AGE DISCRIMINATION

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Introduction

'My salad days,/ when I was green in judgment, cold in blood,/ to say as I said then!'

Shakespeare, *Antony and Cleopatra*, Act 1, scene 5, ll. 73 – 5

1. Age discrimination is still a youthful field, and one which is developing rapidly. The Employment Equality (Age) Regulations 2006 ("the Regulations"), which seek to implement the UK's age discrimination obligations under Directive 2000/78/EC ("the Directive"), came into force on 1 October 2006[1]. Three years on, we take stock, considering the challenges to the Regulations, their operation in practice, and the guidance to be found in the emerging body of case law.

2. In particular, our paper covers:

   A. Compulsory retirement and the implications of the "Heyday" litigation.

   B. Justification of age discrimination.

   C. Special problems relating to indirect age discrimination.

   D. Employee benefits.

3. The EC law context in which the Regulations exist is particularly important, and deserves a brief outline by way of introduction.

4. The Directive is subtitled as *'establishing a general framework for equal treatment in employment and occupation'*, prohibiting discrimination on grounds of religion or belief, disability and sexual orientation, as well as age. Article 2 creates a general definition of discrimination in its two familiar forms, *'direct discrimination'* (Article 2(2)(a) and *'indirect discrimination'* (Article 2(2)(b)). Indirect discrimination is subject to a general justification defence, under Article 2(2)(b).

5. However, Article 6 enables Member States to create further exceptions or defences specific to age discrimination, even in the case of direct discrimination:

   '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.*

   Such differences of treatment may include, among others:

[1] Though some provisions did not come into force until 1 December 2006, e.g. the provisions relating to pension schemes.

(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.*

2. *Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.'*

6. Articles 2 and 6 are the Community law source for the Regulations' most important provisions, and have been the subject of extensive debate.

7. Famously and to a reaction of considerable critical scepticism, the ECJ held in C-144/04 *Mangold v Helm* [2005] ECR I-9981 that the prohibition of age discrimination is *'a general principle of Community law'*, even aside from the Directive, such that an age-discriminatory provision of German law had to be struck down even though Germany not yet implemented the Directive and the period for its implementation had not expired. However, a domestic attempt to rely on such a general principle in respect of treatment prior to the Regulations becoming effective rightly failed in *Lloyd-Briden v Worthing College* [2007] 3 CMLR 27 (EAT). Moreover, as AG Sharpston explained in C-427/06 *Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH* [2008] ECR I-7245 at §89, following AG Mazák in C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, the "general principle" will now be used to interpret the Directive rather than operating autonomously. It seems highly unlikely that this general principle (characterised by AG Sharpston as the *'general principle of equality of treatment well known in Community law'*) has anything to add to the express terms of the Directive[2], though it must be recognised that *Mangold* has not actually been overruled by the ECJ.

[2] AG Sharpston's analysis of *Mangold* – and her reconciliation of the judgment with conventional principles of Community law – is convincing. The Community law principle of equal treatment is an old one (§59) but has no expanded to cover age discrimination. The national rules in *Mangold* fell within the scope of Community law because they were implementing a directive. Such rules *'provide something on which the general principle of equality – here, prohibiting (arbitrary) age discrimination – could bite'* (§72). In *Bartsch*, the case before her, there was nothing to engage the Community law principle: it was a private law matter, with no Community law aspect for the principle of equal treatment to bite on (§88). The ECJ (judgment of 23 September 2008) appears to have dealt with *Mangold* on the same basis as AG Sharpston: §24.

A. Compulsory retirement and the implications of *Heyday*

'Every position must be held to the last man: there must be no retirement. With our backs to the wall, and believing in the justice of our cause, each one of us must fight on to the end.'

Field Marshal Haig, Order to British troops, 12 April 1918

8. Compulsory retirement is perhaps the most obvious and the most controversial form of direct age discrimination. As is well known, regulation 30 of the Regulations creates a "retirement exception" from the general prohibition of age discrimination, permitting employers to require employees to retire at age 65. In this part of the paper we consider the retirement provisions introduced by the Regulations and the unsuccessful challenge to the validity of regulation 30 in the "Heyday" litigation.

(i) The retirement provisions

9. Regulation 30 is in the following terms:

> *'(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the 1996 Act* [i.e. the Employment Rights 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 the dismissal is retirement.*
>
> *(3) For the purposes of this regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of the 1996 Act.'*

10. This creates what has been described in the Heyday litigation as a "designated retirement age" or "DRA". It does not result in retirement by default, but is a permissive provision, allowing forced retirement at or over the age of 65.

11. By force of regulation 30(1) only employees and certain others are covered by the DRA. The forced retirement of other categories of workers, including partners, members of LLPs and office holders must be justified under the general defence in regulation 3 if it is to be justified at all.

12. There is also a procedural hurdle for an employer to pass before it can benefit from the DRA: retirement must be determined to be the reason for the dismissal under new sections 98ZA to 98ZF of the Employment Rights Act 1996. Those provisions must be navigated in conjunction with Schedule 6 of the Regulations, to which regulation 47 gives effect, and which creates a procedure for the employer's "Duty to Consider Working Beyond Retirement".

13. Sections 98ZA to 98ZE lead to three possible destinations (see Figures 1 and 2 below):

Figure 1 - navigating ss.98ZA to 98ZE

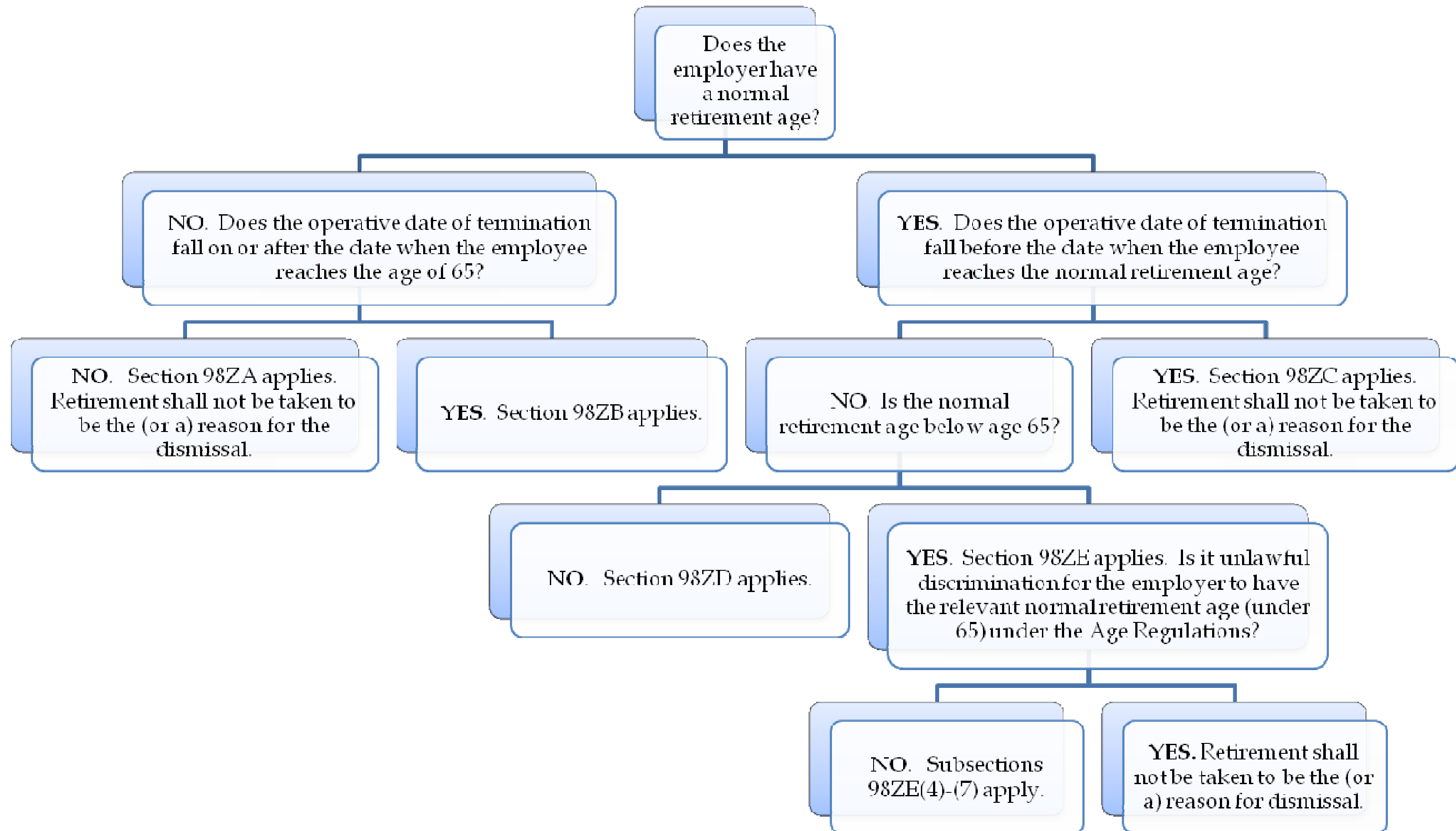
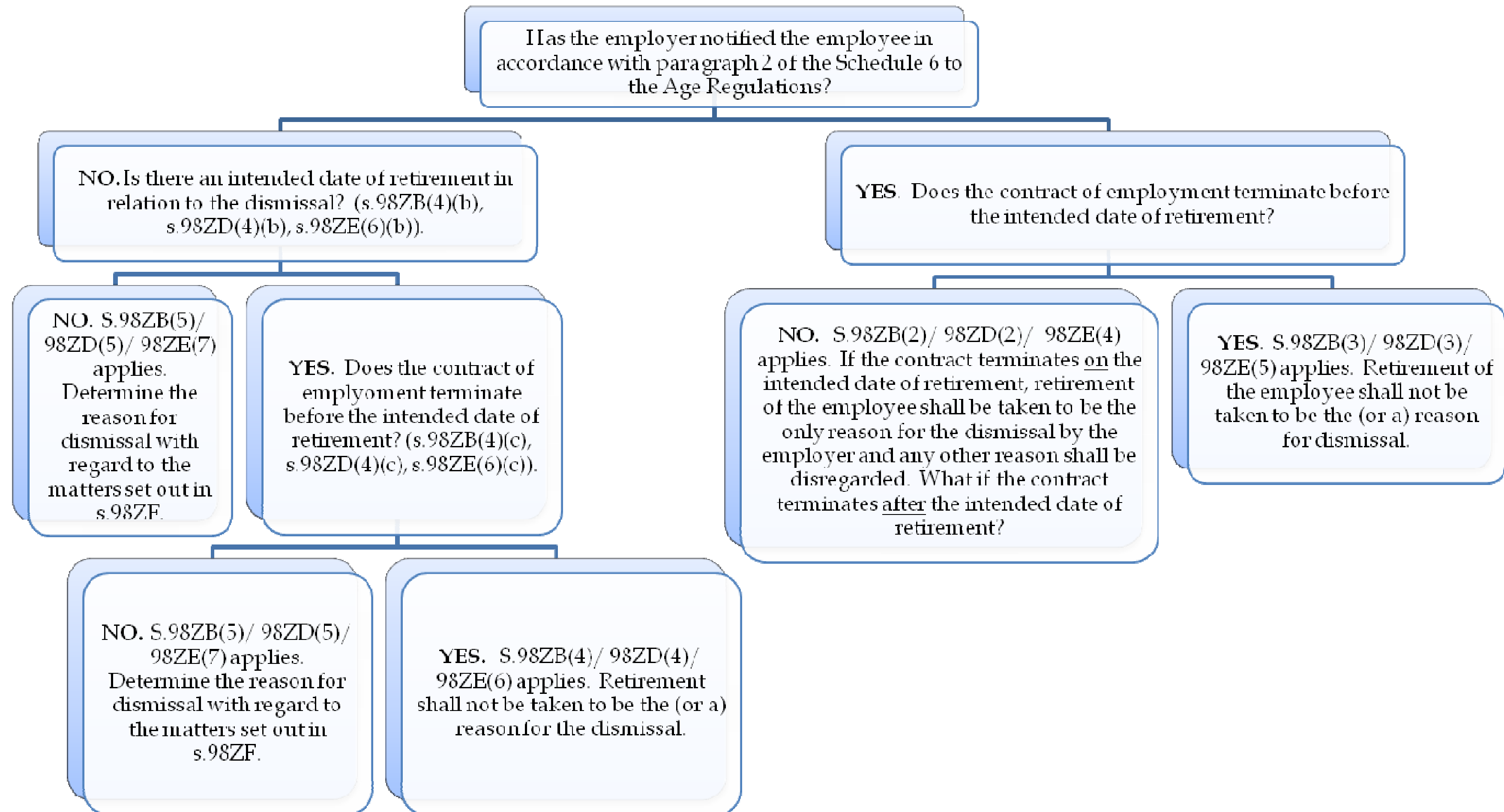


Figure 2 - Navigating ss.98ZB(2)-(5), 98ZD(2)-(5) and 98ZE(4)-(7)



(1) Retirement is deemed not to be the reason or a reason for the dismissal: ss.98ZA, 98ZB(3) and (4), 98ZC, 98ZD (3) and (4), 98ZE(2), (5) and (6).

(2) Retirement is deemed to be the only reason for the dismissal: ss.98ZB(2), 98ZD(2), 98ZE(4).

(3) Whether or not retirement is the reason for dismissal is determined by the Tribunal, having regard to the matters in s.98ZF[3]: ss. 98ZB(5), 98ZD(5), 98ZE(7).

14. As we have noted, whether or not retirement is determined to be the reason for dismissal under these provisions is critical to whether an employer can rely upon the DRA as a defence to an age discrimination claim[4].

15. Sections 98ZA to 98AF require an understanding of the following concepts:

(1) The *'normal retirement age'*. This is defined by s.98ZH as meaning *'in relation to an employee ... the age at which employees in the employer's undertaking who hold, or have held, the same kind of position as the employee are normally required to retire'*.

(2) The *'operative date of termination'*. This means (for the purposes of ss.98ZA-G; again see s.98ZH):

'(a) where the employer terminates the employee's contract of employment by notice, the date on which the notice expires, or

(b) where the employer terminates the contract of employment without notice, the date on which the termination takes effect.'

(3) *'Intended date of retirement'* means (s.98ZH) *'the date which, by virtue of paragraph 1(2)[5] of Schedule 6 to the 2006 Regulations, is the intended date of*

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[3] S.98ZF provides as follows:

'(1) These are the matters to which particular regard is to be had in accordance with section 98ZB(5), 98ZD(5) or 98ZE(7)—

(a) whether or not the employer has notified the employee in accordance with paragraph 4 of Schedule 6 to the 2006 Regulations;

(b) if the employer has notified the employee in accordance with that paragraph, how long before the notified retirement date the notification was given;

(c) whether or not the employer has followed, or sought to follow, the procedures in paragraph 7 of Schedule 6 to the 2006 Regulations.

(2) In subsection (1)(b) "notified retirement date" means the date notified to the employee in accordance with paragraph 4 of Schedule 6 to the 2006 Regulations as the date on which the employer intends to retire the employee.'

[4] It is also critical to any unfair dismissal claim, because if the reason (or principal reason) for dismissal is determined to be retirement, *'The employee shall be regarded as unfairly dismissed if, and only if, there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the following provisions of Schedule 6 to the 2006 Regulations'* - paragraphs 4, 6 and 7, and 8 (s.98ZG).

[5] *'In this Schedule "intended date of retirement" means—*

(a) where the employer notifies a date in accordance with paragraph 2, that date;

(b) where the employer notifies a date in accordance with paragraph 4 and either no request is made or a request is made after the notification, that date;

(c) where,

retirement in relation to a particular dismissal'. See further the Schedule 6 procedure, outlined below.

16. Note that the Schedule 6 procedure and sections 98ZA-98ZH apply to all employees, not only those aged 65 and over. A detailed discussion of Schedule 6 is, however, outside the scope of this paper.

17. There is no appellate case-law on the workings of these provisions. Following the EAT's imposition of a stay until resolution of the "Heyday" litigation in the case of *Johns v Solent* [2008] IRLR 88 (upheld at [2008] EWCA Civ 790, [2008] IRLR 820), on the ground that the claimant sought to challenge the validity of regulation 30, the President of the Employment Tribunals issued a practice direction on 8 November 2007 ordering that all claims raising that issue be stayed until the decision of the ECJ; when the ECJ gave its judgment, a further practice direction of 1 June 2009 stayed such cases until determination of the proceedings by the High Court. Anecdotal evidence suggests that Employment Tribunals have been quick to stay retirement claims even where the validity of regulation 30 is not raised as an issue.

(ii) The "Heyday" challenge

18. The case popularly known as "Heyday" was initiated as *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform*, and ended as *R (Age UK) v Secretary of State for Business, Innovation & Skills*, the claimant having merged with other groups to form Age UK, and a new Secretary of State having assumed responsibility for the Regulations. There was never any such party to the litigation as "Heyday", but since the judgments in the case now properly go under two different names (*Age Concern* and *Age UK*), we will use "Heyday" as a convenient shorthand for the proceedings in general.

19. The proceedings involved a challenge by Age Concern to the validity of both the retirement exception and the availability of a justification defence for direct discrimination under the Regulations. Age Concern contended that regulations 3 and 30 were incompatible with the Directive, and that as such the Regulations were invalid as *ultra vires* section 2(2) of the European Communities Act 1972 under which they were made. In order to allow it to determine the challenge, the Administrative

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(i) the employer has not notified a date in accordance with paragraph 2,
(ii) a request is made before the employer has notified a date in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given),
(iii) the request is made by an employee who has reasonable grounds for believing that the employer intends to retire him on a certain date, and,
(iv) the request identifies that date,
the date so identified;
(d) in a case to which paragraph 3 has applied, any earlier or later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 3(3);
(e) in a case to which paragraph 10 has applied, the later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 10(3)(b).'

Court referred the following questions to the ECJ on 24 July 2007 ([2007] EWHC 3090 (Admin), [2008] 1 CMLR 17, §36):

> *'In relation to Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation ('the Directive'):*
>
> *1. National retirement ages and the scope of the Directive*
>
> *i) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?*
>
> *ii) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the Directive was made?*
>
> *iii) In the light of the answers to (i) and (ii) above*
>
> *(1) were section 109 and/or 156 of the 1996 Act, and/or*
>
> *(2) are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations, national provisions laying down retirement ages within the meaning of Recital 14?*
>
> *2. The definition of direct age discrimination: justification defence*
>
> *iv) Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1) ?*
>
> *3. The test for the justification of direct and indirect discrimination*
>
> *v) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Directive?"*

20. **Questions i), ii) and iii): retirement and the scope of the Directive**. The UK government contended that the retirement provisions in the Regulations did not fall within the scope of the Directive at all. It did so in reliance upon Recital 14 of the Directive (*'This Directive shall be without prejudice to national provisions laying down retirement ages'*) and upon the conclusions of AG Mazák to that effect in his Opinion in *Palacios* (15 February 2007, [2007] ECR I-8531, §15).

21. However, before the time of the hearing in the ECJ of the "Heyday" reference , the ECJ had given judgment in *Palacios* (16 October 2007, [2007] ECR I-8531), holding that the legislation at issue in that case,

> *'which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the*

engagement of the worker concerned in an occupation, by preventing his future participation in the labour force' (§45),

and accordingly *'must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c)'* (§46), bringing it within the Directive's scope.

22. Accordingly, the UK Government conceded, and the ECJ held in due course, that questions i) and ii) had already been answered in *Palacios*, so that it was clear in relation to iii) that the retirement exception did fall within the scope of the Directive (AG Mazák's Opinion of 23 September 2008 and the Judgment of 5 March 2009 are reported at [2009] IRLR 737).

23. **Question iv): does Article 6(1) require a definitive list of forms of permissible conduct?** AG Mazák considered that it did not so require. His reasoning was as follows. First, directives are binding as to the result, but Member States have free choice as to the route to get there (§45), as long as they take measures necessary to ensure that the directive is fully effective (§46). In order to make this Directive fully effective, it is necessary for Member States to adopt specific and clear rules for the prohibition of discrimination on grounds of age (§52). However, the need for sufficient certainty does not require there to be set out an exhaustive list of permissible conduct (§52), because the examples in Article 6(1) were themselves not exhaustive (§53), and it was arguably impossible to establish such a list in advance without unduly restricting the scope of a justification defence (§54).

24. The ECJ adopted essentially the same reasoning (§§41-46), and concluded that a definitive list was not required. However, the ECJ went on to emphasise the importance of being able to identify the underlying aim of a measure where it is not specifically stated (as in the case of regulation 3): §45. Legitimate aims under Article 6 had a *'public interest nature'*, and were *'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness'* (§46). However, *'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'* (§46). The ECJ stated that it was for the national court to determine whether the aims of regulation 3 were legitimate under Article 6, and the proportionality of the means (§§49, 50). Member states had a broad discretion as to choosing the means, but mere generalisation would not be good enough; there needed to be some sort of evidential basis for the selection of the means (§51).

25. **Question v): is there a difference between the tests for justification of direct and indirect discrimination?** AG Mazák considered that age was less of an inherently *'suspect'* ground than e.g. sex or race, and that it might be more difficult to establish when justifiable differentiations turned into unjustifiable discrimination (§74). He suggested that Article 6(1) of the Directive aims to take account of the special character of age discrimination, and to allow Member States to retain age-based employment practices etc. insofar as justified by a legitimate employment or social policy aim (§75). Thus the possibilities of justifying age discrimination are more, not less extensive than under other grounds – but that is not to say that age is at the bottom of a "hierarchy" of grounds (§76). Regulation 30 requires justifying under Article 6 (§78). The inclusion of the word "reasonably" in that Article (a word which does not appear in Article 2) adds nothing to the requirements of "objective"

justification, contrary to Age Concern's submissions (§79). It is not necessary for the national measure itself to identify expressly the legitimate aim relied on; it suffices if the aim can be discerned from the general context (§80, citing *Palacios*). Article 6 does require the creation of some kind of legislation (§82), but it is possible in principle for the legislation to create discretionary or flexible rules, like regulation 30 (§83). Whether such rules are justified is a matter for the national courts (§82); but member states have a relatively wide discretion in identifying the means to be used to achieve the legitimate aim (§87). His answer to question v) was therefore that a rule such as regulation 30 could in principle be justified under Article 6(1).

26. The Court explained that the difference between Article 6 and Article 2 is that Article 6 is focussed on national measures, rather than employers' individual acts. Under Article 6, the burden is on member states to establish to high standard of proof the legitimacy of the aim relied on; however, the word "reasonably" added nothing (§65). It was not necessary for the Court to say whether Article 6 required a higher standard of proof than Article 2 (§66). Accordingly, the Court concluded (§67):

> *'the answer to the fifth question is that Article 6(1) ... gives member states the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are "objectively and reasonably" justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word "reasonably" used in Article 6(1) of the Directive does not appear in Article 2(2)(b) thereof.'*

27. **The decision of Blake J on Regulation 30**. The proceedings at last came before Blake J, who gave judgment on 25 September 2009, [2009] EWHC 2336. We consider his conclusions on regulation 3 in the second part of this paper; here we address his treatment of the regulation 30 issue.

28. The principal complaints of Age UK (supported by the Equality and Human Rights Commission, which intervened on the Regulation 30 issue alone) were that (a) the government had failed to establish a legitimate social policy aim, (b) any such aim was based upon generalisations rather than evidence, (c) a designated retirement age (DRA) was not a proportionate means of advancing the aim and (d) if there was to be a DRA, the choice of 65 was disproportionate (judgment of Blake J, §100). A further submission, that the adoption of a DRA was an attempt to defer implementation of the Directive, was rejected as *'without any substance'* (§101).

29. On point (a), Blake J was clear that the government had a legitimate social policy aim under Article 6: in general terms, maintaining confidence in the labour market (§103). He characterised the government's aim as being to provide *'at least in the short term, some bright line guidance on the contentious issue of retirement and discrimination* (§104). He noted that the ECJ had not suggested that aims of the kind relied upon by the government were not legitimate ones (§105).

30. As to point (b), Blake J held that the ECJ's meaning in emphasising the need for evidence rather than generalisations (in *Age Concern*[6], *Palacios* and *Seymour-Smith*)

[6] At §51 of the ECJ's judgment, noted above at paragraph 24.

was *'deprecating stereotypical reasoning, rather than* [requiring] *a particular form of proof of the social policy justification'* (§107). The government had not adopted regulation 30 on the basis of any generalised assumption that people over 65 are not reasonably capable of competent performance of their duties (§108).

31. As to the question whether it was proportionate to use a DRA at all, Blake J was clear that it was. He was at pains to emphasise that the DRA is not a mandatory retirement age: it does not require the employer to dismiss on the grounds of age, but enables it do so without breaking the law (§109). The employer is not called to make a once and for all decision; there is a right to request further working, which the evidence before him suggested was effective (§110). Age is rather unlike other grounds of discrimination, as various AGs had pointed out (111). *'This is not to assign age to some diminished worth in a supposed hierarchy of rights. Unlike the immutable characteristics of racial and gender identity all of us grow older each year, and all of us face decisions about retirement. The different nature of discrimination on the grounds of age compared with other grounds is reflected directly in the Directive by the fact that Article 6 permits justification of direct discrimination on the grounds of age'*. A DRA is not a generalised statement of social worthlessness (§112). The DRA and the social objective it pursued are not arbitrary or inconsistent. Other member states use mandatory or designated retirement ages as part of their social policy (113). Use of a DRA, he concluded was within the government's margin of appreciation as legitimate and proportionate.

32. However, Blake J was very doubtful as to the choice of 65 as the DRA, identifying *'powerful reasons why an age over 65 should have been adopted by government'* (§117). First, it was in the interests of government to make the case to break the connection between pension age (65 for men) and retirement age. Secondly, there was no evidence of performance problems (or non-stereotypical perceptions about performance problems) in employees aged between 65 and 70. The choice of a DRA of 65 seemed odd when government had announced it intended to raise pensionable age to 68 by the middle of the century. Thirdly, use of a DRA of e.g. 68 would have fulfilled all the government's objectives. The case for advancing the DRA beyond age 65 *'would seem to be compelling'*.

33. However, Blake J upheld the validity of regulation 30 on the sole basis that (a) the challenge was a historical one, and the DRA's adoption had not been outside the state's margin of appreciation in 2006[7] and (b) the government had announced that it would be holding an imminent review of the DRA in 2010[8]: §§128-129. He indicated that, on the material before him and as at the date of judgment, he was of the view that the DRA was not proportionate (§128).

<u>(iii) Regulation 30: conclusions</u>

34. Regulation 30 has had a narrow escape, and Blake J's decision is likely to be the final judicial word on its validity for some time, since neither Age UK nor the EHCR is seeking to appeal.

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[7] This "historical" approach to justification is, at the least, contentious as a matter of Community law.
[8] Rather than in 2011, as it had originally intended.

35. Whether the DRA will survive the government's review next year is another matter: there are strong indications that the view of government on this issue has changed. In difficult financial times, there is an increasing (and much remarked-upon) sense that all of us will end up working for longer, and a powerful policy imperative for the government to enable employees to do so. In addition, the government itself has now decided to abandon compulsory retirement at all levels in the civil service, following an earlier decision to scrap it in part[9]. Political debate has shifted to the extent that the opposition has (on 6 October 2009) proposed increasing pensionable age to 66, which would necessarily involve adjustment or abolition of the DRA. Employers should not anticipate that they will be able to count on the availability of the DRA beyond the very short term future.

36. In the meantime, we can expect to see the stays lifted on the pending regulation 30 Tribunal claims (and the striking-out of those, like *Johns v Solent*, which rely upon the invalidity of the retirement exception), and perhaps the development of some guidance on the retirement procedure, as the cases at last flow through the tribunal system.

B. Justifying age discrimination

'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'.

Recital 25 of the Directive

37. The creation of a general defence of justification for direct as well as indirect discrimination under regulation 3 is a distinguishing and central feature of age discrimination law. It is also highly controversial. We will consider: (i) the challenge to regulation 3 and its creation of a justification defence for direct age discrimination; (ii) the identification of legitimate aims; (iii) principles of proportionality in the context of age discrimination; (iv) whether there is a difference between the tests for direct and indirect age discrimination; and (v) some alternatives to the regulation 3 justification defence.

(i) Challenges to regulation 3

38. We have noted above that in the Heyday legislation the validity of regulation 3 was challenged as well as that of regulation 30. This further challenge was also rejected by Blake J.

[9] Press release of 1 October 2009 at http://www.cabinetoffice.gov.uk/newsroom/news_releases/2009/091001-retirement.aspx

39. Age UK's case (see Blake J's judgment at §83) was that regulation 3 confused the justification of direct discrimination by employers with justification by the state. Only "social policy aims" of government, not private interests, could justify direct discrimination under Article 6 of the Directive. Regulation 3 could lead to employers seeking to justify direct discrimination on grounds of their own business needs, including considerations of cost. Government could not be allowed to delegate the identification of social policy objectives to employers. In addition, the government's reliance on broad social policy objectives not contained in the Regulations themselves or in the explanatory notes violated the principle of legal certainty: parties needed to know what the aims are if they are to litigate over the necessity and proportionality of steps taken by employers).

40. The Government's position was that regulation 3 was justified by the social policy objective of *'preserving the confidence and integrity of the labour market and providing sufficient clarity to the workforce and employers to prevent that confidence being damaged with detrimental consequences to employment and the terms on which employment is offered in the UK'* (§86). Regulation 3 enabled employers to justify particular treatments and practices as necessary and proportionate to their business needs, in order for the government to fulfil those social objectives.

41. Blake J held that the Regulations had to spell out what derogations had been made, and that the legislative context needed to identify the social policy aims (but they did not need to be contained in the Regulations) (§88). He apparently accepted that regulation 3 was a reasonable, necessary and appropriate means for the government to achieve legitimate policy objectives (§§88-9). The government had made out its social policy objectives (§90); and the objectives were sufficiently legally certain (§91).

42. Addressing in more detail the question whether regulation 3 was proportionate, Blake J emphasised that *'the private employer is not afforded the wider margin of discretion in the application of the regulation that the state is'* (§92), and that there is *'a clear distinction between the government as a public body being concerned about the social cost to competitiveness of UK employment <u>in the early phase</u> of implementing the new principles and policies of the Directive, and individual business saying it is cheaper to discriminate than to address the issues that the Directive requires to be addressed'* (§93, emphasis supplied). The words underlined are noteworthy; Blake J seems to have issued a gentle invitation to the government to keep regulation 3, like the DRA, under review, stating that *'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 or 2009 cannot yield to some different perception of where the public interest lies at a later date'* (§94). In such terms Blake J held that, at least for the time being, regulation 3 is justified.

43. At §92 Blake J held as follows (emphasis supplied):

> *'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 <u>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 business</u>. The private employer is not afforded the wider margin of discretion in the application of the regulation that the state is. <u>The flexibility shown to the employer in permitting</u>*

it to endeavour to justify discriminatory 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 indirect discrimination are fundamentally different from those that can justify direct discrimination. If they were the ECJ would have made this clear in its answer to question five in the reference.'

44. It appears reasonably clear from §92 that Blake J considered that regulation 3 does allow employers to justify discriminatory practices by reference to business need, and does not require justification in individual cases on social policy grounds (such justification being a matter for the state in justifying the availability of the general defence).

45. However, at §96, having noted at §95 the *'acute policy tension'* between the various interests lying behind regulation 3, Blake J stated that *'I 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 ECJ jurisprudence requires to be read in to achieve compatibility'*, referring to the interpretative principle in C-106/89 *Marleasing* [1990] ECR I-4135.

46. The reference to a *Marleasing* construction is initially confusing, because Blake J did not identify any defect in regulation 3 as drafted. Our view is that Blake J simply intended to point out that if future developments in ECJ case law (*'emerging ECJ jurisprudence'*) establish that it is not permissible to allow justification of direct age discrimination in the way the UK has, it ought not to be necessary to invoke the concept of *ultra vires*, because most defects could be remedied by a compatible construction. There is, however, a real chance that litigants will seize on this paragraph of the judgment as indicating that Blake J concluded that some special, Community law construction of regulation 3 was required.

47. There is also potential for confusion in Blake J's final conclusion, at §97 (emphasis supplied):

> *'I accept that there is a limit to what a national court can do by way of reading down Directives* [sc. domestic regulations] *that are inconsistent to 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 principles of the Directive and the criteria in the Age Concern judgment. 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 discrimination remains unjustified it will be unlawful'.*

48. The first passage underlined may be prayed in aid by litigants seeking to argue that Blake J recommended some kind of *Marleasing* construction. We still consider that the better view is that Blake J held that regulation 3 is justified, in light of the prevailing law and facts, and left open the question whether it would need to be read down in future.

49. The second underlined passage also gives rise to potential argument. It may be said by claimants that Blake J decided that employers needed to justify direct discrimination in reliance upon the government's social policy objectives, on the basis of the words *'in reliance upon that social aim'*. We do not think that this can be what Blake J meant, particularly in light of his conclusion at §92 (see paragraph 44 above); and it would be bizarre if employers were under an obligation to seek to implement social policy (indeed, such aims could be *ultra vires* for many public authorities). The better view is that *'in reliance upon that social aim'* is a condensed reference to reliance upon the justification defence which is itself justified by the Government's social aim. Undoubtedly, however, there is uncertainty, and the ECJ's judgment is expressed with too much compression to be of assistance in this area.

50. One potential source of clarification is *Seldon v Clarkson Wright & Jakes*, which is currently pending before the Court of Appeal (the case and the EAT decision, [2009] IRLR 26, are discussed in greater detail below). There the appellant, represented by Robin Allen QC, who was also counsel for Age UK in the Heyday litigation, sought to argue as Age UK had done that regulation 3 is invalid because it creates a justification defence to direct age discrimination claims. However, the appeal was heard for a day before being adjourned to await the outcome of *Age UK*, and it is not all clear that the appellant will pursue its regulation 3 argument in light of Blake J's decision.

(ii) Identifying legitimate aims

51. Considering the uncertainty prevailing after *Age UK*, respondents will be well-advised to frame the legitimate aims they rely upon not only in terms of business needs, but also in broader, social terms, simply as a fall-back position in case a tribunal should conclude that (contrary to our view) it is necessary for employers themselves to rely upon a "social policy objective" in order to ensure compatibility with Article 6. For example, it may be appropriate to characterise a measure not only as meeting a business need but as "ensuring intergenerational fairness" or similar.

52. Aside from the possible, but doubtful, need to rely upon a social policy objective in direct discrimination cases, what constitutes a "legitimate aim" capable of justifying age discrimination? When the Regulations were published, various guidance documents[10] suggested recurring themes: business need, health and safety, training requirements, etc.

53. The general tenor of the case-law so far is that courts will adopt a fairly generous, common-sense approach in recognising aims as legitimate. In *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, the Court of Appeal had no doubt at all that rewarding long service (to reward loyalty and to achieve a stable workforce in a redundancy process) was a legitimate aim (see below at e.g. paragraph 120). In *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] ICR 1348, the EAT thought it quite clear that preventing employees from receiving windfall benefits under a redundancy scheme would be a legitimate aim of the scheme, whose

[10] E.g. *Impact of the Age Regulations on Pension Schemes*, DTI, December 2006, p7; *Coming of Age*, p33; *Age and the Workplace*, ACAS, p31.

purpose was to cushion workers from the effects of losing their income (§37). Cases in Luxembourg (always bearing in mind the distinction between justification by a Member State and justification by a private employer) give indirect support to the legitimacy of the aims of protecting public health[11], creating opportunities for younger generations of workers[12], and maintaining a broad cross-section of ages in the workforce for operational reasons[13]. There is only one example of a case where an attempted justification defence to an age discrimination point has failed (in the Opinion of an Advocate General) for want of any legitimate aim at all: C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* (Opinion of AG Bot, 7 July 2009).

54. A particularly broad view of legitimate aims was taken in *Seldon v Clarkson Wright & Jakes* [2009] IRLR 267 (EAT), the leading case on justification of retirement under regulation 3, when regulation 30 does not apply (e.g. in the case of partners, as in *Seldon*, directors, judges, and police constables, and of employees forcibly retired before the age of 65).

55. Mr Seldon had been a partner in the Orpington firm of Clarkson Wright & Jakes for many years. At the end of the year following his sixty-fifth birthday, in accordance with the partnership deed (which he had signed up to), his fellow partners forced him to retire. Mr Seldon sued the firm for age discrimination.

56. The firm sought to rely before the Employment Tribunal on six aims as justifying its direct age discrimination against Mr Seldon (EAT Judgment, §17):

(1) Ensuring the creation of opportunities for associates to make partner (to encourage them to stay with the firm).

(2) Maintaining the turnover of partners so that any partner could hope to be senior partner in due course.

(3) Facilitating workforce planning.

(4) Maintaining a congenial atmosphere, by avoiding the need for performance management.

(5) Enabling and encouraging employees and partners to make financial provision for retirement.

(6) Protecting the partnership model.

57. As recorded by the EAT at §10, the ET accepted (1), (3) and (4) as legitimate aims. It is instructive to consider why the others were rejected (the reasons were given by the ET but not set out in the EAT's decision). Aim (2) was rejected as itself tainted by age discrimination, and unsupported by the evidence. Aim (5) was recognised as a

[11] C-341/08 *Petersen v Berunfungsausschuss für den Bezirk Westfalen-Lippe* (Opinion of AG Bot, 3 September 2009), §52, albeit in the context of Article 2(5) of the Directive.
[12] *Petersen*, §74
[13] C-229/08*Wolf v Stadt Frankfurt am Main* (Opinion of AG Bot, 3 September 2009), §42.

potential legitimate aim, but not accepted as made out on these facts. And aim (6) was considered to add nothing to the previous five aims.

58. The Tribunal proceeded to find that the retirement age was justified as a proportionate means to achieving the legitimate aims it had identified (EAT Judgment §28).

59. Mr Seldon appealed on 22 grounds, and the EHRC intervened. The EAT thought that six of the grounds *'merit[ed] consideration'* (§29), including the complaint that "collegiality" or "congeniality" was not capable of being a legitimate aim; or if it was, there was no basis to fix the retirement age at 65.

60. Notably, the EAT held that congeniality was indeed a legitimate aim. They rejected the submission that it was not legitimate because it was not a "proper business objective" (§66); a business could pray "environmental or charitable objectives" in aid, for example (§67).

61. However, the ET had erred in its finding of justification. The "congeniality" aim was relied upon by the partnership on the basis that partners' performance would "tail off" at or towards sixty-five, and mandatory retirement avoided the need for uncongenial performance management. Yet there had simply been no evidence before the ET that the performance of partners in the firm "tailed off" at sixty-five (§71); this aspect of the justification was little more than an ageist stereotype (§74). Accordingly, on the issue of proportionality in relation to this particular aim (and on this issue only), Mr Seldon's appeal succeeded. We consider proportionality in more detail below at paragraphs 67ff.

62. Mr Seldon, however, is appealing the EAT's conclusion that congeniality could constitute a legitimate aim at all (along with many other of its conclusions).

63. In light of the pending appeal, employers should be cautious in seeking to rely on "congeniality" or on "charitable or environmental" aims; but while it stands, the EAT's judgment suggests that all of these are available, in additional to more conventional "business needs".

64. As for that core set of legitimate aims relating to business need, a vexed question in discrimination law has been the extent to which employers can invoke a need to reduce costs. In *Cross and others v British Airways* [2005] IRLR 423, an indirect sex discrimination case, the EAT reviewed the ECJ case-law and concluded that *'an employer seeking to justify a discriminatory PCP cannot rely solely on considerations of cost. He can however put cost into the balance, together with other justifications if there are any'* (§72). In *Redcar and Cleveland Borough Council v Bainbridge* [2008] ICR 249, counsel sought to persuade the EAT to depart from *Cross* but it declined to do so (§90), explaining its view of the case as follows at §92:

> *'If there are cost constraints, they must be allocated in a way which limits any discriminatory impact as much as possible... Usually, however, the issue of costs may become material when an employer is being asked to put right some alleged continuing discrimination. Cross suggests that an employer cannot defeat the right to equality by pointing to financial burdens alone, but he can pray the financial burdens in aid as some support for a decision which is objectively justified on other grounds. Pay protection arrangements provide a good example. Transitional*

> *arrangements of such a kind will sometimes be appropriate (and often unavoidable in practice) to cushion the pay of those moving to lower pay. It would theoretically be possible to confer the benefit of the higher pay on everyone, but the cost may reinforce the justification limiting the benefit.'*

65. The EAT's decision in *Redcar* was overturned by the Court of Appeal ([2008] EWCA Civ 885, [2009] ICR 133), but this point was not addressed. It seems to us that *Cross* represents good law that is equally applicable to indirect age discrimination.

66. In our view, the same approach ought to stand in direct age discrimination cases in light of *Age UK*. That is on the basis that Blake J 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'*: §92, above at paragraphs 43 to 44. Blake J at §93 (above, paragraph 42) quite clearly suggested that it would not be good enough for employers to say that it is *'cheaper to discriminate than to address the issues that the Directive requires to be addressed'*, but this seems consistent with *Cross* and the EAT's further comments on that decision in *Redcar*: cost can never in itself be a legitimate aim, but it may be factored into the balance. On this analysis, cost really goes to the consideration of whether a measure is "appropriate and necessary" (i.e. questions of proportionality), rather than to the legitimacy of an aim.

<u>(iii) Proportionality</u>

67. Proportionality has emerged as the decisive issue in many of the decided cases (both domestically and in Luxembourg). In the following paragraphs we outline some of the key features that have been identified as tending to support the proportionality of a measure towards its legitimate aim. However, the Luxembourg cases must be treated with caution by those advising in employment disputes. The ECJ decisions all relate to legislation enacted by States, and not to the actions or policies of individual employers. The case law on indirect discrimination indicates that a considerably broader margin of discretion will be granted to a State seeking to justify discriminatory legislation than to an employer seeking to justify discrimination in a particular workplace, and this message was also emphasised by Blake J in *Heyday*.

68. **The need for evidence / avoiding stereotyping**. There are ample examples of the importance of justifications being based on a substantial footing, and avoiding ageist stereotypes. No matter how laudable and legitimate the aim is in theory, a justification will fail if there is an insufficient basis for showing that the measure in question is a proportionate means of achieving it.

69. In *Seldon*, the EAT emphasised that it is not necessary for a tribunal to have *'concrete evidence, neatly weighed, to support each assertion made by the employer'*(§73). The *Age UK* judgment of Blake J may also assist employers by analogy with justification under Article 6: there, in his view, Community law did not require any particular form of proof. But in rejecting the respondent's "congeniality" justification (on the ground that the assumption that partner performance would fall away at 65 was no more than an ageist stereotype; see above at paragraph 61), the EAT in *Seldon* gave a salutary reminder of a very obvious requirement of justification: an employer needs <u>some</u> evidential basis for it. Consider the following two ET cases:

(1) *Hampton v Lord Chancellor* [2008] IRLR 258 involved a complaint by a Recorder about a mandatory retirement age of 65. Most Circuit and High Court judges are promoted from the ranks of Recorders. The Respondent appears to have argued that (a) a retirement age is necessary for judicial independence; (b) to have good candidates promoted to the judiciary, a good flow into the pool from which candidates are selected is required – since candidates aged 65-70 were not eligible for selection, they blocked up the pool, decreasing the number of candidates coming in and (c) it is important that Recorders who are promoted have had challenging cases – that those who are promoted have had sufficient experience. While these were potentially legitimate aims, the Respondent failed in its justification argument, because (a) there was no reason why 65 should be the retirement age; (b) only 3% of the pool were promoted each year, and there was no evidence that Recorders would remain in post after 65; and (c) appropriate listing of cases could ensure that Recorders gained appropriate experience.

(2) In *Baker v National Air Traffic Services* (*The Times*, 27 February 2009) an automatic bar on recruitment of air traffic controllers over the age of 35 was held unjustified because of inadequate evidence of a decline in performance in those aged 36 and over.

70. In C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* (Opinion of AG Bot, 7 July 2009), the AG was particularly critical of the German government's reliance on general assertion, without evidence, in support of its proffered justification of a national rule which discriminated on age grounds. While Member States undoubtedly have a generous margin of appreciation, it is not good enough for Member States to make general assertions of appropriateness; here there was no tangible material to support the assertion or demonstrate that the law was apt to meet the end (§51). By contrast, in C-229/08 *Wolf v Stadt Frankfurt am Main* (Opinion of AG Bot, 3 September 2009), the government appears to have produced impressive scientific evidence to back up a claim that the physical ability of fire-fighters tailed off at age 45-50 (§§33-34).

71. **Coherence and consistency**. The proportionality test does not only require that there be some basis for proposed justifications. It requires that they make sense.

72. The recent ECJ case of *C-88/08 Hütter v Technische Universität Graz* (Judgment of 18 June 2009) is a good example of a member state's attempt at justification under Article 6 failing for incoherence and inconsistency. Mr Hütter was recruited by a public sector employer following his completion of an apprenticeship of three and a half years. Pursuant to a rule of Austrian law, his starting salary was determined by reference to his professional experience after attaining the age of 18, but not before that age. Mr Hütter complained: a colleague had carried out the same apprenticeship and had been recruited by the same employer; but was paid more because she was older and had gathered more professional experience after the age of 18. The referring Court asked whether A6 of the Directive prohibited a law such as the rule in question.

73. The aims relied upon by the government as justifying the rule included:

(1) Promoting the integration of apprentices into the workforce (only 0.03% of apprentices completed training after attaining the age of 18. The fact that

their experience before the age of 18 was not taken into account in calculating remuneration promoted their integration into the workforce and enabled employers to reduce costs associated with recruiting young apprentices: §22); and

(2) Promoting the interests of those who had had a general education prior to the age of 18, rather than acquiring professional experience. Accreditation of periods of experience prior to 18 disadvantaged those with a general education. The Austrian labour market suffered from a lack of higher-education qualifications; and the government did not wish to deter people from undertaking higher education by incentivising apprenticeship before the age of 18 (§23).

74. The Court (having held that the rule constituted direct discrimination) found that these were both legitimate aims (§43). However, despite the fact that Member states *'unarguably enjoy broad discretion'*, (§45), it was difficult to accept that there could be two legitimate aims (for apprentices and non-apprentices) which were *'of advantage to each of those two groups at the expense of the other'* (§46): the justification was internally inconsistent.

75. **Tailored measures**. Moreover, the Court held in *Hütter* that in relation to the legitimate aim of benefitting those with higher qualifications, the measure was simply insufficiently tailored to that end. The discriminatory criterion was applied irrespective of the type of education a recruit had gained; a criterion based on type of studies would have been more appropriate. Nor could it be appropriate that even two people who had had higher education would be discriminated between on grounds of the age at which their professional experience was acquired (§48).

76. Tailoring was also particularly important in AG Bot's Opinion in C-341/08 *Petersen v Berunfungsausschuss für den Bezirk Westfalen-Lippe* (3 September 2009). This was a case of too many dentists. A rule of national law prohibited dentists from practising after the age of 68, subject to certain exceptions. The national court referred the question whether this was permissible under A6. The only justification mentioned in the reference was the protection of patients' health, based on a presumption that dentists' performance would fall away after the age of 68 (§2). The AG was not inclined to limit the analysis to this justification (§3). The government wanted to rely on (a) the need to balance the finances of the medical insurance regime and (b) the need to ensure opportunities for new generations of dentists: there was a surfeit of dentists, which caused problems on both counts. The AG stated that the proper approach to legitimate expectation was that set out in *Palacios* and *Age Concern*; if the national rule is not precise, one can look elsewhere (including the general context) to determine what the aim of the rule is (§44). Here, the general context showed that a tailing off of performance was not the reason for the rule (§45); the matters relied upon by the government were the reasons.

77. The AG made it clear that he was unimpressed by the aim referred to by the national court. If it was really thought that dentists' performance fell away after 68, such that they posed a risk to patients, why could they continue practising in some circumstances, as they could under various exceptions? (§50).

78. The aims relied upon by the government, however (protecting public health by avoiding damage to the public finances, and creating opportunities for new generations of dentists), were legitimate[14], and the rule was a proportionate means to achieve both of them. AG Bot was impressed by the fact that the legislature had adopted a balanced approach: there were exceptions in places where there was a shortage of dentists or there was no problem with becoming a dentist (§80).

79. This is not to say that tribunals in challenges under the Regulations should concentrate on the particular application of an employer's policy to the claimant, or require policies always to be flexible to different employees' situations. In *MacCulloch v ICI plc* [2008] IRLR 846, in the context of a redundancy scheme which had indirectly age-discriminatory effects, the EAT held that the tribunal should consider the aims and application of the scheme as a whole rather than factors specific to the claimant (§§33, 35), and noted that while the inflexibility of rules would need justifying, such justification would be usually available on the ground of the importance of transparency and equality of treatment (§36). In Seldon, the EAT's approach to this issue was slightly more nuanced, but to similar effect:

> *'We do not foreclose the possibility that there may be cases where the particular application of the rule has to be justified, but we suspect that they will be extremely rare. Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule ... is itself an important element in the justification ...'* (§58);
>
> *'we suspect that the need to create exceptions ... in order to prevent an otherwise justified rule from being unjustified in its application will rarely if ever arise. We certainly do not think this case provides an example ...'* (§61).

80. The *Seldon* appeal is of course ongoing, but it seems unlikely that the Court of Appeal will take a radically different view.

81. **Consent.** The fact that a measure has been consented to is also likely to be significant in a proportionality analysis.

82. Thus the EAT in *Seldon* held that the ET had been entitled to take into account the fact that Mr Seldon had agreed to the retirement rule under challenge. His consent was relevant for two reasons. First, there was an analogy with *Bridge v Deacons* [1984] AC 705. There the Privy Council held that public policy will tolerate more restrictive non-compete clauses between partners than between employer and employee: a partner, unlike an employee, benefits from such a clause while he is a partner (EAT judgment at §53). The fact that the partners *'must have perceived the rule to be in their collective interests'* was relevant. Secondly, in assessing justification it is appropriate to have regard to the fact that a rule was agreed in the process of collective bargaining: §54, citing *Palacios* at §53.

83. In *Rolls Royce* (discussed in detail below in part 4; see in particular paragraph 120) Wall LJ, in upholding the proportionality of the relevant provision, particularly emphasised the fact that it had been agreed as part of a very careful negotiating process between the employer and the union, designed to ensure fairness generally.

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[14] Note however that AG Bot thought that the "public health" objective had to be justified under Article 2(5) read with Article 152.5 EC, rather than Article 6.

In *Bloxham v Freshfields Bruckhaus Deringer* (ET) 9 October 2007, too, the detailed process of consultation and agreement that the respondent firm had gone through was a key reason why the Tribunal found in its favour.

84. **The pie principle**. The special nature of age as a criterion can be very significant in the proportionality analysis. An age discriminatory criterion may be something from which people of all ages will benefit, in the course of time. This was relied upon by the respondent in *Bloxham*, and accepted by Arden LJ in *Rolls Royce* (below, paragraph 120). Age discriminatory schemes may apportion benefits over time such that, in due course, they will be accessed by those of all ages. Being awarded a small "slice of the pie" at one age may be balanced by a larger slice at another.

(iv) A different test for direct age discrimination?

85. There has been lively debate as to whether the test for justification of direct age discrimination requires a more exacting standard to be satisfied than justification of indirect discrimination.

86. As noted above, it was argued in the Heyday litigation that the words *'and reasonably'* in the phrase *'objectively and reasonably'* in Article 6 indicated that justification of direct discrimination required a higher standard of proof; the ECJ held that those words made no difference: the relevant difference was between of the nature of justifications under Articles 2 and 6.

87. The ECJ declined to say whether there was a different standard of justification between those articles (paragraph 26 above). The standard of the test under Article 6, however, ought not to be relevant, so long as regulation 3 is itself justifiable under that Article. The direct discrimination justification defence is a creation of UK law –a direct borrowing from the defence in respect of indirect discrimination. Unless it is illegitimate for the UK to have created such a defence (and there is some lingering uncertainty after *Age UK*, as we have noted), we see no compelling reason why the test should not involve exactly the same standard as that applicable to justification of indirect discrimination.

88. This, certainly, has been the view of the EAT to date. In *Seldon* the EAT was firm that tribunals *'must apply the normal principles of legitimate aim and proportionality'* (§41) without any further criterion of exceptionality. The distinction between justification of direct and indirect discrimination lies not in the legal concept, but in practice: it will be harder to justify a directly discriminatory measure as proportionate, because the overall discriminatory effect will be greater (§43, citing its earlier decision of *MacCulloch* [2008] IRLR 846, §12). There is support for this view in the judgment of Arden LJ in *Rolls Royce*; she suggested *obiter* at §155 that it would not make any difference on the facts of that case whether the discrimination was direct or indirect, because the same justification analysis would apply.

89. It must be borne in mind that the Court of Appeal in *Seldon* may overrule the EAT – but it seems to us that that would be a surprising result, for the reasons we have given.

(v) Defending age discrimination claims – some alternatives to justification

90. We conclude our discussion of justification by identifying some alternative (and in some cases unusual) ways of defending age discrimination claims.

91. **Regulation 27(1)** provides that *'Nothing in Part 2 or 3 shall render unlawful any act done in order to comply with a requirement of any statutory provision'*. Thus in *Renfrewshire Council v Martin* (EAT, Scotland, 30 April 2008) it was held that age discrimination challenge in relation to a failure to appoint the claimant to office could not possibly proceed where legislation disqualified him from that office; the respondent's mindset was irrelevant. In *Tower Hamlets LBC v Wooster* (EAT, 10 September 2009), which did not refer to regulation 27 in terms, it was held that a claimant for age discrimination could not complain of a failure to act in a way which would have been *ultra vires* his local authority employer[15]. Legislation requiring respondents to act in a particular way can accordingly be very useful in defending claims; though public bodies in particular should beware in case the legislation they rely on itself contains age discriminatory terms which might be disapplied under principles of direct effect.

92. **The "ready-made"** exceptions contained in the Regulations should always be considered. Regulation 32 in particular (benefits based on length of service) has been interpreted very broadly by the Court of Appeal in *Rolls Royce* (see below in part 3).

93. **Creative use of "Genuine Occupational Requirements"?** AG Bot has recently, in his Opinion of 3 September 2009 in C-229/08 *Wolf v Stadt Frankfurt am Main*, adopted a very broad view of GORs under Article 4 of the Directive. The facts of *Wolf* were that the law of the state of Frankfurt am Main imposed a maximum age limit of 30 for the recruitment of fire-fighters. Mr Wolf was a little over-age, and his application was rejected. He sued. The national Court made an Article 234 reference, asking (essentially) if the rule could be justified under Article 6.

94. The AG described the government's justification (§§26-32): essentially, that fire-fighting is physically demanding work; physical capacity tends to fall away at 45-50, and the age limit is to ensure that fire-fighters can carry out their service for a reasonably long time. Good organisation requires the age limit, really for workforce planning reasons: as the older fire-fighters have to be assigned to less onerous jobs, they are replaced by a wave of new ones, who will be able to carry out the task for a reasonably long time.

95. Neither the referring court nor the state seems to have relied upon the GOR defence in Article 4(1), which provides that *'Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'*. The AG was confident that a maximum recruitment age could amount to a GOR: it was a genuine occupational requirement that fire-fighters be aged 30 or less upon recruitment. This is a surprising use of the concept of a GOR (surely *'characteristic'* means age, sex etc; and it was simply not the case that it was a GOR of fire-fighting to be aged 30 or less). The AG also opined, however, that the age limit was justifiable

[15] The claimant succeeded because this was not his only complaint.

under Article 6; and the ECJ is more likely to agree with this opinion but not with his views on Article 4.

96. If, however, the ECJ were to agree with AG Bot, it would considerably broaden was has been understood to be the scope of Article 4, and arguably justify a similarly broad approach being taken to regulation 8, its implementing provision under the Regulations.

C. Indirect age discrimination: special problems

'[A]ge as a criterion is a point on a scale and ... therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators involved are more clearly defined.'

Palacios, Opinion of AG Mazák, §6

97. Indirect discrimination is a concept very familiar from the other branches of discrimination law. However, the special nature of age as a characteristic is in some respects problematic.

98. Provision for the prohibition of indirect age discrimination is made by Regulation 3(1)(b). A discriminates against B if:

> *'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'*,

unless, of course, A can justify the provision, criterion or practice. Regulation 3(3)(a) defines *'age group'* as *'a group of persons defined by reference to age, whether by reference to a particular age or a range of ages'*.

99. In order to establish indirect age discrimination it is thus necessary to show that persons of the claimant's age group are put at a particular disadvantage when compared with other persons. In *R v Secretary of State for Employment ex p Seymour-Smith (No. 2)* [2000] 1 WLR 435, the House of Lords considered indirect sex discrimination under the old test (whether the proportion of women who could comply with a provision was *'considerably smaller'* than the proportion of men) and held that discrimination law did not require the impact to be absolutely identical, but simply prohibited a significant disparity of impact. We suggest that, under the modern test, a claimant must still be required to show a significant disadvantage as compared with others: pointing to a tiny and insignificant statistical difference would not be enough. Such an approach has the support of the EAT, which has held, albeit without argument, that the "particular disadvantage" test, like the test in *Seymour-*

Smith, requires a disadvantage *'which is more than trivial or insignificant'*: *Pike v Somerset County Council*, 3 October 2008, at §28 per HHJ McMullen QC.

100. Accordingly, in applying the "particular disadvantage" test tribunals will still compare the extent of the difference in treatment (by reference to statistics, where appropriate) and determine whether it is significant.

101. How, though, are the appropriate groups for comparison to be identified? In sex discrimination cases, the nature of the relevant characteristic makes matters relatively simple; but as AG Jacobs observed in *Lindorfer*[16], echoed by AG Mazák in *Palacios*, *'Sex is essentially a binary criterion, whereas age is a point on a scale'*. Adverse effect of a PCP on different sexes can be compared by way of simple bar chart (see Figure 3 for a notional example), but adverse effect by age occurs on a continuum (see e.g. Figure 4).

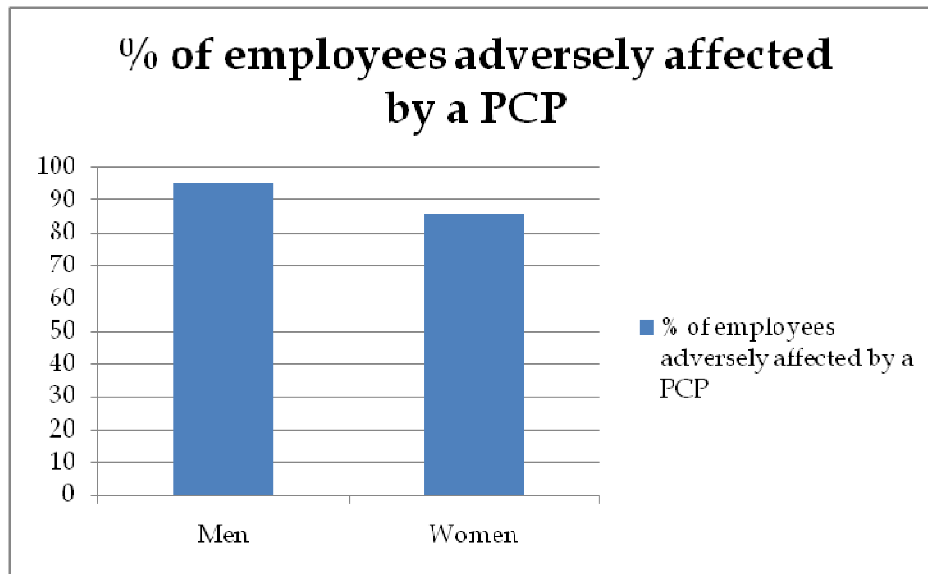

Figure 3

[16] C-227/04 *Lindorfer v Council of the European Union* [2007] I-06767, §84

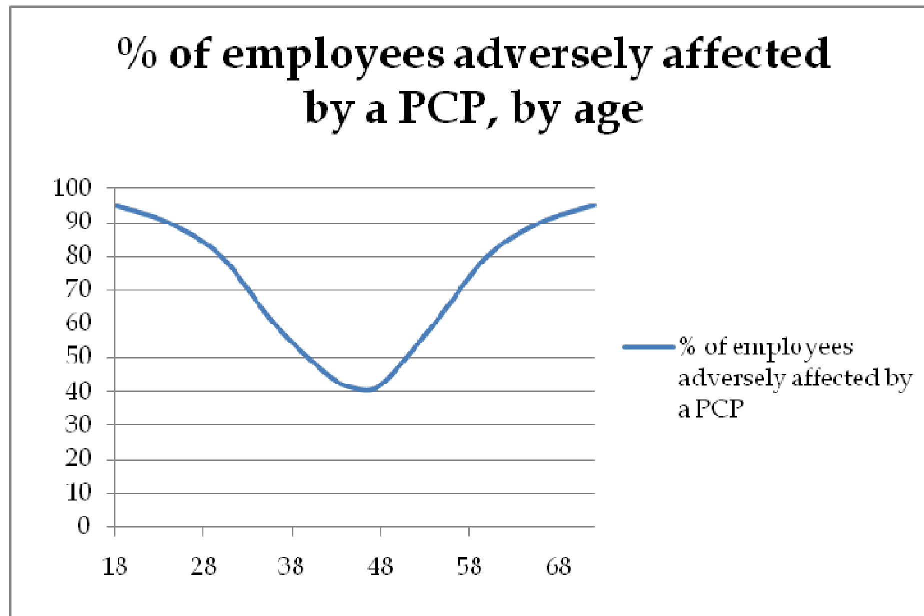

Figure 4

102. This makes the identification of the age group – the question of where to draw the line that marks out the relevant age group from everybody else – particularly important. Indeed, it may be determinative of the question whether there is *'particular disadvantage'* at all. In the notional example at Figure 4, if the relevant age group is 48+, there is no real disparity, on average, between the effect of the PCP on that age group and its effect on others. If, however, the relevant age group is 68+ plus, members of that group will on average be substantially worse affected by the PCP than others.

103. We consider that it must be for the claimant, in the first instance, to identify the relevant age group, just as it is for the claimant to identify the pool relied on in other branches of indirect discrimination; but the tribunal will not necessarily accept that the age group relied on is appropriate: cf. *Abbott v Cheshire and Wirral Partnership NHS Trust* [2006] EWCA Civ 523, [2006] ICR 1267 at §17.

104. In some cases, the appropriate age group may be clear. To take an example, if an employer requires recruits to possess GCSE qualifications (without making allowance for equivalents), there is likely to be a clear cut off in age of those adversely affected (since GCSE examinations were first sat in 1987). In other cases, more closely resembling the hypothetical scenario in Figure 4, identification of the age group may be a hard-fought, and possibly determinative, issue.

105. The EAT has yet to give guidance on identification of age groups. Instead, in *Chief Constable of West Yorkshire v Homer* [2009] ICR 223 (which we believe is its only decision so far to grapple with the specific problems in identifying indirect age discrimination) the EAT has added a further conceptual complication.

106. Mr Homer's employer had introduced a new grading structure, with a new requirement that for employees to achieve the top grade, and enjoy the greatest salary increments, they had to have a law degree. Mr Homer did not have a law

degree. He complained that since he was 61, he could not realistically achieve the top grade, since by the time he had acquired his degree he would be due or very nearly due to retire. The Tribunal found that he had made out a claim of indirect age discrimination.

107. However, the EAT disagreed that Mr Homer had even established a *'particular disadvantage'* (§35):

> *'There was no basis for concluding that there was any particular disadvantage which affected persons falling within the age bracket of 60–65. The employers are right to say that all persons without a degree are treated in precisely the same way. Whoever they are, and whatever their age, they have to acquire the degree before being eligible for the higher pay given to someone in the third threshold. The requirement for a degree is not something required only of those over a certain age.'*

108. The only disadvantage suffered by those in Mr Homer's age group was that younger employees had longer than them to enjoy the benefits that came with a law degree. That, said the EAT, is true of any benefit conferred by employers on employees. It concluded at §39 as follows:

> *'In our judgment, the financial disadvantage—if it can properly be so described—resulting from the operation of this criterion is the inevitable consequence of age; it is not a consequence of age discrimination. The disadvantage follows from the simple fact that it is necessary to be employed to earn pay; the shorter the remaining working life the less will be earned by way of future earnings. It seems to us that the claimant's case would require more favourable treatment for older workers to mitigate the fact that as they get older so their working life span decreases and the future value of benefits conferred by the employer is reduced. That, however, is the human condition, and not even Parliament can change it.'*

109. The EAT's reasoning is not entirely clear. It appears to be that the true cause of Mr Homer's disadvantage was not anything done by the employer, but age itself[17]; that the criterion, in terms of the test under the Regulations, did not put Mr Homer at a disadvantage. The difficulty with this is that the requirement for a law degree plainly did put Mr Homer at some disadvantage. The EAT's approach would seem to introduce a further test of the *real* cause of the disadvantage – a test that does not appear in the Regulations. Perhaps a better analysis would be that, while the provision had a discriminatory effect, it was justified, being towards a legitimate end (rewarding qualifications), and proportionate (not least because the differential effect on those in Mr Homer's position was inevitable).

110. While there has been relatively little judicial consideration of the particular problems posed by indirect discrimination in the context of age, it seems to us that it may prove a fertile area for discussion and dispute.

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[17] It is notable that the EAT was influenced by the "shape of the graph" in Mr Homer's case, holding at §41 that *'the gradual and regular nature of a graph plotting age with advantage itself suggests that the requirement has nothing to do with age discrimination and everything to do with the consequence of age'* (cf. Figures 3 and 4). However, this would seem a highly unreliable basis on which to determine whether age or age discrimination is the "real cause" of disadvantage.

D. Employee benefits

111. We have already noted that several provisions of the Regulations make specific provision for "carve-outs" from the prohibition of age discrimination which employers do not need to justify, but which the government itself has sought to justify as proportionate means to legitimate ends (including legitimate employment policy, labour market and vocational training objectives) under Article 6 of the Directive.

112. In this part we will we will consider regulation 32 (provision to workers of benefits based on length of service), as well as the justification of the provision of employee benefits under regulation 3 which fall outside the scope of regulation 32. We note, but will not address, the further specific exceptions in respect of enhanced redundancy payments (regulation 33) and the provision of life assurance cover to retired workers (regulation 34), or the complex set of exemptions relating to pension provision.

113. The key provisions of regulation 32 are as follows:

> *'(1) Subject to paragraph (2), nothing in Part 2 or 3 shall render it unlawful for a person ("A"), in relation to the award of any benefit by him, to put a worker ("B") at a disadvantage when compared with another worker ("C"), if and to the extent that the disadvantage suffered by B is because B's length of service is less than that of C.*
>
> *(2) Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).'*

114. Thus, from a worker's point of view, regulation 32 creates a two-tier system in relation to the award of benefits. If a worker has five years' service or less he simply cannot complain about less favourable treatment on the basis that other workers were awarded benefits he was not because they had a greater length of service. Only where a worker has more than five years' service is it necessary for a respondent to show that it reasonably appeared to him that the use of the criterion fulfilled a business need.

115. Regulation 32(3)-(5) prescribe a compulsory mechanism for calculating a worker's length of service for the purpose of the regulation. By paragraph (3), A must calculate either the time that B has worked for him *'at a particular level'* or the total time that B has worked for him, and A must consistently adopt each approach every time he decides to award a benefit to workers by reference to length of service. Paragraph (4) provides that A (i) must calculate the number of weeks during the whole or part of which B was working for him, (ii) may discount any periods of absence (unless in all the circumstances it would not be reasonable to do so) and (iii) may discount any period during which B was present at work but then was absent from work, subject to it being reasonable for A to do so. Paragraph (5) provides that A must count any period during which B worked for another, if that period would be treated as a period of employment with A under section 218 of the Employment

Rights Act 1996 or it would count as *'relevant service'* under section 144 of the 1996 Act if A made the worker redundant.

116. The sole appellate case addressing regulation 32 is *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, where the Court of Appeal dismissed Rolls Royce's appeal from a decision of Sir Thomas Morison ([2008] EWHC 2420, [2009] IRLR 49) that a redundancy scheme agreed between it and the respondent trade union was not unlawfully discriminatory on grounds of age. As explained below, even in this case the Court's observations on regulation 32 were probably *obiter*, because the majority of the Court decided the case on the basis of justification under regulation 3, but it still provides important judicial guidance on the operation of regulation 32.

117. It appears from the Court of Appeal's judgment that Rolls Royce had changed its mind as to the desirability of a length of service criterion in a redundancy scheme it had agreed with the union; and it sought a declaration the use of that criterion would be unlawful. The procedure which Rolls Royce had followed – the issue of Part 8 proceedings in the High Court for a declaration – was the subject of considerable debate and criticism by the Court of Appeal, which considered that the appropriate forum for the dispute would have been the Employment Tribunals, but the Court was (just) persuaded to hear the case.

118. Under the agreement between employer and union, the assessment of candidates for redundancy was to be made against an "Assessment Matrix". The matrix gave employees one point per year continuous service, and points under a series of other headings ("Achievement of Objective; Self Motivation... ; Expertise ...&c."): §66. Where two or more employees scored the same, length of service was the deciding factor: §64.

119. The questions for the Court were (§63):

    (1) Was the length of service criterion indirectly discriminatory under regulation 3(1)(b)?

    (2) What is meant by "benefit" in regulation 32?

    (3) Was the use of the length of service criterion a proportionate means of achieving a legitimate aim?

    (4) Depending on the answer to 2, did it reasonably appear to the company that its use of the length of service criterion fulfils a business need of the company's undertaking (the proportionality point under regulation 32)?

120. Wall LJ was clear that the scheme, though indirectly discriminatory on the face of it, was justified. The most important factor was that length of service was but one of many criteria, and was not determinative (§92). Further, the purpose of the agreed scheme was to *'reconcile the different perspectives of the company and union in order to produce a selection process which is fair'* (§93). In his view, '*to reward long service by employees in any redundancy selection process is, viewed objectively, an entirely reasonable and legitimate employment policy, and one which a conscientious employer would readily and properly negotiate with a responsible Trade Union'*, and as such a legitimate aim under Community law and regulation 3 (§§95-97), to the end of (a) rewarding of loyalty and (b) the overall desirability of achieving a stable workforce in the context of a fair

process of redundancy selection (§100). The use of the long service criterion was proportionate because (i) it was only one criterion of many, and was not determinative, (ii) it was consistent with the overarching concept of fairness or (iii) it had been agreed and accepted by younger employees. Arden LJ agreed, concluding that the criterion was proportionate because: (i) the agreements were negotiated between the union as a compromise for mutual benefit, not for the particular advantage of any group of employees; (ii) the length of service criterion was only one amongst many, and younger employers could score on equal terms on the other criteria; (iii) the length of service criterion was included for the principled reason that older employers would find it hardest to find new employment; (iv) all employees stood to benefit at some time from the criterion; (v) all employees stood to benefit because the selection criteria had been agreed, and there was no suggestion that the union would have agreed criteria without a length of service criterion; and (vi) the methodology was not on simple "Last In First Out" grounds (§162).

121. It was accordingly unnecessary for Wall and Arden LJJ to express a view on regulation 32, and they made clear that they did so strictly on an *obiter* basis. Both considered that the use of the length of service criterion constituted the award of a benefit within the meaning of the regulation (§§103, 165). Wall LJ thought that, on an objective view, use of the criterion did reasonably fulfil a business need of the company – the need he had identified as a legitimate aim under regulation 3, of having a loyal and stable workforce (§101). The fact that the employer now wished to *'re-think'* its business need was not determinative (§102). Arden LJ also thought that the employer's view of business need was not determinative (§168), but held that there was insufficient evidence before the Court to decide the regulation 32(2) issue. Wall LJ stated in an addendum that he agreed with Arden LJ's provisional view on regulation 32 (§107), i.e., presumably, that it was not possible finally to determine the issue on the evidence, even though in his view the objective requirements of regulation 32(2) were satisfied.

122. Aikens LJ, in the minority, broadly agreed on regulation 32 (except that he emphasised a need to investigate the state of mind of the employer at the time the criterion was used: §§137-138). As for regulation 3, Aikens LJ did not accept that use of the criterion even amounted to indirect age discrimination, on the basis that many different age groups would be equally affected (§142) and because, in his view, regulation 32 was intended to deal with all "length of service" cases under the scheme of the Regulations (§143).

123. As far as regulation 32 is concerned, the key points emerging from the judgment of the Court of Appeal are that:

(1) The Court was inclined to adopt a broad construction of *'benefit'* for the purposes of the regulation. The whole Court was agreed on this approach[18], Wall LJ seeing nothing to prevent the word *'having its wide dictionary definition'* (§103), and Arden LJ describing the word as *'a very wide one'* (§165)[19]. On this view regulation 32 is not restricted to "employee benefits" as

[18] It is arguable that Aikens LJ's conclusions on this point were a necessary part of his reasoning, and that since the other members of the Court agreed with him on the point, his dicta are binding.

[19] The meaning of "benefit" is restricted by regulation 32(7) so as to exclude benefits awarded to a worker by virtue of his ceasing to work for A. As we have noted, redundancy payments – which might otherwise be considered to be "benefits" – are covered by regulation 33.

they might ordinarily be understood. It seems doubtful, however, that this approach can be compatible with Community law[20]. It would arguably allow an employer in a redundancy situation to select only employees with five years' service or less for redundancy, as a blanket criterion, without any requirement of proportionality; and it is hard to see how such a blindly permissive provision could itself justified as proportionate by the UK under Article 6. We can expect the scope of the word *'benefit'* to be tested to its limits in future cases by imaginative employers – and not necessarily with success.

(2) Under regulation 32(2), the Court inclined towards an objective test that takes into account the employer's subjective view of its business needs, but in which the employer's view is not determinative. This fits with the statutory language, and seems to us likely to be followed.

(3) There may be considerable overlap between the assessment under regulation 32(2) and the tests of legitimate aim and proportionality under regulation 3 (as there was in the reasoning of Wall LJ). However, one would expect greater latitude to be given to respondents under regulation 32(2) in light of the specific account to be taken of their subjective view and the "ready-made" aspect of the legitimate aim of rewarding length of service.

(4) The Court seemed very keen to uphold a scheme (involving the award of "benefits" in a stretched sense) that was designed to be fair and negotiated at length between an employer and a union.

124. As a case principally decided on the basis of regulation 3, *Rolls Royce* is also particularly helpful to employers seeking to formulate employee benefits schemes that are not based solely on length of service: the factors identified by the Court of Appeal will provide a useful point of comparison, along with the general considerations of legitimate aim and proportionality we have discussed in part 2.

Conclusion

125. In its early years, age discrimination has already proved the source of considerable controversy and required the exploration of some novel concepts in discrimination law. The novelty and controversy are unlikely to stop[21]. Lawyers in the field will await with particular eagerness the Court of Appeal's decision in *Seldon*, any indication from the government as to whether it intends to change regulation 30 (or

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[20] We understand that a number of cases in which the compatibility of regulation 32 with Article 6 have been transferred to the Cardiff Employment Tribunal.

[21] In his Opinion in *Kücükdeveci*, for example, AG Bot outlined the classical rule in Community law that directives do not have "horizontal directive effect" between private individuals. However, he invited the Court "to follow a more ambitious approach", and to recognise that a directive whose object is to fight against discrimination should displace contrary national law (§70). This, he suggested, was the only way of reconciling the position with the Court's decision in *Mangold* (§71). The invitation is elaborated at length (§§71-90). It would be a highly significant development, in the (unlikely) event that the Court should accept it; no great surprise that it was in an age discrimination case that such an unconventional suggestion was advanced!

even regulation 3), and further developments from Luxembourg. Already, however, a substantial body of case law has built up.

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Tom Richards

October 2009