

Age Discrimination Christopher Jeans QC

Some specific features: all are victims, all are beneficiaries

1. The Equality Act 2010 has brought most¹ of the law discrimination under a single roof. It has also eliminated some minor differences of wording between the various sub-species of discrimination. But each sub-species retains its own special characteristics.
2. The most obvious special feature of *age* discrimination is that justification (“a proportionate means of achieving a legitimate aim”) is available as a defence to *direct*² as well as *indirect*³ discrimination. But there are other special features, which arise from the nature of age as a “protected” characteristic.
3. For example, the phenomenon of growing older means that a criterion which at one time disadvantages an individual may later benefit him⁴, and *vice versa*. The legislation⁵ (in common with the statutory guidance issued when the Employment Equality (Age) Regulations 2006 were originally drafted) adopts a questionable philosophical starting-point: that a length of service criterion for the enjoyment of benefits is (subject only to justification and elaborately defined exceptions⁶) in principle indirectly discriminatory against “younger” people. The assumption is that the issue of whether treatment is “less favourable” necessarily falls to be judged at the moment the benefit is enjoyed. In other words, the assumption is that it is not open to the Respondent to argue that he is treating younger and older workers equally by applying a length of service criterion simply because the young could have benefited, or could still⁷ benefit, in due course. But even travelling with the assumption that benefits⁸ enjoyed by virtue of length of service⁹ are (subject to

¹ Discrimination against *part-time workers* continues to be governed separately by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Of course discrimination against part-time workers may also involve the indirect variety of other types of discrimination, most obviously sex discrimination against women.

² Section 13(2) Equality Act 2010.

³ Section 19(2) (d) Equality Act 2010.

⁴ In this paper, for ease of expression only, the masculine includes the feminine except where the contrary requires.

⁵ In the form of the Employment Equality (Age) Regulations 2006.

⁶ See in particular Equality Act Schedule 9 para. 10 (benefits based on service of up to five years/more than five years) and 13 (redundancy payments). The exceptions bear out the assumption that a length of service benefit entails less favourable treatment of the young.

⁷ Of course it depends what the benefit is and the circumstances, which trigger it. If, for example, the advantage is a length of service redundancy selection criterion, which has resulted in the dismissal of younger workers, the younger workers will never get to enjoy the advantage.

⁸ In Rolls Royce v Unite [2009] IRLR 506 the Court of Appeal took the view that a length of service criterion in a redundancy agreement was a “benefit” for the purpose of the special

justification and the exceptions) indirectly discriminatory against younger workers, the potential of the younger workers to attain such benefits (and the fact that they are, in that sense, open to all) must ultimately be important to justification.

4. Another unique intrinsic feature is the malleable definition of the protected group. Any “age group” is protected; that is to say, any group defined by a particular age or a range of ages¹⁰. The same workers can be both a younger group for the purpose of one claim and an older group for the purposes of another. What constitutes an “age group” will probably be declared a matter for the good sense and practical judgment of the employment tribunal¹¹, though claimants may be allowed some latitude in formulating the relevant range¹².
5. The question whether an age group is put at a “particular disadvantage” by a provision criterion or practice so as to give rise (subject to justification) to indirect discrimination¹³ also runs up against special considerations. Suppose the disadvantage arises from a practical or social consequence of age, rather than from age itself? The Court of Appeal has recently considered this:

Homer v Chief Constable of W. Yorks [2010] IRLR 620.

H was a retired detective inspector. After retirement he became employed as a legal adviser to the Police. Under a new pay grading system, H was placed in the second of three grades. He was ineligible for the highest grade because he did not have a law degree. He claimed that the requirement to have a law degree in order to be eligible for the highest pay grade was age discriminatory against him as he was already 61 and would have little time to benefit from undertaking a law degree before retirement at 65.

exception then contained in Regulation 32 of the 2006 Regulations (now re-configured in paragraph 10 of Schedule 9 to the 2010 Act).

⁹ Such awards may of course infringe sex discrimination/equal pay: see Wilson v HSE [2010] IRLR 59.

¹⁰ Section 5(2) Equality Act 2010.

¹¹ In Homer v Chief Constable of W Yorks (below) it was the ET, not the claimant which identified the relevant age group. The EAT comments neutrally on this at [2009] IRLR 264 para. 21; the CA does not focus on the point.

¹² In formulating the “condition or requirement” in the original statutory definition of indirect discrimination Sedley LJ has suggested claimants enjoyed some latitude though he thought that there were significant logical constraints to the definition of the relevant “pool”: see in particular Allonby v Rossendale College [2001] ICR 1189 at 1196, para. 12 (where he said that it was sufficient that the claimant can “realistically identify” a requirement or condition) and p. 1198 para. 18 (where he said that he regarded the selection of the pool as a matter of logic and not simply as a matter of fact, as Waite J had stated in Kidd v DRG [1985] ICR 405 at 415).

¹³ Section 19 (2) Equality Act 2010.

The ET upheld H's claim; holding that the law degree requirement constituted a "particular disadvantage" and that the requirement was not proportional and therefore not justified

The EAT ([2009] IRLR 262) upheld the Police's appeal, finding that H had not suffered a "particular disadvantage". Elias P reasoned that the disadvantage suffered by H was the consequence of *ageing* but not of *age discrimination*. The complaint was that the claimant was so close to retirement he could not benefit significantly from obtaining the degree; but, the EAT said, that was true of other benefits, for example a generous pay increase from which older workers would derive less benefit than younger workers. Any disadvantage was the result of the human condition "and not even Parliament can change it". The Claimant was really asking for more favourable treatment to be accorded to older workers.

The Court of Appeal confirmed the EAT's conclusion, but its reasoning was potentially more contentious. The Court of Appeal concluded that it was the proximity of retirement, not H's age which made the degree unworthwhile. Kay L.J. (with whom both Richards L.J. and Mummery L.J. concurred in separate judgments) agreed that "the appellant's case was not one of a particular disadvantage but one of a claim for more favourable treatment on account of age" Mummery L.J. (with whom Richards L.J. also agreed) emphasised the distinction between age and retirement as causative factors:

"45 As for the facts it has not been suggested, by reference to statistical evidence or otherwise, that the proportion of persons of Mr Homer's age group who did not have a law degree was larger than the proportion of such persons in the comparator age group who did not have a law degree. Nor has evidence been produced to suggest that it was in fact more difficult for a person of Mr Homer's age group to obtain a law degree. The absence of such evidence is explained by the particular way in which Mr Homer puts his case. He says that the law degree provision applied by the Police Authority was *intrinsically* discriminatory for the purposes of reg. 3. For such a proposition no evidence could be relevant: on its face the proposition is either correct or incorrect. It is argued that the law degree provision was intrinsically discriminatory because its effect was to put members of his age group at a particular disadvantage, as compared with persons in the comparator age group. The particular disadvantage for members of Mr Homer's age group was quite simply the inability, which was not shared by persons in the comparator age group, to obtain a law degree and qualify for the appointment before retirement.

46 We also need to look at the object of the 2006 Regulations. Both direct and indirect age discrimination are prohibited. No direct, over or 'formal' age discrimination ('You are too old at 61 to be appointed') is alleged. For indirect or covert age discrimination Mr Homer had to establish that the result of applying the law degree provision was to put

members of his age group at a particular disadvantage suggested in support of the claim for age discrimination did not, in my view, result from the application of the law degree provision to the age of persons in Mr Homer's age group. The key fact is that persons in Mr Homer's age group would stop working on retirement at 65. That is why 65 was set as the upper age limit of those included in that group. In those circumstances their inability to satisfy the law degree provision was not a particular disadvantage resulting from the application of that provision to persons of their age. ***The particular disadvantage complained of results not from age at all, but from the fact of impending withdrawal from the workplace at 65. The inability to acquire, by use of the law degree, the status and financial rewards of appointment was the result of the fact of retirement, not of the age of the persons in the group ...***

48 That outcome might seem to be unfair to persons of his age group comparing their lot with that of members of the comparator age group. ***However, the object of the 2006 Regulations (and the Equality Directive 2000/78/EC which they implement) is not to legislate against the general unfairness of age, whether juvenile or geriatric.***"

[Emphasis added]

6. The contrast drawn between age and retirement as causative factors may be a contentious one in circumstances where retirement is itself a feature of age, even if there is no issue about the lawfulness of the retirement age.

Abolition of the default retirement age

7. The ability to rely on the default retirement age¹⁴ is to disappear. By virtue of amendments to the drafting of the transitional provisions¹⁵ an employer may fairly dismiss an employee who has reached 65 by 6 April 2011, or who will reach 65 before 1 October 2011 under a notice of retirement issued by or before 5th April 2011 simply by complying with the formal requirements arising under sections 98ZA to 98ZG of the Employment Rights Act 1996. The last day on which compulsory retirement can take effect under these provisions is 5th April 2012. In future employers who maintain 65 (or any age) as a compulsory retirement age will need to justify such a provision.

Justification

8. No equivalent of the default retirement age has ever applied to retirement from partnerships. The Supreme Court has granted permission to appeal from the Court of Appeal's decision in Seldon v Clarkson Wright & Jakes [2010] IRLR 865. The Court of Appeal held that the need to hold out promotion prospects for employees in a solicitor's partnership justified a compulsory retirement age for partners of 65. The Court of Appeal's reasoning is in line with that of the European Court of Justice

¹⁴ Its abolition had of course been widely expected following R (Age Concern) v Sec of State for BERR [2009] IRLR 373 (ECJ) and Blake J's conclusions on justification [2009] IRLR 1017, which were widely seen as leaving the default retirement age with a limited "shelf life".

¹⁵ See Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.

in Petersen v BFZFD Westfalen-Lippe [2010] IRLR 254, where the need to make jobs available for young dentists was held to be a sound potential¹⁶ justification for maintaining a maximum age of 68 for dentists on the panel of those providing services under the statutory health insurance scheme.

9. In Rosenblatt v Oellerking [2011] IRLR 51, a collective agreement provided for contracts of employment automatically to terminate at age 65, when pensions became payable. Ms R's contract reflected the collective agreement. The German Social Security Code was amended to validate such provisions. Ms R challenged the validity of the contract, collective agreement and Civil Code. The ECJ held that a collectively agreed automatic retirement date could not "generally, be regarded as unduly prejudicing the rights of the workers concerned" and that the intentions of the collective agreement to facilitate planning and employment for young people were legitimate aims. In this case, they had been implemented within the limits of proportionality.

Cost as a justification

10. In discrimination law generally there is uncertainty as to whether cost can, in itself, constitute a justification for what would otherwise be unlawful discrimination. Statements by the European Court in the context of sex discrimination and equal pay (in particular Hill and Stapleton v Revenue Commissioners [1998] IRLR 461) are sometimes understood to mean that cost, *cannot* in principle provide justification. The issue is of particular importance to age discrimination, since cost frequently underpins decisions about, for example, selection for redundancy or the timing of dismissal for individuals who are about to reach age thresholds for particular benefits. Cost is also of central significance to pension benefits¹⁷, which tend to be inherently age related.
11. To allow an employer to say "we cannot afford to pay younger [or older] people the same" is, on a simple view, contrary to the foundations of the legislation¹⁸. Where the potential discrimination is indirect, the challenge to the objects of the legislation becomes less obvious. Indeed the ECJ has recognised as potential justification for indirect discrimination such considerations as "administrative inconvenience" (Bilka-Kaufhaus v Weber von Harz [1986] IRLR 347), which are little more than cost in another guise. In age discrimination, moreover, justification is a defence to direct as well as indirect discrimination; and the fact that age is a "mutable" characteristic (i.e.

¹⁶ As usual it was left to the national Court to make the final decision on justification.

¹⁷ Pension benefits are of course subject to a complex range of exceptions: See the Equality Act (Age Exceptions for Pension Schemes Order) 2010. But the reach of those exceptions is limited in many respects so that it is often necessary to rely on justification.

¹⁸ Although the minimum wage legislation continues to fix lower rates for young workers.

that it benefits and disadvantages the same person at different stages of his life) may make the explanation “I cannot afford to treat them equally” potentially acceptable in the context of age discrimination, even though such an explanation would be abhorrent if applied, say, to gender or race. Can cost alone not suffice or must another factor be identified?

12. In Cross v British Airways [2005] IRLR 423 the EAT (Burton P.) rationalised the ECJ case law on equal pay by holding that “cost alone” could not provide a justification but that cost could be taken into account with some other legitimate factor. Consideration of cost fell naturally into an analysis of whether a step was “proportional”. This was followed in Redcar v Bainbridge [2007] IRLR 91 by Elias P¹⁹ in the EAT, though the Court of Appeal did not appear to address the point.

This point has now been reviewed in an age context:

Woodcock v Cumbria Primary Care Trust [2011] IRLR 119

W was employed by the Trust as Chief Executive. He was entitled to twelve months notice of dismissal. The Trust proposed to dismiss him by reason of redundancy. It realised that if it followed the formal consultation procedure and then served 12 months notice W would be 50 at dismissal and would then be entitled to a costly early retirement pension. It therefore served the notice of dismissal (subject to the possibility of finding alternative employment) before the consultation period was complete, so that he would only be 49 at termination. W complained of, unfair dismissal and age discrimination.

The ET dismissed both claims. As regards age discrimination it held that avoiding the “windfall” of a pension entitlement was a legitimate aim, proportionately achieved.

W appealed arguing that the ET had illegitimately treated cost as a justification. The EAT dismissed the appeal holding that the case was *not* one where cost was the only justification. It was a legitimate aim for the employer, to dismiss an employee who had become redundant. Underhill P reasoned that the prevention of a windfall benefit (or strictly the cost to the Trust arising from it) was legitimate and proportionate. An employer is not obliged to defer steps which he will otherwise take in order to allow an employee to alter an age related benefits.

¹⁹ The case went to the CA on another issue.

Underhill P found that the ET had in substance applied the Cross/Bainbridge approach. But he was not enthusiastic also the need to “find an additional factor” to justify a cost based decision.

“32 The ‘cost plus’ approach propounded in *Cross* represents the current orthodoxy. It was accepted by Elias P in his judgment in *Redcar and Cleveland Borough Council v Bainbridge* [2007] IRLR 91, at paragraph 92 (p. 102)... **But Mr Short submitted, as one alternative basis of his case, that the cost plus approach was wrong, and we have to say that we do not find it convincing.** For reasons which will appear, we need not reach a concluded view, but we will briefly indicate our thinking in case the matter falls for decision elsewhere. We respectfully agree with Burton P’s observation ... that, as a matter both of principle and of common sense, considerations of cost must be admissible in considering whether a provision criterion or practice which has a discriminatory impact may nevertheless be justified; and we see no reason to take a different view in the context of the justification of (what would otherwise be) direct age discrimination. **But we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised.** The adoption of such a rule, it seems to us, tends to involve parties and tribunals in artificial game playing – ‘find the other factor’ – of a kind which is likely to produce arbitrary and complicated reasoning: deciding where ‘cost’ stops and other factors start is not straight-forward (cf the observations of Elias P. in *Bainbridge*, at paragraph 91). **If the matter were free from authority it would seem to us that an employer should be entitled to seek to justify a measure, or a state of affairs, producing a discriminatory impact – or, in the case of age discrimination, an act done on discriminatory grounds – on the basis that the cost of avoiding that impact, or rectifying it, would be disproportionately high.** That would not mean that employers would be able always or easily to avoid liability for indirect discrimination simply by pointing to the cost of avoiding or correcting it. There is an almost infinite variety of cases of ‘prima facie discrimination’. In many cases the discriminatory impact in question may be such that the employer must avoid or correct it whatever the cost. But there may equally be cases where the impact is trivial and the cost of avoiding or correcting it enormous; and in such cases we cannot see why the principle of proportionality should not be applied in the ordinary way. We are not convinced that the single phrase in *Hill and Stapleton* on which this doctrinal structure is built – ‘solely because [avoiding discrimination] would involve increased costs’ – is only explicable in the way that it was understood in *Cross*. As Mr Short submitted, it need mean no more than that it was not enough for an employer to say that avoiding discrimination would involve increased expenditure: he must show that the extent to which it would do so would indeed be disproportionate to the benefit in terms of eliminating the discriminatory impact.

33 Despite those reservations, we should be slow to depart from the established position in this tribunal, accepted by two previous Presidents; and in the event we do not need to decide whether we should do so, since we do not accept Mr Panesar’s submission that the tribunal failed to apply the ‘cost plus’ approach.”

[Emphasis added]

13. So the “find the further factor” approach survives for the time being. Where the issue concerns the relative generosity of benefits (e.g. pension or redundancy benefits) as between groups of employees (or partners) there is usually scope for invoking “fairness” (e.g. “intergenerational fairness”²⁰) in tandem with cost. Where the relevant action is detrimental to the claimant without benefitting another individual or group the “further factor” may be harder to find.
14. Woodcock is to be heard in the Court of Appeal on 31st October 2011. No doubt the employee will argue that the purpose of redundancy is the saving of cost and that the disappearance of the job does not constitute a different, free-standing reason. Alternatively he can say that even if removing a redundant role is not “saving cost with another name”, the timing of the redundancy dismissal in his case was explicitly done for cost-saving reasons and therefore must be regarded as cost-based. The nature of the distinctions to which the EAT is driven may underscore Underhill P’s point that “find the factor” is artificial and that cost should be recognised as a potential “stand-alone” justification. A reference to the European Court would not be surprising.
15. Meanwhile the European Court has already received a reference from a German Court in Fuchs v Land Hessen C159/10 asking straightforwardly:

“Does an interest in saving budgetary resources and labour costs, in the present context by avoiding the recruitment of new staff and so reducing expenditure on personnel, represent a legitimate aim within the meaning of Article 6(1) of Directive 2000/78/EC?”

Whether the answer will be as straightforward is the question of the hour.

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²⁰ See Bloxham v Freshfields (ET 225086/2006); Seldon v Clarkson Wright and Jakes [2010] IRLR 865.