

# The Default Retirement Age: Legitimate Aims and Disproportionate Means

MALCOLM SARGEANT\*

## ABSTRACT

This article considers the default retirement age adopted in the UK in 2006. It is an exception to the principle of equal treatment and requires an objective justification as a legitimate aim with appropriate and necessary means to achieving that aim. Reasons why a traditional retirement age existed are considered together with a consideration of the development of government policy in this regard. Government policy has largely followed that of employers' wishes. Judgments of the European Court of Justice in relation to proportionality and age discrimination are examined and the case brought by Age UK against the government is looked at in more detail.

## 1. INTRODUCTION

The Employment Equality (Age) Regulations 2006<sup>1</sup> was the first statutory measure in the UK to tackle age discrimination in employment. At the same time, the Regulations introduced a default retirement age (DRA) of, normally, 65 years (regulation 30). Provided that an employer followed the procedure set out in Schedule 6, the employee would not be able to make a claim for discrimination on the basis of age or for unfair dismissal when dismissed for reasons of retirement. Retirement amounts to a dismissal for a reason related to an individual's chronological age,<sup>2</sup> which, but for the Regulations, would surely amount to age discrimination.

The inclusion of such a measure was challenged by the Age Concern in judicial review proceedings.<sup>3</sup> In the High Court, the judge<sup>4</sup> stated that

\*Middlesex University Business School, email: m.sargeant@mdx.ac.uk.

<sup>1</sup>SI 2006/1031; these measures are contained in the Equality Act 2010; Sched 9 Part 2 includes all the exceptions to the principle of non-discrimination with regard to age.

<sup>2</sup>S 98(2)(ba) Employment Rights Act 1996 provides that dismissal for retirement amounts to a fair reason within Part X of the Act.

<sup>3</sup>*R (on the Application of Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336 (Admin); [2009] IRLR 1017.

<sup>4</sup>Blake J at [128].

If regulation 30 had been adopted for the first time in 2009, or there had been no indication of an imminent review, I would have concluded for all the above reasons that the selection of age 65 would not have been proportionate. It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations. If the selection of age 65 is not necessary it cannot therefore be justified. I would, accordingly, have granted relief requiring it to be reconsidered as a disproportionate measure and not capable of objective and reasonable justification in the light of all the information available to government.

It is strange that a major piece of discrimination should have been incorporated into Regulations aimed at tackling age discrimination at work. It is clear from the above statement in the *Age UK* case that the fact that a review of the DRA was to take place (completed in February 2010) was an important factor in the Government winning the case. It is argued here that the DRA was an unnecessary piece of legislation which has continued to allow employers to remove employees from the labour force on the basis of their chronological age.

The Coalition Agreement reached by the government elected in May 2010 promised to phase out the measure. In the papers accompanying the 2010 emergency budget, the government confirmed that it 'will consult shortly on how it will quickly phase out the Default Retirement Age from April 2011'.<sup>5</sup>

## 2. STATUTORY BACKGROUND

Regulation 30 of the Employment Equality (Age) Regulations 2006 (the 'Age Regulations') provides that the provisions concerning discrimination in employment<sup>6</sup> do not 'render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for dismissal is retirement'. Whether the reason is for retirement falls to be determined by sections 98ZA to 98ZF of the Employment Rights Act 1996. These provisions broadly state that dismissal for reason of retirement at or after the age of 65 is a fair one, provided the procedures set out in Schedule 6 of the Regulations are followed. Schedule 6, in turn, provides a procedure for notification of the employee of the impending retirement and the individual's right to request to continue working

<sup>5</sup> HM Treasury, *Budget Report 2010*, at para 2.35: [http://www.hm-treasury.gov.uk/d/junebudget\\_chapter2.pdf](http://www.hm-treasury.gov.uk/d/junebudget_chapter2.pdf). (last accessed 17 June 2010)

<sup>6</sup> Parts 2 and 3; Reg 30 applies to employees within the meaning of s 230(1) of the 1996 Act, a person in Crown employment and relevant members of the staff of the House of Commons and House of Lords.

and the procedures to be followed if the individual does so request. This simply is the right to a hearing and to a subsequent appeal. In neither case is the employer required to provide any reasons for not agreeing to the request. Of importance, of course, is that this whole process is permissive. The employer is not required to have a mandatory retirement age. It is only if she or he does so decide that the procedure in Schedule 6 becomes relevant.<sup>7</sup>

The Age Regulations implement the age strand of the Framework Directive on Equal Treatment in Employment and Occupation.<sup>8</sup> Article 1 provides for the introduction of the principle of equal treatment with respect to the grounds of religion or belief, disability, age or sexual orientation. The principle of equal treatment is taken to mean that there should be no direct or indirect discrimination on any of these grounds.<sup>9</sup> The Directive does, however, contain a number of opportunities to treat age discrimination differently and, importantly, provides for the opportunity to justify direct as well as indirect discrimination. Article 6<sup>10</sup> states that Member States may provide for differences of treatment on the grounds of age where the differences can be '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'. Article 6 then gives a number of justifiable differences of treatment (ie legitimate aims). These include:

- (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.

These are broad exceptions and require the Court of Justice to balance the principle of equal treatment against measures which can be justified in these terms

<sup>7</sup> See M. Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimation of Age Discrimination in Employment' (2006) 35 *ILJ* 209.

<sup>8</sup> Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>9</sup> Art 2.

<sup>10</sup> See M. Sargeant, 'Age Discrimination: Equal Treatment with Exceptions' (2005) 6 *International Journal of Discrimination and the Law* 251; see generally M. Sargeant, *Age Discrimination in Employment* (Aldershot: Gower, 2007).

as legitimate, providing that the means of achieving the aim are proportionate. In addition, Recital 14 of the Directive states that the Directive ‘shall be without prejudice to national provisions laying down retirement ages’. Advocate General Geelhoed summed up the situation in *Sonia Chacon Navas*<sup>11</sup> that:

the implementation of the prohibitions of discrimination of relevance here [disability and age] always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market or an increase in the participation level of older workers.

It therefore appears possible that the needs of the labour market can take precedence over the rights of older workers not to be discriminated against on the grounds of their age. This is illustrated by the decision of the Court of Justice in *Félix Palacios de la Villa v Cortefiel Servicios SA*.<sup>12</sup> In this case (considered further below), the Court was asked to decide on the proportionality of a rule which allowed a provision for compulsory retirement ages to be contained in collective agreements. Mr de la Villa complained that the decision to compulsorily retire him at the age of 65 amounted to age discrimination. The Court, however, accepted that such compulsory retirement was an appropriate and necessary means of achieving the legitimate aim of promoting full employment. Advocate General Mazák had argued in his opinion that the collective agreement provided for the termination of employment and the commencement of the pension. He stated that ‘to regard this as “dismissal” is in my view rather far-fetched.’ The Court, however, expressed clearly the view that the automatic dismissal of a person who reaches a certain age ‘must be regarded as directly imposing less favourable treatment for workers who have reached that age as compared with all other persons in the labour force’. The measure however could be justified as a means of promoting full employment. In essence, the Court was saying that it was permissible to eject individuals from the workforce against their will in order to make room for other (younger) potential employees. There is no evidence in the report of the judgment that the Court investigated whether the practice of compulsory retirement actually achieved this aim or not.

### 3. RETIREMENT

Two possible alternative models attempting to explain the growth in the use of retirement are, firstly, the increasing availability of old age pensions and, secondly,

<sup>11</sup> Case C-13/05 *Sonia Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706; this was a disability discrimination case.

<sup>12</sup> Case C-411/05.

the decrease in demand for older workers. This latter view<sup>13</sup> traces retirement at the age of 65 back to the late 19th and early 20th centuries when British and US industry went through a period of structural change: 'Retirement around the age of 65 became an accepted method of dispensing with the services of workers who were increasingly judged industrially obsolete in a more competitive economic environment'.<sup>14</sup> There appeared to be an increasing view that people were worn out by this age. For a period, also, early retirement was seen as a way of reducing employee numbers. This was illustrated in the Cabinet office report *Winning the Generation Game* (2000) which stated that at age 50, almost 90% of men in the UK were in the workforce, and that by the age of 60 this had fallen to some 48%.

An alternative approach is to blame the development of old age pensions as a reason for having a cutoff between working life and retirement. Until quite recently, it was suggested that more than three-quarters of men had a retirement age which was the same as the state pension age. Prior to 1989, retirement was a prerequisite of receiving the state pension, but this is no longer so. 'Many people see state pension age as the point at which society as a whole regards it as reasonable that they should stop working'.<sup>15</sup> Government policy does however appear contradictory. On the one hand, employers are protected from any claims provided that they dismiss employees at the DRA. On the other hand, the Government introduced in 2005 a scheme to allow people to defer their state pension as an incentive for them to continue working.

The reduction of rights for older workers is not a new phenomenon. Prior to the Age Regulations 2006, the Employment Rights Act 1996 had, for example, excluded employees from protection against unfair dismissal (section 109) or the right to redundancy payments (section 156) if they had reached the employer's normal retirement age or 65 years. This exclusion had been in existence for some time. The Industrial Relations Act 1971, which introduced the concept of unfair dismissal, contained such an exclusion in section 28(b). This referred to the employer's normal retirement age or an age of 65 for men and 60 for women, thus depriving women of this protection at an earlier age.<sup>16</sup> An even earlier piece of

<sup>13</sup> J. Macnicol, *The Politics of Retirement in Britain 1878-1948* (Cambridge: Cambridge University Press, 1998) argues that this latter approach is correct and that pensions are a response to this decline in demand.

<sup>14</sup> J. Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge: Cambridge University Press, 2006) 143; see also M. Lyon Levine, *Age Discrimination and the Mandatory Retirement Controversy* (Baltimore, MD: John Hopkins University Press, 1998).

<sup>15</sup> P. Meadows, *Retirement Ages in the UK: A Review of the Literature*, Department of Trade and Industry Employment Relations Series No 18 (2003); the state pension is, however, a subsistence pension. This has always been the case since the first universal old age pension was introduced into Great Britain in 1908. It has been accurately described as 'hardly a pension scheme at all. Rather it was a mechanism for delivering poor relief to the destitute old provided out of the benevolence of taxpayers': M. Sullivan, 'What to do about Retirement Ages?', paper delivered to the Conference on Ageing Populations, Institute of Actuaries, Edinburgh, 2002.

<sup>16</sup> The state pension age for women was reduced to 60 by the Old Age and Widows' Pensions Act 1940.

legislation, the Redundancy Payments Act 1965, which first introduced statutory redundancy payments, contained a similar provision. It is interesting how the legislation mirrors closely the state pension age and, perhaps, historically reflects an expectation that employees will retire from work at the state pension age. One study of the Redundancy Payments Act in 1969<sup>17</sup> stated that:

The maximum age limits of 65 and 60 were incorporated into the Act because it was intended that provision should only be made in respect of enforced loss of employment, where there was a reasonable expectation that it would otherwise have continued. Thus, it was felt that those workers who had already reached the age at which they were eligible for the state retirement pension could not have the same expectations of continued employment as younger workers, and to have brought them within the scope of the scheme would have tended to confuse its purpose with that of the provision for retirement.

There were also tapering provisions in the year before retirement 'aimed to ensure that it would not be advantageous to become redundant rather than stay on at work until the statutory pensionable age'.<sup>18</sup> Thus, there appeared to be an expectation that people would retire at or before the state pension retirement age so it was really not a great issue that rights to unfair dismissal and redundancy payments were not given to people over this age. This was so even though there was much evidence that older workers suffered from a particular vulnerability in redundancy situations.<sup>19</sup> This approach continued until the adoption of the Age Regulations in 2006 by which time there were significant numbers of people working beyond the normal retirement age.

It has been suggested that retirement is 'both the leading form of age discrimination and the driving force behind the wider development of ageism in modern societies'<sup>20</sup>. It does seem somewhat extraordinary, given the ageing of the UK population, that a DRA should have been introduced at all. The change in the proportion of older people in the UK has been very dramatic over the last 150 years or so. In 1841, for example, just over 4% of the population were aged 65 years or over.<sup>21</sup> In 2008, this had grown to 16% of the population and by 2033 this proportion will have increased to 23%.<sup>22</sup> At the same time as the improvements

<sup>17</sup>S. Parker, C. Thomas and N. Ellis, *Effects of the Redundancy Payments Act*, Office of Population Censuses and Surveys, Social Security Division. Department of Employment (1969).

<sup>18</sup>Ibid.

<sup>19</sup>R. Fryer, 'The Myths of the Redundancy Payments Act' (1973) 2(1) ILJ 1.

<sup>20</sup>See A. Walker, 'The Benefits of Old Age? Age Discrimination and Social Security' in E. McEwen (ed.), *Age: The Unrecognised Discrimination* (London: Age Concern, 1990).

<sup>21</sup>Macnicol, *The Politics of Retirement in Britain*, above n.13.

<sup>22</sup>Information from the Office for National Statistics <http://www.statistics.gov.uk/focuson/olderpeople/> (last viewed 26 February 2010).

in health and longevity that has caused this change in the population, there has developed a formal process for taking older people out of the workforce. In the 1890s, about two thirds of males aged 65+ were recorded as 'gainfully occupied'; the mid-point of 50 per cent was reached in the late 1920s; by the early 1950s this proportion had fallen to one third; and by the late 1980s it was less than 10 per cent (about half of whom were working part-time).

The debate about the DRA now seems to be between those that have a positive view of ageing and those who are worried about the negative consequences, resulting from a decline in competency and capability traditionally associated with the ageing process.<sup>23</sup> This certainly showed itself in the responses of many employers to the Government's consultation on the subject.<sup>24</sup> Most of the employer responses supported the introduction of the DRA. The employers were concerned with how to end peoples' careers with dignity, rather than through disciplinary procedures. There was a general assumption that older workers would decline in competence and capability as they aged, but would nevertheless wait to be dismissed or retired rather than leave voluntarily. One employer<sup>25</sup> stated that 'we would not want to resort to using our capability/competence procedure for long serving loyal employees who chose to stay on to a point where it affects their ability to do the job effectively. The effect would be very negative on staff morale generally if this were to happen in organisations'. This is in contrast to a view which celebrates the increase in the number of older workers as an achievement for society.

#### 4. CONSULTATION

In May 1997, the Government announced that it would consult on the best way to tackle age discrimination in employment. The results of this consultation were published in *Action on Age*.<sup>26</sup> The UK Labour Government's policy towards a

<sup>23</sup>D. Hirsch, *Crossroads after 50: Improving Choices in Work and Retirement* (York: Joseph Rowntree Foundation, 2003) suggests that there are a number of other issues that can play a major part in work decisions of older workers. These are, firstly, health and fitness. Many people may live and work longer, but for a substantial minority health issues will have an important effect on their working lives, eg the large numbers of people who retire for reasons of sickness and disability. The second issue suggested is that of having caring responsibilities. About one in five people in their 50s has responsibility for care in relation to older relatives and to grandchildren. Thirdly, peoples' views and outlook may change as they get older. Work may become less important than roles in the family or the community, especially, for example, in relation to partners who may retire or have health or other problems.

<sup>24</sup>Department of Trade and Industry, *Equality and Diversity: Coming of Age* (2006).

<sup>25</sup>British Energy Group plc.

<sup>26</sup>Department for Education and Employment, *Action on Age: Report of the Consultation on Age Discrimination in Employment* (1998).

compulsory retirement age changed over its period in office. At the beginning of its term, it favoured a voluntarist approach to tackling age discrimination, rather than a legislative one. In November 1998, the Government published a consultation on a *Code of Practice for Age Diversity in Employment* followed by the adoption of the Code the following year. This approach only had limited success.<sup>27</sup> There was no consultation on the issue of retirement, although the subject was raised by a number of participants. The document, however, stated that the retirement age was 'outside the scope of the consultation, as like other terms and conditions of employment, retirement ages are a matter for negotiation between individual employers and their employees, or their representatives'.

A second consultation took place in December 2001 when the Government published *Towards Equality and Diversity*.<sup>28</sup> This was concerned with implementing the Race Directive<sup>29</sup> as well as Directive 2000/78/EC. There were a total of 870 responses received to the consultation.<sup>30</sup> The responses confirmed how widespread was discrimination based upon age. Some 50% of respondents had either suffered age discrimination at work or had witnessed others suffering such discrimination. This discrimination took a variety of forms, but the most frequent one reported (some 22%) was that of being forced to retire at a certain age. In response to the question 'Do you think employers should be able to require people to retire at a certain age?' some 43% of the replies were in favour and 57% against. The majority of respondents thought that people wanted the flexibility to choose when they retired, or to retire gradually. The report stated, however, that 'responses from business and their representative organisations urged caution'. The abolition of retirement ages would cause real problems for employers, including those related to staff planning, managing benefits and employee relations difficulties. This last related to the effect of removing the retirement age and the need for employers to have to dismiss employees on competence grounds if they did not wish to retire.

The Government then carried out a third consultation in mid-2003, published as *Age Matters*.<sup>31</sup> It was in this consultation that the possibility of a DRA was first put forward. The consultation document contained a proposal for an alternative approach to just removing the mandatory retirement age. It is worth noting that

<sup>27</sup> See Department for Work and Pensions, *Evaluation of the Code of Practice on Age Diversity in Employment Final Report* (2001).

<sup>28</sup> Department of Trade and Industry, *Towards Equality and Diversity; Implementing the Employment and Race Directives* (2001).

<sup>29</sup> Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L189/22.

<sup>30</sup> Department of Trade and Industry, *Towards Equality and Diversity: Report of Responses on Age* (2003).

<sup>31</sup> Department of Trade and Industry, *Equality and Diversity: Age Matters* (2003).

the document quotes the Green Paper *Simplicity, Security and Choice*<sup>32</sup> as stating that ‘under the Directive, compulsory retirement ages are likely to be unlawful unless employers can show that they are objectively justified’. The majority of respondents to this consultation had been opposed to allowing employers to retire employees at a certain age. The consultation proposed that compulsory retirement be made unlawful but that employers could require employees to retire at a default age of 70, without having to justify their decision. It is not at all clear what the difference between this and a compulsory retirement age is.

There was a significant time gap between the publication of the 2003 consultation and the publication of the Government’s response in 2005. This may be a result of the division of views between the Department of Trade and Industry which favoured a mandatory retirement age and the Department for Work and Pensions which favoured its abolition. In 2004, an Age Taskforce was established to advise Ministers on the legislation. There were deep divisions within this group between employers who favoured a Government set DRA and those organisations who were opposed to such a move.<sup>33</sup> Nevertheless, the Secretaries for State for the Departments of Trade and Industry and Work and Pensions made a joint statement in December 2004 about their decision to introduce a DRA of 65 and to give employees the right to request to continue working beyond their normal retirement date. It was this policy change by the Government that formed part of the argument made by the claimants in the *Age UK* case. Prior to this, the Government had broadly accepted that a mandatory retirement age would require specific justification under the Directive. After this date, the Government favoured a DRA approach. The witness statement by Mr John Wadham<sup>34</sup> suggested that the best explanation for the change was that the Government was anxious to be seen as business friendly. Mr Wadham further stated that:

The process of objective justification was made to fit the demands of changing policy, rather than policy development being constrained within parameters set by the correct legal test.<sup>35</sup>

<sup>32</sup>Department for Work and Pensions, *Simplicity, Security and Choice: Working and Saving for Retirement* (2002).

<sup>33</sup>See *R (on the Application of Age UK) v Secretary of State for Business, Innovation and Skills* [2009] EWHC 2336, at [60]–[61]. The Age Taskforce grew out of another advisory body called the Age Advisory Group which had been set up in 2001 to advise on implementation of the Directive.

<sup>34</sup>John Wadham, Group Legal Director of Equality and Human Rights Commission, intervenors in the case.

<sup>35</sup>Para 65 of Witness Statement.

The response to the 2003 consultation was published in 2005.<sup>36</sup> This was the final statement of views before the publication of the draft Age Regulations. Generally, the 427 respondents welcomed the proposals to make age discrimination unlawful, but there were clearly uncertainties and differences of opinion. One of the issues was the proposed DRA. A majority of respondents (51.8% said yes; 42.9% were opposed) were actually in favour of a DRA, although almost two-thirds were against having that age set at 70. Some 82.4% of respondent employers opposed a higher default age.

In 2005, the Government published its draft Age Regulations which confirmed the business agenda being followed by the Government and the adoption of a DRA of 65 years. The CBI's major concern had centred on the retirement age. Their view was that the right to retire staff at 65 years was a 'vital management tool'.<sup>37</sup> Employees should not be allowed to challenge the decision to retire a person at the proper age. This was also the concern of the Engineering Employers Federation which was concerned that employees should not be able to challenge the presumption of retirement. They were concerned that if an employer allowed some employees to work beyond retirement age, this would be used by other employees as evidence that their dismissal was for other reasons relating to the individual, apart from retirement.

The Government published its summary of responses to the 2005 consultation in 2006.<sup>38</sup> The Report contrasted the reactions of trade unions and employers to the proposals for the DRA. It stated that 'many of those who commented from the union point of view on the DRA found the evidence for it weak and appearing to favour the convenience of employers'. The Report also stated that 'on the whole, employers and employer organisations such as the CBI held firmly to the belief that the right to retire staff at age 65 remained a vital management tool...'.<sup>39</sup> In the event, the employers' agenda took priority and a DRA of 65 was introduced in the 2006 Regulations. There was also a commitment to review this in 2011 (subsequently brought forward to February 2010).

## 5. EUROPEAN COURT OF JUSTICE

To date,<sup>40</sup> there have been 14 cases where questions have been referred to the Court of Justice from the courts in the Member States concerning the implementation

<sup>36</sup> Department of Trade and Industry, *Equality and Diversity: Age Matters Age Consultation 2003 Summary of Responses* (2005).

<sup>37</sup> See CBI response to *Equality and Diversity: Coming of Age*.

<sup>38</sup> Department of Trade and Industry, *Equality and Diversity Coming of Age: Report on the Consultation on the Draft Equality (Age) Regulations 2006* (2006).

<sup>39</sup> Ch 6, 28.

<sup>40</sup> As at 1 March 2010.

of the age aspects of Directive 2000/78/EC. Five of the cases concern the ending of employment at a particular age. These were, firstly, *Félix Palacios de la Villa v Cortefiel Servicios SA*<sup>41</sup> where the Spanish court asked whether the prohibition on discrimination precluded a national law allowing compulsory retirement clauses to be included in collective agreements; secondly, *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*<sup>42</sup> which concerned whether the Directive extended to rules which permitted employers to dismiss employees aged 65 or over by reason of retirement; thirdly, *Gisela Rosenblatt v Oellerking Gebäudereinigungsgesellschaft mbH*<sup>43</sup> where the German court asked whether a national rule that a contract which specified the automatic termination of an employment relationship upon reaching a specific fixed age (in this case 65) contravened the prohibition on age discrimination; in *Vasil Ivanov Georiev v Tehnicheski Universitet*<sup>44</sup> the Bulgarian court asked whether the Directive precluded provisions of a national law which did not permit indefinite contracts with professors who had reached the age of 65, and which provided that professors who had reached the age of 68 were to be compulsorily retired; and, finally, in *Reinhard Prigge v Deutsche Lufthansa AG*<sup>45</sup> the German court asked whether the Directive precluded rules of national law which recognised an age limit of 60 for pilots established by collective agreement for the purposes of ensuring air safety.

In *Palacios de la Villa*<sup>46</sup> the Court did not consider the general issue of whether a mandatory retirement age was compatible with a Directive aimed at tackling, among other matters, age discrimination in employment and occupation, but only looked at the particular circumstances raised by the reference. Law 14/2005 permitted collective agreements to contain clauses providing for the termination of employment at the retirement age stipulated in Spanish social security legislation, provided that, firstly, such a measure was 'linked to objectives which are consistent with employment policy and are set out in the collective agreement'; and, secondly, that the worker 'must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime'. A further special measure, the Single Transitional Provision (STP), was adopted to deal with those collective agreements already

<sup>41</sup> Case C-411/05; [2007] IRLR 989.

<sup>42</sup> Case C-388/07; [2009] IRLR 373.

<sup>43</sup> Case C-45/09.

<sup>44</sup> Case C-250/09.

<sup>45</sup> Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG*.

<sup>46</sup> At the time of writing, judgments had been delivered in two of these cases, so it is only these that are considered here.

in force. Under the STP, collective agreements which already provided for the termination of contracts of employment where workers had reached normal retirement age, would be lawful provided that the collective agreement stipulated that the workers concerned had 'completed the minimum period of contributions and that they [had] satisfied the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime'. There was no requirement here for a link to objectives consistent with employment policy.

Mr Palacios claimed age discrimination as a result of his dismissal at the age of 65. The issue referred was whether the STP was compatible with Community law. All parties, except Mr Palacios, argued that the principle of non-discrimination did not apply to the STP, and relied upon recital 14 for this. Recital 14 states that 'this Directive shall be without prejudice to national provisions laying down retirement ages'. Alternatively, it was argued, that the setting of a retirement age could be justified under Article 6(1).

The Court stated that Recital 14 merely provided that the Directive did not affect the competence of Member States to determine retirement ages, but the Directive did apply to national measures 'governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached'. The issue was whether the measure could be justified under Article 6(1). The fact that it was contained within a collective agreement between the social partners was not decisive. The Court accepted that the aim was legitimate (the aim being to check unemployment and promote employment) and the means were also judged to be appropriate and necessary. Compulsory retirement could be a proportionate means of achieving the aim, particularly taking into account the 'fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable'. Thus, it is important to see the rule within the context of national legislation, part of which ensures that the individual has achieved a not unreasonable level of pension.

The second judgment concerning a mandatory retirement age was contained in the *Age Concern* case,<sup>47</sup> a reference from the English High Court. The Court of Justice was asked, amongst other questions, whether the scope of the Directive extended to rules which permitted employers to dismiss employees aged 65 or over by reason of retirement and whether the national regulations concerning

<sup>47</sup>Case C-388/07 (see above n.42). Subsequently, *Age Concern* and *Help the Aged* amalgamated to create *Age UK*, a title which is reflected in the amended name in the case in the High Court.

discrimination in employment and retirement were national provisions laying down retirement ages within the meaning of Recital 14. This was a claim questioning the introduction of a DRA of 65 years as part of the Age Regulations implementing Directive 2000/78/EC. Age Concern argued that Article 6(1) did not permit Member States to introduce a general defence of justification for direct age discrimination, but allowed them to make specific provisions listing the grounds which could constitute a legitimate aim. The UK Government argued that, in accordance with Recital 14, the provisions at issue did not fall within the scope of the Directive; as an alternative it argued that the provisions were consistent with the Directive. With regard to Recital 14, the Court repeated its view expressed in *Palacios*. It then stated that the contested parts of the national Regulations did fall within the scope of the Directive and went on to say that there was no requirement for a specific list of exceptions. The Court stated that:

Article 6(1) of Directive 2000/78 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.

It was this statement that a high standard of proof was required that gave opponents of the Government policy some hope when the case returned to the national court.

One further case about maximum recruitment ages, but also having an impact on retirement, is the judgment in *Petersen*.<sup>48</sup> The German equality law<sup>49</sup> did not amend the age limits applicable to ‘panel dentists’ which provided for a maximum age of 68. Ms Petersen’s authorisation to operate as a dentist therefore expired when she reached this age. The questions from the national court concerned whether this maximum age limit was an objective and reasonable measure to achieve a legitimate aim. The legitimate aim was the health of patients as, ‘based on general experience’, ‘a general drop in performance occurs from a certain age’. Thus although the question is about a maximum recruitment age, it really aligns itself with those cases concerning a mandatory retirement age. The Court considered the aims put forward by the German Government and concluded that Article 2(5) precluded a national measure setting a maximum retirement age

<sup>48</sup> Case C-341/08 *Dr Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*.

<sup>49</sup> General Law on Equal Treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006.

for practising as a panel dentist where the aim was ‘the protection of patients from the effects of the decline in performance of dentists after the age of 68’. The reason for not accepting this as a legitimate aim was that it only applied to panel dentists and there was no age limit for non-panel ones. In terms of Article 6(1), however, where the aim was ‘to share out employment opportunities among the generations’, the measure was not precluded. The outcome of this case is therefore that, in certain situations, it seems to be acceptable to discriminate against older members of a profession in order to facilitate new members entering.

## 6. THE AGE UK CASE

By the time the *Age Concern* case returned to the High Court, Age Concern had amalgamated with Help the Aged and the Government Department concerned had changed its name, with the Equality and Human Rights Commission and the Attorney General intervening. The case consisted of judicial review proceedings brought by Age UK challenging regulations 3 and 30 of the Age Regulations. Regulation 3 provided that discrimination on the grounds of age could be both direct and indirect discrimination. It further provided, in accordance with Article 6, for the possibility of the less favourable treatment (direct) or the provision, criterion or practice (indirect) to be justified as ‘a proportionate means of achieving a legitimate aim’.<sup>50</sup> Regulation 30 provides the exception for retirement and states that the Regulations are not to apply in a situation where there is a dismissal for reasons of retirement at or over the age of 65. It is possible, of course, under the Regulations to have a different retirement age, but this would have to be justified as having a legitimate aim and the age of retirement being a proportionate means of achieving that aim.

The Government representative submitted at least two witness statements to the Court as justification for its measures.<sup>51</sup> The initial statement explained the policy aims for introducing a DRA. It stated that the Government’s labour market objectives included ‘encouraging the recruitment, retention and proper remuneration of workers, and ensuring proper pension provision for them when they retire’.<sup>52</sup> One of the factors that supported these objectives was ‘confidence

<sup>50</sup> It appears that nothing is to be read into the fact that the Regulations use the term ‘proportionate’ while Art 6 of the Directive uses the words ‘appropriate and necessary’.

<sup>51</sup> The author is grateful to Age UK and the Equality and Human Rights Commission for passing on copies of their witness statements made to the Court; the Department for Business, Innovation and Skills, however, refused a request for copies of those submitted on its behalf by Ms McCarthy-Ward.

<sup>52</sup> At para 72.

in the labour market'. The witness statement stated that having confidence in the labour market meant that employers are:

optimistic about future prospects and trust that the labour market will not be unduly affected by external factors over which they have no control and which will have a detrimental impact on them. In general, business prefers to operate in a climate of certainty and any factors, including labour market factors, that increase uncertainty may have a detrimental effect on confidence. Significant new legislation which affects all employees inevitably will reduce the confidence of some employers because of fears about the impact, which will be uncertain at least until the case law has clarified its effect. If the Government failed to consider the impact of new legislation on business, employers would fear that the impact could be significant.....without confidence then they are less likely to take the risks which are necessary to ensure increasing recruitment, training, remuneration and proper pension provision.

More specifically, the Government, according to the witness statement, decided to adopt the DRA with the aims of, firstly, workforce planning (meaning the provision of a target date against which employers and employees can plan work and retirement; the prevention of job blocking; and encouraging employees to save for retirement) and, secondly, to avoid an adverse impact on the provision of occupational pensions and other work benefits. Other benefits that would result from the DRA were the protection of the dignity of workers at the end of their working lives, the improving of the participation rate of workers in the 50- to 64-year age group and the encouragement of culture change. The Government witness submitted that the 'aim was sufficiently clear and precise as to comply with the requirements of the Directive and enabled employers to justify particular treatments and practices as necessary and proportionate to their business needs without infringing the distinction between public policy and private needs'.<sup>53</sup> In the event the Court accepted that the Government had provided 'to the requisite high standard that it did have social policy concerns in protecting the integrity of the labour market'.<sup>54</sup>

The claimants were sceptical of most of these arguments but, in particular, were concerned at the Government's motives:

... the Defendant did not reach the conclusion that it was justifiable to permit retirement ages above 65 (on the basis of the aim it cites) as a result of objective consideration of legitimate employment policy aims. Instead ministers determined policy on the basis of intense pressure from lobby groups. The decision reached was to adopt the policy preferred by certain employer representatives, and essentially to maintain (and not improve) the law on retirement for people over 65. The objective justification that the

<sup>53</sup>At para 87.

<sup>54</sup>At para 90.

Defendant has offered is essentially a post-facto rationalisation of a decision made outside the framework of the test for justification.<sup>55</sup>

Thus, 'the process of objective justification was made to fit the demands of changing policy, rather than policy development being constrained within parameters set by the legal test'.<sup>56</sup> The Government did not, of course, accept this view and stated in the second witness statement given by senior civil servant Ms McCarthy-Ward that it had carried out an 'an assessment of the relative merits of the arguments and views put forward'.<sup>57</sup>

In respect of Regulation 30, the Court summarised the submissions of the claimant into five parts.<sup>58</sup> These were that:

(i) in the light of the longer term aim of removing a designated retirement age and the intention of reviewing the Regulation in 2011 (subsequently brought forward to 2010), the designated retirement age under Regulation 30 is effectively a decision to defer implementation of the Directive until after December 2006. This was, not surprisingly, rejected as being without substance.

(ii) the Government had not proved to a high standard the existence of a legitimate social policy aim for a default retirement age. This argument also failed as the Court had proved to a high standard that the concept of a designated retirement age was based upon a social policy aim of maintaining confidence in the labour market.

(iii) the social policy aims used were based upon generalisations rather than evidence. The court concluded that the decision to have a default retirement age was not based upon a generalised assumption that people over the age of 65 were not competent to perform their duties. It noted that this was a concern of employers, but it was not a concern of the Government, but, in any case 'social perceptions are a factor that the Government may take into account in implementing the directive ...'<sup>59</sup>

(iv) the use of a default retirement age was not a proportionate way of advancing the aim. Once the court had accepted that the default retirement age was a proportionate means of giving effect to the social policy aim of market confidence, the test for proportionality were complete.

(v) if there was to be a designated retirement age, then the choice of age 65 was disproportionate in its effect upon older workers. The issue of the choice of 65 as a default retirement age was the one that gave the Blake J. the most concern.<sup>60</sup> He dismissed any possibility that a lower age would be acceptable and accepted that

<sup>55</sup> At para 71 of the first witness statement provided by Andrew Harrop of Age Concern England.

<sup>56</sup> Para 104 of Andrew Harrop's statement.

<sup>57</sup> Para 34 of her statement.

<sup>58</sup> At [100].

<sup>59</sup> At [108].

<sup>60</sup> At [115].

a proposed default retirement age of 70 years had not been popular during the consultation period, but the research relied upon by the Government did suggest that there was no evidence that the question of the need for a dignified exit from the workforce because of deterioration arose in the age band 65 to 70. A higher age of, say, 68 would not have undermined any of the government's objectives in adopting the default retirement age.

Generally, the court stated that:

. . . in the light of changed economic circumstances and the generally recognised problems that a longer living population creates for the social security system the case for advancing the DRA beyond minimum age of 65 at least would seem compelling.

It was therefore a limited and conditional acceptance of the Government's case in showing that there was the DRA of 65 was a proportionate means of achieving the legitimate aim of market confidence. What appeared to save the day for the Government was the imminent review of the DRA. Indeed, the judge stated that if regulation 30 had been adopted for the first time in 2009, or if there had been no imminent review, he would have considered the selection of age 65 not to be proportionate. He stated that:

It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations. If the selection of age 65 is not necessary it cannot therefore be justified. I would, accordingly, have granted relief requiring it to be reconsidered as a disproportionate measure and not capable of objective and reasonable justification in the light of all the information available to government.

## 7. OTHER CASES

Many employment tribunal cases had been stayed pending the outcome of the *Age UK* case at the High Court and the Court of Justice. This outcome was the result of the Court of Appeal decision in *Johns*.<sup>61</sup> In this case, the claimant had been retired in 2001 and then subsequently re-employed at the end of 2002. In September 2006, she was given six months notice and her request to continue working was turned down. She brought proceedings for unfair dismissal and unlawful age discrimination. The claim was struck out by the Employment Tribunal on the basis that, after the Advocate General's opinion in the case of *Palacios*, the *Heyday (Age UK)* case was so likely to fail that the claim had

<sup>61</sup> *Johns v Solent SD Ltd* [2008] IRLR 820.

no reasonable prospect of success. This decision was not surprisingly reversed by the Employment Appeal Tribunal on the ground that the Chairman of the Employment Tribunal 'should have stuck to what was known, rather than to speculate about the unknown'. The Court of Appeal agreed that the Chairman's ruling had been 'perverse'. In the event, the outcome of this case was that the President of Employment Tribunals issued a direction that all such claims should be stayed pending the outcome of the *Age UK* case.

Perhaps as a result of this, there have been a very limited number of cases reaching the appeal courts in relation to dismissals for reasons of retirement.<sup>62</sup> In each case, the respondent claimed that the retirement age was a proportionate means of achieving a legitimate aim. The courts seem very ready to accept a variety of legitimate aims (although there is no indication of empirical evidence being produced to support arguments about legitimacy), but are less so when there is consideration of the proportionality of the means. *Hampton v Lord Chancellor*<sup>63</sup> concerned a claimant who held the judicial post of recorder and who was retired at the age of 65. He brought proceedings complaining that his compulsory retirement was contrary to regulation 3(1)(a) of the Age Regulations (direct discrimination). The respondents admitted that he had been subject to less favourable treatment on the grounds of his age, but that the retirement was a proportionate means of achieving a legitimate aim which was to maintain a reasonable flow of candidates and new appointments for posts in the judiciary.<sup>64</sup> The claimant argued that a retirement age of 70 would achieve the same objective. The court accepted the legitimacy of the aim, but, in the event, held that the means of achieving this was not appropriate and reasonably necessary. *Seldon* concerned the retirement of an equity partner in a firm of solicitors.<sup>65</sup> Here the legitimate aims were adopted retrospectively, meaning that they had not been in the minds of the respondents at the time. The legitimate aims were (i) ensuring that associates were given the opportunity of partnership; (ii) facilitating the planning of the partnership and workforce and (iii) limiting the need to expel partners by way of performance management and thus contributing to the collegiate culture of the firm. Partners

<sup>62</sup>There were, of course, a number of challenges to the compulsory retirement age before the adoption of the Age Regulations. These included two cases which attempted to show that compulsory retirement amounted to sex discrimination. These were *Rutherford and another v Secretary of State for Trade and Industry* [2004] IRLR 892 and *Nash v Mash/Roe Group Ltd* [1998] IRLR 168.

<sup>63</sup>*Hampton v Lord Chancellor* [2008] IRLR 258.

<sup>64</sup>There was some discussion in the case about the use of the word 'proportionate' in Reg 3 of the Age Regulations, rather than the words 'appropriate and necessary' which are used in Art 6 of the Directive. The Court decided that the word 'appropriate' was correct, but the 'necessary' should actually be 'reasonably necessary'.

<sup>65</sup>*Seldon v Clarkson Wright & Jakes* [2009] IRLR 267.

whose performance deteriorated could continue until retirement age without any adverse consequences. The Employment Appeal Tribunal accepted these as legitimate aims and concluded that the means of achieving the first two were proportionate. In relation to the third justification concerning the maintenance of collegiality, this was not enough to justify the need for compulsory retirement. The Court stated, correctly, that:

There was no evidence to support the assumption that the performance of partners reduced when they reached the age of 65. There had been a stereotyped assumption that partners would be more likely to underperform by the age of 65.

## 8. CONCLUSIONS

The government had originally proposed to review the Age Regulations in 2011. This was brought forward to 2010 and a consultation closed at the beginning of February 2010. This was likely to result in a further consultation on what is to replace the DRA. The coalition government has also committed itself to phasing out the DRA, but it is difficult to understand why, as part of a measure to tackle age discrimination in employment, the Government actually introduced such a measure which effectively condemned many tens of thousands of employees to continuing discrimination in employment. This measure continued the practice of excluding many people from the labour market on the basis of age.<sup>66</sup> An analysis by Age UK<sup>67</sup> in 2010 suggested that some 6% of people between the ages of 65 and 70 were forced to retire in the first three years after the introduction of the Age Regulations. This amounted to some 150,000 people. There were also indications that this process had accelerated during the recession with the obvious implication that employers were using mandatory retirement as a means of workforce reduction during difficult economic times. The same survey and analysis showed that some 40% of employees aged between 60 and 64 years planned to retire after the age of 65 or planned not to retire at all. This amounted to some 340,000 people. In contrast, some 42% of employees aged 60–70 years work for an employer using mandatory retirement practices. Thus the existing law potentially puts at risk some 530,000 current employees.

One result has been that the ECJ and the national courts have been required to examine the proportionality of this exception to the principle of

<sup>66</sup>Macnicol, *The Politics of Retirement in Britain*, above n.13, at 8.

<sup>67</sup>[www.ageuk.org.uk](http://www.ageuk.org.uk) (last accessed 17 June 2010)

non-discrimination. They have displayed a readiness to accept as legitimate those aims that are connected with the functioning of the labour market. It is not clear that they have relied upon good empirical evidence in reaching conclusions on the legitimacy of these aims, although there appears to have been a closer scrutiny of the appropriateness and necessity of the measures adopted to achieve the aims.

It does appear almost inevitable that the DRA will disappear at some point as an irrelevance based upon stereotypical assumptions of ageing. The complainants in the *Age UK* case stated that:

In conclusion, only a small minority of employers (particularly so in the private sector and among small business) apply mandatory retirement ages. Of these, few have clear business reasons for the practice that might explain why they would lose confidence if the legislation outlawed retirement ages (except where objectively justified). Fewer still have reasons that are clearly related to the Defendant's objective justification.<sup>68</sup>

Nevertheless, many people have lost their jobs and have been excluded from the labour market as a result of the adoption of the Age Regulations. This will continue until this major piece of statutory age discrimination is removed, as the newly elected coalition government has promised.

<sup>68</sup> Para 149 of Witness Statement of Andrew Harrop, on behalf of Age Concern England.