of age discrimination, and Articles 1, 2 and 6 of Directive 2000/78/EC, 1 preclude a national collective agreement which, in making grade classifications under the collective agreement, and thus determining the level of remuneration, discriminates indirectly against older workers by taking account only of their skills and knowledge which they have acquired as air stewards or stewardesses with one airline but not the substantively identical skills and knowledge which they have acquired with another airline within the same group? Does this also apply to an employment relationship which was entered into before 1 December 2009? Can a national court treat as void and disapply a clause of an individual employment contract which indirectly infringes Article 21 of the Charter of Fundamental Rights, the general legal principle of European Union law relating to the prohibition of age discrimination, and/or Articles 1, 2 and 6 of Directive 2000/78/EC, by analogy with the case of *Rieser* and with the case-law concerning agreements breaching antitrust rules as in the case of *Béguelin* on grounds of the horizontal direct effect of the fundamental rights of the European Union?"

Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:
(a) Is indirect discrimination on grounds of age justified by the fact that it is a legitimate aim to preserve acquired social entitlements and because it is an appropriate and necessary means of achieving that aim to temporarily continue to treat older and younger employees differently for the purposes of a transitional arrangement, if this difference of treatment is being gradually phased out and the only alternative in practice would be to reduce the pay of older employees?
(b) Taking into account the right to collective bargaining and the associated autonomy in collective bargaining, must question 3(a) be answered in the affirmative if parties to a collective agreement agree on such a transitional arrangement?
4. If questions 3(a) and (b) are answered in the negative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:
Even taking into account the associated additional costs for the employer concerned and the right of the parties to a collective agreement to collective bargaining, must the infringement of the primary-law prohibition on age discrimination, which is inherent in a collective pay structure and which makes it invalid as a whole, always only be eliminated by taking the highest age category as a basis in each case when applying the collective pay agreements until a new system which is in conformity with Union law comes into force
5. If question 4 is answered in the negative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:
Having regard to the right of the parties to a collective agreement to collective bargaining, would it be compatible with the Union law prohibition on age discrimination and the requirement for an effective sanction in the event of a breach of that prohibition, to grant the parties to a collective agreement a manageable deadline (e.g. six months) in which to retrospectively correct the invalidity of the pay structure they have agreed, and stipulate that in the event that no new structure which is in conformity with Union law is introduced within the deadline, in applying collective rules in each case the highest age category will be taken as a basis and, if so, what discretion in terms of the duration of the retrospective effect of the new structure which is in conformity with Union law could be granted to the parties to a collective agreement?

119. The difficulty of transitioning from old directly discriminatory age rules to new age neutral rules is not confined to the UK! It will be interesting to see what the ECJ makes of this.

120. In Case C- 298/10 *Land Berlin v. Alexander Mai* the German Court asked a rather shorter question -

> Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter of Fundamental Rights of the European Union, 'CFREU'), does a collective pay agreement for public sector employees, which, as in Paragraph 27 of the Bundesangestelltentarifvertrag (Federal collective agreement for contractual public sector employees, 'BAT') in conjunction with the Vergütungstarifvertrag (collective pay agreement) No 35 under the BAT, determines basic pay in individual salary groups by age categories, infringe the primary-law prohibition of age discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?

121. The short answer to be expected to this question is "yes!" However it is to be expected that some discussion of the possibilities of justifying age related provisions in collective agreements will form part of the Court's determination. So this too is a case that we will need to watch out for.

122. The most recent important reference to the ECJ was made by a court in Sweden on the 21 March 2011. In Case C-141/11 *Karl Torsten Hörnfeldt v. Posten Meddelande AB* court asked -

> 1. Can a national rule which, like the 67-year rule, gives rise to a difference of treatment on grounds of age be legitimate even if it is not possible to determine clearly from the context in which the rule has come into being or from other information what aim or purpose the rule is intended to serve?
>
> 2. Does a national retirement provision such as the 67-year rule, to which there is no exception and which does not take account of factors such as the pension which an individual may ultimately receive, go beyond what is appropriate and necessary in order to achieve the aim pursued?

123. These questions clearly build on the jurisprudence of the ECJ in the *Age* litigation to which I have referred above. The answers will show in greater detail the thinking of the ECJ about the link between the justification for a retirement decision and a replacement income. The second question in particular raises the question whether a forced retirement can ever be proportionate in a context in which there is no consideration of the replacement income that a person will enjoy.

124. This highlights a different approach to retirement to that which it in place in the UK where consideration of post employment earnings is often a matter for the employee to consider alone and as a matter of choice. By contract in other parts of Europe the concept of a social Europe is much less individualistic. As I have said earlier the availability and extent of a post – retirement income is likely to become increasingly important.

Some Conclusions

125. The law on age discrimination is developing fast. New circumstances will be thrown up in the near future and it is possible that some of the basic reasons for permitting justification of direct age discrimination when it is not permitted elsewhere will have to be reconsidered now that the policy of the Government has been so clearly stated in the citations above.

126. The key will be to avoid all preconceptions. We are at the threshold of a new understanding of the relationship between age and work. Everything previously thought certain will have to be checked again, again against the Equality Act and Union jurisprudence.

127. In conclusion it seems to me that there are two key points that bear constant repetition -

- Firstly *the age at which a person wishes to stop work is unquestionably a function of many different aspects of their personal health, wealth and happiness. It is also a dynamic consideration and any policy approach which ignores that will be bound to be challenged sooner or later. This means that a blanket policy which ignores retirement income, or the ability of a particular employee to work, or their capacity to do so, runs a heavy risk of causing litigation in the future. On the other hand if these are taken into account there is a much greater chance of avoiding it.*

- Secondly *employers and employee representatives are going to have to accept that capability assessments of their older employees are going to become more common. Where there is no EJRA or it is set later than 65 capability may be a more common issue unless staff self select to retire early.*

Robin Allen QC

Cloisters

22 June 2011