Easter Term
[2012] UKSC 16
On appeal from: [2010] EWCA Civ 899

JUDGMENT

Seldon (Appellant) *v* Clarkson Wright and Jakes (A Partnership) (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Mance
Lord Kerr

JUDGMENT GIVEN ON

25 April 2012

Heard on 17 and 18 January 2012

Appellant
Robin Allen QC
Richard O'Dair
Dee Masters
(Instructed by Equality & Human Rights Commission)

Respondent
Thomas Croxford
Emily Neill

(Instructed by Clarkson Wright and Jakes LLP)

Intervener (Secretary of State for Business, Innovation and Skills)
Dinah Rose QC
Emma Dixon
(Instructed by Treasury Solicitors)

Intervener (Age UK)

Declan O'Dempsey

(Instructed by Irwin Mitchell LLP)

LADY HALE (WITH WHOM LORD BROWN, LORD MANCE AND LORD KERR AGREE)

1. This case raises difficult issues about the scope for justifying direct discrimination on the ground of age and in particular a mandatory contractual retirement age. It arises under the Employment Equality (Age) Regulations 2006 (SI 2006/1031) ("the Age Regulations"), the measure by which the United Kingdom transposed Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation ("the Directive"), into UK law in respect of age discrimination. But the same issues arise under the Equality Act 2010, which has now replaced those Regulations.

2. Age is a relative newcomer to the list of characteristics protected against discrimination. Laws against discrimination are designed to secure equal treatment for people who are seen by society to be in essentially the same situation. The Aristotelian injunction that like cases be treated alike depends upon which characteristics are seen as relevant for the particular purpose. For most of history it was assumed that the differences between men and women were relevant for a whole host of purposes. Now the general rule is that they are not. But as Advocate General Sharpston commented in her Opinion in *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* Case C-427/06 [2008] ECR I-7245, at [47], until comparatively recently differentiating on the basis of age was considered obviously relevant for the purpose of termination of employment. And it is still considered that age may be a relevant consideration for many more purposes than is so with the other protected characteristics. Hence recital 25 to the Directive, after recognising that the "prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce", continued:

> "However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited."

3. The reasons why age may be relevant in more circumstances than the other characteristics may seem obvious, at least where this has to do with the comparative capabilities of people of different ages. A younger person may not

have the same training and experience as an older person. An older person may have lost the mental or physical strength which once she had. But it will be seen from recital 25 above that the European legislators considered that age discrimination might be justified by factors which had nothing to do with the characteristics of the individual but had to do with broader social and economic policy. These factors would not justify direct discrimination on the ground of any of the other protected characteristics, so why should age be different?

4. The answer must be that age is different. As Ms Rose put it on behalf of the Secretary of State, age is not "binary" in nature (man or woman, black or white, gay or straight) but a continuum which changes over time. As Lord Walker pointed out in *R (Carson and Reynolds) v Secretary of State for Work and Pensions* [2006] 1 AC 173, at [60], "Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years". This means that younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age.

5. The critical issues in this case are what sort of policy considerations can justify such discrimination, who decides upon them, and how they are to be applied to any individual person. I turn, therefore, to the facts of this case.

The facts

6. Mr Seldon was born on 15 January 1941, qualified as a solicitor in 1969, joined Clarkson Wright and Jakes, the respondent firm, in 1971 and became an equity partner in 1972. He became the senior partner in 1989. He was also managing partner from 1989 to 1993. He reached the age of 65 on 15 January 2006.

7. There had been a succession of partnership deeds over that period but all had provided for the mandatory retirement of partners at the end of the year in which they reached the age of 65. Clause 22 of the deed adopted in 2005 provided:

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

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

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

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

> "29.1 ensuring that associates are given the opportunity of partnership after a reasonable period as an associate, thereby ensuring that associates do not leave the firm;
>
> 29.2 ensuring that there is a turnover of partners such that any partner can expect to become Senior Partner in due course;
>
> 29.3 facilitating the planning of the partnership and workforce across individual departments by having a realistic long term expectation as to when vacancies will arise;
>
> 29.4 limiting the need to expel partners by way of performance management, thus contributing to a congenial and supportive culture in the Respondent firm;
>
> 29.5 enabling and encouraging employees and partners to make adequate financial provision for retirement;

> 29.6 protecting the partnership model of the Respondent. If equity partners could not be forced to retire at 65, but employees (including salaried partners) could be, it would be preferable to keep lawyers at the Respondent as employees or salaried partners rather than equity partners."

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

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

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

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

the Tribunal would have reached had it assessed the justification by reference only to the other two objectives, the case was remitted to the Tribunal to consider the question afresh (EAT [81]).

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

The issues

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

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

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

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

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

The legislation

16. Article 1 of the Directive proclaims that its purpose is to:

"lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

17. Article 2 defines the concept of discrimination thus:

"1. For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having . . . a particular age . . . at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, . . ."

18. Thus it can be seen that the possibility of justification is built into the very concept of indirect discrimination in a way which is familiar from the prohibition of discrimination on other grounds. The possibility of justification of direct discrimination is not built into the concept itself, but has to be found elsewhere. Article 2(5) provides the familiar general exception that:

"This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of

criminal offences, for the protection of health and for the protection of the rights and freedoms of others."

19. Article 4(1) makes the familiar general exception for genuine occupational requirements:

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

20. Both of these exceptions feature in some of the case law of the European Court of Justice but they have not featured in this case. We are concerned with article 6, which makes special provision for the justification of differences of treatment on grounds of age. Only article 6(1) is relevant to this case:

> "1. Notwithstanding article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
>
> Such differences of treatment may include, among others:
>
> > (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
> >
> > (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

21. Article 6 contemplates provision being made by the Member States, "within the context of national law", but article 18 contemplates that alternatively they "may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements". This has no direct relevance in the United Kingdom where collective agreements are not legally enforceable, but it serves to explain why all the cases before the European Court of Justice have concerned the provisions either of national law or of collective agreements.

22. The United Kingdom has implemented the Directive through the 2006 Age Regulations. Principally relevant is regulation 3, which defines age discrimination:

> "(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, or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—
>
> (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
>
> (ii) which puts B at that disadvantage,
>
> 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.
>
> (2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant

> circumstances in the one case are the same, or not materially different, in the other.
>
> (3) In this regulation –
>
> > (a) 'age group' means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and . . . "

23. Also relevant is regulation 17, which makes unlawful certain acts of discrimination by partnerships:

> "(1) It is unlawful for a firm, in relation to a position as partner in the firm, to discriminate against a person— . . .
>
> > (d) in a case where the person already holds that position—
> >
> > > (i) in the way they afford him access to any benefits or by refusing to afford, or deliberately not affording, him access to them; or
> > >
> > > (ii) by expelling him from that position, or subjecting him to any other detriment."

It is not in dispute that enforcing a retirement age would be unlawful within regulation 17 if it amounts to unjustified discrimination within regulation 3.

24. Although it did not apply to partners, it is also relevant to note that at the material time, regulation 30 provided for a designated retirement age for employees:

> "(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the [Employment Rights Act 1996], a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

> (2) Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement."

25. Regulation 30 did not preclude an employer from having an earlier retirement age, but it would have to be justified under regulation 3. Nor did it require an employer to retire an employee at that age. It simply meant that an employer could do so without having to justify it under regulation 3. By regulation 47 and Schedule 6 to the Regulations, an employer who intended to retire an employee on a particular date had to give the employee between six and 12 months' notice of that intention; the employee had a statutory right to request not to retire on that date and to continue working either indefinitely or for a stated period; the employer had then to take the request seriously, meet with the employee to discuss it, and give the employee a right of appeal if it was turned down.

26. The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069) phase out the designated retirement age in regulation 30, so that (at the latest from October 2012) there is no longer any self-justifying retirement age for employees. Employees will therefore be in the same position as partners, to whom regulation 30 has never applied. The principles governing the approach to the justification of compulsory retirement ages are therefore relevant to a much larger section of the working population than they were when these proceedings were begun. This particular retirement has of course to be considered as at the date when it took place, on 31 December 2006.

Legitimate aims

27. The principal case advanced on behalf of Mr Seldon is that regulation 3 is inconsistent with the Directive, for two inter-linked reasons. The first is that it combines the justification of direct and indirect discrimination in a single familiar phrase: "and A cannot show the treatment or, as the case may be, the provision, criterion or practice to be a proportionate means of achieving a legitimate aim". The Directive, on the other hand, draws a careful distinction. Article 2 prohibits all direct discrimination and all indirect discrimination where the provision etc cannot be justified. Article 6 contains a special rule for age discrimination, which although literally applying to both direct and indirect discrimination, is most likely to apply to direct discrimination. Regulation 3 has impermissibly elided the two types of justification.

28. The second reason is that article 6 contemplates that the justifications for direct age discrimination should be the broad social and economic policy

objectives of the state (or, elsewhere in Europe, the social partners) and not the individual business needs of particular employers or partnerships. This point was most clearly articulated in reply. The problem is that the social policy aims may conflict: there is the need to get young people into the workforce and there is the need to enable older people to continue working for as long as they are able and wish to do so. Only the state (or the social partners) can make the choice between these conflicting aims and that is clearly what is contemplated by article 6.

29. The respondent firm points out that regulation 3 was held by Blake J to be a proper implementation of the Directive 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), [2010] ICR 260 ("*Age UK*") after a reference to the Luxembourg Court. And the jurisprudence has made plain that aims analogous to those found in fact to be the aims of the firm are capable of being legitimate aims in this context.

30. The Secretary of State accepts that only certain kinds of aim are capable of justifying direct age discrimination and that the apparently broad terms of regulation 3 must be read down accordingly. The distinction drawn in the evolving case law of the European Court of Justice/Court of Justice of the European Union ("Luxembourg") is between aims relating to "employment policy, the labour market or vocational training", which are legitimate, and "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness", which in general are not.

31. It is necessary, therefore, to turn to the developing Luxembourg jurisprudence, coupled with its application to these Regulations in the *Age UK* case. It is helpful to do so chronologically.

The jurisprudence

32. Age Concern England (which later became Age UK) brought its challenge to the Regulations in July 2006, just after they had been made. Their principal target was the designated retirement age in regulation 30, but they also attacked regulation 3 on the ground that it was necessary for the state to spell out the circumstances in which age discrimination might be justified. At that stage it was not clear whether the Directive covered retirement ages at all. Recital 14 states that the Directive "shall be without prejudice to national provisions laying down retirement ages". In July 2007, therefore, the administrative court referred five questions to Luxembourg, the first three of which concerned whether the Directive did cover retirement ages, the fourth asked whether article 6 required the state to specify the kinds of differences in treatment on grounds of age which might be

justified, and the last asked whether there was any significant difference between the test in article 2(2) and the test in article 6(1).

33. In October 2007, the Grand Chamber in Luxembourg gave judgment in *Félix Palacios de la Villa v Cortefiel Servicios SA*, Case C-411/05, [2009] ICR 1111**.** Spain had legislated for compulsory retirement when it wanted to encourage recruitment; then abolished it when economic circumstances improved and it wanted to encourage people to stay in work; and then reintroduced it by allowing collective agreements to prescribe retirement ages, provided that the worker had qualified for a retirement pension. The Court held that, despite recital 14, requiring retirement at a particular age is direct age discrimination within the meaning of article 2(1) and 2(2)(a) and has therefore to be justified. But this did not preclude national legislation allowing for this, even if the social policy aims were not spelled out in the legislation, as long as it could be decided from the context and other sources what those aims were. The encouragement of recruitment was a legitimate aim. The means employed had still to be both appropriate and necessary, although member states (and where appropriate social partners) enjoyed a broad discretion in the choice both of the aims and of the means to pursue them. The measure in question did not unduly prejudice the legitimate claims of the workers because it was based, not only on a specific age, but also on having qualified for a pension.

34. Not surprisingly, therefore, when the Third Chamber (with Judge Lindh as juge rapporteur) came to decide the Age Concern reference, in *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07 [2009] ICR 1080 ("*Age Concern*"), it held that member states were not required to draw up a list of differences in treatment which might be justified by a legitimate aim [43]. Lack of precision as to the aims which might be considered legitimate did not automatically preclude justification, although it was necessary to be able to identify the aim in order to review whether it was legitimate and the means of achieving it were appropriate and necessary [44, 45]. However, at [46], much relied upon on behalf of Mr Seldon:

> "It is apparent from article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision … are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers."

As to the fifth question, as the dispute was about the retirement age provisions, it was not necessary to interpret article 2(2)(b) which was concerned with indirect discrimination [63, 64]. But the Court did observe that the scope of article 2(2)(b) and article 6(1) is not identical [58]. In another passage at [65], also much relied upon on behalf of Mr Seldon, it pointed out that:

> ". . . it is important to note that [article 6(1)] is addressed to the member states and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued."

35. Before *Age UK* came back before the administrative court, the Third Chamber (again with Judge Lindh as juge rapporteur) decided the case of *David Hütter v Technische Universität Graz,* Case C-88/08 [2009] All ER (EC) 1129. The law governing public service stipulated that service before the age of 18 was not to be taken into account in determining the pay grade. This discriminated against those who had undertaken apprenticeships in the public sector compared with those who had stayed in general education. The aims of not discouraging people to stay in secondary education, of not making apprenticeship costly for the public sector, and of promoting the integration of young apprentices into the labour market (see [16]) were social policy aims of the kind which could be justification under article 6(1) [43]. But those aims were contradictory [46] and the law was not "appropriate" to achieve them [50]. This case therefore illustrates that it is not enough for the aims of a measure to be legitimate: the measure must still be carefully scrutinised to ensure that it is both "appropriate" to meeting those aims and a proportionate means of doing so.

36. The Grand Chamber (again with Judge Lindh as juge rapporteur) decided three cases in January 2010, after Advocate General Bot had given his opinions in July and September 2009. *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] 2 CMLR 830 concerned a law which prohibited practice as a panel dentist after reaching the age of 68. Both protecting the health of patients and controlling public health expenditure were legitimate objectives under the exception in article 2(5) for measures "necessary . . . for the protection of health". Prohibiting practice as a panel dentist but not private practice over the age of 68 was inconsistent with the former aim but not inconsistent with the latter [63, 64]. The other possible aim, of sharing out employment opportunities between the generations, could be regarded as an employment policy measure under article 6(1) [68]. It might be necessary to impose such an age limit where there were too many panel dentists or a "latent risk" of such [73, 77]. Having given that guidance, the court repeated that it was for the national court to identify the aim which was actually being pursued by the measure [78].

37. *Wolf v Stadt Frankfurt am Main,* Case C-229/08 [2010] 2 CMLR 849 concerned a regulation of the Land Hessen setting an age limit of 30 for recruitment as a firefighter. Although the referring court had asked about justification under article 6(1), the Luxembourg court considered that it could be justified under article 4(1), because the physical capabilities required for the job were related to age.

38. *Kücükdeveci v Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 703 was about a law which calculated the length of notice to which employees were entitled by reference to their length of service but disregarding any period of service below the age of 25. The aim of facilitating the recruitment of young people, who could react more easily to the loss of their jobs, by increasing the flexibility of personnel management did "belong to employment and labour market policy" within the meaning of article 6(1) [35, 36]; but the law was not "appropriate" to that aim because it applied to all employees who joined before 25 irrespective of their age at dismissal [40]. Nor was it appropriate to the aim of strengthening the protection of workers according to their length of service [41].

39. It is worth noting that Advocate General Bot had found it difficult to accept that the flexibility granted to employers could be an aim in itself, because the Court in *Age Concern* had made it clear that legitimate objectives are of a public interest nature [AG44-49]. The Court did not expressly endorse this, but the aim it was considering was more than mere flexibility – it was flexibility designed to encourage the recruitment of young people.

40. When Blake J came to decide *Age UK* in September 2009, he had the decisions in *Palacios de la Villa*, *Age Concern,* and *Hütter,* coupled with the Advocate General's opinion in *Kücükdeveci*, to guide him in deciding whether regulations 3 and 30 were compatible with the Directive. Clearly, a regulation in such general terms as regulation 3 was not precluded, provided that it could be justified. He concluded that the Government's aim in promoting the regulations was to "preserve the confidence and integrity of the labour market" and that this was a legitimate aim for the purpose of article 6(1). In the context of regulation 3 he pointed out that the "private employer is not allowed the wider margin of discretion in the application of the regulation that the state is" [92] and that there was "a clear distinction between the government as a public body being concerned about the social cost to competitiveness of UK employment in the early phase of implementing the new principles and policies of the Directive, and individual business saying it is cheaper to discriminate than to address the issues that the Directive requires to be addressed" [93]. In the context of regulation 30, he concluded that while a designated retirement age could be justified, it was harder to justify adopting the age of 65. Had this been done for the first time in 2009 or there was no indication of an early review, he would have concluded that it was not proportionate [128]. As things were in 2006, however, it was not beyond the

competence of government [129]. But he correctly predicted that the age would not survive the review [130]. As we have seen, of course, the whole concept of a designated retirement age has not survived.

41. In October 2010 the Grand Chamber (again with Judge Lindh as juge rapporteur) decided two more age discrimination cases. *Rosenbladt v Oellerking GmbH*, Case C-45/09, [2011] CMLR 1011, is much relied upon by the respondent firm and the Secretary of State. The dispute was about a clause in the collective agreement for employees in the commercial cleaning sector (RTV) which provided for automatic termination when an employee became entitled to a retirement pension and at the latest at the end of the month when she reached 65. Para 10.5 of the General Law on Equal Treatment (AGG) listed agreements providing for automatic termination on reaching the age when an employee might claim an old age pension among the examples of differences in treatment which might be justified if necessary and appropriate for a legitimate aim.

42. The Court held that the aims of sharing employment between the generations, making it easier for younger workers to find work, particularly in a time of chronic unemployment, while protecting the rights of older workers whose pensions serve as replacement income, and not requiring employers to dismiss them on grounds of incapacity, which may be humiliating [43] were in principle capable of objectively and reasonably justifying a difference in treatment on grounds of age [45]. Authorising clauses like this could not generally be regarded as prejudicing the legitimate interests of the workers concerned [47]. It is based not only on age but also on entitlement to a replacement income [48]. Also, unlike dismissal or resignation, it has its basis in an agreement.

> "That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question (*Palacios de la Villa*, [74])." [49]

So article 6(1) did not preclude a measure such as paragraph 10.5 of the national law; but the collective agreement implementing it must itself pursue a legitimate aim in an appropriate and necessary manner [53]. The clause offered stability of employment and the promise of foreseeable retirement while offering employers "a certain flexibility" in the management of their staff, thus reflecting "a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment" [68]. So it was not unreasonable for social partners to

regard the clause as appropriate [69]. But was it necessary, given the significant financial hardship caused to workers in the commercial cleaning sector, where poorly paid part time employment is typical [71]? Were there less onerous measures? People who had reached retirement age could continue to work, and must not be discriminated against on grounds of age in finding work [74], so they were not forced to withdraw from the labour market [75]. So the measure was not precluded. There is no suggestion that its actual application to Frau Rosenbladt, who needed to carry on working because her pension was so small, had also to be justified.

43. In contrast, in *Ingeniørforeningen i Danmark v Region Syddanmark*, Case C-499/08 [2011] 1 CMLR 1140, the Grand Chamber (again with Judge Lindh as juge rapporteur) held that a Danish law on severance allowances, which did not apply to people dismissed when they had qualified for a retirement pension, was not justified. The general (and legitimate) aim of the severance allowances was to facilitate the move to new employment of people who might find it difficult to find new employment because of the length of time they had been with their old employer. Excluding people who had qualified for a pension and who actually intended to retire was not inappropriate [34, 35]. But it was not necessary to exclude those who wished to waive their pension claims in order to try to continue working [44–47].

44. In *Georgiev v Technicheski Universitet Sofia, Filial Plovdiv*, Joined Cases C-250/09 & C-268/09 [2011] 2 CMLR 179, the Second Chamber (again with Judge Lindh as juge rapporteur) held that article 6(1) did not preclude national legislation under which university professors are compulsorily retired when they reach 68 and may only work beyond 65 on one year fixed term contracts renewable at most twice, provided that it pursued a legitimate aim linked to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations and that it makes it possible to achieve that aim by appropriate and necessary means [68]. Given that the average age of Bulgarian professors was 58 and younger people were not interested in entering the career, it was for the national court to decide whether these actually were the aims of the Bulgarian legislature.

45. The second chamber (again with Judge Lindh as juge rapporteur*)* had to consider a very similar law of the Land Hessen, providing for the compulsory retirement of civil servants, including state prosecutors, in *Fuchs and another v Land Hessen*, Joined Cases C-159/10 and C-160/10, [2011] 3 CMLR 1299. The claimed aims were to achieve a balance between the generations, plus the efficient planning of the departure and recruitment of staff, encouraging the recruitment or promotion of young people, and avoiding disputes about older employees' ability to perform their duties [47]; and also to promote interchange between the

experience of older colleagues and the recently acquired knowledge of younger ones [48]. All of these could constitute legitimate aims [49], [50].

46. The court repeated the general propositions about the nature of legitimate aims in *Age Concern* [46] at [52]. But it went on to issue some words of warning. Member states may not frustrate the prohibition of discrimination on grounds of age, read in the light of the fundamental right to engage in work [62]. Particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life [63]. This interest must be taken into account in respecting the other, potentially divergent, interests [64].

> "Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, [68] and [69]). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (…*Palacios de la Villa* … [69], [71] …*Rosenbladt.*.. [44])." [65]

Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim within article 6(1) [74].

47. This measure might be appropriate to the aim of facilitating access to employment by younger people, in a profession where the number of posts is limited (citing *Petersen* and *Georgiev*) [58, 59, 60]. Nor did it go beyond what was necessary to achieve its aims, given that the prosecutors could retire at 65 on generous pensions, continue working until 68, and practise as lawyers if they left [68].

48. *Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai*, Joined Cases C-297/10 and C-298/10, [2011] ECR, decided by the Second Chamber (again with Judge Lindh as juge rapporteur) in September 2011, is another example of a finding that determining pay grades by reference to age at first appointment could not be justified. Rewarding experience was a legitimate aim (see *Hütter*), but while length of service was appropriate to achieve that aim, age did not always correlate with experience [74, 75, 76].

49. Finally, in *Prigge and others v Deutsche Lufthansa AG*, Case C-447/09 [2011] IRLR 1052, the Grand Chamber (again with Judge Lindh as juge rapporteur) found that a collective agreement providing for the employment of Lufthansa pilots to terminate automatically at the age of 65 could not be justified. This was not an article 6(1) case, as the suggested aims had to do with the safety and security of air travel, which fell within article 2(5), or the physical capabilities required for flying a plane, which fell within article 4(1). But as neither international nor national legislation considered that an absolute ban at the age of 65 was necessary to achieve these aims, it could not be justified.

50. What messages, then, can we take from the European case law?

(1) All the references to the European Court discussed above have concerned national laws or provisions in collective agreements authorised by national laws. They have not concerned provisions in individual contracts of employment or partnership, as this case does. However, the *Bartsch* case, mentioned at [2] above, did concern the rules of a particular employers' pension fund; and the *Prigge* case, [49] above, concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.

(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)*.

(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:

> (i) promoting access to employment for younger people (*Palacios de la Villa*, *Hütter*, *Kücükdeveci)*;
>
> (ii) the efficient planning of the departure and recruitment of staff (*Fuchs*);

(iii) sharing out employment opportunities fairly between the generations (*Petersen, Rosenbladt, Fuchs*);

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

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

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

(viii) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned (*Rosenbladt*); or

(ix) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs*).

(5) However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (*Hütter, Kücükdeveci, 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).*

(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).*

Issues 1 and 3

51. Not surprisingly, in view of the way in which regulation 3 is constructed, the ET in this case approached the task of justifying direct age discrimination in the way that was familiar to them in the context of indirect discrimination on other grounds (as to which see *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15). They did not, of course, have the benefit of any of the subsequent jurisprudence either in Luxembourg or the UK. It now seems clear that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination and that regulation 3 (and its equivalent in section 13(2) of the Equality Act 2010) must be read accordingly.

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

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

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

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

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

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

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

59. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. The ET, EAT and Court of Appeal considered, on the basis of the case law concerning indirect discrimination (*Schönheit v Stadt Frankfurt am Main*, Joined Cases C-4/02 and C-5/02, [2004] IRLR 983; see also *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213), that the aim need not have been articulated or even realised at the time when the measure was first adopted. It can be an ex post facto rationalisation. The EAT also said this [50]:

> "A tribunal is entitled to look with particular care at alleged aims which in fact were not, or may not have been, in the rule-maker's mind at all. But to treat as discriminatory, what might be a clearly justified rule on this basis would be unjust, would be perceived to be unjust, and would bring discrimination law into disrepute."

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

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

62. Finally, of course, the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular

business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.

Issue 2

63. This leads to the final issue, which is whether the measure has to be justified, not only in general but also in its application to the particular individual. After all, the regulation applies to a particular act of direct discrimination, where "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 . . . to be a proportionate means of achieving a legitimate aim." The argument on behalf of Mr Seldon, therefore, is that the partnership, A, had to show that its particular less favourable treatment of him, B, was justified. This could be another distinction between direct and indirect discrimination, because for indirect discrimination the regulation only requires A to show that the "provision, criterion or practice" is a proportionate means of achieving a legitimate aim. Hence, it is argued, the partnership should have to show, not only that the mandatory retirement rule was a proportionate means of achieving a legitimate aim, but also that applying it to Mr Seldon could be justified at the time.

64. The answer given in the EAT, at [58], with which the Court of Appeal agreed, at [36], was that:

> "Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue."

Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare.

65. I would accept that 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. It is true that they did not then appreciate that the forthcoming Age Regulations would apply to them. But it is some indication that

at the time they thought that it was fair to have such a rule. Luxembourg has drawn a distinction between laws and regulations which are unilaterally imposed and collective agreements which are the product of bargaining between the social partners on a presumably more equal basis (*Rosenbladt*, *Hennigs*).

66. There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified.

Application to this case

67. In common with both the EAT and the Court of Appeal, I would pay tribute to the careful judgment of the ET. Their conclusions are particularly impressive given that they were deciding the case in November 2007, before any of the European jurisprudence discussed earlier had emerged. They did approach the justification of direct discrimination in the same way as they would have approached the justification of indirect discrimination, whereas we now know that there is a difference between the two. However, they identified three aims for the compulsory retirement age, which the Court of Appeal summed up as "dead men's shoes" and "collegiality". Mr Seldon, with the support of Age UK, has argued that these were individual aims of the business rather than the sort of social policy aims contemplated by the Directive. I do not think that that is fair. The first two identified aims were staff retention and workforce planning, both of which are directly related to the legitimate social policy aim of sharing out professional employment opportunities fairly between the generations (and were recognised as legitimate in *Fuchs*). The third was limiting the need to expel partners by way of performance management, which is directly related to the "dignity" aims accepted in *Rosenbladt* and *Fuchs*. It is also clear that the aims can be related to the particular circumstances of the type of business concerned (such as university teaching, as in *Georgiev*). I would therefore accept that the identified aims were legitimate.

68. 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 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.

69. Subject to that observation, I would dismiss this appeal.

LORD HOPE

70. I am in full agreement with Lady Hale's comprehensive judgment. For the reasons she gives, I too would dismiss this appeal. I wish to add only a few words of my own.

71. Article 6(1) of Council Directive 2000/78/EC declares that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. The provision in national law which defines age discrimination is regulation 3 of the Employment Equality (Age) Regulations 2006. This case seemed at one stage to be being argued on the basis that it concerns the application to Mr Seldon of a measure of the kind referred to in regulation 3(1)(b), under which a person ("A") discriminates against another person ("B") if

> "A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but –
>
> (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
>
> (ii) which puts B at that disadvantage,
>
> 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."

But I think that it is truly a case of direct discrimination of the kind referred to in regulation 3(1)(a). The proportionality test quoted above also applies to it, although the layout of the regulation in the statutory instrument might be taken as suggesting otherwise. Regulation 3(1)(a) provides that a person discriminates against another person for the purposes of the Regulations if, on grounds of B's age, A treats B less favourably than he treats or would treat other persons.

72. Regulation 3 was held by the ECJ in *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07 [2009] ICR 1080 to be a proper implementation of the Directive, and the general words which appear at the end of the passage which I have quoted survived scrutiny by Blake J in *R (Age UK) v Secretary of State for Business, Innovation and Skills (Equality and Human Rights Commission and another intervening)* [2010] ICR 260: see paras 84-90. They must however be read together with article 6 of the Directive which indicates that aims of a certain character only can be regarded as legitimate in this context. The characteristic which distinguishes aims which are legitimate from those which are not is indicated by the words "including legitimate employment policy, labour market and vocational training objectives".

73. As Lady Hale has demonstrated, the evolving case law of the ECJ and the CJEU has shown that a distinction must be drawn between legitimate employment policy, labour market and vocational training objectives and purely individual reasons which are particular to the situation of the employer. There is a public interest in facilitating and promoting employment for young people, planning the recruitment and departure of staff and the sharing out of opportunities for advancement in a balanced manner according to age. These social policy objectives have private aspects to them, as they will tend to work to the employer's advantage. But the point is that there is a public interest in the achievement of these aims too. They are likely to be intimately connected with what employers do to advance the interests of their own businesses, because that it how the real world operates. It is the fact that their aims can be seen to reflect the balance between the differing but legitimate interests of the various interest groups within society that makes them legitimate.

74. It was submitted that the aims which were identified by the firm to justify the compulsory retirement age in this case were not social policy aims at all, when viewed objectively. Mr Allen QC for Mr Seldon said that the state had no interest in whether it was run in this way. It would make it all too easy for a prejudiced employer to avoid being held to be in breach of the regulation if it could rely on aims such as those that had been identified in this case. Like Lady Hale, I would reject these arguments.

75. It is true that the aims which the Employment Tribunal accepted as legitimate – the retention of associates, facilitating the planning of the partnership and workforce and limiting the need to expel partners by way of performance management – were directed to what could be regarded as being in the firm's best interests. That in itself is not surprising, because firms such as Clarkson Wright and Jakes are in business and must organise their affairs accordingly. They are exposed to all the forces of competition in their chosen market. They are not a social service. This affects the way they choose to manage the partnership and other aspects of their workforce, just as much as it affects the way in which their business as a whole is conducted. But this does not mean that their aims cannot be seen, when viewed objectively, as being directly related to what is regarded as a legitimate social policy. I agree that the Employment Tribunal reached a sound decision on this point and that the aims which it identified were of a kind that, in terms of article 6 of the Directive, were legitimate.

76. The question then is whether, as Mr Allen contended, the partners of the firm had to show that they had the legitimate public interests in mind at the time when the partnership deed was entered into in 2005, or at least that these were their only or main aims or objectives. I would answer this question in the negative. What article 6 requires is that the measure must be objectively justified. Just as it will not be sufficient for the partners simply to assert that their aims were designed to promote the social policy aims that the article has identified, it does not matter if they said nothing about this at the time or if they did not apply their minds to the issue at all. As it happens, no minute was taken of the reasons why clause 22 was framed as it was. But I regard this fact as immaterial, as the matter was one for the Employment Tribunal and not for the partners themselves to determine. Furthermore, the time at which the justification for the treatment which is said to be discriminatory must be examined is when the difference of treatment is applied to the person who brings the complaint.

77. The case must go back to the Employment Tribunal on the issue as to whether it was proportionate for clause 22 to provide for the mandatory retirement of the partners at the end of the calendar year when they reached the age of 65. I agree with Lady Hale that it would be right for account to be taken of the fact that at the time both when the clause was agreed to and when it was applied to Mr Seldon, regulation 30 which provided for a designated retirement age for employees, was still in force. This fact is not, of course, conclusive. But it is a factor that can properly be taken into account, as the question is whether the treatment which Mr Seldon received was discriminatory at the time when he was subjected to it. The fact that it was lawful for others to be subjected to a designated retirement age may help to show that what was agreed to in this case was, at the relevant time, an acceptable way of achieving the legitimate aim.