

THE COALITION GOVERNMENT AND AGE DISCRIMINATION

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ABSTRACT

Beginning in April 2010, a major exception to the age discrimination rubric was removed from the statute book.¹ The default retirement age (DRA) had permitted employers to retire workers at 65,² thus driving the proverbial coach and horses through the anti-discrimination principle. The repeal was effective from April 6, 2011, but there was a 6 month transitional period. Such retirements could continue until October 1, 2011, providing that due notice was given before April 6, and that the worker was 65 (or the normal retirement age) before October 1, 2011 (reg.5).

This repeal will be welcomed by those approaching retirement age and arguably most in need of protection from age discrimination. The bad news for these workers is that employers may still force them to retire, although this time the employer must defend the retirement using either the standard Genuine Occupational Requirement, or (more likely) objective justification.

An interesting aspect to statutory interpretation is absorbed by the objective justification defence. Domestic courts and tribunals have been directed (by the ECJ) to interpret an employer's defence to age discrimination according to expressed government social policy. There are two twists in this process. First, government policy appears to be fluid. Second, it appears nowadays to be somewhat different from other ECJ and Court of Appeal pronouncements on the subject of compulsory retirement. This leaves courts and tribunals with the task of scouring various government statements for a social policy, and then deciding if it can be reconciled with judicial precedent.

Drawing on the extensive legislative background, UK and ECJ case law, and observations from Canada, the United States, and Australia, this article explores and speculates when an employer may succeed in objectively justifying compulsory retirement.

THE RELEVANT LEGISLATION

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¹ The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011/1069 repealed Equality Act 2010, Sch.9, paras.8 and 9.

² Or the employee's "normal retirement age" if higher: ERA 1996 s.98ZC.

Age discrimination was included in the Framework Directive 2000/78/EC, and implemented in the UK by the Employment Equality (Age) Regulations 2006, SI 2006/1031, since superseded by the Equality Act 2010 (EA 2010).

Retirement is most likely to take the form of direct discrimination, as most retirements are directly linked to the age of the worker. Section 13(1) of the Equality Act 2010 outlaws direct discrimination as less favourable treatment because of age. However, unique for direct age discrimination, s.13(2) provides a general 'objective justification' defence.

At EU level, the Framework Directive 2000/78, art.2 outlaws differences in treatment because of age, but by art.6(1), adds a defence:

'... 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.'

Article 6(1) proceeds to provide some rather generalised examples relating to: seniority of service; or the training of younger persons, or older persons with caring responsibilities, or those approaching retirement age.

THE MEANING OF THE OBJECTIVE JUSTIFICATION DEFENCE

The defence (in what is now EA 2010, s.13(2)) is usually reserved for indirect discrimination, and was challenged in the *Age Concern* case,³ for being incompatible with the parent 'Framework' Directive 2000/78/EC, which, by art.6(1) (above), appeared to permit only *specific* defences to direct age discrimination. In this challenge, the ECJ ruled that the defence *was* compatible, but with the qualification that it could be used only to fulfil social policy aims, which were 'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness'. Citing art.6(1), the Court stated that these aims could be identified from the 'general context' of the specific section.⁴

When the case returned to the High Court, now known as *Age UK*,⁵ Blake, J. found that the 'context' from which the social policy aims could be found was the legislative background, including Explanatory Notes, the consultation process, and public debate.⁶

Further, any defect in the defence as originally drafted could be cured by reading it down in light of the emerging ECJ case law.⁷ Blake, J. echoed the ECJ's caution that there was a 'clear distinction' between a government's social policy and 'individual business saying it is

³ Case C-388/07 *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

⁴ *Ibid*, [45]-[46].

⁵ *R. (on the application of Age UK) v Secretary of State for Business, Innovation and Skills* [2009] IRLR 1017 (HC Admin).

⁶ *Ibid*, [90].

⁷ *Ibid*, [96].

cheaper to discriminate than to address the issues that the Directive requires to be addressed'.⁸

This shows that the s.13(2) defence envisages factors quite different from those expected to satisfy the objective justification defence for *indirect* discrimination, where employers normally put forward job-related reasons. Where the aim of *direct* discrimination is job-related, the employer may be able to justify it as a General Occupational Requirement (GOR), under EA 2010, Sch.9, para.1 (corresponding to Framework Directive, art.4).

(a) *The context and social policy*

One rather technical potential problem remains when trying to discern the social policy. Much of the legislative background related to the now-defunct default retirement age (DRA), which was introduced with the Age Regulations 2006. Of course, it would be sensible to use this background for the present purpose, as it related to compulsory retirement. Accordingly, in *Age UK*, Blake, J. was content to combine the social policy evidence behind both the objective justification defence and the DRA,⁹ and there seems no reason to change that approach now. From 2010, there was another flurry of documents produced by the Coalition Government relating directly to objectively justifying retirement. Overall, the main sources appear to be:¹⁰

- 2003 Consultation: 'Age Matters – Consultation 2003'.¹¹
- 2005 Consultation: 'Equality and diversity: coming of age. Consultation on the draft Employment Equality (Age) Regulations 2006'.¹²
- Explanatory Notes to the 2006 Age Regulations.¹³
- DTI Evidence given in *Age UK*.¹⁴
- 2010 'Employment and Skills Guidebook' (2010 – 'Business Link').
- 2010 Consultation: *Phasing Out the Default Retirement Age*.¹⁵
- 2011 Consultation Response.¹⁶
- 2011 Age Positive: Workforce Management without a Fixed Retirement Age.¹⁷
- 2011 ACAS Guidance for Employers: Working Without the Default Retirement Age.¹⁸

⁸ Ibid, [93].

⁹ Ibid, [86].

¹⁰ Unless otherwise stated, the government documents are available through bis.gov.uk. The ACAS guidance was cited approvingly in the government documents. Accessed December 1, 2011.

¹¹ DTI, URN 03/920.

¹² DTI, URN 05/1171.

¹³ SI 2006/1031.

¹⁴ [2009] IRLR 1017 (HC Admin), [72]-[77].

¹⁵ URN 10/1047.

¹⁶ URN 11/536.

¹⁷ < www.dwp.gov.uk/docs/workforce-mgt-without-fixed-retirement-age.pdf > accessed December 1, 2011.

¹⁸ Internet only: < <http://www.acas.org.uk/CHttpHandler.ashx?id=2976&p=0> > accessed December 1, 2011.

Prior to 2010, the documents produced two themes of social policy: ‘workforce planning’ and ‘avoiding an adverse impact on the provision of occupational pensions and other work-related benefits.’¹⁹ These were adopted by Blake, J. in *Age UK*.²⁰ It will become apparent that the Coalition Government has varied this somewhat.

(b) A Wide discretion?

Most of the case law so far on retirement is evaluating whether domestic *legislation* which facilitates compulsory retirement is compatible with the Framework Directive. This is a slightly different task from asking whether an individual employer can justify compulsory retirement. The task is rather awkward because social policy aims are chosen by governments and not by any individual employer. Further, Member States have a ‘wide discretion’ in choosing the means to achieve the aims (such as retirement).²¹ However, it seems that employers will enjoy ‘a certain degree of flexibility’ in choosing the means in pursuit of the established social policy aims.²² Although this was tempered somewhat by Blake, J. in *Age UK*, stating that: ‘the individual employer ... has a much more rigorous task’ than the State had in justifying the inclusion of the defence [of objective justification].²³

There is little case law on objectively justifying any particular retirement, because, until its repeal, employers generally have used the DRA. There is one Court of Appeal decision. Other judicial guidance can be drawn from the ECJ pronouncements, and some observations from North American and Australian cases.

To justify a retirement under EA 2010 s.13(2), an employer must show that the retirement had a legitimate aim, and then that the means of achieving that aim was appropriate and necessary (‘proportionality’).

(c) Unfair dismissal

Without the DRA, a worker forced to retire is likely to claim unfair dismissal in addition to age discrimination. The Government indicated it expects employers who objectively justify the retirement to be able to defend a parallel unfair dismissal claim as ‘some other substantial reason’ under s.98(1)(b) of the Employment Rights Act 1996 (ERA 1996).²⁴

THE LEGITIMATE AIMS

¹⁹ DTI Evidence, in *Age UK*, [72]; Notes, [99]-[101]; 2003 Consultation [3.15] and [4.26]; 2005 Consultation [6.1.14-15].

²⁰ [2009] IRLR 1017, [90].

²¹ *Age Concern* [2009] ECR I-1569 [46]; *Age UK* [2009] IRLR 1017, [92]; Case C-555/07 *Kucukdevici v Swedex GmbH* [2010] 2 CMLR 33, AG47.

²² *Ibid.*, and, in the context of equal pay, Case C-19/02 *Hlozek*, AG[57]-[58].

²³ [2009] IRLR 1017 [97].

²⁴ 2011 Consultation Response, p.9; ACAS Guidance, p.5.

The first proposition to emerge from the leading UK retirement case is that the employer need not have adopted its retirement policy with a social policy aim in mind. The aim passes muster if it is *consistent with* a recognised social policy: *Seldon v Clarkson, Wright & Jakes*.²⁵ It follows that an employer may plead after the event that its aim was a *social aim*.²⁶ This may produce problems where the employer is also defending a claim of unfair dismissal, where the fairness of the dismissal must be judged by what was known to the employer at the time of the dismissal.²⁷

What follows is a consideration of a number of potentially legitimate aims.

(a) Workforce planning

For the DRA, the Government sub-divided its workforce planning aim into three: (i) planning against a known attrition profile; (ii) ‘job-blocking’; and (iii) encouraging pension provision.²⁸

(i) Planning against a known attrition profile

One of the documents explained that: ‘for employers, being able to rely on a set retirement age allows the recruitment, training and development of employees, and the planning of wage structures and occupational pensions, against a known attrition profile.’²⁹

(ii) ‘Job-blocking’

The problem of job-blocking was addressed in *Seldon v Clarkson* (above). Here, a partner in a firm of solicitors challenged compulsory retirement of partners aged 65. (The case was decided under the objective justification defence because the DRA did not apply to partners.) Three aims were cited by the firm. The first was ‘ensuring associates were given the opportunity of partnership after a reasonable period’. The second was ‘facilitating the planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies will arise’. These closely connected aims, known indelicately as *dead man’s shoes*, were held by the Court of Appeal to coincide with the social policy of improving employment and promotion prospects of young people.³⁰

However, the Coalition Government has since changed this stance:

‘Older workers do not tend to block opportunities for younger workers. Evidence indicates that there was no positive effect on youth employment from measures which allowed older workers to retire early.’³¹

²⁵ [2010] EWCA Civ 899 (CA), [18], [20].

²⁶ Ibid, [27]-[29].

²⁷ *Devis v Atkins* [1977] ICR 662 (HL).

²⁸ 2006 Explanatory Notes (100); *Age UK* [72].

²⁹ 2006 Explanatory Notes (100). See also Case C-159/10 *Fuchs v Land Hessen*, [2011] Pens. L.R. 335 [47].

³⁰ [2010] EWCA Civ 899 (CA), [20]-[22]. See also *Fuchs* (ibid) [60]. The third aim is considered below, under (c) *Dignity*.

³¹ Employment and Skills Guidebook, p.6. See also 2011 Consultation Response p.2.

It would seem from this that job-blocking may no longer be considered a public policy aim, and that this aspect of *Seldon* is no longer good law. In substance, there may be little difference between the ‘job-blocking’ and ‘attrition profile’ policies. And it could turn out that the lawfulness of identical retirement practices depends on the label they are given. Employers are more likely to succeed if they emphasize that the purpose of the retirement policy relates to matters such as recruitment, training, employee-development, wage structures, and occupational pensions, rather than job and promotion prospects for younger people.

(iii) Encouraging pension provision

A further aspect of workforce planning was that a definite retirement date would:

‘encourage employees to save now and make provision for their retirement, and avoid them putting off career and pension planning on the assumption that they will be able to continue working indefinitely.’³²

More recent Coalition Government guidance suggests a drift away from this policy. The 2010 Employment and Skills Guidebook notes that:

‘The State Pension age is not a “retirement age” - older workers can carry on working past their State Pension age, and continue to work while claiming their State Pension. Alternatively, they can defer claiming their State Pension for at least a year in return for either an enhanced pension, or a lump sum when they do decide to claim’.³³

A similar fluidity is envisaged for occupational pensions. Where they do not already cater for members working beyond the scheme’s normal retirement age, employers are encouraged to review the terms with the scheme’s managers.³⁴

The 2010 Guidebook observes that workers are notified by the state and/or workplace pension scheme as they approach the state/scheme retirement age. ‘These notifications help to prompt older workers to consider their options for retirement or working on.’³⁵

It appears that Government policy has moved on from ‘planning for a definite retirement date’ to ‘considering your options after a nominal retirement date’. Workers are now treated responsible enough to consider and plan their future without regulatory encouragement. This dilutes – if not extinguishes – any social policy associated with encouraging pension provision. This should not disturb the legitimate aim of *employers* planning for pension provision against a known attrition profile ((i) above).

(b) Stability of pension scheme

Where the employer’s pension scheme is less amenable to flexible retirement dates, it might be that an individual employer wishes to ‘preserve its stability’ with a compulsory retirement

³² Explanatory Notes 2006 (100); see also DTI evidence to *Age UK*, [72].

³³ p.7.

³⁴ Ibid.

³⁵ Ibid. See also 2010 Consultation para.7.3.3. and p.47.

age. Blake, J. recognised this as a social policy aim in *Age UK*.³⁶ Back in 2004, the Government underpinned its DRA policy thus:

‘Furthermore, ... if all employers only had the option of individually justified retirement ages at the time the legislation was introduced, this could risk adverse consequences for occupational pension schemes and other work related benefits. Some employers would instead simply reduce or remove benefits they offer to employees to offset the increase in costs.’³⁷

It would seem that where the employer and/or pension scheme managers persevere with a less flexible scheme, this aim is legitimate.

(c) ‘Dignity’

The third aim in *Seldon v Clarkson* was ‘limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm’. Giving judgment for the Court, Waller, LJ said that this aim of ‘collegiality’ was ‘intended to produce a happy work place ... [M]y experience would tell me that it is a justification for having a cut-off age that people will be allowed to retire with dignity.’ This was held again to coincide with the government’s social policy aims.³⁸

This aim was trumpeted often by employers during the build up to the 2006 Regulations, and appeared in the Government’s 2003 Consultation,³⁹ but not as any part of its social policy. The document merely reported what some employers stated to be the reasoning behind their compulsory retirement policies. No further mention of this was made in the 2005 Consultation⁴⁰ and subsequent 2006 Explanatory Notes. This ‘dignity’ aim was advanced also in the *Age UK* case,⁴¹ but rejected as a social policy aim by Blake, J.⁴² In fact, he considered that compulsory retirement of those wishing to continue in work had an ‘adverse impact on the dignity of autonomy of members of this class’.⁴³

This leaves Waller’s LJ ‘experience’ as the only basis of the ‘dignity’ aim. With due respect, it is not for a judge to create social policy, and as such, this aim would appear to lack credibility. Moreover, in its 2011 Consultation Response, the Government stated that a strong link between age and job performance was a ‘myth’ for most types of work: ‘We believe that

³⁶ [2009] IRLR 1017, [72], [90].

³⁷ Hansard Written Ministerial Statements for 14 Dec 2004 (pt 4), Columns 127WS-130WS; or Lords Hansard Text for 14 Dec 2004 (241214-41), Columns WS78-WS81. Column 128WS.

³⁸ [2010] EWCA Civ 899 (CA), [22]-[24].

³⁹ para.4.6.

⁴⁰ paras.6.14-6.16.

⁴¹ [2009] IRLR 1017, [66], [72], [74].

⁴² *Ibid*, [108].

⁴³ *Ibid*, [122]. Contrast the ECJ, who recently accepted that compulsory retirement of public prosecutors could ‘improve personnel management and thereby to prevent possible disputes concerning employees’ fitness to work beyond a certain age’, and held that this was a legitimate public policy because it maintained the quality of justice, which was a public interest: Case C-159/10 *Fuchs v Land Hessen*, [2011] Pens. L.R. 335, [5], [53].

employers should assess the performance of their staff fairly, whatever an employee's age'.⁴⁴ Accordingly, its 2011 'Age Positive' Guidance suggests that employers should:

'Encourage an open culture of active performance management, formal or informal, throughout workers' careers to avoid unexpected announcements, confrontations or "loss of dignity"'.⁴⁵

And where poor performance cannot be resolved - by say, training, a change of job role, workplace adaptation or a change in working pattern - then the employer should 'follow the normal fair dismissal procedures that apply to employees of any age'.⁴⁶ In other words, the particular worker should be dismissed for 'capability' (under ERA 1996, s.98(2)(a)), and *not* for retirement. This all confirms that 'dignity' or 'collegiality' theories are not part of the Government's social policy. On the contrary, the Government's view is that dignity is *preserved* by performance management.

The Coalition Government's reference to 'most types of work' leaves the door ajar for forced retirement in some cases. It would seem that the employer would have to show a strong link between performance and age, *and* that evaluating performance is not possible, or perhaps not practicable.

(d) Health and safety

(i) Physical fitness

For certain types of work, this is the most obvious reason for employers to set a retirement age. Recital 18 of the Framework Directive identifies as a legitimate aim the 'operational capacity' of the armed forces, police, prison, or emergency services. In *Wolf*,⁴⁷ the challenged rule barred recruitment into the fire service of anyone over 30. This was to allow sufficient time for training, as fire fighters were retired from fire fighting duties at age 45. And this was because, agreed the ECJ, 'very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities'.⁴⁸ Accordingly, the ECJ reasoned, the rule was justified as a GOR. There was no need to find a social policy required by the objective justification defence.

A notable feature of this case was that the job requirement in question was an age limit, not fitness per se. Nonetheless, the ECJ accepted *age* as the job requirement, noting 'scientific data deriving from studies in the field of industrial and sports medicine which show that respiratory capacity, musculature and endurance diminish with age'.⁴⁹ Hence, age was so closely related to job-performance it was a job requirement. This is a rather startling conclusion, given that exceptions to the principle of equal treatment are usually interpreted strictly.⁵⁰ However, it may not have serious ramifications for retirement. Employers at the *recruitment* stage have to predict the physical fitness of recruits over a considerable length of

⁴⁴ p.7.

⁴⁵ Age Positive, p.12.

⁴⁶ pp.12-13.

⁴⁷ Case C-229/08, [2010] IRLR 244.

⁴⁸ *Ibid*, [41].

⁴⁹ *Ibid*.

⁵⁰ e.g. Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, [65].

time, conceivably decades. This is less likely to be the case in *retirement* cases, which would undermine somewhat the legitimacy of the aim. And even if the aim were considered legitimate, an age limit would be harder to prove proportionate where individual testing was available (see further below, under Proportionality). That said, *Wolf* signals that the ECJ willingly accepts generalisations about job performance and age.

(ii) Protection of the public

In *Petersen*,⁵¹ one of the aims of German legislation retiring dentists when they reached 68 was ‘The protection of the health of patients as performance of dentists declines after a certain age’. The ECJ considered that this aim fell readily within art.2(5) of the Framework Directive which provides: ‘This Directive shall be without prejudice to measures laid down by national law which ... are necessary ... for the protection of health...’ As such, the Court had no need to consider whether the health of patients fell within the general objective justification defence of art.6(1).

The Equality Act 2010 has no provision corresponding to art.2(5). An employer using health and safety aims to retire older workers could try to argue this as a GOR (citing *Wolf*, above). Should this fail (distinguishing *Wolf* as a recruitment case) the employer would have to look to the objective justification defence.

Although ‘health and safety’ did not appear as a social policy aim back in 2006, the Coalition has since mentioned it (albeit in passing) as one in its 2010 and 2011 Consultation documents.⁵² Thus, it may be added to the Government’s ‘pension stability’ and remaining ‘workforce planning’ social policy aims and used as a legitimate aim for the objective justification defence. ‘Health and safety’ presumably covers that of the individual employees, their colleagues, and the public.

(e) Reducing or redistributing unemployment

In *Palacios de la Villa*,⁵³ the ECJ accepted a goal of ‘checking unemployment’ as a legitimate basis for Spanish legislation permitting compulsory retirement to be negotiated into collective agreements.⁵⁴

Again, we see a more relaxed judicial approach to age discrimination. ‘Checking unemployment’ is a triumph of form over substance; in fact, such policies merely redistribute it, from the young to the old. Redefining older unemployed people as ‘retired’ cannot change this.

This criticism was neutered by the ECJ in *Petersen* (above), where the second aim cited for

⁵¹ Case C-341/08 *Petersen* [2010] IRLR 254. See also Case 447/09 *Prigge v Deutsche Lufthansa AG* [2011] I.R.L.R. 1052 where the health and safety aim of retiring pilots was legitimate, although not proportionate because of the discrepancy between the retirement age in the applicable collective agreement (60) and national and international rules (65).

⁵² Respectively pp. 31 and 7; see also ACAS Guidance, p.5.

⁵³ Case C-411/05 *Palacios de la Villa* [2007] IRLR 989.

⁵⁴ *Ibid*, [52].

retiring dentists at 68 was ‘the distribution of employment opportunities among the generations’. The Court cited *Palacios de la Villa*, and held:

‘Similarly, a measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as an employment policy measure’.⁵⁵

Similarly, in *Rosenbadt*, the ECJ observed:

‘The termination of the employment contracts of those [aged 65] directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment’.⁵⁶

Thus, it seems, ‘redistributing employment’ is a legitimate aim under the Framework Directive. However, it does not appear in any of the Consultation documents nor Explanatory Notes. Moreover, the 2011 Consultation Response takes quite the opposite stance. In its forward, the Government declares:

‘Working longer is good for the economy, for society and for individuals. Evidence shows that keeping more people in work helps the economy grow. ... We want employers to draw their workforces from the widest possible talent pool ... We believe strongly in the freedom of people to work on for as long as they want and are able to.’

So, for reasons of economic growth and individual justice, the Coalition Government set itself dead against using retirement as a means to reduce unemployment or favouring employment of the young over the old.

This stance hints at a technical problem for the aim ‘redistributing employment’. Favouring young persons over the old amounts to positive action, which normally requires a specific legislative sanction. Further, the concept of positive action has its roots in redressing historic disadvantage. The principal purpose of anti-age discrimination law is to address entrenched discrimination against the *elderly*. This aim does quite the opposite. It is akin to sanctioning positive action in favour of men, or whites. The Canadian Supreme Court has observed that such a redistributive aim:

‘assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age’.⁵⁷

Clearly, aims of reducing or redistributing unemployment by retirement form no part of present Government social policy.

⁵⁵ Case C-341/08 *Petersen* [2010] IRLR 254. [68]. See also Case C-159/10 *Fuchs v Land Hessen*, [2011] Pens. L.R. 335 [47], [60], observing that a balanced workforce ‘helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge’ [48].

⁵⁶ Case C-45/09 *Rosenbadt* [2011] 1 CMLR 32, [43].

⁵⁷ *McKinney v University of Guelph* [1990] 3 SCR 229, pp.302-303.

(f) Costs?

There could be many savings that come with an employer's compulsory retirement age. A rather obvious move by some employers, especially in hard times, is to retire 'expensive' older workers and replace them with younger cheaper ones. This could arise where, say, the employer historically has rewarded long-service, or operates an incremental scale (automatically promoting workers up a pay scale each year). Rather than upset this arrangement openly, an employer may preserve or manoeuvre its retirement policy to offset the expense.

Authority has it for sex discrimination that costs alone cannot be relied on as an aim. In *Redcar v Bainbridge*,⁵⁸ an equal pay case, Elias, J. said that 'an employer cannot defeat the right to equality by pointing to financial burdens alone, but he can pray the financial burdens in aid as some support for a decision which is objectively justified on other grounds.'⁵⁹ Similarly, in *Pulham v Barking & Dagenham LB*,⁶⁰ the EAT suggested that an 'exhausted' budget could be a factor (it would be 'unexceptional') in the proportionality analysis, but not, in itself, a reason to justify age discrimination, because the employer was responsible for allocating the budget in the first place.⁶¹

This suggests that costs per se cannot be used as a legitimate aim, although it could form part of the proportionality argument. But in *Woodcock v Cumbria Primary Care Trust*,⁶² a case of direct age discrimination, the EAT suggested otherwise. Here, a chief executive was made redundant for two reasons:

- (1) to get him off the payroll before he reached 50, when he would have been entitled to early retirement, costing at least £500,000; and
- (2) he was redundant (and been kept on for one year doing very little).

It was held that the redundancy alone validated the dismissal. However, Underhill, J. went on to suggest that where the discriminatory impact was 'trivial' and the cost of the alternative 'enormous', costs alone ought to be able to justify age discrimination.⁶³ This ignores, of course, the ECJ and High Court caution in the *Age Concern* case (see above) that objective justification could not be used to reduce an individual employer's costs or increase its competitiveness.

A third aim argued in *Petersen* (above) was that in Germany there were too many dentists on the public panel, and this threatened the financial stability of the public health care system. It seems that this third aim - 'financial constraints' - was a legitimate aim, because it accorded with the 'public health' purpose. However, this can be distinguished from *Woodcock* and the like, because it fell under the public health exception in art.2(5). It was not an individual employer merely saving money to remain competitive or increase profits. And so, it might be

⁵⁸ [2008] ICR 249 (EAT).

⁵⁹ *Ibid*, [92] citing *Cross v BA* [2005] IRLR 423 (EAT).

⁶⁰ [2010] IRLR 184.

⁶¹ *Ibid*, [42]-[44].

⁶² [2011] ICR 143.

⁶³ *Ibid*, [32]. Approved *Cherfi v G4s Security Services Ltd* (2011) UKEAT/0379/10/DM (EAT) [36], [45].

that where an individual employer tries to justify retirement with the aim of saving money, the argument would be rejected.

With these potential difficulties, the employer wishing to retire older expensive workers in order to replace them with younger ones would be well-advised to declare the apparently legitimate aim under the ‘attrition profile’ strand of the workforce planning policy (above), only mentioning the savings as part of its proportionality argument. Of course, fallacious or pretextual arguments proffered here should be rejected. In *Petersen*, the ECJ rejected the ‘protection of the public’ argument (above) because the rule applied only to public sector dentists, and so lacked credibility.⁶⁴

(g) The needs of the business

Rather curiously, the Coalition Government has stated that in order to objectively justify a retirement ‘an employer would need to show that they were acting to further a legitimate *aim of the business* ...’⁶⁵

Taken at face value, this cannot be correct. A purely business aim was rejected by the ECJ and accordingly by the High Court in *Age UK*, as noted above.⁶⁶ Any business aim would have to, at the least, coincide with a social policy aim (see *Seldon v Clarkson*, above).⁶⁷

OBJECTIVE JUSTIFICATION AND PROPORTIONALITY

In sum, it seems that the most likely aims to be accepted are workforce planning (‘attrition profile’) and, where appropriate, pension stability or health and safety. Once the aim is established, the focus moves to proportionality: was the compulsory retirement an appropriate and necessary means to achieve the given aim? As noted above,⁶⁸ employers may find that tribunals afford them ‘a certain degree of flexibility’ in choosing the means to achieve the aim.

(a) Choice of Age

The choice of a particular retirement age would seem the most vulnerable target for claimants. The question will be just how much proof an employer can be expected to produce to show that its chosen age is *necessary* to achieve the aim. In *Age UK*, the High Court criticised the Government for not choosing a default retirement age above 65, say 68, and but for the Government’s forthcoming review (which led to the abolition of the DRA), it would have held that the age of 65 to be disproportionate to the twin aims of workforce planning and stability of pensions. In particular:

⁶⁴ Case C-341/08 *Petersen* [2010] IRLR 254, [30], [38], [78].

⁶⁵ 2011 Consultation Response, p.4; Guidance 2010, p.3, emphasis supplied.

⁶⁶ Text to n.3.

⁶⁷ Text to n.25.

⁶⁸ ‘(b) A Wide discretion?’.

‘It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations’.⁶⁹

Elsewhere, Blake, J. observed that employers would have ‘a much more rigorous task’ than the State when objectively justifying individual practices.⁷⁰

However, the judicial indications elsewhere are that not much proof, if any, will be required, especially if employers align the retirement age with a norm, typically the state pension age. The ECJ, in *Palacios de la Villa, Petersen, Rosenbadt, and Georgiev*,⁷¹ and the Court of Appeal in *Seldon*, displayed little scrutiny of the employer’s chosen age. In the most pertinent of these cases, *Seldon*, where an *employer* (not the State) was charged with justifying a retirement age of 65, the Court of Appeal appeared notably relaxed about the choice of age. Waller, LJ reasoned:

‘A rule which adopts 66 is less discriminatory to partners aged 65, but is now more discriminatory to partners aged 66. The selection of any age is going to be more discriminatory to that age. If that makes the rule unlawful, it would simply be impossible to justify a retirement age introduced with those aims’.⁷²

Inevitably, the Court of Appeal held that the age of 65 was proportionate, even after conceding that there was no evidence to show things would have been different if the chosen age were 68, 65, or 63. The decision was supported, Waller, LJ continued, by the Government’s choice of 65 as the DRA.⁷³

The Court’s reasoning appears to be rooted in a head-to-head comparison between two workers, respectively aged 65 and 66, when the retirement age is *either* 66 or 65. The 66 year-old can complain he was treated less favourably than the 65 year-old or vice versa. This misses the point, which is achieving the *least* discriminatory means to achieve the aim. As such, any comparison should be (hypothetically) between 65 and 66 where *both* were retirement ages. This reveals it would be less discriminatory to retire the older worker because he would have one more year in employment and one year less unemployed or perhaps employed doing less desirable work.

Regardless of this criticism, *Seldon* may be distinguished because the DRA has been repealed (no longer giving support to 65 as ‘a norm’), and that its aims (‘job-blocking’ and ‘dignity’), to which the logic was attached, no longer form part of social policy.

(i) Job performance generalisations

⁶⁹ [2009] IRLR 1017, [124]-[128].

⁷⁰ *Ibid*, [97].

⁷¹ Joined Cases C-250/09 and C-268/09 *Georgiev*, [54]-[55], where the compulsory retirement age (68) of university professors extended five years beyond pension entitlement and so ‘did not unduly prejudice the legitimate claims of workers’ who had reached 68.

⁷² [2010] EWCA Civ 899, [38].

⁷³ *Ibid*, [39].

For aims more related to a specific job, the ECJ has readily accepted the generalisation that there is a strong relationship between advancing age and declining ability. In *Petersen*, the ECJ accepted the proposition that there was a decline in performance of dentists once past 68.⁷⁴

The Canadian Supreme Court agrees:

‘To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability’.⁷⁵

This is also the view of the United States Supreme Court. In *Massachusetts Board of Retirement v Murgia*,⁷⁶ the Court, when sanctioning the retirement of uniformed police officers at 50, did so on the basis that ‘there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job’.⁷⁷

However, present Government policy does not buy into this apparent received wisdom. It considers this generalisation to be a ‘myth’.⁷⁸ In support, the Government relies on evidence that ‘productivity does not usually decline at least up to 70 years old - notably where older workers receive the same levels of training as younger workers’.⁷⁹ This view contained the single caveat of referring to *most* jobs. Hence, employers may still use this generalisation, but only where they show the link between age and performance for that particular work, *and* the aim coincides with a social policy. As such, this may be argued as a GOR (*Wolf*) and/or as objectively justified.

The most obvious basis for this generalisation coinciding with social policy is health and safety.

(ii) Health and safety

It was noted above that the ECJ in *Wolf* and *Petersen* were prepared to accept generalisations on ability and age. It remains to be seen if the UK courts will accept such a generalisation at the point of retirement. Here, there could be workers who *are* physically fit, or able enough, for the job at the time of their dismissal. Of course, this possibility did not trouble the United States Supreme Court in *Murgia* (above). By contrast, a notable Australian decision rejected such a generalisation. In *Bradley*,⁸⁰ the Army required trainee pilots to be aged between 19

⁷⁴ Case C-341/08 *Petersen* [2010] IRLR 254, [30], [38], [78]. The argument failed because it applied only to public sector dentists, thus undermining its credibility.

⁷⁵ *McKinney v University of Guelph* [1990] 3 SCR 229, at 297, citing Note, ‘The Age Discrimination in Employment Act of 1967’ (1976), 90 Harv. L. Rev. 380, at p. 384; Tarnopolsky and Pentney, *Discrimination and the Law* (1985), at p. 7-5.

⁷⁶ 427 US 307 (1976).

⁷⁷ *Ibid*, pp.310-311.

⁷⁸ 2011 Consultation Response, p.7.

⁷⁹ Age Positive, pp.5, 10, 14, and 20.

⁸⁰ *Commonwealth v Human Rights & Equal Opportunity Commission (Bradley)* (1999) 95 FCR 218 (Federal Court of Australia). See also *Commonwealth of Australia v Hamilton* (2000) 63 ALD 641.

and 28 because inter alia the job required ‘an ability to maintain a high level of medical fitness for the duration of the six-year period of appointment’. It was held that the physical fitness requirement could not be allowed to ‘have the effect of damning individuals over 28 years by reference to a stereotypical characteristic (inferior physical fitness) of their age group’.⁸¹ The logic of this recruitment case applies with all the more force to retirement.

Of course, such a generalisation would be unacceptable if based on other protected characteristics. It may be true to say that women are, in general, physically weaker than men. But no court would sanction the exclusion of all women from a job demanding physical strength. Here, employers should assess each candidate according to his or her physical strength.

(b) Link with pension

A factor in *Palacios de la Villa* was that workers could only be retired (aged 65) if they had sufficient pension contribution. This mitigated the discriminatory impact of the policy and so assisted the (successful) proportionality argument.⁸² This suggests that tying their retirement policy to pension entitlement (be it state or otherwise) would help employers justify the policy.

(c) Consent

Another factor for the ECJ in *Palacios de la Villa* was that the Spanish legislation permitted compulsory retirement only via a collective agreement. The evidence of the challenged law being made with the instigation, or cooperation, of trade unions and employers’ groups clearly influenced the Court.⁸³

Several interesting observations on this matter arose in the Canadian Supreme Court case, *McKinney v University of Guelph*.⁸⁴ Here, some university academics, aggrieved at a compulsory retirement age (65) in their collective agreement, claimed that the facilitating legislation, s.9(a), Ontario Human Rights Code 1981, which excluded those aged over 65 from protection under the Code’s age discrimination prohibition, violated the non-discrimination tenet in s.15(1) of the Charter of Rights and Freedoms. In rejecting the claims (by a 5-2 majority), La Forest, J. proclaimed:

‘The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society.’⁸⁵

It was noted also that the local union, as well as the labour movement generally, opposed McKinney’s claim.⁸⁶

⁸¹ Ibid, [41].

⁸² Case C-411/05, [2007] IRLR 989, [73]; see also Joined Cases C-250/09 and C-268/09 *Georgiev* [54]-[55], [63].

⁸³ See e.g. *Palacios de la Villa*, *ibid*, [53], [60], [74], and Case C-45/09 *Rosenbaldt* [2011] 1 CMLR 32, [39].

⁸⁴ [1990] 3 SCR 229.

⁸⁵ La Forest, J, delivering the judgment of Dickson C.J. and La Forest and Gonthier JJ, *ibid*, p. 313.

⁸⁶ *Ibid*.

Concurring, Sopinka, J. considered that that were the claim to succeed, the Charter ‘would be used to restrict the freedom of many in order to promote the interests of the few’.⁸⁷ Meanwhile, Cory, J. (concurring) observed:

‘Bargains struck whereby higher wages are paid at an earlier age in exchange for mandatory retirement at a fixed and certain age, may well confer a very real benefit upon the worker and not in any way affect his or her basic dignity or sense of worth. If such contracts should be found to be invalid, it would attack the very foundations of collective bargaining and might well put in jeopardy some of the hard won rights of labour’.⁸⁸

By contrast, the statutory exception under the United States federal Age Discrimination in Employment Act 1967 is based entirely on *individual* consent.⁸⁹

A factor in *Seldon* was the individual consent given by an informed person when he signed the (law firm) partnership agreement. The Court of Appeal concluded that there are situations where ‘it is legitimate to take into account the perception which the partner now challenging the clause had at one time’.⁹⁰

But there are various degrees of consent. The bargaining power of a job applicant can vary enormously. For most, there is no choice. Jobs are offered on a take-it-or-leave basis. This will be all the more so in times of chronic unemployment (ironically a situation the ECJ in *Rosenbadt* used to justify compulsory retirement of cleaners).⁹¹ A trade union member may have a diluted influence over a collective agreement, whilst a non-member is likely to have none. There is all the difference between an informed professional entering into a partnership agreement and one of these workers, whose consent is largely illusory.

However, the overwhelming majority of a workforce may support a compulsory retirement age negotiated into a collective agreement, especially when it was linked to other benefits. Similarly, a highly skilled individual, with legal advice, may negotiate a detailed package, which included a retirement age. In either case, as long as the employer can produce an aim that coincides with social policy (most likely workforce planning), consent is likely prove a persuasive argument in justification.

The cases show that the judiciary of Europe and North America are content to have the fundamental right to equality trumped by freedom of contract, majority rule, or bargained away with work-related benefits. This exposes something quite odd about compulsory retirement: for many workers (perhaps a majority of the nation’s workforce) it is *desirable*. Its discriminatory nature is less important than the perceived benefits, making justification all the easier. This certainly encouraged the Canadian Supreme Court. That said, for other protected characteristics, such as race or sex, no such sympathy is likely to be shown for discrimination arising from agreement of any kind.⁹²

⁸⁷ Ibid, p.446.

⁸⁸ Ibid, pp.447-448.

⁸⁹ 29 USC s.626(f)(1). See further, EEOC 29 CFR s.1625.22, at www.eeoc.gov, click ‘Laws, Regulations’, click ‘Regulations’, scroll down to 1625.

⁹⁰ [2010] EWCA Civ 899 (CA), [30].

⁹¹ Case C-45/09, [2011] 1 CMLR 32, [43].

⁹² See e.g. Case C127/92 *Enderby v Frenchay HA*, [1994] ICR 112 (CA).

(d) Costs

It was noted above⁹³ that the EAT constantly has stated that employer's costs may form part of its proportionality argument, if not the mainstay aim. Thus, it seems, an employer retiring workers under any of the legitimate aims highlighted above, could deploy financial savings in its proportionality argument.

(e) Stability of pension scheme

Where the aim is the stability of pensions, the employer would have to show that compulsory retirement was an appropriate means to achieve the aim. This matter was discussed at length by the Canadian Supreme Court in *McKinney* (above). The majority's rejection of the claim was that a general retirement age of 65 was necessary to preserve the stability and integrity of pension schemes. They relied on the defendant's experts, who testified:

'In short, a number of issues regarding the design of occupational pension plans would have to be addressed if mandatory retirement were not permitted. So, too, would the wage policy followed by many employers, especially when the pension benefit is linked to the employee's earnings. The use of the occupational pension plan as a vehicle for deferring a portion of the employee's total compensation to the employee's later work years may be reduced. As before, not permitting mandatory retirement is likely to require compensating adjustments elsewhere in the compensation package and in the set of work rules that govern the workplace.'⁹⁴

The plaintiff's expert confined his evidence to effect upon pension plans of removing the Mandatory Retirement Age (MRA). He highlighted the experiences of Quebec and Manitoba, where the MRA was removed and no 'instability' was apparent in the pension plans as a result. He testified that deferred retirement would invoke some administrative costs for actuarial adjustments, which would 'pale into insignificance compared to administrative costs resulting from pension legislation.' Second, he noted that the removal of the MRA did not necessarily alter the normal retiring age in the pension plan. In Quebec and Manitoba, for example, legislation *required* that a normal retiring age be stated in the pension plan.⁹⁵ In other words, the pension matures at a certain date irrespective of whether the worker retires. The worker draws the pension, and may continue working with the option of contributing further to a pension plan.

The case demonstrates the judiciary's deference to legislation that derogates from the anti-discrimination principle when the treatment is ageist. Faced with divided expert evidence, the majority sided with the defendant. Given that the UK Coalition Government has not absolutely ruled this out as an aim, the remaining issues would be whether compulsory retirement was an appropriate means, and whether the chosen age was necessary. On the first issue at least, it seems that the employer has a 'certain degree of flexibility'.⁹⁶ It remains to be seen whether tribunals show the deference afforded by the Canadian Supreme Court.

⁹³ See text to n.58 et al.

⁹⁴ [1990] 3 SCR 229, at 303 and 304.

⁹⁵ Affidavit of Peter C. Hirst, Case on Appeal Vol 7, Tab 2, respectively paras.11 and 14.

⁹⁶ See above, '(b) A Wide discretion?'

OTHER AGE DISCRIMINATORY MEASURES IN THE ECJ

In *Mangold v Helm*,⁹⁷ German law exempted from regulation fixed-term employment contracts for any worker over 52. This relaxation of protective legislation was designed to encourage employers to recruit older workers. The ECJ held that this was a legitimate aim, but went beyond what was appropriate and necessary to help *unemployed* older workers.⁹⁸ In *Swedex*,⁹⁹ a rule discounting for notice periods the time employed before the age of 25 was challenged. The ECJ held that the aim ('facilitating younger persons' recruitment') was legitimate, but again, as the rule affected all workers who began work before the age of 25, and as it affected young workers unequally (many, after extensive education and/or training, would not begin work until aged 25), it was not an appropriate means to achieve the aim.¹⁰⁰

These two cases indicate a marked contrast to the light touch taken by the ECJ in the retirement discrimination cases. If a pattern could be discerned, it seems that the ECJ shows great deference to retirement policies, accept generalisations about older workers' job performance, and workers consent (even if largely illusory), but otherwise it will apply the orthodox strict justification test.

CONCLUSION

The ECJ has ruled that the objective justification defence to direct age discrimination may be deployed only in pursuit of a social policy aim, which may be gleaned from the context of the legislation. Governments – but not employers – have a wide discretion in choosing these aims, although it seems, employers may have a 'a certain degree of flexibility' in choosing the means to achieve the aims. But whether employers can justify aims that inadvertently coincide with social policy, especially after the event, remains to be seen as employers defend parallel unfair dismissal claims. The ECJ has signalled a light-touch approach to retirement, and this echoes the North American judicial approach. The embryonic UK case law is rather split, with the High Court in *Age UK* suggesting a rather strict approach and the Court of Appeal in *Seldon* doing just the opposite.

However, the Coalition Government has indicated that it no longer wants a fixed retirement age to be the norm. This is the 'context' of the repeal of the DRA, and consequent exposure of compulsory retirement to the objective justification. It remains to be seen just how far tribunals depart from the established 'light touch' pattern in the case law and follow instead the stricter approach suggested by this new context. On this note, it would have been helpful for the Government to have provided more clarity on its social policy aims (e.g. declaring the aims accepted in *Seldon* no longer valid).

⁹⁷ Case C-144/04 [2006] 1 CMLR 43.

⁹⁸ *Ibid*, [64].

⁹⁹ Case C-555/07 *Kucukdevici v Swedex GmbH* [2010] 2 CMLR 33.

¹⁰⁰ *Ibid*, [35]-[42]. See also Case C-88/08 *Hutter* [2009] ECR I-5325.

