

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

At the Tribunal
On 12 & 15 March 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

THE NATIONAL UNION OF RAIL, MARITIME AND
TRANSPORT WORKERS (RMT)

APPELLANT

MR ANTHONY LLOYD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

AGE DISCRIMINATION

The Claimant was a member and branch secretary of the Respondent trade union. At the age of 62, he was nominated to stand for election to the Respondent's National Executive Committee for the requisite three-year term. His nomination was rejected by the Respondent on the basis of a rule in its Rulebook which did not allow nomination where the proposed candidate would if elected reach the age of 65 before the end of the three-year term. The Claimant presented a claim which included detriment on the ground of direct age discrimination, contrary to sections 57(2)(d) and 13 **Equality Act 2010**.

The ET rejected each of the alleged legitimate aims of the rule relied on by the Respondent pursuant to section 13(2); and in the alternative held that the means were disproportionate to any such aims.

The Respondent appealed in respect of three of the alleged aims, namely intergenerational fairness, efficient planning and consistency with its long-established policy of campaigning to lower the retirement age. As to the first two aims, it contended in particular that the ET had taken account of matters which were only potentially relevant at the stage of assessing proportionality. These included findings that (i) the rule had in fact failed to advance younger members in respect of NEC membership and that (ii) the stated aim of effective planning was at odds with the comparative rules in respect of the nomination of paid officials for re-election. As to consistency with policy on reducing retirement ages, the ET had rejected this by a circular argument. As to the alternative decision on proportionality, the decision was based on no more than an assertion and/or was not **Meek**-compliant.

The EAT dismissed the appeal, holding in particular that (i) the ET had been entitled to take account of the matters relied on when considering whether intergenerational fairness and efficient planning were true aims of the rule and, if so, whether they were legitimate aims; (ii) there was no circularity in the rejection of the stated aim of consistency with the Respondent's political policy on retirement age. The ET had correctly held that there was no inconsistency between that policy and its obligations under age discrimination law; and that a policy which was contrary to Government policy on retirement age could not constitute a legitimate aim: **Seldon v Clarkson Wright & Jakes** [2012] UKSC 16 at paragraph 55. The EAT accepted the Respondent's criticism that the ET's alternative consideration of proportionality was too cursory, but that issue fell away in the light of the dismissal of the appeal on the issue of legitimate aims.

A THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal against of the Decision of the London (Central) Employment Tribunal (Employment Judge Stewart and members; “the ET”), sent to the parties on 23 August 2018, whereby the Claimant’s complaint of direct age discrimination by the Respondent trade union was upheld.

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2. The Claimant is a member of the Respondent and is employed by Foreland Shipping Limited. He was born on 23 May 1955. In consequence of legislative changes his entitlement to draw his state retirement pension accrues at the age of 66; namely in May 2021. In 2001 he became the Respondent’s Branch Secretary for Shipping in the Manchester area.

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3. On 23 June 2017 the Respondent sought nominations from the regions for election to its National Executive Committee (“NEC”) for a three-year term from 1 January 2018 to 31 December 2020. In July and August 2017, the Claimant was nominated respectively by the Liverpool branch and his own Manchester branch. By letter dated 14 August 2017 the Respondent’s General Secretary, Mr Nick Cash, informed the Liverpool branch and the Claimant that he was ineligible to stand for election due to the operation of Rule 13 Clause 15 of the Respondent’s Rules. This provides:

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“Subject to complying with all other requirements imposed within the rules, every member seeking nomination in an election must be able to complete the full period of office required of the elected position prior to reaching the normal retirement age: which will not be later than reaching the age of 65 years.”

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4. Since the Claimant would attain the age of 65 on 23 May 2020, his nomination fell foul of that Rule. There had been an attempt to amend that Rule at the Respondent’s Annual General Meeting (“AGM”) in 2015. By Rule 3 Clause 1 the AGM constitutes the “supreme government

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A of the union”. The motion to amend was proposed by the Portsmouth branch in the following terms:

B “This AGM deplores the loss of certainty that a well-funded works pension once brought to our members. We further deplore the lack of a decent state pension and the increases in state pension age that forces people to remain in the workplace for longer than they may wish. We reiterate the demands of the Union Policy seeks to reverse these attacks on workers benefits and without wages. This AGM also recognises the reality these changes bring to our membership in that all the workers may find themselves working past our union’s preferred retirement age. These people must be represented and be able to take full part in the Union’s democratic processes whilst they still have to earn a living.

C This AGM calls upon the council executive to bring forward proposals to the 2016 AGM to ensure that RMT members and officials are not discriminated on grounds of age in line with national employment law. Currently, when seeking to represent the membership in the local workplace and nationality in the offices of this union, people are prevented from carrying out these functions due to meeting the age of 65.”

D 5. Following debate, the motion was defeated by 54 votes to 13 with one abstention. On 16 August 2017 the Claimant wrote to Mr Cash, making the point that “*the Government retirement age is 66 years of age*” and stating that he would continue to work in his employment and pay union contributions until he retired at that age. On 17 August 2017 Mr Cash responded to the effect that he was obliged to administer and comply with the Rules. There followed written exchanges which renewed the same points on each side.

F 6. A domestic appeal having failed, the Claimant on 23 January 2018 presented his ET1 claim form in which he alleged discrimination (direct and indirect) on grounds of age, contrary to sections 13 and 19 of the **Equality Act 2010** (“EqA”).

G 7. It is agreed that in terms of Part 5 of the **EqA**, the claim was pursuant to section 57(2)(d), namely on the basis that the Respondent - a trade organisation of workers - had discriminated against a member by subjecting the Claimant to “any other detriment”. There is no dispute that the inability to stand for election to the NEC and the associated loss of chance of being elected is a detriment. The Claimant also contends that there is consequential financial loss by reference to various payments to which he would be entitled as a member of the NEC if he had been elected.

A 8. It was likewise conceded before the ET that the refusal to accept the Claimant's nomination as a candidate for the election to the NEC constituted less favourable treatment because of his age within the meaning of section 13 of the **EqA**. In consequence, the claim of indirect discrimination fell away and was withdrawn and dismissed.

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9. Section 13 of the **EqA** provides as material:

"13. Direct discrimination

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(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

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10. The ET hearing took place on 25 and 26 July 2018, with each party represented by Counsel who again each appear in this appeal. I am most grateful for the quality of their submissions. The Tribunal had witness statements from the Claimant and from the Respondent's Assistant General Secretary, Mr Mick Lynch, and heard oral evidence from each of them.

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11. In the light of section 13(2) of the **EqA** and the concession on less favourable treatment, the Tribunal in its Judgment identified the relevant questions as:

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"a) whether each of the aims relied upon by the Respondent to justify the role (as particularised in paragraph 8 of that response) are legitimate?

b) whether the Respondent's treatment constitutes a proportionate means of achieving those aims pursuant to section 13(2) of the Act?"

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12. It then noted the Respondent's case that the legitimate aims of Rule 13 Clause 15 were as follows:

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"i. The Respondent has decided upon the default retirement age eligibility for election to the NEC. The line needs to be drawn somewhere. Further, the Claimant has not identified any other competing age.

ii. As a democratic unincorporated association, the Respondent is lawfully only entitled to act in accordance with the Rulebook provisions. The Rule was subject to extensive debate at the AGM in 2015 and the motion to amend the Rule was overwhelmingly defeated. The Claimant (along with the entire membership) are deemed to have consented to the Rule.

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iii. The Rule promotes intergenerational fairness: - the Rule facilitates the opening up of opportunity for younger members to stand for election to the NEC.

iv. The Rule operates to ensure a mix of generations of members so as to promote the exchange of experience and new ideas.

v. The rule is intended to avoid the need to discipline / dismiss NEC members on the grounds that they are no longer capable of carrying out their duties which may cause humiliation, or otherwise avoiding disputes about a member's fitness to serve as an NEC member over a certain age.

vi. The rule operates to insure [sic] efficient planning as to the composition of the NEC - the rules serves [sic] to prevent NEC members retiring part way through office and leaving a vacancy.

vii. The Rule provides a degree of consistency with national policy pursuant to the Respondent's Objects: it is a long-established policy of the Respondent to campaign for employers to facilitate younger retirement age. It would be inconsistent and not in accordance with the Respondent's Objects to operate an inconsistent stance in respect of eligibility for election to the NEC. The Respondent's own employees have a normal retirement age of 60.

viii. The Rule is consistent with other Rulebook provisions concerning retired members. Retired members are allocated to their own branch and are debarred from voting and participating in the Respondent's elections and their participation is confined to matters relating to retirement and recruitment and retention from members.

The Respondent contends that the Rule is a proportionate means of achieving those aims and objectives. The [R]espondent also contends that it is not required to justify the rule in response to the fact presented by the [C]laimant as an individual, it is only required to justify the provision in a general sense."

13. Turning to the authorities on section 13 in respect of direct discrimination because of age, and in particular on the "the approach to justification in retirement cases", it noted the leading case of **Seldon v Clarkson Wright and Jakes (A Partnership)** [2012] UKSC 16, and in particular the guidance of Baroness Hale at paragraphs 50 to 65 and of Lord Hope at paragraphs 73 to 75. It had also been referred to the decisions in **R (Age UK) v Secretary of State for Business, Innovation and Skills (Equality and Human Rights Commission and another intervening)** [2009] EWHC 2336 (Admin) and **Lord Chancellor and others v McCloud and others** [2018] IRLR 284. The Court of Appeal has subsequently given its decision on the appeal in the latter [2018] EWCA Civ 2884. It stated that **Seldon**, "*although a case about a compulsory retirement age contained in a solicitors' partnership, contains a comprehensive statement of the law in relation to age discrimination*" (paragraph 78).

A 14. The ET then identified its task as “to examine each of the aims relied upon by the
Respondent to justify the Rule and determine whether each aim is legitimate. We then have to
B consider whether the Respondent’s treatment constitutes a proportionate means of achieving
those legitimate aims” (paragraph 21). It then turned to consideration of the eight aims asserted
by the Respondent. The first, second, fifth and eighth aims were all rejected as legitimate aims.
There is rightly no appeal from those conclusions.

C 15. The ET then considered and rejected the third and fourth asserted aims together under the
heading of “*intergenerational fairness*”. It concluded:

D “24. The third and fourth declared aims of the Respondent deal with intergenerational fairness.
The third asserts the Rule facilitates the opening up of opportunity for younger members to
stand for election to the NEC. However, we did not see any signs of this in the table at page 181
of our bundle to which our attention was directed. This table provides a breakdown of the age
composition of the membership of the Respondent as at 31 August 2017. The total membership
is stated to be 79,260. The number of members whose age falls within five-year bands from 16
E though [sic] to over 65 is set out as is the corresponding number of the 16 members of the NEC
(ignoring the elected officials who bring the complement of the NEC to 20) whose ages fall within
those bands. It is noticeable that, while some 13% of the membership are below the age of 31,
that cohort provides no members to the NEC. Similarly, the 8.7% of the membership who are
over the age of 60 provide no members to the NEC. 21.1% of the membership are aged between
31 and 40 provide 2 members to the NEC. 27% of the membership are aged between 41 and 50
provide 9 members to the NEC while 28.9% of the membership are aged between 51 and 60
provide 5 members to the NEC.

F 25. We did not discern from these figures that, if the object of the Rule was intergenerational
fairness, it was having any effect whatsoever. We acknowledge there to be a rule which requires
candidates for nomination to have 5 consecutive years’ experience by the 31st of December in
the year which the election take place [sic] - Rule 13 Clause 33. This Rule must reduce the
numbers of members below the age of 31 who would be eligible for nomination. However, if
Rule 13 Clause 15 is intended to encourage young people to stand, these figures do not show
that Rule as meeting its objective. What is very noticeable about the figures is that 14 of the 16
members of the NEC are drawn from the membership that is aged between 41 and 60. That is
87.5% of the NEC. In his evidence before us, Mr Mick Lynch asserted that Rule 13 Clause 15
was intended to avoid the composition of the NEC becoming increasingly old. We consider the
effect of the Rule, if anything, is to ensure that the composition of the NEC is steadfastly middle
aged (assuming that to be a description of the age range of 41 to 60).

G 26. Certainly, the Rule does nothing to ensure a mix of generations so as to promote the
exchange of experience and new ideas which is the stated fourth aim.”

H 16. The sixth aim, namely efficient planning as to the composition of the NEC, was rejected
as a legitimate aim for the following reasons:

“28. The sixth aim advanced by the Respondent is that the Rule operates to ensure sufficient
planning as to the composition of the NEC. The organisation of the elections to the NEC are
now so organised that a third of the membership of the NEC can change every year - a triennial
system of elections. It was said that allowing Branches to nominate individuals who were not

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able to complete the 3-year term on the NEC before the age of 65 would cause the Respondent considerable expense in the organisation and holding of by-elections each year.

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29. We were not convinced by this argument. We considered what the effect would be were there an equivalent percentage of members of the NEC who were drawn from the 6.8% of the membership in the 61-65 age group. 6.8% of 16 would be 1.088 - in other words, there is likely to be only one member of the NEC who might - over a period of five years - be unable to complete the 3-year term before attaining the age of 65. We could not see from this projection that the Respondent was going to be overrun with by-elections.

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30. We noted in this context that those paid officials of the Respondent who stand for re-election do not have to demonstrate that they will fulfil the full term of office before their retirement age of 60. But when they retire, the Respondent organises a by-election. We can see that, with four officials all of whom might have been re-elected, there might be a chance of all four attaining their 60th birthday and having to retire in the same year. But while their retirements might force 4 by-elections in one year, there would be at least 5 years before there would be fresh elections as all the replacement officials would have had to demonstrate they would complete their term of office before their retirement age was attained.

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31. We could not see that the number of by-elections in respect of those Branch nominated NEC members who encountered the age of 65 before the expiry of their term of duty on the NEC would be greater than the number of by-elections for paid officials. Therefore, the cost would not be greater. Indeed, that assumes the cost of both types of by-election to be roughly the same. However, a by-election of a paid official would involve an election in which the whole membership would be canvassed for a vote as opposed to a Branch nominated NEC member where the only people needing to be canvassed for a vote would be the Branch membership. On any view, a Branch by-election must be cheaper than one involving the whole membership. Thus, we were not persuaded that an aim to have efficient planning as to the composition of the NEC was legitimate in the sense of justifying the admitted discrimination.”

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17. As to the seventh aim, namely consistency with the Respondent’s long-established policy to campaign for a younger retirement age, it concluded:

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“32. ... This policy clashes with that of central government which, since 2010, has been to systematically raise the state retirement age. The appropriateness or otherwise of such a policy is not a matter on which we are required to express any opinion. However, we could not see that there was any derogation from the political purpose of the Respondent’s policy in the Respondent seeking to avoid unlawful discrimination in the world of work that is shaped, in part, by government policy. The Respondent’s policy remains intact. To justify the discriminatory effect of a rule because of a desire to ensure consistency with national policy is to conflate a legitimate expression of opposition to government policy with unlawful discrimination. Such an aim cannot render legitimate that which is illegitimate.”

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18. In its concluding substantive paragraph, the ET dealt in the alternative with the issue of proportionality stating:

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“34. Thus, we were not persuaded by the Respondent’s arguments that the Rule is justified by legitimate aims. If we be wrong on this rejection of there being legitimate aims, we find the imposition of a rule which has the effect of causing the Respondent to discriminate as not being a proportionate means of achieving any of its legitimate aims.”

19. The claim was accordingly upheld. In the absence of agreement, the matter will proceed to a hearing on remedy.

A 20. The Respondent's challenge to the conclusions on legitimate aims relates to those which
fall under the three headings of (1) intergenerational fairness, (2) efficient planning, and (3)
B consistency with its long-established policy on reducing the retirement age. On proportionality,
the essential contention is that it confuses this with the issue of legitimate aims; and in the only
paragraph where it expressly dealt with this issue (paragraph 34) its conclusion was no more than
an assertion, contained in one sentence, that the means were disproportionate.

C 21. Ms Tuck naturally starts her submissions by reference to the Supreme Court decision in
Seldon and the judgment of Baroness Hale, with which all members of the Court agreed. Having
considered a large body of European case law, Baroness Hale drew seven conclusions. It is
D sufficient in this case to set out the second to seventh of these, namely:

“(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*).

E (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.

(4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims:

F (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, Rosenblatt, Fuchs*);

(iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev, Fuchs*);

G (v) rewarding experience (*Hütter, Hennigs*);

(vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeniørforeningen 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);

H (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 (*Rosenblatt*); or

(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, Küçükdeveci, Ingeniørforeningen i Danmark*).

(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*).

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(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*).

These have been at the heart of subsequent decisions of the Court of Appeal, in particular Air

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Products plc v Cockram [2018] EWCA Civ 346, [2018] IRLR 755 and Lord Chancellor v McCloud to which I have already referred.

22. At paragraph 55 of Seldon, Baroness Hale stated:

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“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.”

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23. In the following two paragraphs she noted that two different kinds of legitimate objective had been identified by the European Court, which she described as “*intergenerational fairness*” and “*dignity*”. Ms Tuck did not rely in this appeal on the latter category given the ET’s conclusion that the fifth asserted aim was not a legitimate aim.

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24. At paragraph 59 Baroness Hale stated that “*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*”. Citing European and domestic decisions she continued 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*”.

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A 25. At paragraph 60 she continued, “*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*”. Citing the Grand Chamber decision in **Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe** Case C-341/08, [2010] 2 CMLR 830, its answer
B on that point had been that it was for the national court “*to seek out the reason for maintaining the measure in question and thus to identify the object which it pursues... So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation*” (Baroness
C Hale’s emphasis).

26. At paragraph 61 she stated:

D “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.”

E 27. At paragraph 65 Baroness Hale concluded that:

F “65. ... where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. In the particular context of inter-generational fairness, it must be relevant that at an earlier stage in his life, a partner or employee may well have benefited from a rule which obliged his seniors to retire at a particular age. Nor can it be entirely irrelevant that the rule in question was re-negotiated comparatively recently between the partners. ...”

G 28. By reference to paragraph 50 in **Seldon** and its subparagraphs, Ms Tuck in particular
H submits: (2) that the aims of the measure must be social policy objectives; (4) that the aim of intergenerational fairness also applies outside the relationship of employer and employee, including when the union is drafting and maintaining its rules; and (5) (6) that the test of proportionality requires that the measure be both appropriate and necessary in order to achieve the legitimate aims; and that this involves a balancing exercise, weighing the effect of the

A discrimination on the individuals concerned against the importance of those aims. She adds, from citation of the Supreme Court in **Homer v Chief Constable of West Yorkshire Police** [2010] ICR 987, that the word “necessary” is qualified by the word “reasonably.”

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D 29. By reference to paragraph 59 in **Seldon**, Ms Tuck emphasised the distinction between whether an aim is capable of being a legitimate aim and whether it is a legitimate aim in the particular circumstances. There was no closed list of aims which were capable of being
E legitimate. Furthermore, a legitimate aim could be one which has never entered the mind of the alleged discriminator. As to paragraph 60, she pointed to its focus on the reason for maintaining, at the time in question, a pre-existing measure.

D 30. The enquiry for the ET on the issue of legitimate aims was thus:

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- (1) What were the actual aim or aims?
 - (2) In each case, was it capable of being a legitimate aim?
 - (3) If so, was it in fact a legitimate aim in the particular circumstances?

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H 31. As to paragraph 65 in **Seldon**, she submitted that in the present case it was relevant that the Rule had recently been (in effect) renegotiated, in the sense that an amendment had been considered and rejected at the AGM in 2015. Furthermore, the Rulebook in general was not unilaterally imposed, but was the production of discussion and debate. It was not a Rule which had been unilaterally imposed. This distinction between a unilateral and a bargained measure was also supported by the European cases which Baroness Hale had cited earlier in the judgment; in particular **Rosenbladt v Oellerking GmbH** Case C-45/09 [2011] CMLR 1011 where she noted that the clause in the collective agreement for employees (cleaners) which provided for automatic termination of employment when an employee became entitled to a retirement pension

A at the latest when aged 65 “*unlike dismissal or resignation, ... has its basis in an agreement*” (see
B **Seldon** at paragraph 42). She submitted that cleaners in that case would be likely to have much
less input into the agreement than the Claimant, a branch secretary, would have into the Rules of
the Respondent union.

32. Ms Tuck also referred to the citation by the Court for Appeal in **McCloud** of the Supreme
Court decision in **R (Lumsdon and others) v Legal Services Board** [2016] AC 697, [2015]
C UKSC 41, where in the course of its consideration of whether, and if so to what extent, evidence
was needed to establish the asserted legitimate aim it stated:

D “56. ... much may depend on the nature of the justification, and the extent to which it requires
evidence to support it. For example, justifications based on moral or political considerations
may not be capable of being established by evidence. The same may be true of justifications
based on intuitive common sense. An economic or social justification, on the other hand, may
well be expected to be supported by evidence. ...”

33. Turning to the aim of intergenerational fairness, Ms Tuck submitted that the ET had failed
E to deal with the questions of whether this was capable of being a legitimate aim, as it evidently
was (see **Seldon**); or of whether it was a legitimate aim in the circumstances. Instead it had
wrongly asked and answered a different question, namely whether the Rule had achieved the
F alleged aim of intergenerational fairness. In taking that course, it had thus confused the
legitimacy of the aim and its effectiveness.

34. The importance of that distinction was to be seen in **Seldon** at paragraph 61 when
G Baroness Hale had given as an example of the legitimate aim of the particular circumstances
“*improving the recruitment of young people, in order to achieve a balanced and diverse
workforce*”. The question of the effectiveness of the aim was relevant only at the stage of
H proportionality, not at the stage of deciding in whether it was a legitimate aim.

A 35. As to the aim of efficient planning, the ET had not in substance considered whether this was capable of being a legitimate aim, or if so whether it was a legitimate aim in the circumstances. The matters considered by the ET in paragraphs 29 to 31, in respect of the potential time and expense for the Respondent in holding by-elections when an NEC member reached the age of 65, had no relevance to the legitimacy of the aim of efficient planning. They again were relevant only to proportionality and the balancing exercise.

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C 36. Furthermore, as to paragraph 29, its analysis and projection proceeded on the basis that the percentage of NEC members drawn from the 61 - 65 age group was equivalent to its actual percentage within the membership; whereas the evidence and its previous findings (see paragraph **D** 24) were that NEC membership was not reflective of age groups and that activists within the union were disproportionately from the older age groups.

E 37. As to paragraph 31 and the Rules concerning paid officials, there was no true comparison. The effect on the livelihood of paid officials was evidently much greater than the effect on NEC members. The Respondent was entitled to have different Rules for paid officials and NEC members.

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G 38. Ms Tuck added that the aim of efficient planning had a further aspect, namely to provide continuity in the NEC membership. The triennial system of elections meant that each year there was an election of one-third of its members, so it was important that new members benefited from the experience of existing members. That benefit would be diminished if members were able to stand down at the age of 65 before completing the usual three-year term.

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A 39. As to consistency with the Respondent's declared and longstanding policy in favour of
reduction of the retirement age, Ms Tuck first pointed to the Objects clause in the Respondent's
Rules, i.e. Rule 1 Clause 4. This included the object of "*(c) the promotion of equality for all*
B *including through ... (ii) the Union's own employment practices*". In keeping with the political
aim of the policy, all employees of the Respondent had to retire at 60.

C 40. It appeared that the ET had not accepted that consistency with that policy was capable of
being a legitimate aim; and, in any event, had concluded that it was not a legitimate aim in the
circumstances. Its reasoning in paragraph 32 was circular. Thus, in stating that consistency with
the Respondent's political policy on retirement ages conflated a legitimate expression of
D opposition to Government policy with unlawful discrimination, and that such an aim could not
render legitimate that which was illegitimate, the ET had assumed what it had to prove, namely
that application of the Rule constituted unlawful discrimination.

E 41. As Baroness Hale had observed in **Essop and Others v Home Office (UK Border**
Agency) [2017] UKSC 27, [2017] ICR 640, "*There is no finding of unlawful discrimination until*
F *all four elements of the definition are met*" (paragraph 29). There was likewise no finding of
unlawful direct discrimination on the grounds of age unless and until all its ingredients were
satisfied.

G 42. Furthermore, the ET should have taken account of the fact that the Rule had been
discussed and, by rejection of the proposed amendment, reaffirmed at the AGM in 2015. This
was a relevant factor further supported by the observation of Baroness Hale in **Seldon** that it was
H not "*entirely irrelevant that the rule in question was renegotiated comparatively recently*"
(paragraph 65).

A 43. In response, Mr Greaves pointed in particular to Baroness Hale's observations in Seldon
on the need to enquire whether the asserted aim was in fact an aim which was being pursued; that
B it did not need to have been articulated or even realised at the time when the measure was first
adopted; and that it could be an *ex post facto* rationalisation, albeit it had to be the actual object
C (see paragraphs 59 to 60). For the purpose of that enquiry the ET should consider whether the
relevant measure in fact achieved that aim. If the evidence showed that it did not, then it was
reasonably open for the ET to conclude that the *ex post facto* rationalisation failed and that it
cannot have been a true aim or actual objective.

D 44. Turning to the stated aim of intergenerational fairness, the ET had implicitly found it to
be capable of being a legitimate aim. However, in paragraphs 24 to 26, it had concluded that the
E Rule was ineffective in achieving intergenerational fairness. This stark disparity between the
effect and the alleged aim demonstrated that it cannot have been the true aim or actual objective
of the Rule, whether at the stage when it was first made or when the proposed amendment failed
or when the Rule was applied in the Claimant's case.

F 45. In other words, the *ex post facto* rationalisation had been found wanting when subjected
to proper scrutiny. Further or in the alternative, these paragraphs contained an unimpeachable
conclusion of fact that, in the light of the evidence of ineffectiveness, the stated aim was not in
G the circumstances a legitimate aim.

H 46. As to the stated aim of efficient planning, the effect of the ET's conclusion from the
evidence was that the avoidance of the time and expense of by-elections cannot have been the
true aim or actual objective of the Rule; for otherwise the Rules would have prevented paid
officials from standing for re-election in circumstances where they would have to retire before

A the end of their term of office. The rationalisation of the Rule again failed when subject to scrutiny. Further or alternatively, and by reference to the same evidence and analysis, any such aim was not legitimate.

B 47. As to consistency with the Respondent's established political policy on retirement age, the ET correctly found that this was incapable of being a legitimate aim. On a fair reading of paragraph 32, it was holding that a policy which conflicted with that of central government could not be a social policy objective within the meaning of **Seldon** (paragraph 50(2)) or the further observations in paragraph 55 that the objectives must be "*consistent with the social policy aims of the state*". The contrasting political stance of an employer or trade union could not fall within that description. Nor accordingly was there any circularity in the reasoning.

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E 48. For the reasons largely advanced by Mr Greaves, I do not accept this challenge to the ET's conclusion on the issue of legitimate aim. The ET identified the relevant law and in particular the critical paragraphs of Baroness Hale's judgment in **Seldon**. It then identified its task, albeit without express reference to the additional enquiry identified by Baroness Hale, namely in each case whether the asserted aim was in fact being pursued. That enquiry includes consideration of whether an aim first identified through *ex post facto* rationalisation is in fact a true aim and actual objective.

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G 49. However, that the Tribunal did have that further enquiry in mind is evident both from its citation of the relevant paragraphs of **Seldon** and by its observation, when rejecting the fifth alleged aim, that "*We suspect that the inclusion of this aim was solely the result of a reading of Seldon*" (see paragraph 27). In order to achieve the clearest analysis, it would have been better if the Judgment had identified and then dealt with the successive questions of whether each

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A asserted aim was a true aim and actual objective; whether if so it was capable of being a legitimate aim; and, if so, whether it was a legitimate aim in the particular circumstances. However, the ET's relevant conclusions can be sufficiently discerned for the purposes of the questions raised by this appeal.

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50. As to the stated aim of intergenerational fairness, the ET implicitly and rightly accepted that this was an aim which was capable of being a legitimate aim. In my judgment in the light of its analysis of the evidence the ET did not accept that this was a true aim of the Rule; but in any event concluded that it was not a legitimate aim in the circumstances. There is evident overlap between those two questions.

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51. I consider that evidence as to the effectiveness of the relevant measure is relevant to both enquiries, namely for the purpose of testing whether, through subsequent rationalisation or otherwise, it was a true aim; alternatively, whether in the particular circumstances it was a legitimate aim. I do not accept that the evidence of effectiveness is relevant only at the subsequent stage, if it arises, of the balancing exercise on proportionality. If the evidence shows that the Rule has been ineffective in this respect, it is potentially relevant to the issue of whether the aim is legitimate.

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52. In this respect I consider that the observations of and the examples given by Baroness Hale in Seldon at paragraph 61 assist the Claimant rather than the Respondent. Furthermore, as Underhill P (as he then was) observed in HM Land Registry v Benson & Others [2012] ICR 627, it is not always possible or necessary to distinguish between aims and means. In my judgment, the same evidence may be relevant to each.

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A 53. As to the stated aim of efficient planning, the ET implicitly and rightly accepted that this
was capable of being a legitimate aim. I do not accept that it was not entitled to take into account
B the comparative evidence concerning paid officials. That was relevant to the question of whether
the time and expense of by-elections was a true aim and whether such an aim was legitimate in
the circumstances. The ET was entitled to conclude that the contrasting Rules in respect of paid
C officials defeated each argument. Again, I do not accept that this evidence was relevant only to
the issue of proportionality. I am also not persuaded that the fact that the Rule was debated and
reaffirmed at the AGM in 2015 assists the Respondent. If anything, it provides further support
for the relevance of the enquiry into the effectiveness of the existing Rule in achieving the
asserted aims of intergenerational fairness and efficient planning. No more am I persuaded that
D the Claimant was a party to the Rule through the procedures of the AGM.

E 54. As to consistency with the union's established policy on reducing the retirement age, I
conclude that on a fair reading of the admittedly compressed paragraph 32 there is no circularity
of argument. In my judgment the ET's essential reasoning is that: (1) there is no inconsistency
between the Respondent's political policy objective to lower the retirement age and its obligations
under the law of age discrimination; and (2) in any event, a policy on the retirement age which is
F contrary to government policy cannot be a legitimate aim for the purpose of justifying the
enforcement of a Rule which on grounds of his age treats the Claimant less favourably than it
treats others.

G 55. As to the former, it is to be noted that the Respondent's objects include under Rule 1
Clause 4(d) "*to oppose actively all forms of ... unfair discrimination ... on the grounds of ... age*".
H As the latter, it is clear from Seldon that the conditions for the legitimacy of an aim include that
it is consistent with the social policy aims of the state (see in particular paragraph 55).

A 56. Whilst making no concessions on that point, Ms Tuck was not able in argument to suggest an interpretation of the principles in Seldon which could for these purposes legitimise the aim of a policy on the state retirement age which was in conflict with government policy on that subject.

B 57. I therefore conclude that there was no error of law in the ET's conclusion that none of the three identified aims were legitimate for the purpose of section 13(2) of the **EqA**.

C 58. In those circumstances the challenge to the ET's further conclusion on proportionality becomes academic. However, I should deal with it shortly. Ms Tuck's essential argument is that the alternative finding on this point amounted to no more than the assertion in one sentence of paragraph 34 that the imposition of the Rule was disproportionate. Thus it had not grappled with the evidence and argument on this distinct issue and/or had not provided reasons which began to be Meek-compliant. Mr Greaves' response first drew on the Respondent's previous submissions that, in its analysis of the legitimacy of the stated aims, the ET had in fact taken account of matters relevant to proportionality. He submitted that, fairly read, the ET in paragraph 34 was implicitly referring back to those matters and relying on them for the purpose of its valid alternative conclusion on proportionality. He pointed again to the potential for overlap between issues of aims and means.

F 59. In my judgment the ET's conclusion on proportionality cannot be explained on this basis. **G** Having reached its conclusion in respect of legitimate aims the ET took this alternative issue very shortly. However, I do not think it possible to read paragraph 34 as if it implicitly draws on the evidence considered under the first issue. As its earlier identification of the issues had made clear, **H** these had to be taken sequentially. Furthermore, whilst the evidence relevant to the issue of legitimate aims may also be relevant to the balancing exercise on proportionality, the latter

A question is different and thus the answer may not be the same. I therefore accept that the ET's alternative short decision on proportionality did not truly grapple with the alternative issue, nor was its reasoning sufficient.

B 60. Accordingly, if I had acceded to the Respondent's arguments on legitimate aim I would also have allowed the appeal on the issue of proportionality. However, in the light of my conclusion on legitimate aim, the appeal must be dismissed.

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