

## Employment / Discrimination

# Age concern

European Directives strike again **Spencer Keen & Monica Sobiecki** investigate



### IN BRIEF

- EC Directive 2000/78/EC limits when direct discrimination can be justified.
- Domestic law must be interpreted in accordance with the EC legislation.
- *Homer* clarifies when a provision, criterion or practice is indirectly discriminatory.

The Supreme Court has delivered its judgments in the appeals of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, [2012] All ER (D) 121 (Apr) and *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] All ER (D) 122 (Apr). These cases answer important questions about the justification of direct and indirect age discrimination, and in particular, how mandatory contractual retirement ages can be justified.

#### Seldon & direct discrimination

In *Seldon*, the appellant was a partner in a law firm. A succession of partnership deeds provided for the mandatory retirement of partners at 65. For financial reasons, Mr Seldon wished to work for three further years, and made a series of proposals with a view to doing so. These were all rejected by the other partners. He automatically ceased to be a partner, in accordance with the partnership deed, on 31 December 2006. The respondent firm claimed that his treatment was justified, and put forward six legitimate aims, including ensuring that there were opportunities for younger employees to become partners and senior partners, workforce planning and limiting the need to expel partners by performance management.

Mr Seldon argued that the provisions of the Employment Equality (Age) Regulations 2006 (SI 2006/1031) (the Regulations) were contrary to the EC legislation because reg 3 of

the Regulations did not distinguish between the justification test for direct and indirect discrimination (it is worth noting that reg 3 is materially the same as the equivalent provisions in ss 13(2) and 19(2)(d) of the Equality Act 2010).

Directive 2000/78/EC (Framework Directive) provides, at Art 2(2)(b)(i), that indirect discrimination can be justified where the discriminator has a legitimate aim and where the means used to achieve that aim are appropriate and necessary. Article 6 of the Framework Directive provides that acts of direct age discrimination can also be justified where “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”. Mr Seldon argued that the Supreme Court should interpret the justification provisions in reg 3, so that they were compatible with the provisions on justification set out in the Framework Directive.

The Supreme Court agreed with Mr Seldon’s analysis. The main point which emerges from the judgment is that direct discrimination can only be justified by social policy objectives, such as those related to employment policy, the labour market or vocational training. This distinguishes it from indirect discrimination, where the employer can put forward reasons

particular to the employer’s situation, such as improving competitiveness. The circumstances in which direct discrimination can be justified are therefore much narrower than the circumstances in which indirect discrimination can be justified.

As in other areas of discrimination, when justifying his actions, the discriminator can deploy arguments that he hadn’t thought of at the time the discrimination occurred. This is perhaps fortunate since how, at any point, is an employer to know whether its aims are furthering social policy objectives? Although the judgment recognises that individual member states are able to set their own social policy no clue is given as to what the UK’s social policies might be and it is noticeable that the Supreme Court did not even attempt to identify them. The only social policies that the court did identify were those expressly set out in the Framework Directive and referred to in the EU jurisprudence.

#### Handy list of principles

Lady Hale provides a handy list of the principles relevant to justifying direct age discrimination (see para 50) and also provides several examples of what qualifies as a legitimate aim under this new defence. Although flexibility for employers is not itself a legitimate aim, some flexibility will be permitted to employers in their pursuit of legitimate social policy objectives. The measure in question must be both appropriate to achieve its legitimate aim and necessary in order to do so. The gravity of the discrimination has to be weighed against the importance of the legitimate aims.

Lady Hale distilled two particular legitimate aims from the Directive and the EU jurisprudence: “inter-generational

fairness”, eg sharing the limited opportunities in a particular profession fairly between generations and “dignity”, eg avoiding the need to dismiss older workers on the grounds of incapacity. The court recognised that the latter was based on a stereotype of the older worker becoming incompetent through age but said that the Luxembourg court has accepted this argument and so the focus must instead be on whether the aim is legitimate in the particular circumstances of the case.

After a legitimate aim is identified, the question then becomes whether the aim is legitimate in the particular circumstances of the employment concerned. The means chosen to implement the aim have to be both appropriate and necessary. This involves scrutiny of the means in the context of the particular business concerned in order to see whether the measures meet the objective and there are not other, less discriminatory measures, which would suffice.

Finally, the measure has to be justified in its application to the particular individual. However, the Supreme Court indicated that, where there was a general rule which was justifiable, then it would be very likely also to justify the treatment of the individual that resulted from its application.

In Mr Seldon’s case, although the Supreme Court agreed with his interpretation of the law, it held that the justification, which the tribunal had accepted, was in any event a legitimate social policy aim, since it related to workforce planning and dignity. However, the tribunal had not considered whether setting a mandatory retirement age of 65 was a proportionate means of achieving that legitimate aim and so the Supreme Court remitted the case so that the employment tribunal could make a decision on this point.

### Homer & indirect discrimination

Mr Homer worked for the Police National Legal Database as a legal adviser. In 2005, his employer introduced a new grading structure with three “thresholds”. In order to reach the third threshold it was necessary to have a law degree. In 2006, Homer was re-graded but not placed in

the “third threshold”. At this point, he was due to retire in three years; a course of study to obtain a law degree would take at least four years. He claimed that he had been indirectly discriminated against on the grounds of his age and that this could not be objectively justified.

The Employment Appeal Tribunal (EAT) and the Court of Appeal had approached the appeal on the basis that Mr Homer had been disadvantaged, not by his age, but by his impending retirement. The respondent also argued that he was in no different position to those leaving work for a reason other than age or retirement, eg family-related.

## “Seldon provides valuable guidance to what is...a new test of justification for direct age discrimination in domestic discrimination law”

The Supreme Court did not accept either argument. Mr Homer’s situation was different from someone who left work for other reasons because a person coming up against the mandatory retirement age does not have control over whether or not to stay. Second, the Supreme Court held that there was an unreality in distinguishing between retirement and age. The reason for the disadvantage in Mr Homer’s case was that people in his age group did not have time to acquire a law degree because they were soon to reach the *age* of retirement.

The respondent argued that if Mr Homer was allowed into the third category without a degree he would be more favourably treated than employees in other age groups. Lady Hale rejected this argument and Lord Hope broadly concurred, stating that the fact that others may be affected by the removal of the discriminatory practice was not a ground for holding that age discrimination of the group or individual was justified. By contrast, Lord Mance did express a concern that making a personal exception for Mr Homer could have discriminated unjustifiably against younger employees on grounds of age.

### Error of law

The Supreme Court held that the employment tribunal had made an error of law when it held that the terms “appropriate”, “necessary” and “proportionate” were inter-changeable. To be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to achieve it. A measure will not be justified if it is appropriate but goes further than is reasonably necessary in the circumstances. However, the employment tribunal is expected to carry out a balancing act where they

compare the impact of the criterion upon the affected group as against the importance of the aim to the employer. Non-discriminatory alternatives are relevant. It is clear that it is the criterion itself which must be justified with regard to the legislation, not its discriminatory effect. Homer’s case was remitted to the employment tribunal to consider the issue of justification anew.

### Conclusion

These two cases together provide a good overview of how a tribunal is likely to approach the justification of age discrimination. *Seldon* provides valuable guidance to what is, for all intents and purposes, a new test of justification for direct age discrimination in domestic law. *Homer* provides a helpful reminder of the way in which the more usual justification test for indirect discrimination should be applied. NLJ

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