

Discrimination Law in 2011

AGE DISCRIMINATION

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Introduction

1. It is always a pleasure to speak at this annual conference when we review the developments of the last year and start a consideration of what the next may bring. My task this year is to consider what is happening in age discrimination.²
2. Last year I discussed this topic together with other grounds. Age discrimination has become a particularly topical issue even before the BBC were caught out discriminating on grounds of age in relation to Miriam O'Reilly.³ There have been many other interesting ET decisions which have been reviewed in Equal Opportunity Review during the year. I cannot cover all of them. This year so much has happened and so much is expected to happen that this would no longer be practical. So what is it essential to know?
3. Firstly the Equality Act 2010 has been passed. Secondly the Government is taking proactive steps at last to ensure that older persons are not

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² As always I am happy to acknowledge my debt to Mickey Rubenstein's editorial in the Industrial Law Reports, to the new Equality Law Reports, and to his forthcoming Guide to Discrimination law.

³ <http://www.bbc.co.uk/news/entertainment-arts-12161045>

disadvantaged by a default retirement age⁴ and are also about to make clear their wider plans to outlaw age discrimination. Thirdly there has been a raft of case law both in Luxembourg and at home.

The new Equality Act 2010 provisions

4. The old Age Regulations 2006⁵ are no longer in force since the 1st October 2010 and will only apply to cases of discrimination occurring before then. Age is now defined in section 5 of the Equality Act 2010⁶ -

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

(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.

5. 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

⁴ 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 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.

⁵ Employment Equality (Age) Regulations 2006 (S.I. 2006 No. 1031)

⁶ For a guide to the Act see ed Wadham and others, *Blackstone's Guide to the Equality Act 2010*, OUP 2010.

achieving a legitimate aim.

6. 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.
7. At present only age discrimination in the employment field is unlawful. The Equality Act 2010 includes provisions enabling a ban on age discrimination in the provision of services to be introduced. Those provisions were not commenced on the 1st October. The Government is currently considering further how these provisions can be implemented.
8. Taking forward an age discrimination ban would require secondary legislation to be made, setting out the circumstances in which it would remain lawful to use age as a reason for treating people differently. This would need to be the subject of public consultation. It is understood that a consultation on this is imminent, so watch this space.
9. For those who have been interested in the proposals in Europe for a new Goods Facilities Services Directive there is less good news. The draft directive has effectively stalled without any significant development in the course of last year.

What's happening with the default retirement age?

10. From the start the new government in its Coalition Agreement underlined the importance that equality issues are to have in the new administration.⁷ 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

⁷ See my key note speech to the ILS Oxford Conference 2010 - "The Equality Act 2010: Exploring The Limits To The New Consensus On Equality"

...

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.

11. After a period of consultation the Department of Business Innovation and Skills has very recently announced what the government intends to do: *Phasing out the default retirement age: January 2011*.⁸ Draft regulations are expected to follow very shortly.
12. It is significant that despite a good deal of lobbying from business groups the government has decided to hold fast to a swift abolition. By 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. These are insured benefits for income protection, life assurance, and sickness and accident insurance, including private medical cover
13. Concern was also expressed about the difficulty of identifying “good” and “bad” leavers for the purposes of employee share schemes. However the government has no plans to make any exception in relation to these.

Key points in the Government's proposals

14. The key points are
 - The Government intends the new regulations to take effect from 6 April 2011.
 - From this date, subject to Parliamentary procedures, employers will no longer be 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.

⁸ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p11-536-phasing-out-default-retirement-age-government-response.pdf>

- 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 (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. It will be made clear through guidance that this is 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.
- The Government has issued best practice guidance for employers on working without a fixed retirement age is already available through DWP's Age Positive Initiative.⁹ Guidance for individuals is available through Directgov.¹⁰

ECJ case law

15. All UK age discrimination law has to conform to Union law.¹¹ 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").¹²
16. That Directive permits member states to legislate to permit direct age discrimination in certain circumstances. So cases before the ECJ that cover

⁹ <http://www.dwp.gov.uk/age-positive/>

¹⁰ http://www.direct.gov.uk/en/Employment/ResolvingWorkplaceDisputes/DiscriminationAtWork/DG_10026429

¹¹ 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".

¹² This Directive is sometimes called the Framework Directive but as there is more than one Framework Directive this can be confusing.

that issue are very interesting and indicate how such issues might be treated in the UK.

Küçüdeveci v Swedex

17. 2010 started with the very important judgment in the ECJ in *Küçüdeveci v Swedex GmbH & Co LG* [2010] IRLR 346 where the court made it clear that the principle of non-discrimination on grounds of age is a general principle of EU law. 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.
18. Accordingly, it is 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.
19. The Court went on to hold in the case that Union law precludes national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.
20. Although the aim of the legislation is to afford employers greater flexibility in dismissing young workers, the legislation is not appropriate for achieving that aim since it applies to all employees who joined the undertaking before the age of 24, whatever their age at the time of dismissal.

Andersen

21. *Ingeniørforeningen i Danmark (acting for Andersen) v Region Syddanmark* [2010] EqLR 345 was one of the cases I mentioned in my talk last year to look out for. The judgment duly came and the Court of Justice 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.

22. The key to understanding the decision lay 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 went beyond what is necessary to attain the objective pursued in that it treated those who will actually receive an old-age pension from their employer in the same way as those who are eligible for such a pension.
23. The measure actually made it more difficult for workers who are eligible for an old-age pension to exercise their right to work because they are not entitled to the severance allowance when seeking new employment.

Rosenblatt

24. *Rosenblatt v Gebäudereinigungsges mbH* [2010] EqLR 365 ECJ was another case I noted last year. In that case the Court of Justice had to construe legislation derived from a collective agreement concerning the cleaning industry. 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 is eligible to retire and claim a retirement pension.
25. The case is interesting because of the wide range of aims of the legislation but requires care because of the rather thin reasoning.
26. 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.
27. 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.
28. 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.

29. Indeed 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.

30. The Regulatory Impact Assessment published with that document provides a much more detailed set of reasons for that conclusion.¹³ 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)¹⁴ 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

¹³ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p11-634-phasing-out-default-retirement-age-impact-assessment.pdf>

¹⁴ 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

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.

31. So the basis for the approach taken by this case should not be accepted here without much more analysis of the UK position.
32. 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 wish to stop working as soon as they are able to retire and the pension they receive serves as a replacement income once they lose their salary.
33. The Court also considered the dignity argument again without any very obvious evidence. It held that the automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age.
34. 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.
35. Again the position 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).

36. In the UK the Regulatory Impact Assessment 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.¹⁵ 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 65.¹⁶

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.¹⁷

37. In *Rosennblatt* 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.

¹⁵ Smeaton D, Vegeris S & Sahin-Dikmen M (2010) Older workers: employment preferences, barriers and solutions, Equality and Human Rights Report 43. Manchester: EHRC

¹⁶ McKay S (2010) Never too old? Attitudes towards longer working lives in Park et al (Eds) British Social Attitudes 26th Report, Sage, London

¹⁷ 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*

Petersen

38. Another case I mentioned last year to look our for was *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] IRLR 254 . This case 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.
39. Firstly the Court of Justice 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) 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.
40. 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.
41. 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.
42. 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 could be established here.

43. 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.
44. 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

45. 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 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.
46. 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.

47. 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.

48. 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* litigation¹⁸ and also in *Seldon v. Clarkson Wright & Jakes* [2010] IRLR 865.

49. 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 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

¹⁸ See footnote 3.

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

50. 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.
51. 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.
52. In *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.
53. 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.

54. 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 age 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.
55. 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.
56. 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.¹⁹

New references

57. There are two new references that are currently outstanding. Firstly in Case C-297/10 *Sabine Hennigs v. Eisenbahn-Bundesamt* the German Bundesarbeitsgericht has 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'),
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¹⁹ 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.

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 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?

58. 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.

59. 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?

60. 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.

UK Cases

61. Unsurprisingly there have been a number of important age discrimination cases in the domestic courts. One of them is on its way to the Supreme Court: *Homer v Chief Constable of West Yorkshire Police* [2010] IRLR 619 and another is the subject of an application for permission to appeal which has yet to be determined: *Seldon v. Clarkson Wright & Jakes* [2010] IRLR 865. Additionally there has been a rather controversial statement about the function of cost as a justification for age discrimination: *Pulham v London Borough of Barking & Dagenham* [2010] IRLR 184.

Homer

62. In *Homer* the Court of Appeal held that the introduction of a requirement that to be in the top grade for legal adviser an employee had to obtain a law degree did not cause any particular disadvantage for employees between age 60 and 65 without law degrees even though they were close to retirement. 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.

63. The problem with this approach is it simply ignores that for a younger person getting the degree would serve some purpose while for an older person such as Mr Homer it would not. This is one of the issues in the case to be heard by the Supreme Court this year.
64. 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.
65. 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

66. 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. In essence Mr Seldon did not wish to retire at that age.
67. 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.
68. 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.
69. The case is therefore particularly interesting in considering the extent to which a policy which is general needs to be justified in its particular application. Unfortunately it is a very poor judgment in the Court of Appeal and it is to be hoped that the Supreme Court will grant permission to appeal.²⁰

²⁰ I should of course add that I was the advocate for the losing side!

70. 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.
71. 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 would be inconsistent with upholding the justification for the derogation allowed by regs.3 and 30, 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. 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.
72. 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.
73. 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. As Recital 14 of the Employment Equality Directive contemplates the legitimacy of a retirement age and thus 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.

74. 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.
75. It has been widely argued that this case will determine how tribunals and courts will look at EJRAs once the DRA is abolished and this is a reason why the Equality and Human Rights Commission has backed the application for permission to appeal.

Pulham

76. In *Pulham v London Borough of Barking & Dagenham* [2010] IRLR 184 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.
77. 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.
78. 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).

79. 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

80. Finally I want to mention Kraft Foods UK Ltd v [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.

81. 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!

Conclusions

82. The law on age discrimination is going to develop fast. New circumstances will be thrown up in the course of the year 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 changed so radically as can be seen from the citations above.

83. 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.

84. Two key points arise in this respect. 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. 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

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