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RETIREMENT MATTERS

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Introduction

1. The likely reliability of my contribution to today's seminar can be gauged by the fact that the Employment Tribunal ("ET") in *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16 approached the matter in hand on a basis which was shown by the sister decision of the Supreme Court in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 to have been wrong. That was to equate the tests for justification where it is claimed that there has been indirect discrimination and where there is claimed direct age discrimination. *Homer* makes it clear that the test of justification for direct age discrimination is more difficult to satisfy.

2. What does this mean in practice? Well, I shall return to the practical implications below. Before I do so, it is likely to be helpful if I set out what the Supreme Court has decided in *Seldon*, and refer to the Supreme Court's take on the various cases which were cited to it. I then refer to several UK cases which have been decided so far and which might be useful indicators of how an ET is likely to approach a claim of unfair dismissal where the reason for the dismissal is claimed by the employer to have been retirement.

Seldon

3. What was *Seldon* about? The following passage from the judgment of Lady Hale (with which all of the four other members of the Supreme Court agreed; Lord Hope added a few of his own reasons as well) is a comprehensive but succinct statement of the position.

> '**The facts**
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> 6. Mr Seldon was born on 15 January 1941, qualified as a solicitor in 1969, joined Clarkson Wright and Jakes, the respondent firm, in 1971 and became an equity partner in 1972. He became the senior partner in 1989. He was also managing partner from 1989 to 1993. He reached the age of 65 on 15 January 2006.
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> 7. There had been a succession of partnership deeds over that period but all had provided for the mandatory retirement of partners at the end of the year in

which they reached the age of 65. Clause 22 of the deed adopted in 2005 provided:

> "Any partner who attains the age of 65 years shall retire from the Partnership on 31st day of December next following his attainment of such age (or on such later date as the Partners shall from time to time and for the time being determine.)"

The deed did not make any provision for the removal of underperforming partners or for the reduction of their profit share to reflect underperformance. The partners preferred to address these matters through discussion and agreement.

8. As he approached his 65th birthday, Mr Seldon realised that for financial reasons he would need to go on working in some capacity for another three years. Early in 2006 he made a series of proposals to his partners with a view to continuing to work as a consultant or salaried employee for another three years. These proposals were rejected by the other partners in May 2006 on the basis that there was no sufficient business case, but an ex gratia payment of £30,000 was offered as a goodwill gesture to reflect his long service with the firm. The Age Regulations came into force on 1 October 2006. Mr Seldon told the firm that he was seeking legal advice on the Regulations and the offer of an ex gratia payment was withdrawn. Mr Seldon automatically ceased to be a partner in accordance with the partnership deed on 31 December 2006.

9. He began these proceedings in March 2007, alleging that his expulsion from the firm was an act of direct age discrimination and the withdrawal of the offer of the ex gratia payment was an act of victimisation. The firm claimed that his treatment was justified. They put forward six legitimate aims:

> "29.1 ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm;
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> 29.2 ensuring that there is a turnover of partners such that any partner can expect to become Senior Partner in due course;
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> 29.3 facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise;
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> 29.4 limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the Respondent firm;
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> 29.5 enabling and encouraging employees and partners to make adequate financial provision for retirement;
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> 29.6 protecting the partnership model of the Respondent. If equity partners could not be forced to retire at 65, but employees (including salaried partners) could be, it would be preferable to keep lawyers at the Respondent as employees or salaried partners rather than equity partners."

It was made clear that the firm was not relying on the personal characteristics or any poor performance of Mr Seldon, nor were they relying on the structure of the wider market for legal services, but simply upon their own circumstances.

10. The Employment Tribunal ("ET") accepted that the firm did have the first, third and fourth of the claimed aims and that they were legitimate. Retention of associates was a legitimate aim for a firm "with a strategy for growth and the preservation of a reputation for the quality of its legal services" (ET [51.5]). The short and long term planning of the requirement for professional staff was facilitated by solicitors having, among other things, an expectation of when vacancies within the partnership would arise (ET [53.4]). The lack of a power to expel partners for under-performance was capable of contributing to the creation of a congenial and supportive culture among the partners (ET [54.8]. The tribunal were not persuaded that the firm actually had the second, fifth and sixth of the claimed aims: enabling all partners who stayed the course to become senior partner (ET [52.4]); encouraging partners to make financial provision for their retirement (ET [55.5]); or protecting the partnership model (ET [56.3]).

11. The ET also accepted that compulsory retirement was an appropriate means of achieving the firm's legitimate aims of staff retention, workforce planning and allowing an older and less capable partner to leave without the need to justify his departure and damage his dignity. The first two could not be achieved in any other way and introducing performance management would be difficult, uncertain and demeaning, so there was no non-discriminatory alternative to the third. Having balanced the needs of the firm against the impact of the rule upon the partners, the ET concluded that it was a proportionate means of achieving a congenial and supportive culture and encouraging professional staff to remain with the firm (ET [67]). The discrimination claim therefore failed but the victimisation claim succeeded.

12. The ET was not asked to consider whether any of those aims could be achieved by a different retirement age. The Employment Appeal Tribunal [2009] IRLR 267 appears to have accepted that the aims of staff retention and workforce planning could be met by any fixed retirement age. But there was no evidential basis for the assumption that performance would drop off at around the age of 65, and thus for choosing that age in order to avoid performance management and promote collegiality (EAT [77, 78]). As the EAT could not be sure what decision the Tribunal would have reached had it assessed the justification by reference only to the other two objectives, the case was remitted to the Tribunal to consider the question afresh (EAT [81]).

13. Mr Seldon appealed to the Court of Appeal, where the principal issues were the same as those before this Court. The appeal was dismissed: [2010] EWCA Civ 899, [2011] ICR 60.

The issues

14. The issues before this Court, as agreed by the parties, are three:

(1) whether any or all of the three aims of the retirement clause identified by the ET were capable of being legitimate aims for the purpose of justifying

direct age discrimination;

(2) whether the firm has not only to justify the retirement clause generally but also their application of it in the individual case; and

(3) whether the ET was right to conclude that relying on the clause in this case was a proportionate means of achieving any or all of the identified aims.

15. Both Mr Seldon and Age UK invite the Court to consider these issues having it firmly in mind that the purpose of all anti-discrimination legislation is to "address the mismatch between reality and past assumptions or stereotypes. In the context of age discrimination these assumptions have usually concerned age as a proxy for continuing competence or capability or financial security or intentions about work". These assumptions no longer hold good (if they ever did) in times of increasing longevity, where there are benefits both to individuals and to the wider society if people continue to work for as long as they can. Put simply, the younger generations need the older ones to continue to be self-supporting for as long as possible. So we should put such stereotypical assumptions out of our minds.'

4. What was the Supreme Court's answer? In fact, it simply approved the Court of Appeal's approach, which was to approve that of the Employment Appeal Tribunal. Along the way, though, the Supreme Court gave guidance. The specific answers to the questions posed above were these:

(1) Yes; all three aims were legitimate (see paragraph 67 of the judgment of Lady Hale).

(2) Not usually; but in exceptional circumstances it will be necessary to justify not only the rule but also its application to the individual in question (see paragraph 65 of Lady Hale's judgment).

(3) Not necessarily; the matter is remitted to the ET to consider whether the mandatory retirement age of 65 was "appropriate and necessary to achieving [the end of avoiding the need for performance management procedures]" (paragraph 62). Furthermore (ibid):

> "The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so."

Seldon guidance

5. So, does the Supreme Court's judgment clarify the situation: er, well, yes and no. Lady Hale set out (in paragraph 50) the following very helpful summary of the European Court of Justice ("ECJ") statements of principle.

> '(1) All the references to the European Court discussed above have concerned national laws or provisions in collective agreements authorised by national laws. They have not concerned provisions in individual contracts of employment or partnership, as this case does. However, the *Bartsch* case, mentioned at [2] above, did concern the rules of a particular employers' pension fund; and the *Prigge* case, [49] above, concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.
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> (2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (*Age Concern*, *Fuchs*).
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> (3) It would appear from that, as Advocate General Bot pointed out in *Kücükdeveci*, that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.
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> (4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims:
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> > (i) promoting access to employment for younger people (*Palacios de la Villa*, *Hütter*, *Kücükdeveci*);
> >
> > (ii) the efficient planning of the departure and recruitment of staff (*Fuchs*);
> >
> > (iii) sharing out employment opportunities fairly between the generations (*Petersen*, *Rosenbladt*, *Fuchs*);
> >
> > (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev*, *Fuchs*);
> >
> > (v) rewarding experience (*Hütter*, *Hennigs*);
> >
> > (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeniorforeningen i Danmark*);
> >
> > (vii) facilitating the participation of older workers in the workforce (*Fuchs*, see also *Mangold v Helm*, Case C-144/04 [2006] 1 CMLR 1132);

> (viii) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned (*Rosenbladt*); or
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> (ix) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs*).
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> (5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (*Hütter*, *Kücükdeveci*, *Ingeniorforeningen i Danmark*).
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> (6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (*Fuchs*).
>
> (7) The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (*Age Concern*).'

6. The following paragraphs of her judgment, apart from paragraph 51, are in reality in my view helpful in clarifying what can and cannot be taken into account by an ET, and point the way forward.

7. Before setting out those paragraphs, I note that Article 4(1) of the Directive which gave rise to the prohibition on age discrimination provides this:

> ". . . Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

8. This was the basis of the ruling of the ECJ in *Wolf v Stadt Frankfurt am Main*, Case C-229/08, [2010] IRLR 244, which concerned the maximum age applied by the employer there for the recruitment of fire-fighters (30). The German government in that case submitted unchallenged scientific evidence to the effect that very few people over the age of 45 have the physical capacity required to fight fires as a member of a professional fire-fighting service. In the circumstances, the maximum recruitment age of 30 was held to be lawful.

9. Paragraphs 52-62 of Lady Hale's judgment in *Seldon* are in these terms:

'52. In *Age Concern*, the Court recorded the submission of the EU Commission that in article 6, the focus is on the legitimate aim pursued by the member state, whereas in article 2(2)(b) the focus is on whether the employer can justify his employment practices [57]. The Court did not expressly approve that, but it did say that the scope of the two is not identical [58] and that article 6 is addressed to member states [67]. (It is also worth noting that in *Ingeniorforeningen i Danmark*, Advocate General Kokott pointed out that the objectives which might be relied upon to justify direct discrimination, whether under article 6(1), 4(1) or 2(5), were "fewer than those capable of justifying an indirect difference in treatment, even though the proportionality test requirements are essentially the same" [AG31].)

53. But what exactly does this mean in practical terms? On the one hand, Luxembourg tells us that the choice of social policy aims is for the member states to make. It is easy to see why this should be so, given that the possible aims may be contradictory, in particular between promoting youth employment and prolonging the working life of older people. On the other hand, however, Luxembourg has sanctioned a generally worded provision such as regulation 3, which spells out neither the aims nor the means which may be justified. It is also easy to see why this should be so, given that the priority which might be attached to particular aims is likely to change with the economic, social and demographic conditions in the country concerned.

54. In *Age UK*, Blake J identified the state's aim, in relation both to regulation 3 and to the designated retirement age in regulation 30, as being to preserve the confidence and integrity of the labour market. This is not an easy concept to understand, and there is a risk that it might be taken as allowing employers to continue to do whatever suits them best. But it is, as Advocate General Bot observed in *Kücükdeveci*, difficult to see how granting flexibility to employers can be a legitimate aim in itself, as opposed to a means of achieving other legitimate aims. Furthermore, the Secretary of State accepts that there is a distinction between aims such as cost reduction and improving competitiveness, which would not be legitimate, and aims relating to employment policy, the labour market and vocational training, which would.

55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.

56. Two different kinds of legitimate objective have been identified by the Luxembourg court. The first kind may be summed up as inter-generational fairness. This is comparatively uncontroversial. It can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing

limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers.

57. The second kind may be summed up as *dignity*. This has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance. Either way, it is much more controversial. As Age UK argue, the philosophy underlying all the anti-discrimination laws is the dignity of each individual, the right to be treated equally irrespective of either irrational prejudice or stereotypical assumptions which may be true of some but not of others. The assumptions underlying these objectives look suspiciously like stereotyping. Concerns about capacity, it is argued, are better dealt with, as they were in *Wolf* and *Prigge* under article 4(1), which enables them to be related to the particular requirements of the job in question.

58. I confess to some sympathy with the position taken by Age UK. The fact that most women are less physically strong than most men does not justify refusing a job requiring strength to a woman candidate just because she is a woman. The fact that this particular woman is not strong enough for the job would justify refusing it to her. It would be consistent with this principle to hold that the fact that most people over a certain age have slower reactions than most people under that age does not justify sacking everyone who reaches that age irrespective of whether or not they still do have the necessary speed of reaction. But we know that the Luxembourg court has held that the avoidance of unseemly debates about capacity is capable of being a legitimate aim. The focus must therefore turn to whether this is a legitimate aim in the particular circumstances of the case.

59. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. The ET, EAT and Court of Appeal considered, on the basis of the case law concerning indirect discrimination (*Schönheit v Stadt Frankfurt am Main*, Joined Cases C-4/02 and C-5/02, [2004] IRLR 983; see also *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213), that the aim need not have been articulated or even realised at the time when the measure was first adopted. It can be an ex post facto rationalisation. The EAT also said this [50]:
"A tribunal is entitled to look with particular care at alleged aims which in fact were not, or may not have been, in the rule-maker's mind at all. But to treat as discriminatory, what might be a clearly justified rule on this basis would be unjust, would be perceived to be unjust, and would bring discrimination law into disrepute."

60. There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place. Indeed, the national court asked that very question in *Petersen*. The answer given was that it was for the national court "to seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues" [42] (emphasis supplied). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation.

61. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.

62. Finally, of course, the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.'

Some guidance from the UK case law

10. Two decided UK cases are likely to be helpful here. One is that of the ET in *Hampton v Lord Chancellor* [2008] IRLR 258. The headnote describes the facts as follows:

"Mr P Hampton held the judicial office of recorder. He was retired from his role on 31 March 2007 because he had attained the age of 65.

Recorders were fee-paid judicial officer holders appointed pursuant to the Courts Act 1971. Fee-paid office holders were not appointed on a permanent basis but were paid for each day that they worked, as opposed to salaried judicial office holders, such as circuit judges or High Court judges, who were permanently appointed. A recorder's appointment was for a renewable period of five years, although the five-year term would be successively renewed, subject to the individual's agreement and the upper age limit, unless a question of cause for non-renewal was raised, or the individual no longer satisfied the conditions or qualifications for appointment.

Although the statutory retirement age for recorders was 70, the terms and conditions of service for recorders provided that the period of office would not be extended beyond the end of the financial year in which the recorder had reached the age of 65. That rule was introduced to create additional opportunities for others to sit, in order to create a larger pool of candidates for appointment to the salaried judiciary, since service as a recorder was generally a pre-requisite for appointment to a salaried position as a circuit or High Court judge.

It was the Lord Chancellor's policy that two years' service in a fee-paid capacity was normally required before an individual was appointed to any salaried judicial position. Applicants for such posts had to commit to a reasonable length of service, which ranged from two to five years depending on the post, with the result that the opportunities for recorders who were 65 or older to advance to a salaried post were severely limited or even nil. It was desirable that recorders who aspired for appointment as a judge obtain experience in sitting on the more demanding or difficult cases, but such work tended to be allocated to the older recorders, partly because they tended to be more readily available at short notice. On average, approximately 3% of recorders were appointed to the High Court or circuit benches a year. On that basis, it was estimated that a retirement age of 70 for recorders would reduce the pool of candidates for appointment to the salaried judiciary by between 17% and 24%.

Mr Hampton brought proceedings in the employment tribunal against the Lord Chancellor and the Ministry of Justice, complaining that his enforced retirement at the age of 65 constituted unlawful age discrimination, contrary to reg. 3(1)(a) of the Employment Equality (Age) Regulations 2006 SI 2006/1031, which implemented Council Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation). He accepted that a retirement age for judicial officer holders was necessary in order to preserve judicial independence, but he argued that the retirement age should be 70 and not 65. It was accepted by all the parties that Mr Hampton was an officer holder within the meaning of reg. 12 of the Regulations.

The respondents admitted that Mr Hampton had been treated less favourably than others on the grounds of his age, but submitted that the discriminatory treatment was justified as a proportionate means of achieving a legitimate aim within the meaning of reg. 3(1).

They argued that the imposition for recorders of a retirement age of 65 rather than the statutory maximum of 70 was necessary in order to maintain a reasonable flow of new appointments and a reasonable flow of candidates for posts in the salaried judiciary, both by permitting new appointees to begin judicial careers and by ensuring a sufficient supply of work to those who might progress to a salaried appointment, giving them the necessary experience.

...

The employment tribunal held:

The respondents had not shown that their discriminatory treatment of Mr Hampton was a proportionate means of achieving their legitimate aim.

...

In the present case, the respondents had not shown that the discriminatory treatment of Mr Hampton was a proportionate, ie reasonably necessary, means of achieving their legitimate aim of maintaining a reasonable flow of new appointments and a reasonable flow of candidates for posts in the salaried judiciary.

> One of the assumptions underlying their argument was that all recorders aged over 65 would remain in post until aged 70. There was no evidence in support of that assumption, and it was almost certain that the assumption was flawed. Moreover, the argument appeared to leave out of account the fact that there was on average a 3% decrease in the number of recorders, because that was the average percentage who were appointed judges. Each promotion created a vacancy, so that there would on average be a turnover of 3% a year.
>
> On the evidence, a retirement age of 70 would still leave a large pool of candidates, given that only 3% of recorders were appointed judges. There was no evidence that such a pool was unlikely to produce the suitable candidates. Furthermore, if a reduction in the number of vacancies were to have any effect, it was likely that it would lead to an increase in the quality of those appointed because the competition would be more intense. Steps could be taken to ensure that those in the pool of candidates were allocated to the right type of case for them to gain experience.
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> Accordingly, the discriminatory treatment could not be objectively justified and the age discrimination claim succeeded."

11. In *Baker v National Air Traffic Services Ltd* ET 2203501/07, there was an absolute bar on the recruitment of trainee air traffic controllers over the age of 36. It was argued on behalf of the National Air Traffic Services Ltd that there was a correlation between decline in cognitive functions and age. The judgment of the ET in that regard was revealing:

> "In general, if there are limitations brought on by cognitive decline, one might expect to find evidence of removal of validations in older operatives. The respondent was unable to find any evidence of a correlation between older individuals losing validations and age. In fact the evidence relied upon by Ms Baron [the respondent's expert] would tend to indicate that the more experienced individuals have fewer safety related incidents. There would appear to be no correlation between increasing age and increase of dangerous incidents."

Practical guidance

12. So, what can a school do in relation to retirements? First of all, the situation of teachers can be considered. They are entitled to take their pensions at the age of 60. However, not all teachers will wish to do so, and not all teachers will by that age have acquired the maximum pension rights which they can attain under the Teachers' Pensions Scheme.

13. What about imposing a retirement age of 66, or the age at which state pension is payable? Well, that would serve the need of workforce planning, but why would a teacher cease to be effective at that age rather than any other? It is usually the case that teachers cannot wait to retire, because the job is so stressful. If they want to work on, and there are no obvious capability issues,

it might well be best to let them do so. Perhaps there could be a maximum age of 68, like that in *Georgiev*. There, university professors were compulsorily retired when they reached 68 and could only work beyond 65 on one year fixed term contracts renewable at most twice, and that approach was held by the ECJ to be lawful provided that it pursued a legitimate aim linked to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations and that it made it possible to achieve that aim by appropriate and necessary means. The ECJ there held that since the average age of Bulgarian professors was 58 and younger people were not interested in entering the career, it was for the national court to decide whether these actually were the aims of the Bulgarian legislature. One wonders just how easy it was to justify the challenged legislation in the national court. I suspect that it will not have been easy to do so.

14. What about groundsmen/women? Or cooks? Or cleaners? Can a different view be taken in regard to them? I suspect not. I suspect that an employer would have to have some objective evidence linked to the recruitment and/or retention of workers of those sorts before a fixed retirement age could be adopted.

15. So, is there a practical solution? I think that there is. A standard (but not compulsory) age of retirement for each occupational area could be adopted, in order to give the employer an option of asking the employee whether or not the employee wants to work on past the standard age of retirement, so that the employee who is flagging a little and wants an excuse to go with dignity can do so, but the employee who wants to work on can do so. In that way, mutually agreed terminations of employment can take place.

16. On that basis, I would say that forced "retirements" should be imposed only on the ground of capability, which will of course be the real reason for the dismissal. In that regard the usual indignity of a forced dismissal through incapability will not be avoidable. But if there is an indicative age of retirement and capability proceedings are initiated, then the employee can say that he or she has decided to retire.

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