AGENDA ITEM NO.6

BRISTOL CITY COUNCIL

HUMAN RESOURCES COMMITTEE

For Resolution

2nd September 2010

Report of: Chief Executive/Service Director: HR

Title: Default Retirement Age : Implications for Bristol City Council

Officer Presenting Report: Robert Britton, Service Director: HR
Tom Wallen, Pay and Pensions Officer

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RECOMMENDATION

The Committee is asked to :

(1) note the Court of Appeal judgement (Seldon v Clarkson, Wright & Jacques) in June 2010, and the proposed abolition of the default retirement age, to be effective from 1st October 2011, and

(2) agree that a further report will be brought to this Committee in the New Year, regarding the impact of the above upon the Council's existing policies & procedures.

Summary

Details for changing the current default retirement age (DRA) of 65 years have been released, and consultation will take place (nationally) until October 2010.

The proposals under consideration will be that the DRA will cease completely on 1st October 2011, and that no new notices of intended retirement on the basis of reaching age 65 years, may be issued after 6th April 2011.

Transitional arrangements are expected to apply to retirements that have

been notified before 6th April 2011, which will take effect before 1st October 2011. Retirements notified before 6th April 2011, but intended to take effect after 1st October 2011, will not be valid (unless objectively justified) if the draft proposals are enacted.

The procedural requirements (currently) applicable to a retirement dismissal, as set out in Schedule 6 to the Age Regulations, will be abolished when required by the proposed changes in the legislation governing this issue. (We are currently awaiting for the legislative changes to be specified by parliament).

The significant issues in the report are:

As set out in paragraphs 1.1, 4.1 and 4.2 below.

1. Policy

1.1 The Council's current retirement age is 65. Currently Strategic Directors have discretion to allow employees to remain with the Council beyond that date, on operational grounds ('flexible retirement').

1.2 The new regulations applicable from the 1st October 2011 will be published after consultation at national level. This will require an amendment to the Council's policy, prior to this date.

2. Consultation

2.1 Internal

A copy of this report has been given to the trade unions in order that they are aware of the Council's current position regarding the DRA, and its intention to review this matter before April 2011. Consultation will be undertaken prior to a report being submitted to this Committee in the New Year.

2.2 External

Consultation regarding the DRA abolition, will be undertaken at national level, as stated above. In particular, there may be legislation regarding compulsory retirement (based upon age), where it can be “objectively justified”.

3. Context

3.1 At the present time, Strategic Directors determine whether or not employees approaching age 65 years, can remain in employment, or are required to retire. Decisions are made after taking into account the employee's health, vacancy management considerations, recruitment & retention issues, the employee's performance, and budgetary considerations.

3.2 In addition, the Council's "People Strategy: 2010/2015" has identified a significant imbalance in the age profile of the Council's workforce, which shows that the proportion of young employees aged under 25 years is too low and disproportionate to those aged 55+, when taking into account the Council's longer term staffing needs and skills requirements.

3.3 The Council is currently addressing this issue via its "People Strategy". In this context however, the "policy tension" set out in paragraph 19 (subsection 95) of the Judgement (Appendix A), should not be under-estimated.

3.4 The Council currently employs 247 employees aged over 65 years, and there are a further 106 employees over age 65 in locally managed schools.

4. Proposal

4.1 It is proposed that the Council's existing HR policies and procedures will be reviewed and updated, as soon as the national consultation process is concluded, and the revised regulations are published.

4.2 In the meantime, the Council's existing arrangements, as set out in paragraph 3 above, will continue, as will arrangements within locally managed schools. These include employee appeal rights, where employment beyond 65 years is not agreed by the Strategic Directors concerned.

4.3 A summary of the Judgement is attached as Appendix A. (Please note this case deals mainly with the issue of non-employees). In addition, the DRA bulletin issued by the Department for Business, Innovation and Skills, and the Department for Work and Pensions, is attached as Appendix B.

5. Other Options Considered

5.1 None: pending further national guidance.

6. Risk Assessment

6.1 Not applicable at this stage.

7. Equalities Impact Assessment

7.1 To be undertaken prior to the changes being implemented in April 2011. The “equalities impact assessment” will be included as part of the further report to this Committee in early 2011.

Legal and Resource Implications

Legal

This report details the intended removal of the current default retirement age. From April 2011 the Council will be required to show that retiring an employee is a proportionate means of achieving a legitimate aim. The Court of Appeal provided some guidance on this issue in the recent case of Seldon v Clarkson (Appendix A). The guidance confirms that an employer can objectively justify retirement of an employee, however a blanket policy to retire all employees is likely to be challenged. Each decision must be based on its own facts and documented.
It is expected that further guidance will be provided by the Government on this issue once consultation has been completed in October 2010.

Advice from Husinara Jones for Head of Legal Services

Financial

(a) Revenue:

Not sought at this stage, pending further national guidance.

(b) Capital/Land:

Not applicable

Personnel

As set out in paragraphs 3.2 and 3.3, and also in 4.1 to 4.3 above.

Appendices

Appendix A: Copy of Court of Appeal Judgement.

Appendix B: Notification re: proposed change in the DRA

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985 Background Papers:

None

Neutral Citation Number: [2010] EWCA Civ 899

Case No: A2/2009/0149

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
UKEAT/0063/08

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th July 2010

Before:

LORD JUSTICE LAWS
LORD JUSTICE HUGHES
and
SIR MARK WALLER

- -

Between:

MR LESLIE SELDON	**Appellant**
- and -	
CLARKSON WRIGHT & JAKES (a partnership)	**Respondent**
- and -	
SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS	**Intervener**

- -
- -

Robin ALLEN Q.C. and Richard O'DAIR (instructed by Equality & Human Rights Commission) for the Appellant
Thomas CROXFORD (instructed by Messrs Clarkson Wright & Jakes) for the Respondent
Dinah ROSE Q.C. and David PIEVSKY (instructed by Treasury Solicitor) for the Secretary of State for Business, Innovation and Skills

Hearing dates: 29th & 30th June 2010

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Judgment

Sir Mark Waller:

Introduction

1. Mr Seldon the appellant was a partner in the respondent firm of solicitors (the firm). He was compulsorily retired in accordance with the terms of the partnership deed at the end of the year following his 65th birthday. He brought a claim for unlawful direct age discrimination. The Employment Tribunal (the ET) concluded that he had suffered less favourable treatment as a consequence of his age, but that his treatment was justified. The ET held that his firm had established that the clause in the deed had three legitimate aims:-

   (1) ensuring associates were given the opportunity of partnership after a reasonable period.

   (2) facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise.

   (3) limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm.

   (1) and (2) are identified for short as "dead men's shoes" and (3) as "collegiality". The ET also held that the term was a proportionate means of achieving those aims.

2. He appealed to the Employment Appeal Tribunal (the EAT) who upheld the ET's decision save that in relation to aim (3) 'collegiality', they held that the firm were not entitled to form the view that the aim justified fixing the age at 65. The EAT decided to remit the matter to the same ET in the light of the EAT's findings.

3. The matter has not been remitted pending Mr Seldon's attempt to appeal the EAT's decision to the Court of Appeal. That attempt has not been straightforward and an explanation of why I say that will help to identify how the issues have come to be raised. The permission application was adjourned into Court with the appeal to follow if permission was granted on 8th March 2009 by Wall L.J. (as he then was). It was at this stage that Mr Robin Allen Q.C. was instructed to act for Mr Seldon. He was Counsel for Age UK (as they are now called and as I shall call them throughout this judgment) in proceedings brought by them against the Secretary of State for Business Innovation & Skills challenging the lawfulness of the Employment Equality (Age) Regulations 2006 (the Age Regulations). In those proceedings five questions relating to the interpretation of Council Directive 2000/78/EC had been referred to the ECJ [see *R(Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform* [2009] ICR 1080]. The ECJ had handed down their judgment on 5th March 2009 which left certain important questions relating to justification to the national court. The ECJ had held that provided the UK Government had legitimate

"employment policy, labour market, and vocational training aims" and provided the Age Regulations were a proportionate means of achieving those aims, the Age Regulations would be lawful. The court held that it was for the national court to resolve those points.

4. The hearing before the national court to resolve the issues was to take place before Blake J. on 16th July 2009 when the permission application, adjourned into Court by Wall L.J. in these proceedings, came before the Court of Appeal on 13th July 2009. Mr Allen Q.C. wished to amend his Notice of Appeal in Mr Seldon's appeal to argue questions of vires similar to those being argued before the ECJ and Blake J. In the result the application for permission to appeal in these proceedings was adjourned pending the judgment of Blake J. That judgment was handed down on 25th September 2009. It held that the Age Regulations were lawful on the basis that the Government had established legitimate "employment policy, labour market and vocational training" aims and that the Age Regulations were a proportionate means of achieving those aims.

5. It is relevant for the points which arise hereafter just to say that the attack by Age UK was (a) on Regulation 3 because it allowed direct age discrimination to be justified if aims were legitimate and means were proportionate without identifying the aims, and (b) on Regulation 30 which in the employer/employee context provided that nothing in the Age Regulations rendered unlawful the dismissal of a person over the age of 65 when the reason for dismissal was retirement again without specifying the aims.

6. Age UK did not appeal the judgment of Blake J. Mr Allen Q.C. could not thus now on behalf of Mr Seldon take the same points on vires as were argued before the ECJ and Blake J. However what he did wish to argue (in addition to points argued before the EAT) was that (1) the judgments of the ECJ and Blake J. in the Age UK litigation had held in the context of Age UK's attack on the legality of the Age Regulations that justificatory aims must be of a "social policy/public interest nature"; (2) that the firm before the ET had not established "social policy or public interest" aims; in so far as they had established the aim of encouraging associate retention and internal planning those were individual aims peculiar to their own situation; and (3) thus that the ET had erred in law in holding that such aims were legitimate.

7. On 11th November 2009 Maurice Kay L.J. directed that an amended notice of appeal be filed by 25th November 2009. The amended notice was filed and in the result the points sought to be raised on behalf of Mr Seldon became (and I summarise from Mr Allen's latest skeleton) the following:-

   (1) The point identified in paragraph 6 above which if right would be likely to outlaw any retirement clause in any partnership deed – and was thus of some importance; [Ground 1A]

(2) That a different less discriminatory clause could have been tailored to fit at least the "dead men's shoes" aims; [Ground 1B]

(3) The choice of 65 was not proportionate; it is asserted that the EAT were right in condemning the assumption made in relation to the collegiality aim and were wrong not to take the same view in relation to the "dead men's shoes" aims; an older age even by a year would have been less discriminatory and/or there was no evidence that 65 was necessary to encourage associates to stay; [Grounds 5 and 6]

(4) It was wrong to concentrate on the justification of the clause as opposed to whether the application of the clause to Mr Seldon was justified; [Ground 7]

(5) The fact that Mr Seldon as a partner had agreed the clause as a partner was irrelevant; [Ground 9]

(6) Ex post facto justification of the rule was not legitimate; a justificatory aim must be one upon which reliance was placed at the time; [Ground 10A]

(7) The ET was wrong to rely on evidence from the firm alone without evidence from comparable firms; [Ground 10B]

(8) The ET erred in finding compulsory retirement was justified in the absence of evidence that the incidence of partners wanting to stay on was likely to be significant; [Grounds 11,12 & 14]

(9) Aim (3) collegiality could not possibly have the necessary element of public interest or social policy; [Ground 13A]

(10) The collegiality principle was applied in a discriminatory fashion because under 65 partners underperforming were negotiated out of the partnership; [Ground 13B]

(11) Remittance to the same ET was wrong; [Ground 15].

8. At the outset of the hearing before us we granted permission to appeal. Whether we should have done so on all grounds is debatable, but arguing about arguability would not have been conducive to a good use of time.

The Legal Framework

9. The key provisions are set out in the judgment of the EAT and I gratefully adopt the quotations from that judgment.

> "12. Council Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation. This is the framework Directive which sets out the core principles of EU law. Some of the recitals have been relied upon in this case, together with relevant provisions of the Directive:

"Whereas …

…

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

…

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

…

Article 1: Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2: Concept of Discrimination

1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

    a. Direct discrimination shall be taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

    b. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

        i. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary …

Article 6: Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2) 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 …"

13. The Age Regulations seek to give effect to the Directive. Insofar as is material, they are as follows:

"3. Discrimination on grounds of age

(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if –

(a) On grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

And A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

17. Partnerships

(1) It is unlawful for a firm, in relation to a position as partner in the firm, to discriminate against a person –

…. (d) in a case where the person already holds that position –

(i) in the way they afford him access to any benefits or by refusing to afford, or deliberately not affording, him access to them; or

> (ii) by expelling him from that position, or subjecting him to any other detriment."

10. Regulation 30 is not applicable to partnerships but it was the subject of attack before the ECJ by Age UK. Because of its choice of retirement age as at 65, and because, in agreement with the EAT, it has some if only limited significance when a partnership is seeking to justify compulsory retirement at the age of 65, I set it out too. It provides:

> "30.- (1) This regulation applies in relation to an employee within the meaning of section 230(1) of the 1996 Act, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.
>
> (2) Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for dismissal is retirement."

11. As I have already indicated the Age Regulations in particular Regulations 3, 7 and 30 were the subject of attack by Age UK. The decisions of the ECJ and Blake J. are relied on by Mr Allen in relation to his first wide reaching point and an analysis of what the ECJ and Blake J. decided must form part of the legal framework.

12. It is helpful in order to get an overview of what was before the ECJ and what it decided to quote part of the head note:

> "The High Court referred to the Court of Justice of the European Communities for a preliminary ruling the questions whether national rules such as those at issue fell within the scope of Directive 2000/78; whether article 6 (1) of the Directive allowed member states to define differential treatment that was not discriminatory by reference to a general principle such as "a proportionate means of achieving a legitimate aim", or whether a list of justificatory measures, such as that set out in article 6 (1), was necessary; and whether there was any significant practical difference between the tests for justification set out in article 2 of the Directive, which defined the "concept of discrimination", and article 6.
>
> On the reference for a preliminary ruling –
>
> Held, that, since national rules such as those set out in regulations 3, 7 (4) and (5) and 30 of the Employment Equality (Age) Regulations 2006 were to be regarded as relating to "employment and working conditions, including dismissals and pay" within the meaning of article 3 (1) (c) of Directive 2000/78, they fell within the scope of the Directive; that article 6 (1) of the Directive did not automatically preclude a national

> measure which, like regulation 3 of the 2006 Regulations, did not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age, but that, in the absence of such precision, the underlying aim of the measure had to be identifiable by reference to other elements taken from its general context; that article 6 (1) gave member states the option to derogate from that principle, but only in respect of measures that were reasonable and objectively justified by legitimate social policy objectives such as ones relating to employment policy, the labour market or vocational training, and if the means of achieving the objective were appropriate and necessary; that article 6 (1) imposed on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as justification; that it was for the national court to ascertain whether the legislation at issue was consonant with such legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the member states' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim; and that, although the scope of articles 2 (2) (b) and 6 (1) of Directive 2000/78 were not identical, no particular significance was to be attached to the fact that the word "reasonably" used in article 6 (1) did not appear in article 2 (2) (b)."

13. It is furthermore of interest to see what Advocate General Mazak said in reaching a conclusion which the ECJ in its judgment was to adopt.

> "80. Furthermore, the court held in *Palacios de la Villa* that it is not necessary for the national measure at issue, in order to be justifiable under article 6 (1) of the Directive, to refer expressly to a legitimate aim of the kind envisaged in article 6 (1); it suffices that
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> "other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary" (para 57).
>
> 81. Indeed, bearing in mind the old legislative maxim, "*lex imperat, non docet*", the possibility of justification of a provision should not depend on its objectives being set out expressly.
>
> 82. But I think that what such a possibility also presumes is that there is in any event some kind of legislation, and I also agree with the Commission that this is arguably also implied by recital 25 ("specific provisions") and

> the working of article 6 (1) of the Directive itself. The latter primarily targets national measures, which reflect social and employment policy choices and not individual decisions of employers (see also, to that effect, the reference by the Court of Justice to "the choice which the national authorities concerned may be led to make" in *Palacios de la Villa*, para 69). The justification of measures providing for differences of treatment on grounds of age therefore falls to be assessed at member state level, "within the context of national law".
>
> 83. However, that does not in my view exclude the possibility of justifying national rules which confer some discretionary powers or a degree of flexibility on authorities or even individuals. It just means that the question to be asked in a case such as the present one, in respect of a rule such as regulation 30 and with regard to article 6 (1) of Directive 2000/78 is not whether the individual decision of an employer forcibly to retire an employee is justified, but whether a rule whereby an employer is permitted to do so on grounds of retirement if the employee is aged 65 or over is justified by reference to a legitimate aim, as article 6 (1) envisages. (I think the failure to make that distinction accounts for certain confusions and a lack of precision in the present case)."

14. I quote the above paragraphs so as to draw attention to the important distinction between what was being decided by the ECJ i.e. whether United Kingdom regulations were valid and what is in issue in this appeal i.e. whether a decision by a firm to have a retirement age and enforce it is justified. It is the United Kingdom's regulations or law which must be justified by reference "primarily" to "social and employment" policy choices. That is not the same (as I believe Mr Allen would argue) as saying that a particular employer must only have "a social or employment policy" aim.

15. This concept is repeated by the ECJ in its judgment where it says this:

> "44. Consequently, it cannot be inferred from article 6 (1) of Directive 2000/78 that a lack of precision in the national legalisation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision: see, to that effect, *Palacios de la Villa v Cortefel Services SA* (Case C-411/05) [2009] ICR 1111, para 56.
>
> 45. In the absence of such precision, it is important, however, that other elements, taken from the general

> context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary: *Palacios de la Villa,* para 57.
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> 46. It is apparent from article 6 (1) of Directive 2000/78 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 or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.
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> 47. It is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to determine whether and to what extent a provision which allows employers to dismiss workers who have reached retirement age is justified by "legitimate" aims within the meaning of article 6 (1) of Directive 2000/78."

16. The ECJ in the paragraphs that follow gives guidance but that guidance relates to the State justifying the Regulations. The summary is in paragraph 52 which says:

> "52. Having regard to the foregoing, the answer to the fourth question referred is that article 6 (1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like regulation 3 of the 2006 Regulations, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. However, article 6 (1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legalisation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the member states' discretion in matters of social policy, that the

> means chosen were appropriate and necessary to achieve that aim.

17. Mr Allen argues that in effect one must apply paragraph 52 in considering whether the aims of the firm in adopting a retirement clause were legitimate. So he argues if the firm did not have "social policy objectives", and only had self-interested aims, the aims could not be legitimate. As Miss Rose Q.C. pointed out in her penetrating submissions for the Secretary of State, this is to fail to draw the distinction between justification of the legislation which either renders lawful or unlawful the actions of an employer or a firm, and those actions themselves as contemplated by the legislation.

18. The justification for the derogation allowed by Regulations 3 and 30 is that it is in the interest of young would be employees and/or actual employees that employers or firms should have a retirement age providing a greater likelihood of employment for young persons and reasonable prospects of promotion. It would be quite inconsistent with upholding that justification of the Regulations, to hold that a compulsory retirement age whose aim was consistent with that social policy was not legitimate.

19. It is important to take into account also what Blake J. said when the matter returned to the national court. He made much the same point as the Advocate General and the ECJ and considered the position of employers in the following paragraphs:

> "92. I consider that, examining the legislative context as a whole, there is a distinction between the social aim of confidence in the labour market and the application of that aim in the particular regulations that permit employers to discriminate where they can show it is necessary and proportionate to do so in the interests of their businesses. The private employer is not afforded the wider margin of discretion in the application of the regulation that the state is. The flexibility shown to the employer in permitting it to endeavour to justify discrimintory treatment is not an aim in itself, but a means of advancing the social policy aim of confidence in the labour market. There is no reason to believe that, in the special context of age discrimination, the kind of business practice reasons that can justify direct discrimination are fundamentally different from those that can justify discrimination. If they were the Court of Justice would have made this clear in its answer to question (5) in the reference.
>
> 93. There is, however, a clear distinction between the government as a public body being concerned about the social cost to competitiveness of UK employment in the early phase of implementing the new principles and polices of the Directive, and individual business saying

it is cheaper to discriminate than to address the issues that the Directive requires to be addressed.

94. In my judgment, the government was entitled to take the view that there is little point in developing the principle of age discrimination in the field of employment if it resulted in fewer UK jobs altogether for young and old alike, or jobs being generally offered on worse terms to accommodate the increased costs created by uncertainty. That does not mean that the priorities and the policy may not change, or that what is considered necessary in 2006 and 2009 cannot yield to some different perception of where the public interest lies at a later date.

95. There is an acute policy tension in this area. On the one hand there is the government's interest in promoting employment, continuity of employment, self sufficiency in employment, tax revenues from people who remain in employment after 65, reducing the burden on the state pension, and ensuring that as people live longer they work longer and are able to lead both socially and economically productive lives. On the other, there is the need for reassurance, clarity and flexibility to reduce the social cost of regulation, maintain competitiveness, address issues as to career planning, and ensure availability of jobs in industry and public service to workers of different ages.

96. I further consider that any defect in regulation 3 when drafted can to a certain extent be remedied by the national court reading down and reading in what the emerging Court of Justice jurisprudence requires to be read in to achieve compatibility. Accordingly, the concept of ultra vires in this area would only apply to radical cases where it is not possible or not permitted for the national court to adjust the regulation by the vigorous interpretative technique required by *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135.

97. I accept that there is a limit to what a national court can do by way of reading down provisions that are inconsistent with Community law on the grounds of vagueness or uncertainty and where policy choices need to be made by the legislator to cure the defect. But, having concluded that sufficient policy aims have been identified in this context, the future application of the Regulations can be determined in accordance with the purposes and principle of the Directive and the criteria in the *Age Concern* judgment (Case C-388/07) [2009]

> ICR 1080. The social aims that the government relies on are ones in which the states enjoy 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 the discrimination remains unjustified it will be unlawful. In short, I see no illegality in the form of transposition of article 6 of Directive 2000/78 in regulation 3 of the 2006 Regulations."

20. When Blake J. says "reliance on that social aim" in paragraph 97 quoted above I do not understand him to be saying that an employer's aims are limited strictly to "a social aim". An employer or partnership may have slightly mixed motives but if its aim is to provide employment prospects for young people and encourage young people to seek employment by holding out good promotion prospects that is at least consistent with the government's social policy and that is what I believe he had in mind. The legislation can as the ECJ said give "some discretionary powers or a degree of flexibility" to employers but their actions must (I suggest) be consistent with the social or labour policy of the United Kingdom which justified the Regulations and that is what in my view Blake J had in mind.

21. It is right to recognise that there is a margin of appreciation available to a national government which is not available to an employer or to parties entering into a partnership deed. But where a partnership is acting consistently with the social aim which has justified the legislative provision, it would be (as I have already said) to contradict that aim to render such a provision unlawful if the clause was a proportionate means of achieving the aim.

22. Accordingly in my view Mr Allen's first point directed at the legitimacy of the "dead men's shoes" aims clearly fails. It also in my view equally clearly fails in relation to the "collegiality" aim. It seems to me that an aim intended to produce a happy work place has to be within or consistent with the Government's social policy justification for the regulations. It is not just within partnerships that it may be thought better to have a cut-off age rather than force an assessment of a person's falling off in performance as they get older.

23. I have not read all the evidence put in by the Government in the Age UK litigation, but my experience would tell me that it is a justification for having a cut-off age that people will be allowed to retire with dignity. To have such a policy requires a cut-off age which some when they reach it will think too low but it does not follow that it is not justified to have a cut off age.

24. There is a very great difference between employees or partners who are under-performing but not by reason of age, and employees or partners who are doing their best but it is no longer good enough because old age has caught up on them. Thus the fact that a negotiated retirement has been achieved with partners in the former

category does not begin to demonstrate that a cut-off age for retirement is not justified. For this reason not only would I dismiss Ground 13A but also Ground 13B [(9) and (10) in para 7 above].

25. I now turn to the other grounds which seek to attack the EAT decision on aspects argued before them. I should say at the outset that I intend to deal with the points shortly because, in agreement with Wall L.J. in considering permission to appeal on paper, both the judgment of the ET and the judgment of the EAT are of a very high quality. Furthermore they reach conclusions with which I entirely agree.

26. I am going to take the grounds in the same order as the EAT because there is a logic in so doing, a view on one point being relevant to a view on another.

Ex post facto justification

27. Was there a need for the aims to have been consciously recognised either when the clause was introduced into the deed or when a decision was made to confirm it? [Point (6) in paragraph 5 above and Ground 10A]

28. The ECJ has held in *Schonheit Daft v Frankfurt Ohman* [2004] IRLR 983 as approved in *Crossley v British Airways* [2005] IRLR 423 that a discriminatory measure may be justified by a legitimate aim other than that which was specified at the time when the measure was introduced. Those were indirect discrimination cases. Like the EAT I cannot see that there is any difference in principle between indirect discrimination which can be justified and direct discrimination which in the context of age can also be justified.

29. In any event even if partners had not articulated it and set it out in some document at the time, what the ET was finding was that the partners did actually have the aims. This was true both when the clause was introduced and when it was relied on vis a vis Mr Seldon.

Significance of consent (Point (5) and Ground 9)

30. The ET took the fact that Mr Seldon had agreed the clause into account but directed themselves that that did not mean that the clause could be assumed to be justified. Like the EAT I think it is a legitimate consideration that a rule of this kind has been agreed by parties of equal bargaining power. The EAT in its judgment referred to what it viewed as analogous situations. It was entitled so to do. They simply exemplify that there are situations, of which a clause in a partnership deed is one, when it is legitimate to take into account the perception which the partner now challenging the clause had at one time.

Lack of focus on particular treatment of Mr Seldon [Point (4) in paragraph 5 and Ground 7]

31. This is connected with other points advanced by Mr Allen such as:-

    (1) A different clause, which required a partner to be given 12 months notice but only if there was a prospective partner in the wings, would be less discriminatory (Point (2) and Ground 1B);

    (2) It was wrong for the ET to find compulsory retirement justified in the absence of evidence as to the incidence of partners wishing to stay on after 65 (Point (8) and Grounds 11, 12 and 14).

    (3) This clause contained an exception enabling some partners to be kept on.

32. Mr Croxford for the firm accepted that by virtue of the terms of Regulation 3 and 17 the question was whether the expulsion of Mr Seldon could be justified. So he accepted that the moment of time when the clause and (he accepted) the decision to enforce the clause had to be justified was at the moment of termination. That was also Mr Allen's position but so far as the clause was concerned Mr Allen's primary submission was more subtle. He submitted that when the regulations came into force i.e. 1st October 2006, the clause could not be justified and was void, thus as at the moment when Mr Seldon was expelled his expulsion could not be justified. His primary argument was that the clause became void under Schedule 5 on the date when the regulations came into force [1st October 2006] and that it could not thus be relied on by the firm as at the date of termination. Two key grounds on which he submitted the clause could not be justified were first that a different clause as per (1) of paragraph 31 above would have been sufficient and less discriminatory; and second that the clause contained the exception and thus was not a clear cut-off clause.

33. Mr Allen's alternative submission was that even if the clause could be justified, there was a separate question which the ET did not address which was the question whether it was justifiable to rely on the clause vis a vis Mr Seldon when, for example, it had not been established that there was an associate waiting in the wings and/or that Mr Seldon's desire to work past 65 was one-off because other partners on the whole did not seek to do so.

34. It is, as Mr Croxford submits, the termination or expulsion which must be justified but that involves two interrelated questions. First as at the date of termination was a rule requiring retirement at 65 justified? Second was the application of that rule justified in Mr Seldon's case?

35. The first question involves considering whether there are legitimate aims for having such a rule and whether the rule provides a proportionate means of achieving the aim.

It is in that context that it is legitimate to consider the effect of having the particular rule from the date when it was brought in and that rule's effect on recruitment and promotions within the partnership over a period. The rule suggested as an alternative [see (1) in paragraph 31 above], would not achieve the objective of the actual rule as the EAT explain in paragraph 64 of its judgment. It is no encouragement to a young recruit that a retirement might or might not take place depending on whether a prospective partner is waiting in the wings. Nor is it relevant to the policy or aim of having the rule that it can be shown that some partners retired at 65 without enforcement of the rule. Furthermore the exception in the rule itself would not be seen as other than that which it was, to deal with exceptional situations. It is the existence of the rule with a limited exception which has an effect on recruitment or the decisions of associates as to whether they stay.

36. As regards the second question- the application of the rule to Mr Seldon- once the clause or rule is justified its applications will need little justification. That is in the nature of a rule or clause of this kind. Of course the principle that the least discriminatory means should be employed is important. But that does not mean that the following argument succeeds:-

(1) the clause requiring a partner to retire at 65 has a legitimate aim and is a proportionate means of achieving that aim. But

(2) if any partner desires not to retire, unless you show that the application of the clause to him actually leads to an associate being promoted, you cannot enforce it.

That argument does not succeed because it is the clause and its enforcement which is designed to achieve the legitimate aim and enforcement is part of the proportionate means of achieving the aim.

37. There could be exceptional circumstances as the EAT recognised where a justified rule could be unjustified in its application but it will rarely arise and as the EAT said (paragraph 61), this is not such a case.

The choice of 65 as the age

38. There is a distinction between a cut-off date in relation to the "dead men's shoes" aims, and the "collegiality aim". Under performance as a result of age is not relevant to 65 being chosen as a cut-off to encourage recruitment or long term planning. That being so it seems to me that the mere fact that the firm might have chosen some other age in relation to those aims cannot automatically lead to the conclusion that the rule which provides for retirement at 65 is not justified. 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. The directive (recital 14) seems to contemplate the

legitimacy of a retirement age and it cannot thus have envisaged that it would be impossible to justify one age because a different age would be less discriminatory to persons of the age chosen.

39. The question is whether the clause introduced with the legitimate aims is a proportionate means of achieving those aims. If it is proportionate to choose 65, the fact it would be less discriminatory to some to have chosen 66 cannot in my view render the clause unlawful. It is true there was no evidence as to whether it would have made any difference to associates or others whether the age chosen had been 68, 65 or 63. But in my view the fact the firm might have justified anyone of those ages does not mean that it is unable to choose one at all. The choice of 65 when Regulation 30 actually renders lawful 65 in the employer/employee context must support the choice of 65 as a fair and proportionate cut-off point.

Absence of evidence from other firms

40. This was not much pressed by Mr Allen orally. It is up to the parties what evidence they adduce before a Tribunal. If the evidence produced does not justify a conclusion, then the Tribunal can say so. It was open to Mr Seldon to produce evidence from other firms if he or his advisors thought it assisted his case.

Same ET

41. This point was also not pressed orally. It was plainly sensible if the matter was to be remitted not to require an ET to start all over again if possible. There was no complaint that the ET had acted unfairly towards Mr Seldon or anything of that nature. If such a compliant had been made, then I could see the force of an argument that a different ET should consider the matter. There is in my view nothing in this ground of appeal.

Conclusion

42. For the above reasons I would dismiss the appeal.

Lord Justice Hughes:

43. I agree.

Lord Justice Laws:

44. I also agree.

Appendix B: Notification re: Proposed Change in the DRA.

More choice on when to stop working - default retirement age retired

29 July 2010 07:00

Department for Business, Innovation and Skills (National)

BIS | Department for Business Innovation & Skills

The Default Retirement Age (DRA) will be consigned to the history books by October 2011 under proposals published for consultation by the Government today.

The new plans allow for a six month transition from the existing regulations, following the announcement in the Budget that the DRA would be phased out from April 2011.

Currently employers can make staff retire at 65 regardless of their circumstances but this is set to change as people are living longer, healthier lives.

This measure is one of the steps Government is taking to help and encourage people to work for longer against the backdrop of demographic change. Others include reviewing when the state pension age should increase to 66 and re-establishing the link between earnings and the basic state pension.

The consultation also proposes to help employers by removing the administrative burden of statutory retirement procedures. With the DRA removed there is no reason to keep employees 'right to request' working beyond retirement or for employers to give them a minimum of six months notice of retirement.

Employment Relations Minister Edward Davey said:

"With more and more people wanting to extend their working lives we should not stop them just because they have reached a particular age. We want to give individuals greater choice and are moving swiftly to end discrimination of this kind.

"Older workers bring with them a wealth of talent and experience as employees and entrepreneurs. They have a vital contribution to make to our economic recovery and long term prosperity.

"We are committed to ensuring employers are given help and support in adapting to the change in regulations, and this consultation asks what kinds of support are required."

Pensions Minister Steve Webb said:

"Many older people want to work after age 65 and have a wealth of skills and experience that are not being used. We want to get rid of the Default Retirement Age so that if they want to work they can do so. By spending longer in the workforce they can also have a better pension in retirement."

Although the Government is proposing to remove the DRA, it will still be possible for individual employers to operate a compulsory retirement age, provided that they can objectively justify it. Examples could include air traffic controllers and police officers.

The consultation asks whether the Government could provide additional support for individuals and employers in managing without the DRA or statutory retirement procedure. This includes the possibility of future guidance or a more formal code of practice on handling retirement discussions.

Views are also being sought on whether removal of the DRA could have unintended consequences for insured benefits and employee share plans.

The consultation is open from today until 21 October 2010.

Notes for editors1) A copy of the consultation can be found here: **www.bis.gov.uk/retirement-age**

2) We propose that from 6 April 2011, employers will not be able to issue any notifications for compulsory retirement using the DRA procedure. Between 6 April and 1 October, only people who were notified before 6 April, and whose retirement date is before 1 October can be compulsorily retired using the DRA. After 1 October, employers will not be able to use the DRA to compulsorily

retire employees; if they wish to use retirement ages they will have to be able to demonstrate these are objectively justified.

3) The Default Retirement Age of 65 was introduced in the Employment Equality (Age) Regulations 2006. It allows employers to set retirement ages of 65 or higher.

4) The Department for Business, Innovation and Skills (BIS) and the Department for Work and Pensions (DWP) issued a joint call for evidence to inform policy on the DRA, with submissions requested by 1 February 2010. In addition, a number of key pieces of research were commissioned. A summary of the evidence and the independent research reports have been published alongside this consultation document. They can be found here:
http://www.bis.gov.uk/policies/employment-matters/research

And here:

http://research.dwp.gov.uk/asd/asd5/rrs-index.asp

5) DWP published a call for evidence about the right point at which the state pension age should rise to 66 for both men and women on 24 June 2010. It can be found here:
www.dwp.gov.uk/policy/pensions-reform/latest-news

6) BIS' online newsroom contains the latest press notices, speeches, as well as video and images for download. It also features an up to date list of BIS press office contacts. See **http://www.bis.gov.uk/newsroom** for more information.

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