

## NOTES

### Age Discrimination and Redundancy

#### **Loxley v BAE Systems (Munitions & Ordnance) Limited**

[2008] ICR 1348; [2008] IRLR 853 (EAT)

#### **MacCulloch v Imperial Chemical Industries plc**

[2008] ICR 1334; [2008] IRLR 846 (EAT)

#### **Rolls-Royce plc v Unite the Union**

[2009] IRLR 49 (QB)

### 1. INTRODUCTION

The introduction into the domestic legal framework in 2006 of legislation rendering unlawful direct and indirect discrimination on grounds of age was seen by some as sounding the death knell for, or at least raising serious doubts about the viability and longevity of, the application of age-related criteria in redundancy exercises, for example, in relation to selection or the calculation of enhanced redundancy payments. The decisions which this note analyses throw some light on how, in the particular context of redundancy situations, employment tribunals should approach the defence of justification of what would otherwise be unlawful age discrimination against the background of the inevitably open-textured nature of the concept which is central to that defence—the achievement or fulfilment of a legitimate aim by proportionate means.<sup>1</sup> While the relevant EU Directive provides specific examples of situations in which age discrimination may be justified and the Government originally intended to legislate on the basis of an exhaustive list of potentially justifiable age restrictions, the matter was ultimately left ‘open-ended’ to be considered on an ex-post basis<sup>2</sup>. This approach renders all the more important the provision of guidance to employment tribunals (and therefore by extension employers) on their approach to the issue of the establishment of justification.

### 2. THE EU LAW CONTEXT

The 2006 age discrimination legislation derives from the Framework Directive.<sup>3</sup> By its Article 3(1), the Framework Directive applies in relation to a variety of matters including,

<sup>1</sup> For discussion of the domestic courts’ approach to proportionality, see A. Baker, ‘Proportionality and Employment Discrimination in the UK’ (2008) 37 ILJ 305.

<sup>2</sup> See Davies and Freedland, *Towards a Flexible Labour Market* (Oxford University Press 2007), ch 4, p 205.

<sup>3</sup> Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

by sub-paragraph (c), 'employment and working conditions, including dismissals and pay'. By its Article 2, the Framework Directive establishes the principle of equal treatment which prohibits direct or indirect discrimination on any of the grounds referred to in its Article 1. Nonetheless, Article 6 of the Framework Directive provides that:

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 ... and if the means of achieving that aim are appropriate and necessary.

As Lady Justice Smith put it in *Johns v Solent SD Ltd*<sup>4</sup>, this is an '... unusual provision in European law, in that it leaves open the door to justification of direct discrimination on the grounds of age, whereas in respect of discrimination on the grounds of race and sex, only indirect discrimination can be objectively justified'.

### 3. THE DOMESTIC LEGISLATION

The Framework Directive was implemented into domestic legislation by the Employment Equality (Age) Regulations<sup>5</sup> (the 'Age Regulations'). Regulation 3 of the Age Regulations provides that:

- (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if:
  - (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
  - (b) A applies to B a provision, criterion or practice which applies or would apply equally to persons not of the same age group as B, but:
    - (i) which puts B at that disadvantage, and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.
- (2) A comparison of B's case with that of another person under paragraph (1) must be such that the related circumstances in the one case are the same, or not materially different, in the other.
- (3) In this regulation:
  - (a) "age group" means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and
  - (b) the reference in paragraph (1a) to B's age includes B's apparent age'.

The cases discussed in this note in relation to redundancy payments did not fall within the exemption provided by Regulation 33 of the Age Regulations which applies to arrangements mirroring the statutory redundancy scheme.

<sup>4</sup>[2008] IRLR 820, CA.

<sup>5</sup>S1 2006/1031.

#### 4. OVERVIEW

In seeking to understand how justification is to be established and adjudicated, relatively little assistance as to the detailed operation of the legislation can be derived from contemporaneous Government materials. For example, the Government's Age Legislation Fact Sheet<sup>6</sup> simply states that '...differences of treatment on the grounds of age can sometimes be justified' subject to the caveat that 'employers will not be able to make arbitrary decisions, which are not suggested by evidence'. The fact sheet does little more than provide an overview of the requirements of the justification defence generally accepted to apply under EU law. Hence, it is stated that a legitimate aim of an employer must correspond with a real need on the part of the employer.<sup>7</sup> Examples of a legitimate aim could be the vocational integration of individuals of a particular age, the particular training requirements of the job or the need for a reasonable period of employment before retirement. However, it will be for the employer to show that the aim is valid.<sup>8</sup> The discriminatory effect of any age-based practice should be significantly outweighed by the importance and benefits of its legitimate aim, and the employer should have no reasonable alternative. If the legitimate aim can be achieved by less or non-discriminatory means, then those must take precedence. The principle of proportionality requires the tribunal to weigh the discriminatory effect of the measure against the reasonable needs of the undertaking.<sup>9</sup>

#### 5. *MACCULLOCH*

In *MacCulloch*, the employee was made redundant at the age of 36 having been employed by the employer for seven years. The relevant redundancy policy based eligible employees' entitlement to a severance payment on a combination of age and length of service. Consequently, the employee was entitled to a redundancy payment broadly equating to 55% of gross annual salary, whereas the chosen comparator with ten years' service who had reached the age of 50 by the time of dismissal would receive 175% of his gross salary.

The employee argued that the employer's redundancy policy unlawfully discriminated against her, both directly and indirectly, on the ground of her age. Her contention was that Regulation 3 of the Age Regulations was infringed because she would have been entitled to a greater payment had she been older (thereby establishing direct discrimination) or if she had completed longer service (thereby establishing indirect discrimination on the basis that younger staff were less likely to have enjoyed the longer service required to receive the higher level of benefit).

<sup>6</sup> Age Legislation Fact Sheet No. 2—March 2006—<http://www.berr.gov.uk/files/file29239.pdf>

<sup>7</sup> cf *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] IRLR 317, ECJ.

<sup>8</sup> cf *Starmar v British Airways* [2005] IRLR 862, EAT.

<sup>9</sup> cf *Hardys & Hansons v Lax* [2005] IRLR 726, CA.

An employment tribunal held that the redundancy policy was both directly and indirectly discriminatory on grounds of age. However, the employment tribunal accepted that the justification defence was established. The policy had the legitimate aims of encouraging and rewarding loyalty in older employees, of providing them with greater financial protection against the adverse consequences of dismissal and potential unemployment (to which those older employees were more susceptible) and the encouragement of older employees to leave (which would make space for junior employees and reduce the need for compulsory redundancies, thereby making change easier to manage). The policy was also held to constitute a proportionate means of achieving those legitimate aims. The employment tribunal relied, in reaching that conclusion, on the generosity of the policy, its having been continued for 35 years and the fact that it was generally accepted by the workforce.

## 6. LOXLEY

*Loxley* concerned a claim of direct discrimination arising from the operation of a contractual scheme providing for enhanced redundancy payments which again had been in place for a considerable period of time. Entitlements to a redundancy payment were based primarily on length of service. However, only those under 60 were entitled to these redundancy payments and the entitlements of those aged between 57 and 60 were reduced by tapering provisions. Those over 60 had been excluded from the scope of the contractual redundancy scheme because employees had previously been required to retire at the employer's compulsory retirement age of 60 and were able to retire at that age with a full pension. The view was that for those close to retirement to receive the full enhanced payment on being made redundant would constitute a windfall. In 1996 the employer's compulsory retirement age was increased to 65. The applicable pension age was subsequently also raised to that age in stages and, from 2006, a reduction introduced to the pension available. At the time of Mr Loxley's departure, the pension reduction had not been implemented.

An employment tribunal dismissed the claim brought by Mr Loxley, who at the relevant time was 61 and therefore ineligible for an enhanced redundancy payment. The redundancy scheme was held to be justified by the need to prevent those employees who were close to retirement from receiving a windfall. The employment tribunal also considered that the fact that the redundancy scheme had been introduced after consultation with the relevant trade unions contributed to its being justified.

## 7. APPEAL DECISIONS

In upholding the appeal in *MacCulloch*, the Employment Appeal Tribunal (EAT) held that, while the employment tribunal had properly identified the legitimate aims of the redundancy scheme in question, it had not properly determined whether the measures adopted constituted a proportionate means of achieving those aims. The principal matters

by which the employment tribunal appeared to have been influenced in reaching its conclusions were the generosity of the scheme and its general acceptance by the workforce over a considerable period. While these features were accepted as being potentially relevant to the achievement of the aims of the scheme, they did not deal with the issue of whether the difference in treatment between those of different ages was justified. The employment tribunal had also failed to address the degree of difference in payment made to the employee and the chosen comparator and to assess whether this was reasonably necessary to achieve the scheme's objectives. As the employment tribunal had made no reference to the need to balance the reasonable needs of the business with the discriminatory effect of the scheme on the claimant, even though the scheme might be justifiable, the matter was remitted to the same employment tribunal for that analysis to be carried out. As the EAT put it, it cannot be 'assumed that because the scheme in broad terms achieves certain business objectives that this necessarily establishes the justification for [the relevant] differentials'.

In *Loxley*, the EAT also concluded that the employment tribunal's reasoning was defective. The employment tribunal appeared to have assumed that the claim of age discrimination derived solely from the change in the relevant pension arrangements whereas it should have focused on the operation of the redundancy scheme in question and the key issue of whether it was proportionate to exclude Mr Loxley from any redundancy payment altogether because of his entitlement to a pension. The employment tribunal had not 'grappled with the question of whether it was proportionate to exclude the claimant from any redundancy payment altogether because of his entitlement to a pension'. Greater scrutiny was required of the employer's position since, in the EAT's view, it was not 'inevitably and in all cases justified for those entitled to an immediate receipt of a pension to be excluded from the redundancy scheme'. Consequently, the matter was remitted for consideration by a different tribunal.

## 8. GUIDANCE FOR TRIBUNALS

With regard to the establishment of a legitimate aim, two evidential issues were addressed on appeal in *MacCulloch*. First, it was argued that the employment tribunal had accepted the employer's assertion as to the aims of the redundancy policy in question at face value rather than determining whether these were in fact the true aims of the scheme. The EAT held that the employment tribunal had been entitled to accept the employer's objective of rewarding loyalty as the reason for linking the quantum of redundancy payments to length of service. Second, in relation to the assertion that the redundancy policy had the aim of helping older employees who are particularly vulnerable in the job market, the EAT considered that it was not necessary for the employer to produce evidence to prove that older workers are particularly vulnerable in the job market. The employment tribunal had been entitled to reach its conclusion by reference to its own experience.

Perhaps more importantly in substantive terms, the EAT approved the finding that encouraging staff turnover and facilitating career progression for other employees are, in principle, capable of being legitimate aims that might be furthered by increased payments for older workers. Similar arguments had been accepted at first instance, albeit in the context

of a compulsory retirement age for partners in a law firm, in *Seldon v Clarkson Wright and Jakes*,<sup>10</sup> supplemented in that case by the argument that a compulsory retirement age was necessary to maintain a congenial and supportive culture for the firm by avoiding the need to deal with underperformance on the part of partners close to retirement.

In *Loxley*, the assertion that the prevention of employees from receiving a windfall could not be a legitimate aim was rejected. Such an aim was seen as potentially legitimate as regards both the exclusion of these over the age of 60 from the redundancy scheme in question and also its tapering provisions. As one of the purposes of a redundancy scheme is to cushion workers from the effects of losing their income, this is not required at all or to the same extent where an employee is or will be in receipt of a pension. The EAT also endorsed the employment tribunal's view that the fact that a particular arrangement has been agreed with trade unions is potentially relevant but not conclusive. While 'plainly the imprimatur of the trade union does not render an otherwise unlawful scheme lawful, any tribunal will rightly attach some significance to the fact that the collective parties have agreed a scheme which they consider to be fair'. That said, the EAT cautioned against 'the risk that the parties will have been influenced, consciously or unconsciously, by traditional assumptions relating to age'.

## 9. ROLLS-ROYCE

While the *Loxley* and *MacCulloch* decisions reinforce the need for employment tribunals closely to scrutinise the employer's position in relation to the justification of arrangements which are otherwise unlawfully discriminatory on grounds of age, the *Rolls-Royce* decision draws particular attention to a different route by which the application of age-related criteria can avoid the prohibition of age discrimination established by the Age Regulations. In *Rolls-Royce* the employer had agreed with the relevant trade union two collective agreements relating to redeployment and redundancy. The agreements noted explicitly the need for the employer and employees 'to be able to restructure flexibly and peaceably'. Selection for redundancy was to be conducted on the basis of an assessment matrix which, according to the collective agreements themselves, had been 'designed to ensure that the selection process is fair in general terms and fair to the individual'. The selection process not only entailed assessment against specific criteria but points were also awarded for length of continuous service.

The manner in which this matter came to be litigated was unusual in two respects. First, it was the employer which sought to rely on the Age Regulations. Presumably because it wished to rely solely on the qualitative selection criteria established in the collective agreements, the employer contended that the length of service element of those redundancy selection criteria constituted unlawful age discrimination which could not be justified. The trade union argued that justification was established. Second, the matter was adjudicated not in the employment tribunal but by the High Court pursuant to Part 8 of the Civil

<sup>10</sup> ET 1100275/2007 although an appeal was successful on the basis that one of the aspects of justification, the assumption that performance tails off at around 65, was not supported by evidence and involved stereotyping (EAT/0063/08).

Procedure Rules. The Part 8 procedure may be used where a claimant 'seeks the court's decision on a question of which is unlikely to involve a substantial dispute of fact'.

Despite his considerable experience of employment and discrimination matters as a former President of the EAT, Morison J made clear his reluctance to determine the matter as a single judge, indicating that he considered the employment tribunal and EAT to be better placed to determine, as an industrial jury, those questions which arise in age discrimination cases relating to the achievement or fulfilment of legitimate aims or business needs. Nonetheless, Morison J held that, while the length of service element of the redundancy selection criteria in question in principle constituted age discrimination, it was objectively justified under Regulation 3 of the Age Regulations. The collective agreements in question were considered to be a compromise between the employer and the union which pursued a legitimate business aim of enabling redundancy exercises to be 'perceived as fair and ... executed peaceably'. The learned judge considered that the length of service is likely to be a 'fair indicator of both loyalty and experience'<sup>11</sup> and, as a selection criterion, 'respect[s] the loyalty and experience of the older workforce and protect[s] the older employees from being put on to the labour market at a time when they are particularly likely to find alternative employment hard to find'. The observation was also made that, had the case considered collective agreements not utilising a variety of selection criteria but rather applying solely 'last in first out' as the basis for selection, then that might have been objectionable. This comment suggests that the length of service will be legitimate only as one of a variety of selection criteria, although it is difficult to see how this can be a statement of general principle since each case must be considered on its own facts.

Moreover, Morison J held that the collective agreements in question fell within the scope of the exemption established by Regulation 32 of the Age Regulations. Regulation 32 exempts from unlawfulness the situation where an employee is placed in a better position than others by the 'award of any benefit' where the consequent disadvantage to another employee derives from the length of service.<sup>12</sup> There was, in Morison J's view, no reason in these circumstances to construe narrowly the concept of a 'benefit'. To award points to employees in a redundancy selection process which might lead to their retention by the employer was, properly viewed, a benefit and to construe Regulation 32 of the Age Regulations in this way a 'normal use of language'.

<sup>11</sup>This comment echoes the ECJ's observation (which has been cited as support for the legitimacy of Regulation 32) in case C-109/88 *Danfoss* [1989] ECR 3199, ECJ, where, in the context of sex discrimination, at paragraph 24 the ECJ observed that 'since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better, the employer is free to reward him without having to establish the importance it has in the performance of specific tasks entrusted to the employee'.

<sup>12</sup>By way of an exemption to the prohibition of age discrimination established by the Age Regulations, Regulation 32 provides that: '(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 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 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)'.

Regulation 32(2) of the Age Regulations establishes one further hurdle which must be passed in order for the Regulation 32 exemption to apply. It must be established that to award or extend a benefit related to length of service to employees with over five years' service reasonably appears to the employer to fulfil a business need, for example, by encouraging loyalty or motivation or rewarding experience. In *Rolls-Royce* it was held that it was probable that the redundancy scheme would be regarded as reasonably fulfilling the requisite business need in circumstances such as these where the redundancy scheme was negotiated with the relevant trade union and length of service was only one element of a scheme which also deployed a wider scheme of measured performance. The inclusion of a length of service criterion in the collective agreements was not therefore unlawful.

## 10. ANALYSIS

One of the problems presented by the proportionality test is its inevitable fact sensitivity which renders specific first instance decisions of limited value. However, the balancing exercise which is required in establishing whether the defence of justification is made out ensures a case specific and transparent review of the arrangements being challenged.<sup>13</sup> After all, a flexible defence provides a 'safety value' for extreme cases.<sup>14</sup> Now that the appellate courts are getting to grips with the issues which arise in relation to the operation of the age discrimination legislation, it can be seen that it is far from impossible for an employer to operate age-related criteria, whether in relation to redundancy selection or the formulation of severance payments. Encouraging and rewarding loyalty, ameliorating the consequences of dismissal for the more vulnerable and the avoidance of a windfall can all be legitimate aims which are permissible under the age discrimination legislation. To take this approach reflects the argument that the courts and tribunals should 'defer to employer expertise as to what is in the interests of the business or, to an extent, what is necessary for the achievement of a business objective'.<sup>15</sup>

However, even if an age related but legitimate aim would appear relatively easy for an employer to establish, the EAT requires the employment tribunals to set exacting standards for employers to demonstrate they have utilised a proportionate means of achieving their legitimate aims. Establishing a business need does not equate to justification. The reasonable needs of the business must be balanced against the discriminatory effects of the arrangements in question.<sup>16</sup> A careful appraisal is required in order to justify discrimination and the employment tribunal's decision must demonstrate that such an appraisal has taken

<sup>13</sup>See Baker, above n1, at 327–8.

<sup>14</sup>See Hepple, 'Age Discrimination in Employment: Implementing the Framework Directive 2007/78' in Fredman and Spencer (eds), *Age as an Equality Issue* (Hart 2003) at p 85.

<sup>15</sup>Baker, above n 1 at 327.

<sup>16</sup>cf *Hampson v Department of Education & Science* [1989] ICR 179 at 190–1 where it was held by the Court of Appeal that justification under the Race Relations Act 1976 'requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'.



place. As was noted in *Loxley*, even if union agreement to the arrangements being challenged can bolster the argument of proportionality, the employment tribunal must be alive to the risk in any event of the arrangements in place being based on discriminatory assumptions. Moreover, as Elias P observed in *MacCulloch*, it will (because the discriminatory effects will 'necessarily' be greater) be generally more difficult to justify directly as opposed to indirectly discriminatory arrangements. While not expressed in quite such trenchant language, the EAT's readiness to require strict review of the proportionality aspect of the justification defence in age discrimination cases chimes with the view expressed in *Allonby v Accrington and Rossingdale College*<sup>17</sup> that establishing justification entails 'a critical evaluation of whether the [employer's] reasons demonstrated a real need ... and if there was such a need, consideration of the seriousness of the disparate impact ... and an evaluation of whether the former were sufficient to outweigh the latter'.<sup>18</sup>

It can therefore be seen that, consistent with the case law in relation to other protected grounds, the age discrimination jurisprudence matches a relatively business friendly attitude to the establishment of an employer's legitimate aims with a strict appraisal of the means deployed to achieve those aims. Nonetheless, the *Rolls-Royce* decision suggests that it is possible legitimately to apply length of service criteria for the benefit of older employees not by reference to objective justification but on the basis that it reasonably appears to the employer that the criteria in question fulfil a business need. Regulation 32, based on the employer's assessment (albeit qualified by reasonableness) of what may be in its business interests presents a far less stringent test than the objective balancing required under Regulation 3 of the Age Regulations. It was widely assumed that the Regulation 32 exception applied to the salary and fringe benefits forming part of an employee's remuneration package rather than to the wider concept of benefit deployed by Morison J which potentially extends the scope of the exemption to the application of any favourable criteria to the benefit of an older employee. Indeed the Explanatory Memorandum to the Age Regulations<sup>19</sup> refers specifically in this regard to 'service related benefits'. To apply the wider or literal (depending on one's point of view) interpretation adopted by Morison J in *Rolls-Royce* arguably widens the permissive scope of the limited form of positive discrimination legitimised by Regulation 32 and appears to establish an alternative and more subjective method by which age discrimination can be justified, at least insofar as the more favourable treatment of older employees is concerned. By increasing the apparent scope of Regulation 32, the *Rolls-Royce* decision risks introducing into domestic legislation two competing tests of justification for age discrimination, the potential inconsistency and uncertainty created by which detracts from the clear guidance which *MacCulloch* and *Loxley* provide on the approach to be adopted by employment tribunals to this issue.

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<sup>17</sup>[2001] ICR 1189, CA.

<sup>18</sup>Ibid at 1201.

<sup>19</sup>At paragraph 7.15.