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# Shades of Grey

Malcolm Sargeant \*

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read the **abstract**

## Introduction<sup>1</sup>

Is age discrimination different to discrimination in relation to the other grounds of discrimination, now to be found in the Equality Act 2010? The answer is yes, according to the Supreme Court in the case of *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16. Lady Hale somewhat contentiously stated that age is a continuum, rather than binary in nature (man or woman, black or white, gay or straight) and, as a result, one can say that “younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will have already benefitted from a provision which favours younger people, such as the mandatory retirement age”.

The case concerned Mr Seldon who was a senior partner in a law firm where the partnership deed contained a mandatory retirement clause. There was a requirement to retire from the partnership at the end of the year when the age of 65 was reached. When the time for retirement approached Mr Seldon put forward a number of proposals to the partners that would enable him to continue working for another three years. The partners rejected this and offered him an ex gratia payment in recognition of his services. He told the firm that he was taking legal advice on a claim for age discrimination after which the offer of the ex gratia payment was withdrawn. He began proceedings in March 2007 alleging direct age

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<sup>1</sup> This article was first published by Solicitors Journal on 08 May 2012, and is reproduced by kind permission ([solicitorsjournal.com](http://solicitorsjournal.com)).

discrimination and victimisation (because of the withdrawal of the ex gratia payment offer). Five years later the case arrived at the Supreme Court.

The argument centres on the possibility of justifying both direct and indirect age discrimination if the act is a “proportionate means of achieving a legitimate aim”. Art. 6 par. 1 of Directive 2000/78/EC provides that differences in treatment on the grounds of age will not constitute age discrimination if they are “reasonably and objectively 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”. Regulation 3 of the Employment Equality (Age) Regulations 2006 (SI 2006/1031) (now incorporated into the Equality Act 2010) then provided that direct and indirect age discrimination could be justified if the treatment could be shown to be “a proportionate means of achieving a legitimate aim”. Mr Seldon claimed that regulation 3 was inconsistent with Directive 2000/78/EC. This was firstly because regulation 3 did not take into account the distinction between direct and indirect discrimination and, secondly, because Art. 6 of the Directive contemplated that justification for direct age discrimination should be based upon the broad social and economic policy objectives of the state and not the individual needs of employers and partnerships.

### **1. Legitimate Aims**

The firm had put forward a number of what it claimed were legitimate aims to the Employment Tribunal which accepted that compulsory retirement was an appropriate means of achieving the “firm’s legitimate aims of staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify the departure and damage dignity”. After a review of the case law at the Court of Justice of the EU, Lady Hale concluded that two kinds of legitimate aims had been identified. These were inter-generational fairness and dignity. The first of these, which was stated as being “comparatively uncontroversial” meant a various things depending upon the particular circumstances of the employment, but could include facilitating access to employment for young people, but it could also mean enabling older people to remain in the workforce. It can also mean sharing limited opportunities to work in a particular profession fairly between the generations. It is interesting how a number of the references on retirement to the CJEU have concerned the

professions (case C-341/08 *Petersen* concerning dentists; cases C-250/09 and C-268/09 *Georgiev* concerning university professors and cases C-159/10 and 160/10 *Fuchs* concerning public prosecutors) where, arguably, it might be possible to show that there are a finite number of jobs and progression demands that older members of the profession retire to make way for younger ones.

The second general type of legitimate aim is dignity, which was an argument put forward by employers wanting the default retirement age established by the 2006 Age Regulations. It is concerned with avoiding the need to go through lengthy disciplinary and competence procedures when some older workers decline in performance and capacity. Retirement is seen as a way for older workers to exit the workforce with dignity rather than being dismissed for other reasons. There is an underlying issue here concerning the stereotyping of older workers, however.

In *Age UK* (Case C-388/07), according to the Court, the social policy aim of the government had been identified as the need to preserve the confidence and integrity of the labour market. This is not an open ended justification for employers because “the Secretary of State accepts that there is a distinction between aims such as cost reduction and improving competitiveness, which would not be legitimate, and aims relating to employment policy, the labour market and vocational training, which would”. Lady Hale summed up the position in Para 55 of the judgment as “that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it”.

Having found that a legitimate aim can be justified under the Directive in social policy terms there are still further steps to be undertaken. Firstly it has to be shown that the legitimate aim is actually the one being pursued, although there is the possibility of post facto rationalisation of the aims. It is also necessary to then ask whether the aim is legitimate in the particular circumstances of the employment concerned, e.g. a wish to recruit young people to establish an age diverse age force might be a legitimate aim in social policy terms, but if the employer already has many young employees and does not have a problem recruiting them, then the aim may not be “legitimate” for that employer. Similarly if there is an established and sophisticated performance management system in place then avoiding the

need for a performance management system for older workers would not constitute a legitimate aim for that enterprise.

## **2. Limited Usefulness**

The Supreme Court concluded that there was a difference in the treatment of justification for direct and indirect discrimination with regard to age and that the two should not be treated in the same way. The Court accepted that three of the legitimate aims put forward by the partnership were legitimate both in social policy terms and also in the partnership's individual circumstances. Two of them were, firstly, the need to ensure that associates had the opportunity of a partnership after a reasonable period of time as an associate, thus aiding retention; and, secondly, ensuring that there is a turnover of partners such that any partner can expect to become senior partner eventually, thus aiding workforce planning. Both of these aims were related to the legitimate social policy aim of "sharing out professional employment opportunities between the generations". The third justification accepted was limiting the need to expel partners by way of performance management and this fell under the legitimate social policy heading of "dignity". The Court accepted that these were legitimate social policy aims and that they also applied to the type of business concerned.

In the event the case was referred back to the Employment Tribunal to consider whether the age of 65 was an appropriate choice of age for achieving these legitimate aims, particularly the first two, which, according to the Court, might be taken to justify any retirement age, not just this particular one. On this issue Lord Hope intervened to state that the fact that a default retirement age of 65 was in existence at the time of Mr Seldon's dismissal may be helpful in deciding this issue.

## **3. Conclusion**

Many employers were hoping for a clear lead from this judgment on what were the conditions required to adopt an employer justified mandatory retirement age. Lady Hale's judgment is clear and concise, although it can be criticised for appearing to accept the lump of labour fallacy that removing older workers through retirement actually encourages the employment of young people (for which there is little or no evidence). It is doubtful whether the judgment will, however, make it any easier for the

justification of mandatory retirement by employers. The approach to justifying direct age discrimination is different to that justifying indirect discrimination (for comment on this see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, published on the same day). This must be a correct approach. Age is the only one of the nine protected characteristics, contained in the Equality Act 2010, for which direct age discrimination can be justified. There is the need to ensure that the aim is legitimate in both social policy terms and in the application of that social policy to the individual circumstances of the employer concerned. Nevertheless a mandatory retirement age is possible where an employer can justify it as being so. The hurdles to be overcome are high, but this must be justifiable in terms of the potential impact of the justified discrimination upon the individual.





# Adapt International Network



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