

Justifying Age Discrimination

By Rebecca Tuck

The Employment Equality (Age) Regulations 2006 are unique in domestic employment law in permitting justification of direct discrimination. An issue in the much-publicised *Age Concern* (formerly known as *Heyday*) litigation has been whether the test for justification of direct discrimination is the same as that for indirect discrimination. To date the answer remains somewhat elusive. Rebecca Tuck reports:

Background

Regulation 3 sets out the definitions of direct and indirect discrimination, and provides that either can be justified by showing the treatment or, as the case may be, the provision, criterion or practice (PCP) to be 'a proportionate means of achieving a legitimate aim'. The Equal Treatment Framework Directive at article 6 - which permits the justification of direct age discrimination - provides that:

'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.'

Article 2(2) refers to indirect discrimination - covering all strands of discrimination under the directive - and says that a PCP can be 'objectively justified by a legitimate aim', providing that 'the means of achieving that aim are appropriate and necessary'. But is there any difference in what can constitute a legitimate aim, depending on whether it is direct or indirect discrimination that is at issue?

EAT judgments

The EAT has considered the justification set out in regulation 3 in two notable cases. In *MacCulloch v Imperial Chemical Industries plc* there were complaints of both direct and indirect discrimination arising from the operation of a redundancy scheme. Direct discrimination was admitted; the tribunal accepted that justification was made out and held that this answered both the direct and indirect discrimination claims.

Elias P (as he was then,) giving judgment in the EAT, held that where direct discrimination is reflected in general rules or policies, the discriminatory effect of the measure will necessarily be greater than where a rule is cast in apparently neutral terms but has indirect discriminatory adverse effects. To that extent, direct discrimination may be harder to justify.

Similarly in *Seldon v Clarkson Wright and Jakes*, a case concerning the forced retirement of a partner in a law firm, Elias P held that 'the overall discriminatory effect of a measure will necessarily be greater when there is direct as opposed to indirect discrimination', such that while it will not be necessary to apply different concepts of justification, it ought to be recognised that 'the application of the concept may vary with the form which the discrimination takes'. This comment seems to relate to the balancing

exercise to be carried out in determining proportionality and there is nothing to suggest that what can constitute a 'legitimate aim' differs according to the form the discrimination takes.

Age Concern

This approach seems to have been followed by Blake J, giving judgment in the Age Concern case when it was remitted to the High Court. He held that 'there is no reason to believe that in the special context of age discrimination, the kind of business practice reasons that can justify indirect discrimination are fundamentally different from those that can justify direct discrimination'.

However, Age Concern argued before the European Court of Justice that the test for justifying direct discrimination must be stricter than that for indirect discrimination. The ECJ agreed that the scope of the relevant provisions was not identical but held that the omission of the word 'reasonable' from the test of justification of indirect discrimination - present in article 6, justification of direct discrimination - was not significant.

It is no easy task to discern from the judgment what, if any, the practical differences of the non-identical provisions are. In relation to article 6 the ECJ does hold (at para 46) that:

*'The aims which may be considered "legitimate" within the meaning of that provision, and consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are **social policy objectives**, such as those related to employment policy, the labour market or vocational training. By their **public interest nature**, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction ... although it cannot be ruled out that a national rule may recognise, in pursuit of those legitimate aims, a certain degree of flexibility for employers [emphasis added].'*

European judgments

In *Kücükdeveci v Swedex GmbH & Co*, currently pending before the ECJ, the question is whether a rule ignoring periods of employment under the age of 25 when calculating service-related notice entitlement - a provision admitted to be directly discriminatory - could be justified. AG Bot has delivered an opinion that it cannot be and seems to draw from the ECJ Age Concern judgment, a principle that the potential for justifying age discrimination under article 6 only exists in relation to public interest aims, distinguishable from purely individual reasons particular to an employer's situation.

It may be for the ECJ to offer further guidance on whether direct discrimination can ever be justified without a social policy aim. Two recent judgments, however, serve as a timely reminder that justification can also be shown if there is a 'genuine occupational requirement' (GOR within Art 4(1)), or if a national law is necessary for the protection of public health.

In *Wolf v Stadt Frankfurt am Main*, the ECJ held that an age bar not allowing recruits over the age of 30 to the fire service can be justified as a GOR. The test asks *whether the characteristic (of age) is a 'genuine and determining occupational requirement', and whether the objective being pursued is legitimate and the requirement proportionate.*

The legitimate aim in *Wolf* was the need to establish a balanced age range within the workforce in order to maintain an operational service in circumstances where very few employees over the age of 50 remain in frontline fire-fighting and rescue duties.

In *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lipp*, the ECJ found there were potentially legitimate aims to justify, under the public health exemption, an upper age limit of 68 for dentists to be accredited to work in the German National Health Service, but did not consider the test of proportionality to have been satisfied when those in private practice did not have the same age bar.

Conclusion

Returning to the decision of the High Court in *Age Concern*, despite stating that the type of 'business practices' used to justify indirect discrimination can be used in seeking to justify direct discrimination, Blake J went on to say - in the context of the specific issue of justifying a designated retirement age of 65 - that:

'The social aims that the government relies on are ones in which the state enjoys a wide margin of appreciation. Whereas the individual employer justifying particular practices or treatment in reliance upon that social aim has a much more rigorous task and where discrimination remains unjustified it will be unlawful.'

It is not clear whether the reference to employers relying on the state's 'social aim' is meant to suggest that it is only social aims that can prove to be 'legitimate' to justify direct discrimination but, if so, this is at odds with the earlier passage in the judgment.

What then of the aims relied on in *Seldon v Clarkson, Wright and Jakes*, when forcibly retiring a partner in a law firm is alleged to have been in pursuit of legitimate aims such as ensuring that associates were given an opportunity of partnership after a reasonable period and ensuring a turnover of partners? The EAT saw no objection to having these as 'legitimate aims' per se. Can what clearly amount to 'business practices' be framed as being in pursuit of social policy aims? Even if the employers gave no consideration at the time of their decision to such social policies? Hopefully the Court of Appeal when it considers *Seldon* will shed light on this difficult area.

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