Appeal No. UKEAT/0434/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 May 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR L J SELDON — APPELLANT

CLARKSON WRIGHT & JAKES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RICHARD O'DAIR (of Counsel) Direct Public Access Scheme
For the Respondent	MR THOMAS CROXFORD (of Counsel) & MS EMILY NEILL (of Counsel) Instructed by: Messrs Clarkson Wright & Jakes LLP Solicitors Valiant House 12 Knoll Rise Orpington Kent BR6 0PG

SUMMARY

AGE DISCRIMINATION

The Claimant alleged age discrimination against him because he had to retire at 65 from the solicitors' practice ("R") in which he had been a partner. R was held by superior courts to have legitimate aims which it was appropriate to achieve by applying a rule requiring retirement at a fixed age - namely, retention of associate solicitors, workforce planning, and "congeniality" (not blighting the inter-personal atmosphere by challenging a partner with evidence of declining performance at a time in his life when it might be more likely). The issue for the Employment Tribunal was whether the age of 65 was reasonably necessary to achieve this. It held it was. That decision was held to be within its entitlement to make - the fact that it could have been set a year later did not mean it was wrong in law to fix it at 65, which fell within a narrow range identified as proportionate (64 - 66) and it was appropriate to take into account other considerations such as the legislation at the time, and the default retirement age, in setting it at that point within the range.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

The facts

1. There is a long history to this case, well known to employment lawyers. The story began as long ago as 31 December 2006 when Mr Seldon, formerly a partner and, for a while, managing partner in a firm of solicitors, was compelled by reasons of his age and the provisions of the partnership deed to take retirement. He complained that he had been discriminated against on the grounds of age. There followed a hearing before the Employment Tribunal, judgment in which was given on 4 December 2007; an appeal to the Appeal Tribunal [2009] IRLR 267, judgment in which was given on 19 December 2008; in turn followed by an appeal to the Court of Appeal [2011] ICR 60, where judgment was given on 28 July 2010; and then onto the Supreme Court [2012] UKSC 16, where judgment was given on 25 April 2012.

2. Save in one respect the Claimant failed at every turn to establish that he had been discriminated against on the ground of age. That one respect was that in the Employment Appeal Tribunal the Tribunal, chaired by the then President, Elias J, concluded that part of the reasoning of the Employment Tribunal employed a stereotypical assumption as to there being an age at which there would be declining performance and that that might invalidate the choice of 65 as the retirement age. The matter returned, following the Supreme Court hearing, to the Employment Tribunal. It gave its decision for reasons delivered on 14 May 2013, consisting, as it did before, of Employment Judge Salter, Mr Pearson MBE and Mr Lane.

3. It is now 13 May 2014. It may be pause for some reflection that as simple an idea as eliminating age discrimination should, after eight years, still be unresolved in this case. The many broad issues of principle have, however, been determined along the way. Thus, the issue which the Tribunal of 2013 had to determine, as remitted originally by the Appeal Tribunal in 2008, was:

> **"whether on the basis of the EAT, Court of Appeal and Supreme Court judgments, the retirement provisions in the Respondent's partnership deed was (sic) justified in all the circumstances."**

4. It is unnecessary for me to set out all the detail and all the law considered by the Supreme Court, the Court of Appeal and the EAT before. I could add nothing which would make a contribution to the law that they have described. Summarising, though broadly, the effect of their decisions was that in applying the Directive 2078 EC and the **Employment Equality (Age) Regulations 2006** direct discrimination on the grounds of age was capable of objective justification. Regulation 3 of the **2006 Age Regulations** defines the matter in this way:

> **(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —**
>
> > **(a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons […]**
>
> **and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim."**

5. In the Supreme Court Lady Hale's judgment shows that the aims which might be legitimate were those which, again viewed broadly and generally, sought to achieve inter-generational fairness or dignity at work. In the particular circumstances of this case, the three aims which the partnership had were found to be actual aims and legitimate in relation to providing there should be a retirement age of 65. Those aims which the provision sought to achieve were retention:

> **"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;"**

workforce planning:

> **"facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise;"**

and congeniality:

> **"limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm."**

6. The issue as it has now reached this Appeal Tribunal has focused upon one central issue, that is whether the age could lawfully and properly be chosen as 65 rather than some other less discriminatory age.

7. The Tribunal reviewed the judgments of the courts which went before it because the parties had been in dispute about what they meant. Broadly, the Tribunal agreed with the Respondent's submissions.

8. At paragraph 35 it set out that having concluded that there was no alternative to achieve the retention and planning aims, other than mandatory retirement, it should proceed on the basis that the issue to be determined was whether or not the selection of the mandatory age to achieve those two aims was proportionate or whether, as the Claimant argued, a different age, such as 68 or 70, should have been selected as being less discriminatory. The collegiality justification for a rule requiring retirement at 65 was not actively promoted by the Respondent before the Tribunal.

9. The Respondent had indicated at the Case Management Discussion prior to the hearing that it did not intend to rely upon collegiality as a justification for the age chosen. It intended to rely only upon the other two aims. The Tribunal noted that at that stage counsel for the Claimant conceded that the mandatory retirement age was justified in relation to those two aims

but not in relation to collegiality. He maintained that a higher mandatory retirement age, appropriate and necessary to achieve collegiality, should be applied to achieve the other two aims. That concession was later withdrawn.

10. The hearing thus proceeded upon the basis that seeking retention and workforce planning were legitimate aims. The effect of the judgments of previous courts was that it was appropriate that that should be achieved by a provision which specified a retirement date. The question before the Tribunal was whether the choice of date, the 65th birthday, was appropriate and necessary: in effect, whether that was a proportionate choice.

The legislation

11. Having reviewed the evidence in part which had been given before the same Tribunal back in 2007, and referred generally to all the evidence which it had then had before it, together with some additional factual evidence which the Judge referred to at paragraphs 44 to 47, the Tribunal turned to review the law. It set out concisely between paragraphs 48 and 60 the propositions it drew from the various decided cases, including the appeals in this particular matter, but extensively referring to European authority. Reference to **Seldon** in the Supreme Court was itself reference to the European authorities, so far as relevant, because they were extensively set out and discussed in the judgment of Lady Hale. There is no criticism of any of those statements of principle.

12. In reviewing those cases in the course of his submissions both on paper, and orally, Mr O'Dair for the Claimant heavily emphasised the reference repeatedly made by Baroness Hale to justification having to be rendered in the context of the needs of the particular business concerned. He referred to **Seldon** in the Supreme Court as having been a game changer. This meant that a Tribunal had to concentrate on the evidence relating to the business

itself in order to show that a particular age was proportionate and necessary and could not really upon generalities. This cannot, as Mr Croxford points out in writing, avoid the conclusion (and indeed necessarily implies) that discrimination in this field as in others is heavily fact-sensitive. I agree.

13. The judgment and the assessment by a Tribunal of what is necessary in order to appropriately fill a legitimate aim is to be approached on standard principles on appeal. It is only if an appeal court can identify an error of law that it is entitled to interfere with a decision which has the status of a finding of fact. There is here no argument about any statement of law made by the Tribunal, nor sensibly could there be since the great issues arising from the earlier decisions in this case have all been dealt with by higher courts. There remains simply a question of factual assessment and whether the Tribunal erred in law in its approach to that assessment.

14. The Tribunal dealt with the scope of that assessment in its summary of the law at paragraph 51 when it said this:

> **"'Necessary' is to be qualified by the adjective 'reasonably' but the presence of the word 'reasonably' reflects the applicability of the principle of proportionality and does not permit the margin of discretion or the range of reasonable responses (*Hardy & Hansons plc v Lax* (2005) IRLR 726). The employer does not have to show that no other proposal is possible but that the means is justified objectively notwithstanding its discriminatory effect. The Tribunal has to take account of the reasonable needs of the business and to make its own judgment whether the proposal is reasonably necessary based upon a fair and detailed analysis of the working practices and the business considerations."**

15. With that in mind, the Tribunal dealt with the aim of retention at paragraph 76 and that of workforce planning at 77 to 78. In doing so, it had in mind, because it had earlier said so, the evidence which had been given in its earlier judgment, a judgment, which save in the one respect I have identified, enjoyed the unanimous approval of the higher courts. Then in the light of that at paragraph 79, under the heading "The age of 65" the Tribunal said this:

> **"The Tribunal considered whether the selection of the age of 65 as the mandatory retirement age was appropriate and reasonably necessary to achieve each of the two aims. The age had been in the partnership deed for as long as could be remembered and the clause was retained in the most recent partnership deed without discussion. It was an age that the Claimant described as a reasonable target. It was not an age with which any of the partners had expressed any disagreement. The partners, including the Claimant, were in an equal bargaining position when they consented to the inclusion of the rule."**

16. This reflects earlier evidence which led Baroness Hale in the Supreme Court to suggest that the partners had renegotiated the partnership deed. The evidence referred to earlier was that there had been no active discussion about it, though there could have been, and it had been up to the partners had they wished to do so to have discussed the age, to have taken into account the impact upon them as partners and the firm, and that this had happened as recently as 2005 just, therefore, a year before the Claimant was retired.

17. The Tribunal went on at paragraph 80 to say this:

> **"80. The partners might have selected another age whether below or above the age of 65. The fact that a higher or lower retirement age could have been agreed does not mean that the age selected was not appropriate and reasonably necessary (see the judgment of the Court of Appeal). The aims were to assist the retention of associates and facilitate planning. It is not, in the view of the Tribunal, correct to argue that *any* retirement age would achieve the two aims. The retirement age has to be not so high as to discourage associates who may otherwise leave and join a firm where the opportunities for partnership are more immediate. Nor must it be so low that the associates become concerned (a) about partners being required to retire before the end of their careers and continuing to practise elsewhere with the consequential loss to the partnership of their goodwill and connection and/or (b) that the duration of partnership would not meet their expectation or (c) that there might be insufficient time as partners to make proper provision for retirement. Planning will be facilitated by reference to the dates upon which partners are bound to retire and the matters referred to above in relation to the retention of associates apply. Planning the future cannot be achieved by any retirement age. The age must be such that the aims of the partnership are fulfilled not only in the provision of legal services but also in the progression of younger solicitors to provide and extend such legal services.**
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> **81. There has to be a balance between the needs of the firm and of the partners and of the associates. Partners are to be encourage to spend their professional lives with the firm with a view to establishing a successful and continuing legal practice but not to an age where succession cannot be assured and associates will lose interest and leave. It does not follow that there is but one age that fulfils such aims. There is a narrow range of ages that will do so. So, for example, the partners might have selected the age of 64 or 66 as reasonably necessary to achieve the two aims. In such circumstances the Tribunal had also to consider other factors that contribute to the selection of the mandatory retirement age in order to determine whether the age was also appropriate."**

I note the word 'also'.

18. The other factors it took into account were (i) the consent of the partners: the agreed default retirement age, which at the time of retirement was 65, when salaried partners and associates could be required to retire. (ii) The Claimant, in evidence, described it as anomalous that partners might retire beyond the retirement age that applied to salaried partners and associates; and the Tribunal made the point that a mandatory retirement age for partners higher than the age at which associates could be required to retire was unlikely to achieve the legitimate aim, indeed, might have the opposite effect. (iii) State Pension Age. (iv) Regulation 30, which at that time was applicable. (v) The fact that the European Court of Justice had in a number of different cases upheld the retirement age of 65. (Those cases include that of **Palacios de la Villa v Cortefiel Servicios SA** (Case C-411/05) [2007] IRLR 989, **Rosenbladt v Oellerking GmbH** (Case C-45/09) [2011] 1 CMLR 32, **Fuchs and another v Land Hessen** (Joined Cases C-159/10 and C-160/10) [2011] 3 CMLR 47 and **Georgiev v Technicheski Universitet – Sofia, filial Plovdiv** (Joined Cases C-250/09 and C-268/09) [2010] All ER (D) 25). Finally, (vi) the Tribunal took into account the finding that mandatory retirement at the age of 65, it must be implied, achieved the aim of collegiality.

19. Accordingly, in its conclusions the Tribunal said:

> **"90. A mandatory retirement age to achieve the two aims has to be a balance between the interests of the practice, the partners and of associates who aspire to partnership. Any determination has to weigh up the needs of the partnership against the harm caused by the discriminatory treatment. In addition to the matters referred to in paragraph 80 above, the Tribunal took account of the fact that the lower the retirement age the more harm to the partners who are required to retire and the higher the retirement age the more harm to the associates who may leave. The age has also to reflect that the Respondent needs to be able to plan for its future and that such plan has to ensure that there are partners in place with relevant experience to ensure the future of the practice and its various practice areas. In short the age has to reflect the expectations of the partners and associates, ensure succession and fulfil the needs of the partnership.**
>
> **91. The Tribunal has found that there is a narrow range of ages any one of which would achieve the two aims. In concluding that the age of 65 was proportionate the Tribunal has taken into account the factors (which I have just mentioned) […] and in particular that the partners had consented to the mandatory retirement age and that the default retirement age at the relevant time was 65. The Tribunal was supported by the judgment of the Court of Appeal and its conclusion that (a) the age of 65 was a fair and proportionate cut off date in**

> **relation to the two aims and (b) the selection of one of a number of possible ages was not of itself unlawful.**
>
> **92. While the position might be different if the relevant date had been after the abolition of the default retirement age and after the planned changes in the state pension age, the Tribunal is satisfied that the mandatory retirement age is appropriate and reasonably necessary for the achievement of each of the two aims and finds that on the basis of the judgments of the EAT, the Court of Appeal and Supreme Court, the retirement provision of the Respondent's partnership deed was justified in all the circumstances."**

20. Five ground of appeal are pursued against that decision.

The first ground of appeal

21. The first ground argues that there is a principle that where there is a provision which would achieve the legitimate aim with less discriminatory impact than the measure relied upon, then the measure relied upon cannot be justified. The Tribunal erred in excluding the question of justifiability of the particular age chosen by the Respondent for retirement. The Claimant's case had been that either 68 or 70 would be an age which would have served just as well. The particular age was in issue throughout the proceedings. It could not have been otherwise, since the age selected by the Respondents was 65, but it is right to say that there was far less emphasis in the earlier hearings on the precise age as opposed to the argument that there could be no mandatory retirement age at all, which was for a while the Claimant's primary case.

22. The Tribunal had identified the Court of Appeal as disposing of the first ground. The Respondent through Mr Croxford, Queen's Counsel, who appears with Ms Neill on this appeal, submits that the Court of Appeal decision was not controverted by the Supreme Court; it deals clearly with the point; it was raised as ground number five before the Court of Appeal (see [2011] ICR 64 against letter E) and in dealing with the choice of 65 as the age Sir Mark Waller, with whom Hughes and Laws LJJ agreed said:

> **"38. There is a distinction between a cut-off date in relation to the 'dead men's shoes' aims, and the 'collegiality aim'. Under-performance as a result of age is not relevant to 65 being chosen as a cut-off to encourage recruitment or long-term planning. That being so it seems to**

me that the mere fact that the firm might have chosen some other age in relation to those aims cannot automatically lead to the conclusion that the rule which provides for retirement at 65 is not justified. A rule which adopts 66 is less discriminatory to partners aged 65, but is now more discriminatory to partners aged 66. The selection of any age is going to be more discriminatory to that age. If that makes the rule unlawful, it would simply be impossible to justify a retirement age introduced with those aims. Directive 2000/78 (recital 14) seems to contemplate the legitimacy of a retirement age and it cannot thus have envisaged that it would be impossible to justify one age because a different age would be less discriminatory to persons of the age chosen.

39. The question is whether the clause introduced with the legitimate aims is a proportionate means of achieving those aims. If it is proportionate to choose 65, the fact it would be less discriminatory to some to have chosen 66 cannot in my view render the clause unlawful. It is true there was no evidence as to whether it would have made any difference to associates or others whether the age chosen had been 68, 65 or 63. But in my view the fact the firm might have justified any one of those ages does not mean that it is unable to choose one at all. The choice of 65 when regulation 30 actually renders lawful 65 in the employer/employee context must support the choice of 65 as a fair and proportionate cut-off point."

23. Lady Hale made it clear, paragraph 62 of her judgment in the Supreme Court, that it was one thing to say that the aim of achieving a balanced and diverse workforce was appropriate and necessary and another to say that a mandatory retirement age of 65 was appropriate and necessary to achieving that end. It is one thing to say that the aim to avoid the need for performance management procedures was legitimate and another to say that a mandatory retirement age of 65 was appropriate and necessary to achieving it. She observed that the means had to be carefully scrutinised in the context of the particular business concerned in order to see whether they did meet the objective and whether there were not other less discriminatory measures which would do so. Mr O'Dair founds himself upon those last remarks.

24. It was said on his behalf that it would be less discriminatory, insofar as the Claimant was concerned at any rate, if the age were older. He argued for a specific age of 68. He also argued that by envisaging a range of possible retirement ages which might have been justified, the Tribunal fell foul of the principle expressed in **Hardy and Hansons Plc v Lax** [2005] ICR 1565. There it had been argued, in relation to a refusal of part-time working, that the range of reasonable responses was to be applied when determining objective justification. In the judgment of Pill LJ at paragraphs 31 and 32 that was rejected.

25. However, as Mr Croxford points out, Pill LJ did not go so far as to say that there was only one solution to a particular problem which might be justified as necessary. He recorded the argument of counsel for the successful Claimant as being that the test did not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. It was for the Employment Tribunal to weigh the real needs of the undertaking expressed without exaggeration against the discriminatory affect of the employer's proposal. At paragraph 32 he said:

> **"[…] That qualification (that is the use of the word reasonably) does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal […] is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."**

26. In my view the Tribunal was entitled to conclude that 65 was an appropriate age. The fact that it might, in the words of Sir Mark Waller or in the Tribunal's own words, have identified a different date within very much the same age range but which was slightly later does not mean that there was an error of law. I reach that conclusion for these reasons. First, I accept the point which the Tribunal took, and which is made to me by Mr Croxford, as to the effect of the Court of Appeal decision. Second, the word "necessary" is qualified by the word "reasonably". This qualification is essential if one is looking for a particular age. As is obvious, if it were to be said that a day later than a given age would discriminate less, as it would if the interests of the retiree were to be considered, it would therefore be wrong in law not to take a day later as the date: and if a day later still, the same would apply - but then as a matter of principle it would seem that no date could be chosen lawfully because any date would

be capable of being rendered unlawful by the argument that a slightly later date would serve just as well.

27. Yet, the effect of the judgments of the superior courts thus far has been that it is entirely appropriate to meet the legitimate aims of this employer that there should be an age. An age is necessarily expressed as one point in time. The issue for the Tribunal is to determine where a balance lies: the balance between the discriminatory effect of choosing a particular age (an effect which, as the Tribunal noted, may work both ways, both against someone in the position of the Claimant but in favour at the same time of those who are associates, and thereby in the interests of other partners, whose interests lie in the success of the firm and its continued provision for them) and its success in achieving the aim held to be legitimate. That balance, like any balance, will not necessarily show that a particular point can be identified as any more or less appropriate than another particular point. This is not to accommodate the band of reasonable responses rejected in **Hanson** but to pay proper and full regard to its approach to what was reasonably necessary, given the realities of setting any particular bright line date.

The second ground of appeal

28. The second ground was that the Tribunal erred in law in finding for the Respondent even although the partners, who bore the burden of proof, did not provide an explanation of why retirement at 65 was necessary. As Mr O'Dair emphasised in his final submissions, the Tribunal in giving its reasons for rejecting his client's case did not identify any headline fact which showed that 65 rather than another age was the place at which to set the balance. The fact he would be looking for was not one deriving from extraneous considerations such as the default retirement age or decisions of the European Court, which had in their own particular circumstances upheld ages of 65, but evidence relating to the particular circumstances of the firm. Sir Mark Waller at paragraph 39, as I have quoted, referred to there being no evidence.

29. This is an argument, in effect, that the Tribunal could not come to the conclusion that it did because no evidence had been put forward by the partnership which could justify the decision. As Mr Croxford points out, the dismissal of the Claimant's appeal to the Supreme Court is inconsistent with any suggestion that there was insufficient evidence. In what she said, Baroness Hale made it plain that it might be open to the Tribunal to hold on the material before it that 65 was an appropriate age. At paragraph 68 she said this:

> **"As to whether the means chosen were proportionate, in the article 6(1) sense of being both appropriate and (reasonably) necessary to achieving those aims, the case is already to go back to the ET on the basis that it had not been shown that the choice of 65 was an appropriate means of achieving the third aim. The question, therefore, was whether the ET would have regarded the first of two aims as sufficient by themselves. In answering that question, I would not rule out their considering whether the choice of a mandatory age of 65 was a proportionate means of achieving the first two aims. There is a difference between justifying a retirement age and justifying *this* retirement age. Taken to extremes, their first two aims might be thought to justify almost any retirement age. The ET did not unpick the question of the age chosen and discuss it in relation to each of the objectives. It would be unduly constraining to deny them the opportunity of doing so now. I would emphasise, however, that they are considering the circumstances as they were in 2006, when there was a designated retirement age of 65 for employees, and not as they are now."**

30. In seeking to show specific evidence which shows a particular choice of age as appropriate the evidence may not always be as strong and compelling as it is in other areas, so argues Mr Croxford. That in part is because of the inevitable spectrum of speculation around the effect of altering the age from one figure to another. In dealing with concepts such as retention and workforce planning he is inevitably correct. They depend upon assumptions and estimates as to how people will act or react, not in general labour force terms such as might be the subject of expert evidence, though in part those are appropriate, but in relation in particular to the personalities and practice with which a firm is concerned. That is inevitably going to be reflected in the evidence of witnesses who say what happened at that firm and give their own views as to the situation.

31. The requirement that the Tribunal say why 65 was necessary is not addressing the question of why 65 was chosen and whether it was reasonably necessary as a means of addressing the legitimate aim the employer had. That is because once it is accepted, as it is, that a date is appropriate, the only questions are which date, and what particular factors may argue in support of that date as opposed to some other; the object being to avoid discrimination, but balancing the discriminatory effect against the objective aims.

32. Here the Tribunal did have some evidence. I do not accept that it was restricted simply to the paragraphs which I have cited from 79 to 81. It had dealt with the evidence in summary at paragraphs 76 to 78; it had referred back to the evidence which it had accepted during its first sitting in 2007. An argument that there is no evidence to support a particular conclusion means that there must be no evidence at all. I do not accept that even upon the basis that there was limited evidence the Tribunal would be disentitled from coming to the conclusion it did. But, more than that, at paragraph 80, as it seems to me, the Tribunal was implicitly taking into account its own view of the labour market and the world of employment. Mr O'Dair argues that the observations made there are hopelessly general. I do not agree. They refer in context to this particular firm and, therefore, to the evidence that there had been about this particular firm. The conclusion at 81 is generally expressed but appropriately so. It sets out the rival considerations. It has often and rightly been said that a Tribunal does not have to dot every 'i' nor cross every 't'. It summarised its views here. It was not inappropriate that it should do so. There was, in my view, no error of law in reaching the conclusion it did.

33. In passing I should mention that I was taken to the case of the **Commission v Hungary** (Case C-286/12) [2013] 1 CMLR 44 as being a case in which the European Court of Justice had found that there had been a failure to justify a retirement age of 62. That was, however, a case on very different facts from the one before me. Judges had been entitled to continue in work

until the age of 70. At paragraph 67 the court noted that they would have had a legitimate expectation that they would be able to remain in office until that age. The failure of the Government was to introduce sufficient transitional provisions which would have prevented the particular disadvantage caused to those who were appointed at a time when they had that expectation. This could easily have been done without affecting the achievement of the legitimate aim. That point is made at paragraph 68. The conclusion was that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reached the age of 62, which gave rise to a difference in treatment on the grounds of age, was not proportionate as regards the objective pursued. I do not think that case assists on the issue whether this case on its particular facts, having regard to the particular circumstances of this business, as the Tribunal plainly did, should have been determined other than it was.

The third ground of appeal

34. The third ground argued that it was an error of law to take into account as relevant the consent of the Claimant and others and the default retirement age. This is said to be perverse. As Mr Croxford points out, this argument is suggesting that it was perverse to follow a conclusion which the Supreme Court reached. In Lady Hale's judgment at paragraph 65 she recognised that the agreement of a party to a measure later affecting them was relevant. The Tribunal did not say it was decisive. It took account of the consent of the parties and the default retirement age in helping it to conclude that the choice of 65 was not other than reasonably necessary as an appropriate response to meeting the legitimate aim.

The fourth ground of appeal

35. In ground four it is said the Tribunal erred in law in paragraphs 82 to 88 in that it took account of irrelevant factors, they being the state pension age and the aim of collegiality. Reliance was placed upon the case of **Dansk Jurist-og Okonomforbund v Indenrig-og**

Sundhedsministeriet (Case C-546/11) [2014] IRLR 37. That was a case in which civil servants who had reached the age at which they were able to receive retirement pensions were solely for that reason denied entitlement to availability pay intended for civil servants who had been dismissed on the grounds of redundancy. The point there was not that the decision maker had wrongly taken account of state retirement age. It concerned the accessibility of the availability payment which would otherwise have been made and was only not made because of the age of some of those who would have received it. I do not consider this case has anything to offer in helping me to see whether this Tribunal erred by taking account wrongly of something they should not have done in reaching the decision which they did.

36. The position rather is demonstrated better by **Fuchs and another v Land Hessen** (Joined Cases C-159/10 and C-160/10) [2011] 3 CMLR 47. That considered three aims, they being to encourage the recruitment and promotion of young people, to improve personnel management and to prevent possible disputes concerning employees' fitness to work. A precise age was chosen, that being 65. It was held not inappropriate that that should be the case. In my view it is plain that in establishing whether one age is to be selected, from a very narrow range beyond which it would be inappropriate, it is not wrong in law to have regard to factors which assist with where it might be placed. I see the remarks of Lady Hale in the concluding paragraph of her judgment at 68 as saying just that.

37. The point about collegiality should not be misunderstood. The Tribunal did not take into account a conclusion that if regarded on its own an age of 65 would be necessary for achieving the collegiality aim. Rather, the point here was that there was nothing inconsistent with the aim of collegiality in choosing 65. To the extent it was, if it was, some years earlier than it might have been, nonetheless the same effect resulted. There would be no question here of performance management of the embarrassing type envisaged by the principal. It seems to me

appropriate that the Tribunal should have had regard to that not so much as setting the date but at least in satisfying itself that a different date need not be preferred.

The fifth ground of appeal

38. Finally I turn to the fifth ground, which was the significance of the collegiality aim. Much of what I have just said relates to this too. The argument on paper, not pursued orally before me, was that if a variety of ages would have done the job with regard to planning or associate retention, the only age which could be said to be reasonably necessary in the circumstances of this business was the one required by collegiality. Since the Respondent had failed to prove it its case failed.

39. I do not accept that this is so. The Tribunal was examining whether workforce planning and retention justified the age of 65. The question of collegiality was separate from and distinct from those two issues. There was nothing inconsistent in the conclusion that was reached about planning and retention. I do not see that this gives any ground for thinking that a careful and considered judgement by the Employment Tribunal, as this was, was to any extent in error.

Conclusion

40. The first instinct, as it seems, of the Claimant was to accept at the Case Management Discussion that the aims of retention and workforce planning objectively justified a retirement of 65. Viewed now, after argument, that attitude was appropriate. The Tribunal came separately to that conclusion without taking that concession into account other than to note that it had been made and withdrawn. It did so for reasons which amounted to a factual conclusion as to which there was some evidence in support. It did not take into account any inappropriate matter nor leave out of account anything which it should otherwise have taken into account. It came to a conclusion which was in line with the higher authorities which have so far considered

this case. Its statement of the law was, so far as it went, impeccable. In conclusion, this appeal must and does fail.