

AGE DISCRIMINATION & JUSTIFICATION – WHERE ARE WE NOW?

NOTES FOR A TALK TO THE LIVERPOOL LAW SOCIETY

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Introduction

1. The recent abolition of the Default Retirement Age (“**the DRA**”) from UK domestic legislation has led to a considerable amount of commentary and speculation as to:
 - a. Whether and in what circumstances a ‘blanket’ compulsory retirement age (“**CRA**”) will nevertheless remain lawful; and
 - b. Steps which employers can take to minimise the potential risk of successful age discrimination claims, pursuant to the Equality Act 2010 (“**the EqA**”).
2. It is generally accepted amongst practitioners that the safest option for employers (in terms of litigation risk), following the abolition of the DRA, is:
 - a. Not to persist with a CRA; but instead
 - b. To review and operate comprehensive systems of performance monitoring and management, relying if necessary on capability as a potentially fair reason for dismissal.
3. Notwithstanding the above, it remains the case that:
 - a. EU law expressly envisages that there will be circumstances in which a CRA is perfectly permissible (see below);

- b. Many employers continue to view a CRA as a valuable tool for effective business planning and management; and
 - c. The recent decision of the UK Supreme Court in **Seldon v Clarkson Wright & Jakes [2012] IRLR 590** has provided employers with some cause for optimism on this front.
4. This paper considers some of the key legal and practical issues surrounding the issue of ‘justified’ age discrimination, including an analysis of the approach adopted by the European Court; and how this is (perhaps surprisingly) noticeably more ‘pro-employer’ than the approach adopted to date in the UK domestic tribunals and appellate courts.
5. The paper is divided into the following broad headings:
- a. Age discrimination and social policy aims – the approach of the ECJ;
 - b. The UK domestic position, in light of **Seldon**;
 - c. Justifying a CRA – practical guidance and tips; and
 - d. Justification by reference to cost considerations; and
 - e. Direct vs indirect age discrimination: a difference of approach?

Age discrimination and social policy aims – the approach of the ECJ

6. The EU Equal Treatment Framework Directive 2000 (2000/78/EC) (“**the Directive**”) was drafted in a way which permitted justification of both indirect and direct discrimination on grounds of age. Article 6 of the Directive provides as follows:

“Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational

training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”

7. So, it can be seen that EU law envisages a fairly broad range of possible justifications for direct age discrimination. It is trite law that the defence of justification under EU law requires a two-stage assessment; with regard to the particular issue under consideration here, the following questions arise for determination:
 - a. Is the application of the age discriminatory measure (as contained in the domestic legislation of a member state) in pursuit of a legitimate aim; and if so,
 - b. Is that measure a proportionate and necessary means of achieving that aim?

8. There is already a substantial (and growing) body of European jurisprudence on the lawfulness of age discriminatory measures (as contained in the domestic legislation of several member states), including CRAs. This is perhaps unsurprising, given the importance of this matter in terms of social, labour and economic policy across the EU. What is perhaps surprising is the rather deferential and non-interventionist

stance adopted by the ECJ in such cases – discussed further below. The European cases are divided broadly into two categories¹:

- a. Health and safety justifications; and
- b. Labour market policy justifications (most frequently on grounds of “inter-generational fairness”).

9. These two broad categories are dealt with in turn.

Health and safety justifications

10. In **Wolf v Stadt Frankfurt am Main (C-229/08) [2010] IRLR 244**, German legislation prohibited anyone who was over 30 years of age from applying for an “intermediate career post” in the German fire service (i.e. an ‘on the ground’ firefighter role).
11. The ECJ accepted the (uncontested) medical evidence that “some of the tasks of persons in the intermediate career of the fire service...such as fighting fires or rescuing persons, require exceptionally high physical capabilities and can be performed only by young officials”. With regard to the proportionality of the maximum *recruitment* age (note that this was not a case involving a CRA), the ECJ observed at paragraph 43 of its judgment:

“The age at which an official is recruited determines the time during which he will be able to perform physically demanding tasks. An official recruited before the age of 30, who will have to follow a training programme lasting two years, can be assigned to those duties for a minimum of 15 to 20 years. By contrast, if he is recruited at the age of 40, that period will be a maximum of 5 to 10 years only. Recruitment at an older age would have the consequence that too large a number of officials could not be assigned to the most physically demanding duties...”

¹ Albeit some of the cases comprise overlapping justifications

12. In light of such considerations, the ECJ formed the view that the applicable age limit was an appropriate means of achieving the legitimate objective of ensuring the operational capacity and proper functioning of the professional fire service, and did not go beyond what was necessary to achieve that objective.
13. A more recent analysis by the ECJ of health and safety objectives can be found in **Prigge & Others v Deutsche Lufthansa AG (Case C-447/09) [2011] IRLR 1052**. Here, the claimants were employed for many years by Lufthansa as commercial pilots and then flight captains. A collective agreement which applied to the crew of Lufthansa, and which was recognised by German law, prohibited pilots from continuing to work as pilots after the age of **60**.
14. When the claimants reached the age of 60, their contracts of employment terminated automatically in accordance with the collective agreement. The claimants objected to the application of this blanket provision and sought a declaration from the German federal courts that it amounted to unlawful age discrimination (and that, as a consequence, their contracts of employment had not been terminated but rather continued in force).
15. The German Federal Labour Court referred the matter to the ECJ, asking whether a collective agreement which provided for an age limit of 60 for commercial airline pilots, for the purposes of air safety, was compatible with EU law. The ECJ held that it did not.
16. The ECJ reiterated well-established principles that collective agreements entered into with the “social partners” must, as with the national laws of Member States, respect the principle of non-discrimination on grounds of age. With regard to whether application of this CRA was in pursuit of a legitimate aim, the ECJ unsurprisingly accepted that measures which aim to stop human failure causing aeronautical accidents constitute measures aiming to ensure public security and protection of health, and are therefore legitimate.

17. The ECJ further accepted that possessing particular physical capabilities may be a “genuine and determining occupational requirement” for acting as a commercial airline pilot, and that it was “undeniable that those capabilities diminish with age”. Accordingly, applying a maximum age for commercial air pilots, in order to promote the health and safety of crew, passengers and persons in areas over which aircraft fly, could in principle constitute lawful direct age discrimination.
18. On the facts, however, the ECJ held that the CRA, set at 60, was disproportionate and therefore unlawful. The ECJ reiterated that it is only in very limited circumstances that a difference in treatment, on grounds of age, may be justified. In reaching its conclusion that the CRA was contrary to the Directive, the ECJ was persuaded by the fact that international and indeed German national legislation provided that, between the ages of 60 and 64, an airline pilot *may* continue to act as a pilot, provided s/he is a member of a multi-pilot crew and the other pilots are under the age of 60. That particular legislation applied a blanket ban on pilots continuing in employment beyond the age of 65.
19. Against this legislative backdrop, the ECJ was not persuaded that the particular prohibition contained in the collective agreement constituted a necessary and proportionate measure for the protection of public health and security.
20. The decision in **Prigge** highlights the importance of identifying very clearly the objective(s) which are being pursued by the application of a CRA. Where the objective is one solely related to health and safety, the tribunal/court is likely to require cogent evidence that the particular ‘cut-off point’ which has been selected has a clear justification, based on some form of empirical evidence – for example, medical evidence relating to workers’ physical capacity to undertake certain tasks (see **Wolf** above), or statistics demonstrating a higher rate of accidents amongst older workers.
21. The outcome in **Prigge** may well have been different if the ‘dead man’s shoes’ justification (as to which, see below) had been relied upon by Lufthansa and advanced

before the ECJ (whether as the primary objective being pursued, or a secondary aim in addition to health and safety considerations).

Labour market policy justifications

22. In **Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (C-341/08) [2010] IRLR 254**, the ECJ was required to consider the decision of a German Appeal Board to refuse to permit the claimant to practise as a ‘panel’ dentist (i.e. treating patients under a statutory health insurance scheme) after she had turned 68 years of age. This decision was made in accordance with national legislation, which set the ‘cut-off’ point for panel dentists at age 68.
23. Although it was ultimately for the German national court to resolve the question of proportionality, the ECJ stated that where the aim of the discriminatory measure was to “share out employment opportunities among the generations”, the measure could in principle be lawful.
24. This notion of ‘inter-generational fairness’ amongst the workforce (put crudely, freeing up jobs for younger workers by retiring older workers) is commonly – and perhaps rather grimly – referred to as the ‘dead man’s shoes’ argument. Whilst accepting in **Petersen** that this was capable *in principle* of constituting a lawful justification for an age discriminatory measure, the ECJ stated that it would be important to consider the particular circumstances of the relevant industry. The Court held at para. 71:

“...Where the number of panel dentists in the labour market concerned is not excessive in relation to the needs of patients, entry into that market is usually possible for new practitioners, especially young ones, regardless of the presence of dentists who have passed a certain age, in this case 68. In that case the introduction of an age limit might be neither appropriate nor necessary for achieving the aim pursued”.
25. On the other hand, however:

“...faced with a situation in which there is an excessive number of panel dentists or with a latent risk that such a situation will occur, a Member State may consider it necessary to impose an age limit such as that at issue in the main proceedings, in order to facilitate access to employment by younger dentists” (para. 73).

26. This reasoning tends strongly to suggest that an analysis of the specific characteristics of the labour market in question (i.e. the industry within which the Respondent employer is operating) will be both appropriate and necessary, in order to give proper consideration to the question of whether an age discriminatory measure is justified.
27. In **Seda Küçükdeveci v Swedex GmbH & Co. KG (C-555/07) [2010] IRLR 346**, a question arose as to whether a German national measure which disregarded periods of service before an employee reached the age of 25 (for the purpose of calculating the statutory notice period) was justified. The practical effect was that the claimant had worked for Swedex for 10 years at the date of dismissal, but her notice period was calculated as if she had only three years’ service. In this instance, the ECJ concluded that the measure in question was contrary to the Directive and unlawful. The German government sought to justify the measure (in part) on the basis that “young workers generally react more easily and more rapidly to the loss of their jobs and greater flexibility can be demanded of them. A shorter notice period for younger workers also facilitates their recruitment by increasing the flexibility of personnel management”. In the ECJ’s opinion, these objectives “clearly belong to employment and labour market policy within the meaning of Article 6 (1) of [the Directive]”.
28. However, the German government failed to persuade the ECJ that the measure was a necessary and proportionate means of achieving those legitimate objectives. In so concluding, the ECJ observed (*inter alia*) that the measure in question affected young employees unequally, in that it had a greater adverse effect on those young people who entered employment after little or no vocational training, in comparison to those who started work at a later date (but who were dismissed at the same age).

29. In **Rosenblatt v Gebaudereinigungsges mbH (Case C-45/09) [2011] IRLR 51**, the ECJ accepted that a collectively negotiated CRA, which provided that employment terminated at the point at which the employee could claim a retirement pension or at the latest when the employee reached 65, was lawful. The CRA in question was intended (*inter alia*) to “facilitate employment for young people, planning recruitment and allowing good management of a business's personnel, in a balanced manner according to age”, which the ECJ again accepted was a legitimate aim. The German government’s submissions to the ECJ included the following (mainly ‘policy-based’) arguments (at para. 43):

“...the lawfulness of clauses on automatic termination of employment contracts of employees who have reached retirement age, which is also acknowledged in a number of other member states, is the reflection of a political and social consensus which has endured for many years in Germany. That consensus is based primarily on the notion of sharing employment between the generations. The termination of the employment contracts of those employees directly benefits young workers by making it easier for them to find work, which is otherwise difficult at a time of chronic unemployment. The rights of older workers are, moreover, 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. 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.”

30. Having considered these points, the ECJ accepted (without reservation) that such aims “must be regarded” as legitimate objectives. The ECJ also stated in its judgment:

“It must be observed that the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many member states and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made

between prolonging people's working lives or, conversely, providing for early retirement" (para. 44).

31. As regards the question of proportionality, the ECJ considered it was important that:
- a. The workers would benefit from "financial compensation by means of a replacement income in the form of a retirement pension at the end of their working life"; and
 - b. The measure had its basis in agreement, rather than being unilaterally imposed on the workers².
32. Having weighed up the competing considerations, the ECJ came down in favour of the German government, holding that:
- "...it does not appear unreasonable for the authorities of a member state to take the view that a measure such as the authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached the age at which he is eligible for a retirement pension..., may be appropriate and necessary in order to achieve legitimate aims in the context of national employment policy, such as those described by the German government" (para. 51).
33. A further example of the 'dead man's shoes' argument being deployed at European level is **Georgiev v Technicheski universitet Sofia (Case C-250/09) [2011] 2 CMLR 179**. In this case, the ECJ held that the Directive did not necessarily preclude national legislation under which university professors were compulsorily retired when they reached the age of 68, and could continue working beyond the age of 65 only by means of renewable fixed term contracts. However, the ECJ considered that it was for the national court to determine whether the measure in question was justified on the

² See also the decision in **Felix Palacios de la Villa v Cortefiel Servicios SA (Case C-411/05) [2007] IRLR 989**, where the ECJ held that a Spanish national law which allowed DRAs to be included in collective agreements was justified, on the basis that it was a proportionate means of achieving the legitimate aim of creating employment opportunities for younger workers.

facts. The ECJ commented that relevant considerations for the national court would include the delivery of quality teaching, and the best possible allocation of posts for professors between the generations.

34. Finally, in **Hornfeldt v Posten Meddelande AB (Case C-141/11) [2012]**, a Swedish national law provided that employees had a *prima facie* right to remain in employment until the end of the month in which they reached the age of 67, but no longer. Whilst an employer was not *compelled* to terminate the employment relationship at age 67, under the Swedish legislation it would not be unlawful to do so. The Swedish government contended, and the ECJ accepted, that the following amounted to legitimate objectives under the Directive:

- a. Avoiding the “termination of employment contracts in situations which are humiliating for workers by reason of their advanced age”;
- b. Enabling retirement pension regimes “to be adjusted on the basis of the principle that income received over the full course of a career must be taken into account”;
- c. Reducing obstacles for those who wish to work beyond their 65th birthday;
- d. Adapting to demographic developments and anticipating the risk of labour shortages; and
- e. Establishing a right, and not an obligation, to work until the age of 67, in the sense that an employment relationship may continue beyond the age of 65;
- f. Making it easier for young people to enter the labour market.

35. Interestingly, the Swedish government had made no mention of what aim(s) were being pursued by this CRA, at the time when it was introduced. Nevertheless, the ECJ held that:

“It cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation at issue as regards the aim pursued has the effect of excluding automatically the possibility that that national legislation may be justified under that provision. In the absence of such precision, it is important that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of that measure for the purposes of review by the courts as to whether it is legitimate and as to whether the means put in place to achieve it are appropriate and necessary” (para. 24).

36. The ECJ then turned to consider whether the measure in question was a necessary and proportionate means of achieving the aforesaid legitimate objectives. It held that it was, stating (*inter alia*):

“In the light of the broad discretion granted to the Member States and, as necessary, to the social partners at national level in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it, it does not appear unreasonable for the social partners to take the view that a measure such as the 67-year rule may be appropriate for achieving the aims set out above” (para. 32).

....

“In order to examine whether the measure at issue in the main proceedings goes beyond what is necessary for achieving its objective and unduly prejudices the interests of workers who reach the age of 67, that measure must be viewed against its legislative background and account must be taken both of the hardship that it may cause to the persons concerned and of the benefits derived from it by society in general and by the individuals who make up society” (para. 38)

37. The ECJ also noted that:

- a. The provision did “not establish a mandatory scheme of automatic retirement. It lays down the conditions under which an employer may derogate from the principle of the prohibition of discrimination on grounds of age and terminate the employment contract of an employee on the ground that he has reached the age of 67”;

- b. Once the employment contract was terminated by reason of age, it remained possible for an employer to offer the employee concerned a fixed-term employment contract (the duration of which could be freely agreed by the parties and, if necessary, renewed);
 - c. The 67-year rule took account of the fact that a dismissed worker will be entitled to financial compensation by means of a replacement income in the form of a retirement pension at the end of his working life; and
 - d. The age of 67 was *higher* than the age at which a retirement pension and other state benefits may be drawn (65).
38. Having taken into account all these relevant factors, the ECJ concluded that the measure in question was “objectively and reasonably justified by a legitimate aim relating to employment policy and labour-market policy and constitutes an appropriate and necessary means by which to achieve that aim” (para. 47).

The UK domestic position, in light of *Seldon*

39. Section 13 (2) of the Equality Act 2010 broadly follows the structure of Article 6 of the Directive, providing as follows:

“If the protected characteristic is age, A does not [directly] discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim”.

40. Unlike Article 6 of the Directive (and indeed the EqA Code of Practice relating to disability discrimination and reasonable adjustments), the EqA does not set out a list of relevant factors which a Tribunal should or may take into account, when considering the proportionality of an age discriminatory measure.

41. Although **Seldon** was a claim brought pursuant the Employment Equality (Age) Regulations 2006 (and not the EqA), the test of proportionality is defined in the same way in both pieces of legislation; and accordingly the reasoning and guidance of the Supreme Court will apply to claims of age discrimination brought under the 'new' law.
42. The facts of **Seldon** are well known and will not be rehearsed in detail here. In short, the complainant, Mr Seldon, was forced by the respondent law firm to retire at the end of the year following his 65th birthday, as required by the partnership deed. He argued that this was directly discriminatory on grounds of age and could not be justified³. The ET held that the measure was a proportionate means of achieving three legitimate aims, namely:
- a. to ensure that associates were given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates did not leave the firm;
 - b. to facilitate the planning of the partnership and workforce by enabling realistic long-term expectations as to when vacancies would arise; and
 - c. to limit the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the firm.
43. On appeal, the EAT⁴ accepted that the first two aims could have been met by *any* fixed retirement age, but held that there was no evidential basis for the assumption that performance would drop off at around the age of 65, and thus for selecting the age of 65 in order to achieve the third aim. As the EAT could not be sure what decision the ET would have reached had it assessed justification by reference only to the first two objectives, it remitted the case to the ET to consider the question afresh. The CA dismissed Mr Seldon's appeal⁵.

³ Note that under the 2006 Regulations the DRA did not apply to partners.

⁴ [2009] IRLR 267

⁵ [2010] IRLR 865

44. The UKSC also dismissed Mr Seldon’s appeal. Perhaps somewhat regrettably, the UKSC chose not to definitively resolve the question whether the measure in question was a proportionate means of achieving a legitimate aim – instead reaffirming the earlier decisions that the matter should be remitted back to the ET for reconsideration. Accordingly, whilst the statements of principle from Lady Hale (with whom Lords Brown, Mance, Kerr and Hope⁶ agreed) are helpful to an extent in assessing how ETs may be likely to analyse future claims involving the imposition of a CRA, the judgment does not provide a practical example of a CRA being found to be justified by the appellate courts (in a UK domestic context).

45. As regards the first issue, namely what aim(s) on the part of an employer (as opposed to a member state) are / may be classified as legitimate, Lady Hale observed that:

“...The distinction drawn in the evolving case law of the European Court of Justice/Court of Justice of the European Union ('Luxembourg') is between aims relating to 'employment policy, the labour market or vocational training', which are legitimate, and 'purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness', which in general are not” (para. 30).

46. Lord Hope stated (at para. 73):

“...a distinction must be drawn between legitimate employment policy, labour market and vocational training objectives and purely individual reasons which are particular to the situation of the employer. There is a public interest in facilitating and promoting employment for young people, planning the recruitment and departure of staff and the sharing out of opportunities for advancement in a balanced manner according to age. These social policy objectives have private aspects to them, as they will tend to work to the employer's advantage. But the point is that there is a public interest in the achievement of these aims too. They are likely to be intimately connected with what employers do to advance the interests of their own businesses, because that is how the real world operates. It is the fact that their aims can be seen to reflect the balance between the

⁶ Lord Hope gave his own short judgment at paras. 71 – 77

differing but legitimate interests of the various interest groups within society that makes them legitimate”.

(Emphasis added)

47. Whilst certainly not providing an ‘open goal’ for employers wishing to retain a CRA, the tenor of the UKSC’s judgment does tend to suggest that ETs should be willing to afford some measure of latitude to those employers who are genuinely seeking to pursue legitimate social policy objectives. Lady Hale stated at para. 50 (3):

“It would appear...that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives”.

48. Lady Hale also summarised some of the labour / social policy objectives which have been recognised by the ECJ as legitimate, in the context of age discrimination claims, including:

- a. promoting access to employment for younger people / sharing out employment opportunities fairly between the generations;
- b. ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas;
- c. the efficient planning of the departure and recruitment of staff;
- d. avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned; and
- e. avoiding disputes about the employee's fitness for work over a certain age.

49. The UKSC emphasised, however, that “...the gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen” (para. 50 (6)).

50. Furthermore, it is not sufficient for an employer to cite and rely upon a particular aim(s) which is in principle legitimate; rather, “it is still necessary to enquire whether it is *in fact the aim being pursued*” (para. 59, emphasis added). So, whilst the failure of the Swedish government in **Hornfeldt** to specify the legitimate aim(s) it was seeking to achieve by implementing the measure in question (at the point in time when it was introduced) did not preclude it from satisfying the test of proportionality, ETs are likely to scrutinise very carefully the rationale / justification advanced by private employers at the hearing stage, as against any contemporaneous evidence of what factors truly motivated the introduction / retention of the measure in question.
51. That is *not* to say that aims which were not even contemplated at the time when the measure was first adopted cannot subsequently be relied upon by an employer in support of its statutory defence; indeed, the UKSC expressly acknowledged that it “may be an ex post facto rationalisation” (para 60), and noted the ECJ’s observations in **Petersen** that the national court should “seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues” (emphasis added). Lord Hope went further, stating that he considered it to be “immaterial” that “no minute was taken of the reasons why clause 22 [the CRA] was framed as it was” (para. 76). He also highlighted the fact that “the time at which the justification for the treatment which is said to be discriminatory must be examined is when the difference of treatment is applied to the person who brings the complaint” (emphasis added).
52. Notwithstanding the above, where there is evidence that *illegitimate / improper* motives were the driving force behind, or significantly influenced the introduction or retention of the discriminatory provision in question, that will plainly present employers with very considerable difficulties at any ET hearing where the justification of that measure is in dispute.
53. As regards the second issue, namely whether a employer is able to demonstrate that the measure in question, whilst pursuing a legitimate aim(s) (both in principle *and* in fact) is a proportionate means of achieving that aim(s), the UKSC emphasised that this

assessment will need to be made on a case by case / business by business basis. Lady Hale stated (at para. 62) that:

“...the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so”.

54. Broadly reflecting the ECJ’s reasoning in Petersen (see paras. 22 – 26 above), Lady Hale gave these practical examples (at para. 61):

“...improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce”.

55. The latter example could be viewed as an ‘invitation’ for employers wishing to introduce / retain a CRA to ensure that they do not have in place “sophisticated performance management measures”. In my view, for those employers who do already have such measures in place, eradicating or seriously watering down those procedures – with the aim of potentially bolstering a defence to future spate of age discrimination claims – would not be a sensible course of action to adopt. Amongst other matters, an ET would be likely to view such a move as cynical and motivated by improper considerations, which would in turn have a detrimental bearing on the ET’s assessment of: (a) whether a legitimate aim was in fact being pursued; and (ii) whether the means adopted were proportionate.

56. As outlined further below, in my view the legitimate aim which is likely to find most favour with ETs – and which generally will not give rise to the many practical difficulties associated with (for example) operating a business without any or any proper systems of performance management⁷ – is the aim (broadly defined) of “inter-generational fairness”.
57. In its judgment in **Seldon**, the UKSC also addressed the question whether the particular measure in question has to be justified by the employer:
- a. not only in general; but also
 - b. in its application to the particular complainant.
58. On this issue, Lady Hale stated as follows:

“[65] I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. Nor can it be entirely irrelevant that the rule in question was re-negotiated comparatively recently between the partners. It is true that they did not then appreciate that the forthcoming Age Regulations would apply to them. But it is some indication that at the time they thought that it was fair to have such a rule. Luxembourg has drawn a distinction between laws and regulations which are unilaterally imposed and collective agreements which are the product of bargaining between the social partners on a presumably more equal basis.

[66] There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the

⁷ It is of course important to remember the very important role which performance management processes have to play across a businesses’ workforce as a whole, in particular: (a) monitoring and encouraging a high level of performance / productivity; and (b) helping employers to protect themselves against claims of unfair dismissal, in circumstances where a capability dismissal is deemed necessary (of employees of any age). The practical effects of removing such procedures could easily outweigh the potential benefits consequent upon the operation of a (lawful) CRA.

purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified.

(Emphasis added)

Justifying a CRA – practical guidance and tips

59. So, what practical guidance or tips can be derived from the substantial and somewhat ‘high level’ nature of the ECJ and domestic jurisprudence discussed above, for those employers who do wish to implement / retain a CRA? In my view they may be summarised as follows:

- a. An employer should, as a first step, carefully consider the objective(s) which it is seeking to achieve by implementing / retaining the measure in question (having regard to the types of objectives which *have* been deemed to be legitimate – both by the ECJ and UKSC);
- b. Having done this, it would be prudent clearly to define these objective(s) in a document / policy, by reference to the factors / evidence relied upon. ‘After the event’ justifications, whilst not necessarily unlawful, are likely to be scrutinised particularly carefully by an ET;
- c. In respect of ‘safety-critical’ roles, there may be a persuasive justification for implementing a CRA on health and safety grounds. However, cogent evidence will need to be adduced as to:
 - i. why the chosen ‘cut-off’ point is appropriate and necessary – e.g. by reference to detailed job description(s) / academic studies on how performance declines with age (and how this relates to the particular role(s) in question) / other relevant medical evidence / statistical evidence / potentially anecdotal evidence about any serious problems experienced in the past by the employer vis-à-vis older employees

(although this is likely to be less persuasive when seeking to justify a blanket rule);

- ii. why it would not be feasible / appropriate to manage the situation by less restrictive means – e.g. annual health / fitness checks;
 - iii. as regards (ii) above, how invasive / cumbersome / time-consuming / expensive / administratively difficult would the operation of such processes be?
- d. With regard to the ‘avoiding humiliation’ justification, in my view ETs are likely to fairly sceptical and unimpressed by this line of argument. Whilst the ECJ has in principle accepted the legitimacy of this particular objective, the essence of the justification is: ‘I am directly discriminating against you for your own good’, which is an inherently unattractive proposition to advance before an ET. If this justification is relied upon (whether as a principal justification or in the alternative), careful thought will need to be given as to why the potential performance issues (assuming the roles are not ‘safety-critical’) cannot effectively be dealt with through ordinary performance management processes and procedures;
- e. With regard to the ‘inter-generational fairness’ aim, as I have already stated in my view there is greater scope for persuading ETs that a particular CRA is justified by reference to this legitimate objective. However, once again, cogent evidence will need to be adduced by the employer as to:
- i. why it is considered necessary and desirable to encourage the recruitment of more younger workers into that particular job / industry; along with
 - ii. the current state of affairs – e.g. the proportion of workers of different ages working in that particular job / industry, by reference to

reliable and up to date evidence (and not simply relying upon nationwide figures relating to high levels of youth unemployment, and/or the generic aspiration to ‘get more young people into work’); and

- iii. an explanation as to how and why the operation of a particular CRA is considered likely, in practice, to alter (ii) and achieve the aim at (i).
- f. Consideration should be given to providing additional financial benefits to those employees who are / will be affected by the CRA in question (e.g. an *ex gratia* payment based on length of service) – providing a ‘replacement source of income’ (in addition to pension benefits) may assist in demonstrating that the measure is objectively justified;
 - g. As a general rule, it will probably be an easier task to justify a ‘cut-off’ age which is *greater* than the state pension age;
 - h. Policies which are collectively negotiated and subject to detailed debate with trade unions / employee representatives are likely to be easier to justify than those which are unilaterally implemented by an employer;
 - i. Consider whether a CRA should be implemented for a particular section of the workforce only (owing to e.g. particular health and safety / labour market concerns), rather than as a ‘company-wide’ measure;
 - j. Consider the approach adopted by other employers in the same industry – do they have a CRA; if so, at what age and for what role(s)? Whilst this information will not be a ‘silver bullet’ in terms of successfully defending a complaint of age discrimination (the ET may, for example, conclude that *none* of the policies are lawful), it may potentially provide some evidential support for the employer’s chosen course of action;

- k. Ensure that the policy is kept under review – it would be prudent to undertake an annual assessment of the policy and document the same.

Justification by reference to cost considerations

60. In **R (Age UK) v Secretary of State for Business, Innovation and Skills (EHRC & another intervening)** [2009] EWHC 2336 (Admin), it was expressly conceded by the Secretary of State – in the context of a challenge to the lawfulness of the (now abolished) national DRA of 65 – that “cost reduction” would not constitute a legitimate aim. More recent authorities have, however, indicated that the pursuit of cost reductions may, in certain circumstances:

- a. properly constitute / form part of, a legitimate aim; and
- b. be highly relevant in any assessment of proportionality.

61. What is commonly referred to as ‘the orthodox approach’ was propounded in **Cross and ors v British Airways plc** [2005] IRLR 423; in this case, following a detailed analysis of European case-law on the subject the EAT concluded (at para. 72) that:

“...An employer seeking to justify a discriminatory [provision, criterion or practice] cannot rely solely on considerations of cost. He can, however, put cost into the balance, together with other justifications if there are any...”

62. This statement of general principle was doubted by the EAT in **Woodcock v Cumbria NHS Trust** [2011] IRLR 119. In *obiter* remarks, Underhill P stated (at para. 32):

“...We respectfully agree with Burton P's observation... that, as a matter both of principle and of common sense, considerations of cost must be admissible in considering whether a provision criterion or practice which has a discriminatory impact may nevertheless be justified; and we see no reason to take a different view in the context of the justification of (what would otherwise be) direct age discrimination. But we find it hard to see the principled basis for a rule that such considerations can never by

themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised. The adoption of such a rule, it seems to us, tends to involve parties and tribunals in artificial game-playing – "find the other factor" – of a kind which is likely to produce arbitrary and complicated reasoning: deciding where "cost" stops and other factors start is not straightforward (cf. the observations of Elias P. in **Bainbridge**, at para. 91 (p. 267)). If the matter were free from authority it would seem to us that an employer should be entitled to seek to justify a measure, or a state of affairs, producing a discriminatory impact – or, in the case of age discrimination, an act done on discriminatory grounds – on the basis that the cost of avoiding that impact, or rectifying it, would be disproportionately high. That would not mean that employers would be able always or easily to avoid liability for indirect discrimination simply by pointing to the cost of avoiding or correcting it. There is an almost infinite variety of cases of "*prima facie* discrimination". In many cases the discriminatory impact in question may be such that the employer must avoid or correct it whatever the cost. But there may equally be cases where the impact is trivial and the cost of avoiding or correcting it enormous; and in such cases we cannot see why the principle of proportionality should not be applied in the ordinary way. We are not convinced that the single phrase in **Hill and Stapleton** on which this doctrinal structure is built - "*solely* because [avoiding discrimination] would involve increased costs" – is only explicable in the way that it was understood in **Cross**. As Mr Short submitted, it need mean no more than that it was not enough for an employer to say that avoiding discrimination would involve increased expenditure: he must show that the extent to which it would do so would indeed be disproportionate to the benefit in terms of eliminating the discriminatory impact".

63. This 'opening of the door' by Underhill P to justification by reference to 'cost alone' was shut firmly by the CA in **Woodcock**⁸. Whilst the CA recognised that there was "some degree of artificiality" in an approach that required the reduction of costs to be linked to / accompanied by a 'non-cost' factor, in order to constitute a legitimate aim (i.e. even before considerations of proportionality would come into play), it confirmed that this was the clear position under EU law. Put simply, the saving or avoidance of costs will not, without more, constitute a legitimate aim for the purpose of section 13 (2) or 19 (2) EqA.

⁸ [2012] IRLR 491

64. However, on the particular facts of Woodcock, the CA held (at para. 67) that the avoidance of cost was not the sole aim of the respondent, stating that:

“...The dismissal notice of 23 May 2007 was not served with the aim, pure and simple, of dismissing Mr Woodcock before his 49th birthday in order to save the trust the expense it would incur if was still in its employ at 50. It was served, and genuinely served, with the aim of giving effect to the trust's genuine decision to terminate his employment on the grounds of his redundancy...”

65. Accordingly, the fact that the claimant’s role was genuinely redundant amounted to a ‘non-cost’ factor which allowed the respondent to satisfy the ‘legitimate aim’ element of the statutory defence. *Per* Rimer LJ, even though the timing of the claimant’s dismissal (i.e. prior to the scheduled consultation meeting) was plainly motivated by considerations of cost (in light of the fact that delaying the dismissal until after this meeting would have resulted in an additional pension liability of between £500k and £1m), the Trust’s genuine decision to terminate the claimant’s employment on the grounds of his redundancy was in pursuit of a legitimate aim and therefore *prima facie* lawful (subject to considerations of proportionality).

66. In concluding that the employer’s conduct was a proportionate means of achieving a legitimate aim, the CA upheld the reasoning of the ET, holding (at para. 71) that the “essence of the case” was:

- a. that the trust was fully entitled, and had effectively resolved, to terminate Mr Woodcock's employment prior to his 50th birthday;
- b. the implementation of that intention was delayed through no fault of its own but through a chapter of accidents; and

- c. whilst the consultation 'corner cutting' in theory deprived Mr Woodcock of an opportunity, in fact it deprived him of nothing of value, because, as the ET found, consultation would have achieved nothing.

Direct vs indirect age discrimination: a difference of approach?

- 67. So, whilst it seems clear that cost considerations alone will not be capable of justifying either direct *or* indirect age discrimination, it is necessary to note that a different approach to the 'overarching' question of justification may be applied to cases of direct / indirect age discrimination, notwithstanding the identical wording contained in sections 13 (2) and 19 (2) EqA 2010.
- 68. In **Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601**, the UKSC (*per* Lady Hale) held (at para. 19) that:

“...The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business...”

- 69. In practical terms, this means that a respondent faced with a complaint of indirect age discrimination will not – in order to make good the section 19 (2) EqA defence – be compelled to persuade an ET that the PCP in question seeks to achieve one of the specific 'social policy' aims contained within the Directive. A more 'business-centric' justification may well suffice.

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