Age discrimination has been generating much excitement of late with a few long-awaited decisions coming through hot on each other's heels. Though dealing with some interesting points, what practical impact do these decisions have on employers?

As is frequently the case, the implications of the decisions we will discuss below turn on their individual facts, but there are definitely still lessons to be learned.

**Defence to discrimination**

Employers can argue a justification defence to direct and indirect age discrimination. Discrimination will only be justifiable if the employer is able to show that the discriminatory treatment is a "proportionate means" of achieving a "legitimate aim".

**Comparators**

Who is the correct comparator for the purposes of showing a "particular disadvantage" in a claim for indirect age discrimination?

In *Homer v Chief Constable of West Yorkshire Police* the employers introduced a requirement that to be graded at the top grade for legal adviser, and to receive the higher salary linked to that grade, an employee had to have a law degree. When the claimant had been appointed a law degree was not a requirement of the job. He argued that this was indirect age discrimination because someone in his age group would not be able to finish the course and obtain a degree before reaching the employer's normal retirement age (65).

The EAT and the Court of Appeal both held that there was no indirect age discrimination because someone in his age group would not be able to finish the course and obtain a degree before reaching the employer's normal retirement age (65).

The EAT and the Court of Appeal both held that there was no indirect age discrimination because the criterion did not place those in the claimant's age group at a particular disadvantage. They reasoned that whatever the employee's age was when the criterion was introduced, he would have failed to achieve the top grade until he obtained the degree. In addition, any particular disadvantage suffered resulted not from age discrimination, but from his impending withdrawal from the workplace, and the same disadvantage would affect anyone else who also stopped working before qualifying.

The Supreme Court disagreed, holding that it was not valid to compare those who had a choice in the matter to those who were "running up against the buffers of a mandatory retirement age" as their circumstances were materially different. As the circumstances of the comparator must not be materially different to those of the complainant, it was not appropriate to compare someone leaving work voluntarily with someone leaving out of compulsion.

**What constitutes a legitimate aim?**

*Seldon v Clarkson Wright and Jakes* involved a partner in a law firm, not an employee, so what was then the default retirement age did not apply. The firm had a retirement age for partners of 65 which it justified on the grounds that it avoided the indignity of forced retirement of those who were underperforming, and that it improved staff retention of younger employees.

The Supreme Court held that the justification tests for direct and indirect discrimination are not the same. It held that the test of justification must be read in conjunction with ECJ decisions, where direct age discrimination can only be justified by reference to legitimate aims which are "social
policy objectives”, and not simply reasons which are particular to an individual employer’s or firm’s situation.

In Seldon two different kinds of legitimate social policy objective had been identified; inter-generational fairness, and dignity. Inter-generational fairness can include facilitating access to employment by young people, and enabling older people to remain in the workforce. Dignity covers the need to be able to dismiss older workers without proceeding on the ground of underperformance, thus preserving their dignity by avoiding humiliation and costly and divisive disputes.

Following Seldon an employer may be able to justify compulsory retirement on the basis that their legitimate aims are inter-generational fairness and/or dignity. However, a cautious approach should be taken. Lady Hale noted “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”. As a result employers might struggle to show that a compulsory retirement age based solely on the aim of dignity is proportionate.

An employer must also be able to show that the legitimate aims it seeks to rely on are relevant to its individual circumstances. For instance, as Lady Hale pointed out “avoiding the need for performance management may be a legitimate aim [dignity], 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”.

In HM Land Registry v Benson the claims for indirect age discrimination arose out of a voluntary redundancy exercise, with the employer saying that it could not release everyone because it had a limited budget (a budget of £12 million to support early retirement and early severance schemes). As a result, applications from employees between 50 and 55 (who would have been entitled to early retirement on an unreduced pension) were disproportionately rejected on grounds of cost.

Here the aim was difficult to characterise. It could be to reduce the number of applicants at a cost which came within the £12 million budget, or to reduce headcount so that the employer’s costs did not exceed its revenue. The EAT found that it was legitimate for the employer to seek to break even and to make redundancies, supported by voluntary redundancy or early retirement schemes in order to achieve this. It was also legitimate to impose a budget on the amount to be spent on such schemes, even if that meant that selection had to be made between the applicants. Any discriminatory impact would be the result of the particular selection criterion chosen rather than the aim being pursued.

Proportionality

An employer may be able to identify a legitimate aim, but it must also establish that the means of achieving that aim is proportionate.

In Seldon the law firm was found to have established a couple of legitimate aims, but the Supreme Court remitted the issue of whether the retirement age of 65 was proportionate to the tribunal. It held that the question for the tribunal to ask was whether compulsory retirement at 65 was “appropriate and necessary”.

The Supreme Court also suggested that the tribunal might wish to consider whether the choice of a retirement age of 65 was a proportionate means of achieving the aims, as “there is a difference between justifying a retirement age and justifying this retirement age”. It remains to be seen whether the employer’s retirement age of 65 will be proportionate when it could have chosen a less discriminatory age of, say, 67 or 70.

Has justifying compulsory retirement become any easier for employers? Unfortunately Seldon doesn’t go that far, in fact if anything it’s a course of action which should be approached with caution in light of Lady Hale’s statement that “all businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified”.

As discussed above in Benson, although the budgetary restraint in the voluntary redundancy programme was disproportionately disadvantageous to employees in the 50 to 54 age group, the tribunal had found that as no other satisfactory method of selection had been shown to be possible, it was inevitably justified.

The EAT rejected an argument based on the decision in Pulham v London Borough of Barking and Dagenham where the EAT had held that employers “cannot automatically justify a failure to eliminate discrimination by allocating the costs of doing so to a particular budget and then declaring the budget to be exhausted”. Pulham was a case of a directly discriminatory pay practice which the employer wished to continue on the basis that it would cost too much to eliminate. In Benson the budget was for a particular project (i.e. the redundancy programme) that was not indirectly discriminatory but which required a selection exercise.
that could only practicably be done on an indirectly discriminatory basis.

The EAT’s decision does not mean that the use of similarly discriminatory criterion will necessarily be justified in other cases. The EAT was not sure that the tribunal’s decision that the employer had no real alternative to using the criteria it had (i.e. selecting the cheapest voluntary redundancy applicants) had necessarily been inevitable, and suggested that evidence in other cases might produce a different result.

**What role do costs have to play in justification?**

It may seem that confusion surrounding the issue of costs as justification for a discriminatory practice continues (given the decision in Benson), but clarification has been received following the Court of Appeal's decision in *Woodcock v Cumbria Primary Care Trust*.

In *Woodcock* the central issue that the Court of Appeal had to explore was when is the cost of not discriminating a justification for discriminating? In this case the EAT held that the Trust had established that it was justified age discrimination to dismiss the claimant on grounds of redundancy so as to avoid his eligibility for early retirement, thereby saving between £500,000 and £1 million. A notable feature of the case is that Mr Woodcock knew for some time that he was liable to be made redundant and it could be said that he would have received a windfall if he was not dismissed before becoming eligible for early retirement.

The Court of Appeal held that Mr Woodcock’s treatment by the Trust could not be characterised as being no more than treatment aimed at saving or avoiding costs. His notice of dismissal had been served to give effect to the Trust’s genuine decision to terminate his employment by reason of redundancy. The dismissal of an employee on such grounds was a legitimate aim, and it was a legitimate part of that aim for the Trust to ensure that it saved the extra cost that, had it not timed the dismissal as it did, would have been incurred.

Following the decision in *Woodcock* it is clear that cost alone cannot be a justification for discriminating, but it can be a factor. As the Court pointed out, almost every decision taken by an employer is going to have regard to costs. However, employers should be wary of dismissing workers in order to avoid incurring additional pension liability. The Court of Appeal noted that the Trust had already been over-generous to Mr Woodcock (he only wanted a chief executive position and wouldn’t take a lesser role, he’d known he could be redundant for 10 months and was paid a large redundancy payment) and that, in the ordinary run of things, he had no legitimate expectation of the enhanced pension with the result that it would be an undeserved windfall.

It is also worth noting the EAT’s decision in *London Borough of Tower Hamlets v Wooster*. Here a 49-year old employee suffered unlawful age discrimination in light of evidence that the reason for a failure to redeploy him when a secondment came to an end was to ensure that he did not become entitled to an early retirement pension when he reached his 50th birthday. The original tribunal attached significant weight to the council’s comment that “If he goes now we do save the pension”.

The EAT noted that Mr Wooster was an experienced administrator, with a good record, working for one of the largest local authorities in London and willing to accept a demotion if necessary. In those circumstances there was nothing outlandish in a finding that, had he been fairly treated, he would have obtained one of the 16 suitable jobs identified in the course of his evidence, or another similar job.

**Justification and non-discriminatory alternatives**

In the *Homer* decision discussed above, the Supreme Court remitted the question of whether or not the police were justified in imposing a degree requirement to fulfil their legitimate aim of recruiting and retaining the best staff back to the tribunal.

Although it was not disputed that the recruitment and retention of sufficiently high-calibre staff was a legitimate aim, it was necessary to distinguish between
the justification of the criteria for entry to higher pay grades. The recruitment and retention of staff were different legitimate aims which might call for different measures, and the issue of whether non-discriminatory alternatives were available should be taken into account. The Supreme Court noted that clauses preserving the status, salary and benefits of existing staff are not uncommon when salary structures are revised.

In conclusion....

Here are various points which employers should take on board:

Direct age discrimination can only be justified via "social policy objectives";

Legitimate aims must be relevant to an employer's individual circumstances;

Dismissing workers to avoid incurring additional pension liability will be discriminatory and hard to justify;

Careful consideration should be given to the justification behind any compulsory retirement;

Always consider non-discriminatory alternatives to the requirements you impose to fulfil a legitimate aim; and

Costs can only be a factor in a justification argument and must not be the sole reason for the discriminatory practice.