

Addressing age stereotyping against older workers in employment: the CJEU and UK approach

Abstract

Purpose – The purpose of this paper is to report on an analysis of direct age discrimination cases by the Court of Justice of the European Union (CJEU) and the UK courts and employment tribunals over an 11 year period. The paper focuses upon age stereotyping towards older workers and analyses whether it is endorsed at European and/or national level.

Design/methodology/approach – This research has analysed a sample of 100 employment tribunal judgments concerning direct age discrimination together with 28 CJEU decisions on direct age discrimination.

Findings – This paper highlights that there are a number of cases in which age stereotyping has been endorsed at CJEU level. By contrast the UK courts and employment tribunals have adopted a more robust approach.

Research limitations/implications – The main limitation is that it only considers case law from the European Court and the influence on the UK case law, without analysing the eventual decisions of the other EU member states.

Originality/Value – The paper contributes to the debate with regards to the approach of the CJEU in tackling age stereotyping and is the first to examine the influence it has had on the UK jurisprudence over the period studied.

Keywords – Age Stereotyping, Direct Age Discrimination, Case law, Employment legislation, Framework Employment Directive 2000/78.

Paper type - Research paper.

Introduction

Differences of treatment between individuals are often based on generalised assumptions or stereotypes. Age stereotyping allows us to think of others purely in terms of their chronological age, or perceived chronological age, regardless of how experienced they are or how able they are physically and mentally to perform a task. A number of studies reveal the wide range of age stereotypes that exist towards older persons (Doering et al, 1983; Taylor and Walker, 1994; Loretto and White, 2006; Parry and Tyson, 2009) and the link between negative stereotypical attitudes and employment practices affecting workers (Taylor and Walker, 1998; Loretto, Duncan and White, 2000; Abrams et al, 2016). A common stereotype is that an individual's physical and mental abilities are perceived to decrease with age (Metcalf and Meadows, 2006). Age stereotypes have been questioned (Benjamin and Wilson, 2005) and research suggests that ability does not decrease at a particular age (Harper and Marcus, 2006). In the words of Lady Hale *'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'*[1]. The challenge therefore is for the law to tackle age stereotypes and address *'the mismatch between reality and past assumptions or stereotypes'*[2].

The Equality Act 2010 provides that an act of direct age discrimination will be lawful if an employer can point to a legitimate aim and the means of achieving that aim are proportionate[3]. This definition proved to be controversial during the consultation process to the introduction of age discrimination legislation. The DTI report on the consultation (2006, page 15) recorded that *'one Respondent spoke for many when she wrote 'the concept of justifying direct age discrimination is wholly unacceptable and unnecessary and inconsistent with other equality laws.'* However for Duncan and Loretto (2004) such a wording need not necessarily weaken protection because it would inevitably depend on how the domestic courts and employment tribunals apply the legislation.

The development and interpretation of the definition for direct age discrimination must be understood in light of European law and principles established by the CJEU in its case law under Article 6(1) of Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation (the '*Framework Employment Directive*')^[4]. This Article states that Member States may provide for differences of treatment on grounds of age if that treatment is '*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*'. This is the first time that an EU Directive provides a justification for direct discrimination and therefore this makes '*age*' as an equality ground unique.

There have been a number of CJEU Judgments relating to the wording of Article 6(1) and in particular, the legality of mandatory retirement ages within various Member States. Guiding principles can be distilled from the CJEU case law as to what aims have been relied upon by Member States and those aims that have been accepted as lawful by the CJEU. In addition, the CJEU case law has also revealed what factors should be taken into account in deciding whether the means adopted in order to achieve the aim are '*appropriate and necessary*.' These cases may therefore be influential upon the UK courts and employment tribunals in deciding whether an act of direct age discrimination is unlawful under the Equality Act 2010. For Dewhurst (2015) the CJEU decisions are very influential in the interpretation of the UK legislation and Butler (2011) has argued that the CJEU decisions on retirement have devalued the age discrimination provisions. This research contributes to the debate in this area as to whether the CJEU judgments are tackling age stereotyping in employment and the influence it has had on the UK case law.

In order to analyse the CJEU and the UK approach towards age stereotyping, a case-by-case analysis was undertaken. The analysis included all CJEU case law relating to direct age discrimination between October 2005 and April 2018 and a sample of 100 direct age discrimination cases heard by employment tribunals between October 2006 and April 2018. In order to place the employment tribunal decisions in context; the EAT, Court of Appeal and Supreme Court decisions relating to direct age discrimination were also considered from the same period. This article analyses whether age stereotyping is being endorsed at European and national level through this qualitative analysis, and provides an examination as to whether the CJEU has influenced the national courts and employment tribunals in this regard. This analysis becomes even more pertinent due to the European Union (Withdrawal) Act 2018 which provides that a court or tribunal '*is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court*'^[5]. Exit day has been subject to amendment and at the time of writing, this date is yet to be determined.

In this article it is advanced that there are a number of instances in which age stereotyping has been endorsed by the CJEU in its decisions relating to direct age discrimination. In some respects this has undesirably influenced the UK courts and employment tribunals however on the whole the UK has adopted a more robust approach. This article considers the way ahead after exit day and how the UK can better protect older workers from unlawful age stereotyping. In doing so, the article is structured as follows. First, the article briefly discusses the background to direct age discrimination legislation in the EU and UK and the importance of combatting age stereotyping in employment. Second, the article analyses the CJEU case law and discusses those cases in which age stereotyping has been endorsed. Third, the article discusses the domestic courts and employment tribunals approach and highlights a more robust approach in tackling age stereotyping to that of the CJEU. However there are examples of age stereotyping being endorsed. Finally the article concludes with a suggested way ahead for the UK after exit day.

Methodology

Analysis of direct age discrimination cases heard by Employment Tribunals: 2006-2018

The research has analysed a sample of 100 direct age discrimination cases heard by ETs in full merits hearings from 1st October 2006 to 1st April 2018. The start date represents the date on which the Employment Equality (Age) Regulations 2006 came into force^[6]. The end date represents the chosen end date of the research as it was considered that a continuous period of 11 years would be a sufficiently long period to collect the data. The EAT, Court of Appeal and Supreme Court decisions relating to direct age discrimination were also analysed from the same period to place the ET judgments in context.

An online database exists for searching ET judgments from England, Wales and Scotland and this became available in February 2017[7], although a selection of judgments from 2015 and 2016 are included in the database. Using a drop down menu, age discrimination was selected as the jurisdiction code and the search term '*direct age discrimination*' was used in the search box in order to locate the direct age discrimination judgments from the database. The judgments which did not contain full reasons did not form part of the sample. For the earlier judgments which are not available from the database, a search was undertaken through a general internet search and through Michael Rubenstein Publishing[8]. The search term '*direct age discrimination*' was used for the older judgments. Where a case summary was located online, the full judgment was obtained through a written request from the ET Field Support Office in Bury St Edmunds, which holds ET judgments prior to February 2017. A full list of the ET judgments included in the sample are contained in Appendix A.

A qualitative case-by-case analysis utilising the process of a content analysis was adopted in order to explore the ET judgments in depth. A content analysis has been described as '*a systematic coding*'[9] which is used '*to determine trends and patterns of work used, their frequency, their relationships and the structures and discourses of communication.*'[10]. It is a method that has as its purpose the examination of a documents content from the viewpoint of who says what and the effect of that communication upon that person. The results of the content analysis would be useful in revealing important aspects arising from the litigation record concerning age stereotyping. A content analysis was used to identify those cases in which employers displayed age stereotyping and acted as a means of filtering out those cases where the ETs decision in respect of that stereotyping could be analysed. The variable of interest for the content analysis was therefore the existence of age stereotyping by employers in the context of ET claims.

The judgments were analysed on a case-by-case basis sequentially and in chronological order (with the oldest judgment first). On becoming familiar with the content of the judgments, those cases where employers display age stereotyping could be identified. The existence of age stereotyping by employers was informed by the content of the data as a whole; with particular focus upon who said what and to whom. This method for analysis would allow for the exploration of the relevant facts alongside the legal arguments raised in respect of age stereotyping. A range of literature utilises a qualitative case-by-case content analysis of ET judgments as the appropriate method in analysing legislation and court judgments (Leonard, 1987; Rosenthal and Budjanovcanin, 2011; Lockwood, Rosenthal and Budjanovcanin, 2011).

Analysis of direct age discrimination cases before the CJEU: 2005-2018

A qualitative case-by-case examination of 28 CJEU decisions in respect of direct age discrimination were analysed together with a consideration of the Advocate General's Opinions in relation to that decision. Those decisions and Opinions were also analysed sequentially and in chronological order (with the oldest first). They were then compared to the ET sample to determine the extent to which age stereotyping is tackled at European level and whether the CJEU has influenced the national courts and ETs in this regard.

Judgments of the CJEU were obtained online from the curia website using the search term '*direct age discrimination*'[11]. Advocate General's Opinions delivered in relation to each judgment were also obtained from this website. The start date of 1st October 2005 represented the first date on which the search term was considered within an Advocate General Opinion in the case of *Lindorfer v Council of the European Union*[12]. The end date of 1st April 2018 again represents the chosen end date for the research as it was considered that the continuous period of 13 years for CJEU judgments would be a sufficiently long period to collect data. The CJEU which formed part of the sample are contained in Appendix 2.

Background

The EU has placed importance on increasing the inclusion of older workers in the labour market and was the major driving force behind the introduction of age discrimination legislation in the UK. The Treaty on the Functioning of the EU[13] embedded age equality by providing the power to combat discrimination. Article 19 (formerly Article 13) was a significant step in combating age discrimination

within the EU and the significance of this should not be overlooked in influencing the UK in tackling age stereotyping in the workplace[14]. This Article provides:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

At its meeting in December 1999 the European Council agreed the European Guidelines for 2000, stressing *'the need to pay particular attention to supporting older workers, in order to increase their participation in employment'*[15]. The Framework Employment Directive introduced a minimum level of protection against age discrimination and gave age discrimination a place alongside other protected grounds in the EU's anti-discrimination agenda. Member States had to implement the provisions and were given the option of justifying acts of direct age discrimination pursuant to Article 6(1) of the Framework Employment Directive. It is, as Lady Justice Smith put it in *Johns v Solent SD Ltd*[16], an *'unusual provision in European Law.'* Unsurprisingly Article 6(1) generated a large volume of literature and controversy (Meenan, 2007; Sargeant, 2006; Waddington, 2003; Hepple, 2001; McGlynn, 2000). The European Commission (1999, page 10) explained that Article 6(1) limits the *'possibilities of claiming justification in cases of direct discrimination to exceptional situations concerning the ground of age.'* However, for Waddington (2003) the prohibition against age discrimination can *'justifiably feel let down by the broad exceptions provided for in the Framework Employment Directive'* (Waddington, 2003: page 53). Butler (2011), who has conducted a review of the CJEU case law, concludes that the CJEU has applied a conservative approach in retirement cases and this has devalued the age discrimination provisions. Dewhurst (2013) observes that the CJEU gives *'too much discretion and flexibility to Member States in retirement cases which are no evident in other age discrimination cases'* and this *'impacts adversely on older workers'* (Dewhurst, 2013B: page 536). However in the context of compensation reduction Dewhurst (2015) suggests that the treatment of older employees at European level (in the context of compensation reduction) suggests that *'generalised assumptions about older workers should not be tolerated'* (Dewhurst, 2015: page 201).

Article 6(1) must be read in conjunction with Article 4, which provides the test for a genuine and determining occupational requirement. It states that *'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 the objective is legitimate and the requirement is proportionate.'* Historically this test has been interpreted strictly, as with other exceptions to the principle of equal treatment[17].

The development and interpretation of the UK age discrimination law (and in particular the definition of direct age discrimination) must be understood in light of European law and principles established by the CJEU in its case law. The underlying philosophy of the Equality Act 2010 is to protect the dignity of individuals and the *'right to be treated equally irrespective of stereotypical assumptions which may be true of some but not of others'*[18]. Dignity is the root of age discrimination laws and indeed the Charter of Fundamental Rights of the EU highlights that *'human dignity is inviolable. It must be respected and protected'*[19]. More recently Pnina Alon-Shenker (2014) has emphasised that *'since all human beings are of equal moral worth, each individual should be treated with equal concern and respect for the dignity of each individual'* (Alan-Shenker, 2014: page 42).

It is important to acknowledge that age is a unique equality ground as it can include social and economic considerations that underpin government policy. Indeed *'the justification for a European wide measure in relation to age discrimination appeared to stem from economic and social foundations relating to the need to combat unemployment and exclusion in the European workforce'* (Dewhurst, 2013A: page 1341). The definition of direct age discrimination in the Equality Act 2010 provides a *'mechanism for balancing competing interests'* (Hepple, 2014: page 39). Competing interests include government social policy, the interests of other disadvantaged groups such as women and an employer's workforce planning needs. Furthermore there are adverse financial consequences of age discrimination in employment. People are living longer due to advances in medical science and improvements in living conditions. People are working for less of their lifespan and retiring younger. Indeed the European

Commission has placed great importance on older persons remaining in employment due to the ageing population and has put in place a range of policies to promote older workers. The European social partner's autonomous agreement on active ageing (2017, page 3) commits to making it easier for older workers to stay in employment, whilst also (conflictingly) ensuring that measures are taken to '*ease inter-generational transitions in the context of high youth unemployment.*' Ultimately, however, employment policy is the responsibility of each Member State. In the context of the UK, the age of the UK population is increasing. A House of Lords report (2012-13, page 8) warned that Britain is '*woefully underprepared for a rapidly ageing population*' and highlighted that '*major changes are needed in our attitudes to ageing*' with many people needing to work for longer. The report emphasises that employers should facilitate people working for longer.

This background illustrates that there are important social and economic interests that underpin age as an equality ground. Considerations such as easing youth unemployment and promoting older workers in employment are conflicting, and it becomes all the more challenging when the case law must protect an individual's dignity and ensure that individuals are treated equally irrespective of stereotypical assumptions. All in all making it a challenging area for the courts and employment tribunals.

The case law of the CJEU

The CJEU has insisted that the prohibition against age discrimination should be applied with the same rigour as the other anti-discrimination grounds and that a high standard of proof as to whether the aim(s) are legitimate should be applied. More specifically the CJEU has emphasised that '*mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough*'[20]. It may therefore appear that the CJEU has sent a clear message to Member States that any measure based on a stereotypical assumption would not be suitable to achieve an aim. However, a qualitative analysis of the CJEU case law concerning direct age discrimination demonstrates the opposite. The first problem is that the CJEU has taken a generous view on what constitutes a legitimate aim under Article 6(1) to such an extent that its approach violates an individual's dignity and perpetuates age stereotyping. The second is the CJEU's approach to whether the aim is appropriate and necessary where there is a repeated failure of the CJEU to reject a link between age and ability. The third and final problem area is the CJEU's approach to Article 4 and the signal that this sends Member States about age as an equality ground. Each of these problems will be addressed in turn.

(1) Legitimate aims which perpetuate stereotyping

In the well-known case of *The Incorporated trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*[21] the CJEU ruled that Article 6(1) is restricted to legitimate aims linked to social policy objectives and Member States enjoy broad discretion in matters of social policy. Therefore this means that the aim may not be legitimate if it is for a reason particular to an employer's situation '*such as cost reduction or improving competitiveness*'[22]. Although this does narrow the scope of legitimate aims, this is ultimately not helped by the wide variety (and questionable) social policy aims accepted by the CJEU which perpetuate age stereotyping.

One social policy aim accepted by the CJEU is the so called '*dignity*' aim and the aim of avoiding disputes about fitness to work. In the case of *Gerhard Fuchs, Peter Kohler v Land Hessen*[23] the CJEU had to consider whether the German compulsory retirement of civil servants at 65 years was lawful. One of the aims put forward by the German Government (and accepted by the CJEU as legitimate) was to avoid disputes about older employees' ability to perform duties. Unfortunately, the CJEU did not clarify or provide any guidance on the circumstances in which avoiding disputes relating to fitness to work would be acceptable. Stereotypical assumptions underpin this aim. This aim simply assumes that all those who reach 65 years of age will have performance issues and therefore it may be legitimate to retire all individuals at that age on the basis of that assumption. Rather conflictingly, the CJEU also highlighted that particular attention must be paid to the participation of older workers in the labour force, which '*promotes diversity in the workplace*'[24].

The idea that retirement would avoid disputes about older employees being fit for work was raised again in the case of *Hörnfeldt Torsten Hörnfeldt v Posten Meddelande AB*[25] which involved a challenge to the Swedish retirement age of 67. The CJEU accepted that the retirement age avoided the termination of employment contracts in situations which are humiliating for workers by reason of their advanced age. Therefore again the CJEU considered a legitimate aim may be the prevention of possible disputes concerning employee's fitness to work and in turn this would be better for their 'dignity'. Again, revealing that older workers may be assumed to have lost the physical and/or mental capability at a certain age and an employer may legitimately dispense with the services of that employee on that basis to avoid performance management. The focus here was that it was more 'dignifying' to an older worker to be retired than to be dismissed for lack of capability. This argument is flawed. The acceptance of this aim is in itself based upon the stereotype that older workers will require performance management. This argument uses an individual's age as a convenient tool to retire rather than proceed down the employer's unsatisfactory performance procedure. This is the exact discrimination that the legislation should avoid. The aim also does not acknowledge the indignity experienced by individuals reaching a particular age being told they are being retired against their will because of an assumption they are no longer capable of working. It may also lead to detrimental consequences if their pension is insufficient to cover their cost of living. Indeed research suggests that a mandatory retirement can lead to a decreased satisfaction with life (Dingemans and Henkins, 2014) and that it can cause exclusion for individuals.

Another questionable aim accepted by the CJEU in its case law is the 'intergenerational fairness' aim. This is the argument that there should be a fair spread of work across generations. This encompasses a range of policies; including, the need to facilitate younger workers access to the labour market, sharing opportunities amongst generations, and promoting employment amongst generations to exchange ideas. Whilst it should be noted that this may also include the aim of enabling older workers to remain in employment, the CJEU case law does focus on the idea that older workers should make way for younger workers. In *Palacios de la villa v Cortefiel Servicios SA*[26] the legitimate aim accepted in support of the retirement age of 65 was described as 'regulating the national labour market, in particular, for the purposes of checking unemployment'[27]. Put simply this aim moves the unemployment away from the younger workers to the older workers (Butler, 2011). In *Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*[28], *Georgiev Tehnicheski Universitet – Sofia*[29] and *Gisela Rosenblatt v Oellerking Gebäudereinigungsges*[30] the aims were described as sharing out employment opportunities amongst the generations. In *Georgiev* the retirement age also had the advantage of developing the quality of the teaching and research at the university. Whilst in *Fuchs* the retirement age was in place with the aim of achieving an age balance between generations, promoting the interchange of experience of older colleagues and encouraging recruitment and promotion of young people.

Very closely linked to this 'intergenerational fairness' aim is the 'fair innings' and 'job blocking' argument. This the assumption that older workers have had their time in employment and because they block the opportunity for younger workers, they must leave in order for the younger workers to access the labour market. These arguments perpetuate age stereotyping. Fredman (2001) argues that the 'fair innings' argument is fundamentally unsound as it assumes that there are a fixed number of jobs which can be handed from one worker to another. Manfredi and Vickers (2011) suggest that this argument may be viable on macro level, but it cannot apply at an individual or sector level. However even this assumes that the older workers have had their 'fair innings' and assumes the rights of younger workers in employment are greater than those of older workers.

(2) *Appropriate and Necessary*

Once an aim is accepted as legitimate, the CJEU will then consider whether the measure adopted in pursuit of the legitimate aim is appropriate and necessary. The concept 'appropriateness' involves consideration of the measure adopted in pursuit of the aim and only when it is 'manifestly unsuitable' will it fail this hurdle[31]. The concept 'necessity' involves a consideration of whether the aim can be achieved by 'an equally suitable but more lenient means'[32]. Advocate General Mazak suggested that the CJEU should only find a measure to be justified if it was 'manifestly disproportionate'[33]. Clearly

if the CJEU (and the UK courts and employment tribunals) adopted this stance then it would endorse age stereotyping and the protection against age discrimination as a whole would have a ‘*virtual non-utility*’ (Butler, 2011: page 376). However the CJEU decision in *Mangold v Helm*[34] held that the national court has a responsibility to guarantee the ‘*full effectiveness of the general principle of non-discrimination in respect of age*’[35] and the measure adopted must not go beyond what is appropriate and necessary[36]. Although the CJEU adopted a stringent approach here, the CJEU has failed to scrutinise the justification put forward in a number of subsequent cases.

Indeed the early case of *Palacios* has attracted criticism for demonstrating a relaxed approach to age discrimination (Connolly, 2012; Butler, 2011). The CJEU was short in its assessment of whether the retirement age was appropriate and necessary and in turn, endorses age stereotyping. There was a failure to address whether the retirement age actually achieved the objective pursued (checking unemployment). The CJEU reached the conclusion that ‘*it does not appear unreasonable for the authority of a Member State to take the view that a measure such as that at issue*’[37] is appropriate and necessary. Therefore the CJEU appeared to lean more towards a test of reasonableness. Furthermore the fact that the retirement age was determined by a collective agreement was influential to the decision, however there was no warning that the agreement itself should be carefully scrutinised to determine whether it was influenced by stereotyping.

In the case of *Gisela Rosenblatt v Oellerking Gebäudereinigungsges*[38] Mrs Rosenblatt’s contract provided that her employment was terminated at the end of the calendar month in which she could claim a retirement pension, or, at the latest, at the end of the month in which she reached the age of 65. The aim pursued was the notion of sharing employment between generations. Therefore the retirement of those over 65 was argued to directly benefit younger workers making it easier for them to enter the labour market. In support of this aim the CJEU accepted that this automatic termination had the advantage of not requiring employers ‘*to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have not reached an advanced age*’[39]. Here the CJEU perpetuated stereotyping by assuming that individuals approaching the age of 65 would be unable to perform the role and as it would be humiliating to dismiss on grounds of capability the retirement age allowed them to leave with dignity. This factor supported the age limit of 65 being appropriate and necessary.

Interestingly in *Rosenblatt* the referring Court took the view that because the age limit is ineffective, as it does not achieve the aims pursued. It gave evidence that the age limit had been in use for a long time without there being any effect on the level of employment in Germany and doubted whether the measure was appropriate and necessary given there was no risk of an ageing workforce. Indeed the collective agreement which contained the age limit did not prohibit the employer from employing people over 65 and it did not require the employer to employ a younger worker. The referring court also expressed the view that there were less discriminatory measures available, for example by asking employees whether they planned on working beyond the retirement age. Ignoring these observations, the CJEU took the view that the measure did not go beyond what was appropriate and necessary to achieve the aims. There was no specific evidence as to why 65 was an appropriate age, other than that was the age the person receives their pension. The CJEU also highlighted the wide discretion that was granted to Member States in the area of social policy and development.

In the case of *Petersen* the CJEU held that it is not unreasonable for Member States to consider an age limit ‘*leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones*’[40]. There was no examination by the CJEU of why the age 68 for dentists was considered to be an appropriate age, only that the age was ‘*sufficiently high*’[41]. The CJEU gave no guidance as to what age limit would be acceptable in such circumstances. There was also no evidence produced that it was difficult for younger workers to seek employment or that there was a recruitment gap in that area to support the idea of a social policy to alleviate that block. Furthermore there was no analysis as to whether the aim could be achieved by limiting the number of years a dentist could practice, which would have been a less discriminatory alternative. The CJEU seemed to consider that, based on general experience, performance declines with age. It appears that the CJEU accepted that a decline in performance based on ‘*general experience*’ which is related to age is capable of justifying direct age discriminatory. The CJEU also appeared to accept that age related decline in performance is capable of justifying directly age discriminatory rules. The reference to the

CJEU by the German National Court specifically refers to a stereotypical assumption that performance of panel dentists deteriorate after the age of 68.

In *Fuchs* the CJEU reiterated the '*broad discretion*' that is afforded to Member States and held that it does not appear '*unreasonable*' for member states to take the view that the measure can secure the aim of putting in place a balanced age structure, so as to facilitate the planning of staff departures, ensure promotion and prevent disputes as to capacity. The CJEU therefore leaned towards a test of reasonableness, as opposed to a strict proportionality test under Article 6(1) which it should have applied. There was also little scrutiny by the CJEU as to why a particular age was chosen and whether the measure adopted actually achieves the aim pursued.

The CJEU also did not appear to reject a link between age and ability in the cases of *Georgiev v Tehnicheski Universitet – Sofia*[42] and *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG*[43]. In the former case, the redistribution of job opportunities among younger generations had the advantage of not only promoting employment opportunities for younger professionals but also maintained the quality of the teaching. The CJEU felt that a mix of generations would '*promote an exchange of experiences and innovation, and thereby the development of the teaching and research at university*'[44]. The CJEU seemed to therefore accept the correlation between age and competence, as a mix of generations were assumed to increase the quality of teaching.

(3) Age as a Genuine Occupational Requirement

A person's age was considered to be so closely related to their job performance that it was an occupational requirement in the case of *Colin Wolf v Stadt Frankfurt am Main*[45]. The CJEU did not comment on whether the age limit was justified under Article 6(1). The CJEU considered there was no need because it gave Article 4(1) a wide interpretation and reached the view that possessing especially high physical capacities may be classed as a genuine and determining occupational requirement. Indeed as Pitt (2012, page 10) has observed '*the effect of Wolf is to expand the concept of genuine occupational requirement and thus to water down the powerful protection of the concept of direct discrimination, which has always depended on the notion that no defence is possible in such cases.*' The CJEU based their conclusion on uncontested '*scientific data,*' produced by the German Government and highlighted that '*very few officials over 45 years of age have sufficient physical capacity to perform the firefighting part of their activities and at the age of 50 the officials concerned no longer have that capacity*'[46]. The result of this age limit therefore is that someone at the age of 45 who does have the ability is tarred with the same brush as those who may not. The Judgment also assumes that every person under the age limit will have capacity to perform the role and it assumes an individual's fitness for the next 15-20 years.

In the later cases of *Vital Pérez v Ayuntamiento de Oviedo*[47] and *Salaberna Sorondo v Academia Uascade Policia y Emergencies*[48] the CJEU had the opportunity to revisit the issue of age being a genuine occupational requirement. The former case involved a reference to the CJEU from Spain concerning the maximum recruitment age of 30 for the role of a police officer. The CJEU reiterated that possession of particular physical capabilities could be a genuine occupational requirement under Article 4. Therefore the CJEU was continuing to determine that possession of physical capabilities is a characteristic relating to age and therefore there are circumstances in which age stereotyping may be valid. However contrary to the broad interpretation of Article 4 in *Wolf*, the CJEU distinguished this case on the basis that the level of physical fitness required to be a police officer cannot be compared to the '*exceptionally high physical capacities which are regularly required of officers in the fire service, most notably in fighting fires*'[49]. In *Sorondo*, however, the age limit of 35 for recruitment to the police officer role was a genuine occupational requirement. The crucial difference here was the functions of the police officer roles recruited by the academy which were more physically demanding and involved frontline duties. This case demonstrates again the CJEU making assumptions of the physical abilities of those aged 35 and over and leaves no flexibility for candidates over the age of 35 who could be fitter than those under 35.

The UK case law

Moving on to the decisions of the UK courts and employment tribunals, a qualitative content analysis reveals that a clearer message has emerged that age stereotyping against older workers will not be tolerated and a more robust approach has been adopted to that of the CJEU. This is apparent in three respects. Firstly the employment tribunals have, on the whole, rejected a link between age and ability and highlighted that stereotypical assumptions will not suffice. Secondly the UK courts have tried to narrow the application of the aims accepted as legitimate by the CJEU. Finally the employment tribunals and courts have, on the whole, set a high bar when considering whether the means of achieving that aim are proportionate.

Rejecting the link between age and ability

There were a number of cases in which the Claimants were dismissed because of a perceived link between their age and their ability to perform the role[50]. Overall, the employment tribunals tackled age stereotyping. The employment tribunals focussed upon the stereotypical views held by employers and reached the decision that there was unlawful direct age discrimination. In the case of *Court v Dennis Publishing*[51] where the Claimant was dismissed at the age of 55 on the grounds of redundancy, the employment tribunal held that the Respondent held negative stereotypical views which led to the dismissal. Notably there were comments in the Respondent's 'How to Get Rich' book that '*by the time talent is in its mid to late forties or early fifties, it will have become very expensive*'[52] and '*it will reach a stage where it is being paid based on reputation alone. That is when you must part company with it*'[53]. The employment tribunal held that the stereotyping had '*infected the respondent*'[54]. In *Koh v Sainsburys Supermarkets Ltd*[55] the employment tribunal held that the comments that the Claimant should do something '*less responsible, stressful and demanding*'[56] and stereotyped someone in their early 50s as '*flagging in some way and unsuitable for the job*'[57].

In the case of *Baker v National Air Traffic Services*[58] which involves an age bar of 36 for recruitment for air traffic controllers, the employment tribunal gave judgment that the Respondent '*did not approach the consideration of the age issue with an open mind*'[59]. The employment tribunal observed that the age bar reflected '*the received wisdom that air traffic controllers must start young and older individuals will not be suitable*' and that age stereotyping is ingrained in employment and '*will be difficult to eradicate*'[60]. The employer's view was '*understandable*' considering the background to the age limit and they proceeded from a genuine wish to ensure safety. The employment tribunal acknowledged that '*challenging mere perceptions will be a challenge for the Respondent*',[61] however, the fact that the stereotyping was acknowledged and tackled here will no doubt go some way towards challenging such views.

In the case of *Dixon v (1) The Croglin Estate Co Ltd (2) Michael George and (3) Mr Angus Gunning*[62] the employment tribunal provided detailed reasoning and again focussed upon the stereotypical phrases used by the employer which included '*set in his ways*'[63], '*unlikely to change*'[64] and could not see the Claimant doing '*GPS computer work*'[65]. The employment tribunal considered the Claimant had been '*the victim of a grave injustice at the hands of his employer*'[66] and based on these stereotypical assumptions the respondent's directors formed the view that they wanted a younger person in the role. In the more recent case of *Gomes v (1) Henworth Ltd t/a Winkworth Estate (2) Graham Gold*[67] the employment tribunal held that the use of the word '*traditional*' is linked to other stereotypical phrase '*old fashioned*' and reached the decision that the word would not have been said to someone of a younger age.

In the more recent case of *Constantandinou and Kakkoufa v Supadance International Limited and Others*[68] the phrase '*old workers like old football players need to leave so that it could bring in new blood*'[69] suggested that the employers acted on the basis of age stereotyping in their decision to dismiss the Claimants by way of redundancy. In *Morrison v (1) JSB Healthcare Ltd (2) Kirsty Jones and (3) Rajdeep Tuff*[70] the ET held that the employers failure to allow the Claimant to return to work following sick leave was based on '*assumptions of a stereotyping nature regarding the ability of those individuals aged 80 plus*'[71]. The Claimant was a '*robust and hardworking individual*'[72] and the dismissal was held to be '*humiliating and undignified*'[73]. Finally, in *Roberts v Voodoo Doll Limited*[74] stereotypical comments including '*we will have to get you a stair lift*'[75], '*you're too old to be a doorman*'[76] and '*where did you get this fossil from*'[77] were all rightly acknowledged by the

ET to be age stereotyping and it was held the Claimant succeeded in their claim for direct age discrimination.

Narrower application of what constitutes a legitimate aim

Although a wide variety of aims have been accepted by the CJEU as legitimate, the case law of the UK courts and employment tribunals demonstrates that this will not be an easy hurdle for employers to overcome. The employment tribunals and courts will scrutinise carefully whether the aim is legitimate on the facts of the particular case. In the cases of *Frost v David Harber Ltd*[78] and *Kerr v (1) O'Hara Brothers Surfacing Ltd (2) Mr O'Hara*[79] the Respondent employers failed at the first hurdle of establishing that the aims they relied upon were the true aims on the facts. In the latter case the Claimant was a 67 year old driver and labourer for the Respondent road surfacing company and was informed that he was 'too old' to carry out particular work. The employment tribunal reached the conclusion that if it were the true aim then it would have carried out a risk assessment and discussed the matter with the Claimant.

The 'intergenerational fairness' and the 'dignity' aims accepted by the CJEU were considered in the well-known case of *Seldon v Clarkson Wright and Jakes*[80]. In this case the Supreme Court narrowed the application of these aims. The case involved a challenge to a mandatory retirement age of 65 for partners in the law firm. One of the aims accepted as legitimate was to limit the need to expel partners through performance management. This in turn would maintain a congenial and supportive culture (the 'dignity' aim). The case reached the Supreme Court. Relying on the cases of *Prigge and Wolf* it was argued by the Claimant that concerns about capacity are better dealt with under Article 4(1) of the Framework Employment Directive, as it enables the employer to relate the concerns to the particular requirements of the job rather than on stereotypical assumptions. As Blackham (2019) highlights, reliance upon dignity as a legitimate aim can be used to reinforce age stereotypes in employment'. Lady Hale acknowledged the CJEU case law and that she was bound by the jurisprudence which had held the 'dignity' aim to be legitimate. However Lady Hale expressed concern about this aim, stating that the assumptions look 'suspiciously like stereotyping'[81] and she confessed to having 'some sympathy with the position taken by Age UK'[82]. She gave the example that 'most women are less physically strong than most men'[83] and this does not justify refusing a job to a woman applicant based upon this stereotypical assumption.

Lady Hale cautioned that if a 'business already has a sophisticated performance management procedure in place it may not be legitimate to avoid them for only one section of the workplace'[84]. If there is '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'[85]. The means of achieving the legitimate aim must therefore be carefully scrutinised in the context of the business concerned in order to see whether measures which appear to be discriminatory do meet the objective and there are no other, less discriminatory, measures which would do. Lady Hale highlighted that 'all businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified'[86]. However this Judgment may have gone one step further in order to tackle age stereotyping. Connolly (2012) has argued that Government documents indicate a shift away from the 'intergenerational fairness' aim and the Supreme Court should have held that it was not a legitimate social policy aim. Similarly in contradiction to the 'dignity' aim the Government has highlighted (DWP, page 12) that employers should 'encourage an open culture of active performance management, formal or informal, throughout workers' careers to avoid unexpected announcements, confrontations or 'loss of dignity.' ' Nevertheless, the Supreme Court considered itself restricted by the CJEU decisions in this regard sending the message to employers that these aims are potentially legitimate albeit it may be difficult to successfully rely on such aims.

A high bar in assessing proportionality

Once a legitimate aim is established, the courts and employment tribunals require evidence to substantiate reliance upon the aim pursued. There must be evidence that supports the aim and an employer must not act on the basis of generalised assumptions. If a less discriminatory alternative is available then this will render the measure disproportionate[87]. Indeed in the early case of *Martin v*

Professional Game Match Officials[88] the employment tribunal questioned why the Respondent could not have introduced competency tests instead of an age limit of 48. The employment tribunal warned that the discriminatory effect is serious and this, in turn, requires cogent justification. Stereotypical assumptions did not suffice in this case. The employment tribunal also stressed that evidence must be adduced supporting why a particular age had been chosen. The fact the Respondent was happy with the age limit of 48 and it was an age limit adopted across Europe was insufficient.

The cases of *Baker v National Air Traffic Control*[89], *Hampton v The Lord Chancellor and The Ministry of Justice*[90] and *Engel v Transport and Environment Committee of London Councils*[91] further demonstrate a high bar being set for assessing whether proportionality. The employment tribunals, on the whole, require more than the CJEU's reasonableness. The courts and employment tribunals have held that rationale is required as to why a particular recruitment or retirement age has been adopted and there must be an examination of the means adopted in the context of the business concerned. There must be a consideration as to other ways of achieving the aim and thereby reducing the discrimination and the existence of a trade union agreement must be subject to careful scrutiny[92].

The case of *Engel v Transport and Environment Committee of London Councils*[93] demonstrates how difficult it would be for employers to rely upon the 'dignity' aim in the UK. Mr Engel was a Parking Adjudicator, a role which is judicial in nature and his term of appointment expired in May 2013 when he reached the Respondent's retirement age of 70. It was argued by the Respondent that having a fixed retirement age of 70 was a 'proportionate means of achieving the aim of ensuring the competence of parking adjudicators without having to apply capability procedures to older parking adjudicators in order to remove them from office'[94]. Like the law firm in the *Seldon* case the Respondent argued that it would be humiliating for older parking adjudicators to be removed from office by reason of a competency assessment and it would therefore be preferable for their dignity that they should have a fixed retirement age. The employment tribunal rejected the argument that it could reach the decision that 70 was an appropriate age based on its own experience. This can be contrasted to the employment appeal tribunal *Seldon* case which rejected the point that the 'tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer'[95].

In the case of *Willey and Sharpe v England and Wales Cricket Board Limited*[96] the employment tribunal considered the 'dignity' aim in respect of a retirement age of 65 for umpire officials. The employment tribunal held that 'dignity' is a legitimate aim because it was bound by the decision in *Seldon*. However the respondent failed to prove that the retirement age was appropriate and necessary to preserve the dignity of umpire officials stating that there is 'no evidence that there is a pattern whereby umpires start to make more mistakes as they enter their 60s'[97]. Furthermore medical evidence was clearly important as the employment tribunal commented that they were 'shown no medical reason'[98] why 65 years old had to be 'saved from themselves'[99]. The compulsory retirement age must be at an age 'before major problems start to occur, but no problems had started to manifest by the age of 65'[100]. There was no medical evidence before the employment tribunal to support why the retirement age of 65 was appropriate in the circumstances and therefore it was discriminatory 'to cut off their career too soon'[101].

However, in *White v Ministry of Justice*[102] the Claimants careers were ended by the respondent whilst they were still 'in good health mentally and physically'[103]. One of the aims relied upon was to preserve the 'dignity' of the judiciary by avoiding the need for individual assessment of health and capacity. It was held that the retirement age for the judiciary must be when they were not perceived by the public to be 'past it'. In this case that point was at age 70. The aim of maintaining the public confidence in the capacity and health of the judiciary was also justified. This case demonstrates inconsistency in the judgments as to when assumptions are sufficient justifying an act of direct age discrimination. However one important distinction is the possibility of performance management. Where performance management is impossible or very difficult, then the retirement age is likely to be proportionate. The difficulty with this case is whether a performance procedure can be devised for the judiciary which can achieve judicial independence but also not jeopardise the rule of law. At present, however, the judgment stereotypes against the judicial age and leads to a loss of expertise.

The more recent case of *Sargeant v London Fire and Emergency Planning Authority*[104] demonstrates that inconsistencies still remain in the approach to proportionality. The EAT held that the ET failed to appreciate and apply the domestic law. In particular, the requirement set out in *Seldon*[105] that the means adopted must be scrutinised in the context of the particular business concerned. The ET

therefore erred in applying the appropriate level of scrutiny and the EAT remitted the claims back to the ET for consideration in light of this decision.

Conclusion

The European Commission's approach to the European employment market has put emphasis on promoting older workers in employment. Yet the approach of the CJEU sends the opposite message and has the opposite effect. A major hurdle in tackling age stereotyping is the generous view the CJEU has taken in what is a legitimate aim under Article 6(1) and in turn, the domestic courts are bound by this. Most significantly the acceptance of the 'dignity' aim displays an extremely generous view. The acceptance of this aim as legitimate is based upon the stereotypical view that workers contribute less by a certain age and it would therefore be more dignified for them to be retired rather than dismissed. It is unclear whether the Supreme Court in *Seldon* would have reached the same conclusion had it not been bound by the CJEU jurisprudence. However it is clear from the Judgment that Lady Hale did believe it looked '*suspiciously like stereotyping*' and therefore it may well have held it is not capable of being legitimate had she not been bound by the jurisprudence of the CJEU. Going forward, after exit day from the EU a Supreme Court should accept that this aim is no longer legitimate under the UK legislation.

The CJEU has also been quick to confirm that '*intergenerational fairness*' as a legitimate aim. This can be criticised because an individual reaching a particular age may not necessarily have had their '*fair innings*'. This is particularly pertinent when age is combined with sex discrimination, when women take time off work for maternity and childcare. As government policy indicates a shift from this aim, successful reliance should be rare. Indeed a future Supreme Court may now go as far as to hold this aim is no longer legitimate and ensure that the interests of older workers are not treated as subordinate to those of younger workers.

There has also been little scrutiny by the CJEU on why a particular age limit has been chosen and whether the measure adopted actually achieves the aim pursued, for example in the cases of *Fuchs* and *Hornfeldt*. However in the UK the Courts and employment tribunals have adopted a more holistic approach and tried to narrow the scope of the general justification defence. Nevertheless inconsistencies remain in the case law, particularly on what evidence must be adduced in support of the justification argument.

The impetus for legislation prohibiting age discrimination in the UK came from Europe in the form of the Framework Employment Directive. This positive influence at the outset should not be overlooked. If it were not for the Framework Employment Directive then age discrimination legislation may not exist in the UK. Going forward there must be a shift away from some of the accepted, outdated legitimate aims. The domestic courts and employment tribunals must continue to be aware of the risk of age stereotyping and carefully analyse the aim that is relied upon by the employer before considering proportionality. However it is now time to revisit what is a legitimate aim and clarity should be provided in this regard. Another way forward may be doctrinal reform to finally lay down a list of exceptions to the derogation of direct age discrimination. This would bring some much needed clarity, ensure that each derogation is consistent with social policy and would send out a clear message that we must reject any assumed link between age and ability. Further, a consistent approach to proportionality must be adopted going forward with some clear guidelines which eradicate the inconsistencies that have arisen.

NOTES

1. *Seldon v Clarkson Wright and Jakes* [2012] UWSC 16, [15] available at: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> (accessed 15th February 2019).
2. *Ibid.*
3. Section 13, Equality Act 2010.
4. [2000] OJL 303 02/16.
5. Section 6(1)(a).
6. The Employment Equality (Age) Regulations 2006, SI 2006/1031 came into force on 1st October 2006 prohibiting unlawful age discrimination in the workplace. On 1st October 2010 the Employment Equality (Age) Regulations 2006 was replaced by the Equality Act 2010.

7. <https://www.gov.uk/employment-tribunal-decisions>.
8. <http://www.rubensteinpublishing.com/>.
9. Vaismoradi, M. Turunen, H and Bondas, T. (2013), "Content analysis and thematic analysis: Implications for conducting a qualitative descriptive study" Vol. 15 No. 3 Nursing and Health Sciences pp.398-405.
10. Ibid pp400.
11. <http://curia.europa.eu/juris/recherche.jsf?cid=264949>
12. Case C-227/04 available at: <http://curia.europa.eu/juris/document/document.jsf?docid=62600&doclang=en> (accessed 11th November 2019).
13. [2012] C326/01.
14. The UK gave domestic effect to its obligations arising out of the Treaty on EU and Treaty on the Functioning of the EU in UK law by section 2 of the European Communities Act 1972.
15. Recital 8 of the Framework Employment Directive.
16. [2008] IRLR 820, [4] available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2008/790.html> (accessed 11th November 2019).
17. *Sirdar v Army Board* Case C-273/97 available at: <http://curia.europa.eu/juris/liste.jsf?num=C-273/97> (accessed 11th November 2019).
18. *Seldon v Clarkson Wright and Jakes* [2012] UWSC 16,[57] (Lady Hale) available at: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> (accessed 15th February 2019).
19. Article 1.
20. Case C-388/07 *The Queen on the Application of the Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* paragraph 51 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-388/07>. (accessed 11th November 2019).
21. Ibid.
22. Ibid paragraph 46.
23. Case C-159/10 and Case C-160/10 available at: <http://curia.europa.eu/juris/liste.jsf?num=C-159/10&language=en> (accessed 11th November 2019)
24. Ibid paragraph 63.
25. Case C-141/11 available at: <http://curia.europa.eu/juris/document/document.jsf?docid=124743&doclang=EN> (accessed 11th November 2019).
26. Case C-411/05 available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/05> (accessed 11th November 2019).
27. Ibid paragraph 62.
28. Case C-341/08 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-341/08> (accessed 11th November 2019).
29. Case C-250/09 and Case C-268/09 available at: <http://curia.europa.eu/juris/document/document.jsf?docid=83844&doclang=EN> (accessed 11th November 2019).
30. Case 45/09 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-45/09> (accessed 11th November 2019).
31. Case C-499/08 *Ingeniorforengen I Danmark v Region Syddanmark*, opinion of Advocate General Kokott, delivered on 6 May 2010, paragraph 54 available at: <http://curia.europa.eu/juris/documents.jsf?num=C-499/08> (accessed 11th November 2019).
32. Ibid paragraph 60.
33. Case C-411/05 *Palacios de la Villa v. Cortefield Servicios SA*, opinion of Advocate General Mazak, delivered on 15 February 2007, paragraphs 73-74 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/05> (accessed 11th November 2019). It is important to note that Advocate General Mazak also suggested that if retirement ages came within the Framework Employment Directive then they would have to be justified against the 'Sword of Damocles' at paragraph 64. In his view Member States should be able to lay down retirement ages without fear of it being direct discrimination. This was rejected by the CJEU and it was held that retirement ages must be justified.

34. Case C-144/04 available at: <http://curia.europa.eu/juris/showPdf.jsf?docid=56134&doclang=en> (accessed 11th November 2019).
35. Ibid paragraph 78.
36. For a discussion on how the CJEU has applied a strict principle of proportionality here see Schiek, D. (2006), “The ECJ decision in Mangold: a further twist on effects of directives and constitutional relevance of community equality legislation”, *Industrial Law Journal*, Vol 35 No. 3, p.332.
37. Case C-411/05 paragraph 72 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/05> (accessed 11th November 2019).
38. Case C-45/09 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-45/09> (accessed 11th November 2019).
39. Ibid paragraph 18.
40. Case C-341/08, paragraph 70 available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-341/08> (accessed 11th November 2019) .
41. Ibid paragraph 52.
42. Case C-250/09 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-250/09> (accessed 11th November 2019).
43. Case C-447/09 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-447/09> (accessed 11th November 2019).
44. Case C-250/09 and Case C-268/09, paragraph 46 available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-250/09> (accessed 11th November 2019).
45. Case C-229/08 available at: <http://curia.europa.eu/juris/liste.jsf?num=C-229/08> (accessed 11th November 2019).
46. Ibid paragraph 41.
47. Case C-416/13 available at: <http://curia.europa.eu/juris/document/document.jsf?docid=159557&doclang=en> (accessed 11th November 2019).
48. Case C-258/15 available at: <http://curia.europa.eu/juris/documents.jsf?num=C-258/15> (accessed 11th November 2019).
49. Ibid paragraph 54.
50. *Hibbert v West End Working Mens Club & Institute* ET Case Number 1402145/2007, *Martin v SS Photay and Associates* ET Case Number 1100242/2007, *Martin v Professional Game Match Officials Limited* ET Case Number 2802438/2009, *Dixon v (1) Croglin Estate Co Ltd (2) Michael George and (3) Angus Gunning* ET Case Number 2502955/2011, *Jessemey v Rowstock Ltd and Mr Davis* ET Case Number 2700838/2011 and 2701156/2011, *Engel v Transport and Environment Committee of London Councils* ET Case Number 2200472/2012. All judgments available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
51. *Court v Dennis Publishing* ET Case Number 2200327/2007 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
52. Ibid [37].
53. Ibid.
54. Ibid.
55. *Koh v Sainsburys Supermarkets* ET Case Number 2312267/2008 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk .
56. Ibid [27].
57. Ibid [77].
58. *Baker v National Air Traffic Services* ET Case Number 2203501/2007 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk .
59. Ibid [7.13].
60. Ibid [7.144].
61. Ibid [7.145].

62. *Dixon v (1) Croglin Estate Co Ltd (2) Michael George and (3) Angus Gunning* ET Case Number 2502955/2011 ET Case Number 2502955/2011 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk
63. Ibid [9.10] and [18].
64. Ibid.
65. Ibid.
66. Ibid [8.7].
67. *Gomes v (1) Henworth Ltd t/a Winkworth Estate (2) Graham Gold* ET Case Number 3323775/2016 available at: <https://www.gov.uk/employment-tribunal-decisions/ms-c-gomes-v-henworth-ltd-t-a-winkworth-estate-agents-and-mr-g-gold-3323775-2016> (accessed 11th November 2019).
68. *Constantandinou and Kakkoufa v Supadance International Limited and Others* ET Case Number 3200222/2016 and 3200230/2016 available at: <https://www.gov.uk/employment-tribunal-decisions/mr-c-constandinou-and-mr-t-kakkoufa-v-supadance-international-ltd-and-others-3200222-2016-and-3200230-2016> (accessed 11th November 2019).
69. Ibid [12].
70. *Morrison v (1) JSB Healthcare Ltd and others* ET Case Number 1600440/2017 available at: <https://www.gov.uk/employment-tribunal-decisions/mrs-i-morrison-v-jsb-healthcare-ltd-and-others-1600440-2017> (accessed 11th November 2019).
71. Ibid [39].
72. Ibid.
73. Ibid.
74. *Roberts v Voodoo Dolls* ET Case Number 2403330/2017 available at: <https://www.gov.uk/employment-tribunal-decisions/mr-b-roberts-v-voodoo-doll-ltd-2403330-2017> (accessed 11th November 2019).
75. Ibid [46].
76. Ibid.
77. Ibid [47].
78. *Frost v David Harber Ltd* ET Case Number 2703446/2009 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
79. *Kerr v (1) O'Hara Brothers Surfacing Limited (2) Mr O'Hara* ET Case Number 3302349/2012 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
80. *Seldon v Clarkson Wright and Jakes* [2012] UWSC 16 available at: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> (accessed 15th February 2019)
81. Ibid [57].
82. Ibid [58].
83. Ibid.
84. Ibid [61].
85. Ibid [61].
86. Ibid [66].
87. *Baker v National Air Traffic Services* ET Case Number 2203501/2007 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk; *Seldon v Clarkson Wright and Jakes* [2012] UWSC 16 available at: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> (accessed 15th February 2019)
88. *Martin & Others v Professional Game Match Officials Limited* ET Case Number 2802438/2009 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
89. *Baker v National Air Traffic Services* ET Case Number 2203501/2007 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk .
90. *Hampton v The Lord Chancellor and The Ministry of Justice* ET Case Number 2300835/2007 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.

91. *Engel v Transport and Environment Committee of London Councils* ET Case Number 2200472/2012 [62] available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
92. *Loxley v BAE Systems (Munitions and Ordnance) Limited* EAT/0156/08/RN available at: http://www.bailii.org/uk/cases/UKSC/2008/0156_08_2907.html (accessed 15th February 2019), *Pulham and Others v London Borough of Barking and Dagenham* UKEAT/0516/08/RN, *Macculloch v Imperial Chemical Industries Plc* UKEAT/0119/08 available at: http://www.bailii.org/uk/cases/UKSC/2009/0516_08_2810.html (accessed 15th February 2019).
93. *Engel v Transport and Environment Committee of London Councils* ET Case Number 2200472/2012 [62] available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
94. *Ibid* [36].
95. *Seldon v Clarkson Wright and Jakes*, UKEAT 0063_08_1912 [73].
96. *Willey and Sharpe v England and Wales Cricket Board Limited* ET Case Number 2201406/2014 and 2201407/2014 available by writing to the ET Field Support Office at St Andrews Street North, Bury St Edmunds, IP33 1TR or by email at buryet@justice.gov.uk.
97. *Ibid* [46].
98. *Ibid* [45].
99. *Ibid*.
100. *Ibid* [47].
101. *Ibid* [45].
102. *White v Ministry of Justice* ET Case Number 2201298/2013 available at: <https://www.matrixlaw.co.uk/wp-content/uploads/2017/01/WhitevMinistryofJusticeETdecision-1.pdf> (accessed 11th March 2019).
103. *Ibid* [25].
104. *Sargeant and others v London Fire and Emergency Planning Authority and others* ET Case Numbers 2202235/2015, 1303751/2015, 1401812/2015, 1601172/2015 and 1601173/2015 available at: https://assets.publishing.service.gov.uk/media/58d11f9640f0b60683000012/Ms_R_Sargeant_and_others_v_London_Fire_and_Emergency_Planning_Authority_and_others_2202235-2015_full.pdf (accessed 11th November 2019).
105. *Seldon v Clarkson Wright and Jakes* [2012] UWSC 16,[57] (Lady Hale) available at: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> (accessed 15th February 2019)

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Appendix 1 Employment Tribunal Judgment Sample

1. Astor v Ministry of Defence and Mr Redman ET Case Number 2404378/2016
2. Baker v National Air Traffic Control Services ET Case Number 22003501/2007
3. Bartram v East Sussex CC ET Case Number 3102389/2011
4. Berrill v Corbetts and Company (Galvanising) Ltd ET Case Number 1302495/2010
5. Bloxham v Freshfields Bruckhaus Deringer ET Case Number 2205086/2006
6. Bonnett v Prospects Services Limited ET Case Number 1316946/2011
7. Brando-Caleron v Co-operative Group Limited ET Case Number 1600715/2017
8. Brunt v Pochin Construction Limited ET Case Number 2408506/2015
9. Cassidy v Quest Vitamins Ltd ET Case Number 2401277/2017
10. Cheney v MS Amlin Corporate Services Ltd ET Case Number 2207640/2016
11. Costandinou and Kakkoufa v Supadance International Ltd and Others ET Case Number 3200222/2016
12. Cleave Wallace v KPI Bridge Oil London Ltd ET Case Number 227596/2016
13. Cook v (1) Beckford Silk Limited (2) James Gardner ET Case Number 1400279/217
14. Court v Dennis Publishing Limited ET Case Number 2200327/2007
15. Dickinson v The Governing Body of Easington Lane Primary School and other ET Case Number 2501167/2016
16. Dixon v South Tyneside Homes Ltd ET Case Number 2501275/2016
17. Dove v Brown and Newirth ET Case Number 3301905/2015
18. Doyle v Sebden Steel Service Centres Ltd ET Case Number 2501322/2016
19. Duffy v HM revenue and Customs ET Case Number 2202058/2015
20. Eagles v Howard Kennedy Services Ltd ET Case Number 2301244/2016
21. Engel v Transport and Environment Committee of London Councils ET Case Number 2200472/2012
22. Fairclough v Helen Allen t/a Olivia George ET Case Number 2403288/2017
23. Faye Atkins v Paula Mason trading as Lawrence Paul Hair and Beauty ET Case Number 3328241/2017
24. Ferguson v Anglia Water Services ET Case Number 1500997/2007
25. Frost v David Harber Ltd ET Case Number 2703446/2009
26. Fryer v Balfour Beatty Group Employment Ltd ET Case Number 3322779/2016
27. Fryett v Sun crust Bakery ET Case Number 1501483/2008
28. Galt and others v National Starch and Chemical Limited ET Ce Number 2101804/07 & Others
29. Gee v Santander ET Case Number 3400309/2016.
30. Gheasuddin v British Telecommunications plc ET Case Number 2302777/2017
31. Gillet v TFHC Ltd t/a transform ET Case Number 2404370/2016
32. Gimson v Telegraph Media Group Ltd ET Case Number 2200711/2012
33. Gomes v Henworth Ltd T/A Winkworth Estate Agents and Mr Gold ET Case Number 3323775/2016
34. Green v South Cave Kids Club ET Case Number 1800950/2017
35. Guiloff v Chelsea and Westminster ET Case Number 2201321/2008
36. Hampton v The Lord Chancellor ET Case Number 2300835/2007
37. Hardy v Amec Foster Wheeler Group Ltd ET Case Number 2500066/2017

38. Harman v TMD Technologies Ltd ET Case Number 3324348/2016
39. Hibbert v West End Working Mens Club and Institute ET Case Number 1402145/2007
40. Hodgetts v Middlesbrough Borough Council ET Case Number 2516138/2006
41. James v Gina Shoes ET Case Number 3204495/2009
42. Jessemey v Rowstock Ltd ET Case Number 2700838/2011 and 27001156/2011
43. Kerr v (1) O Hara Brothers Surfacing Ltd and (2) Mr O'Hara ET Case Number 3302349/2012
44. Khan v Adidas UK Ltd ET Case Number 3201318/2015
45. Khan v Nucleus Central Limited ET Case Number 2423412/2017
46. Koh v Sainsburys Supermarket ET Case Number 2312267/2008
47. Kumar v Guys and St Thomas' NHS Foundation Trust ET Case Number 2302841/2015
48. Liladhar v Barnados Ltd ET Case Number 3201718/2010
49. Lockwood v DWP ET Case Number 1808694/2007, 101539/2008, 115515/2010.
50. Mackay v Yellow Pages Sales Ltd t/a Yell ET Case Number 2701418/2008
51. Martin v Professional Game Match Officials Ltd ET Case Number 2802438/2009
52. Matthews v Bircham Dyson Bell LLP ET Case Number 2208036/2016
53. McCloud and others v The Lord Chancellor and Secretary of State for Justice and Ministry of Justice ET Case Numbers 2201483/2015 and others
54. McDonald v Unite the Union ET Case Number 1306150/2010,
55. McDowell v Bae Systems ET Case Number 1401127/2015
56. Mohammed v Bloomsbury Bowling Ltd ET Case Number 2200410/2012
57. Montgomery v (1) Seller Property Group (2) Turpin ET Case Number 2201918/2008
58. Morrison v (1) JSB Healthcare Ltd (2) Kirsty Jones (3) Rajdeep Tutt ET Case Number 1600440/2017
59. Mubayiwa v Cygnet Health Care Ltd ET Case Number 3324515/2017
60. Mundin v Beal Developments Ltd ET Case Number 1800455/2017
61. Newey v Sainsburys Supermarkets ET Case Number 2514387/2009
62. Nock v Barnsley Metropolitan Borough Council ET Case Number 2801354/2007
63. Nolan v CD Bramall Dealership Ltd t/a Evans Halshaw ET Case Number 2601000/2012
64. O'Reilly v (1) BBC (2) Bristol Magazines Ltd ET Case Number 2200423/2010
65. Osborne and another v Gondnia and others ET Case Numbers 3401426/2014 & ET/3401427/2014
66. Omerod v Cummins Engine Company Ltd ET Case Number 2508268/2009
67. Osoba v The Chief Constable of The Hertfordshire Constabulary ET Case Number 1200552/2012; UKEAT/0055/13/BA
68. Parsons v Thomson Reuters (Professional) UK Limited ET Case Number 3200248/2017
69. Patton v Secretary of State for Justice ET Case Number 1302702/2016
70. Peckham v Magnox Ltd ET Case Number 2301637/2016
71. Perrin v (1) Fred Christopher's and sons (2) Jon Christophers ET Case Number 1401278/2014
72. Peters v Rock Chemical ET Case Number 2404460/2015
73. Plewes v Adam Pork Produce ltd ET Case Number 2600842/2007
74. Quick v Cornwall Council ET Case Number 1701914/2011
75. Roberts v Cash Zone ET Case Number 2701804/2012
76. Roberts v Voodoo Doll Limited ET Case Number 2403330/2017
77. Rodcliffe v SOS Parking Ltd Case Number 3200714/2016
78. Sargent and others v London Fire and Emergency Planning Authority and Others ET Case Number 2202235/2015 and others
79. Sayers and Wooldridge v Joe Jennings Bookmakers Ltd ET Case Number 32101024/2007
80. Scarth v Atkins Gregory ET Case Number 1502430/2012
81. Seldon v Clarkson Wright and Jakes ET Case Number 1100275/2007, UKEAT 0063_08_1912, [2010] EWCA Civ 899, [2012] UWSC 16
82. Sharp v Plymton Academy ET Case Number 1400688/2017
83. Simon Stewart v Loughborough Specsavers Limited ET Case Number 2600760/2017
84. Skipper v BP Plc ET Case Number 2202035/2011
85. Smith v Regent Steep Service Centres Ltd ET Case Number 1300644/2017

86. Shiret v Credit Suisse Securities (Europe) Limited ET Case Number 3202676/2011
87. Sudlow v Thomson Airways Ltd ET Case Number 1201242/2010
88. Terraneo v Whitbread Group Plc ET Case Number 3401249/2015
89. Thomas v (1) Eight Members Club (2) Killip ET Case Number 22002603/2007
90. Thompson v Bombardier Transportation UK Ltd and Others ET Case Number 2603778/2011
91. Thornton v Le Maitre Ltd ET Case Number 2301127/2016
92. Vickers v ABM facilities Services Ltd ET Case Number 3200556/2016
93. Walsh v Tewkesbury Borough Council ET Case Number 1404614/2009
94. Warrilow v Openwork Ltd ET Case Number 3329040/2017
95. White v Ministry of Justice ET Case number 2201298/2013
96. Whitham v Capita Insurance Services Limited ET Case Number 2505448/2012
97. Wilkinson v Springwell Engineering ET Case Number 2507420/2007
98. Willey and Sharpe v England and Wales Cricket Board ET Case Number 2201406/2014 and 2201407/2014
99. Woodcock v Cumbria Primary Care Trust ET Case Number 2506917/2008; UKEAT/0489/09, [2012] EWCA Civ 330.
100. Wright v Purple Parking ET Case Number 330277/2012 and others

Appendix 2: CJEU Judgments

1. Birgit Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH C-427/06
2. Colin Wolf v Stadt Frankfurt am Main C-229/08
3. Daniel Unland v Land Berlin Case C-20/13
4. Dansk Jurist –og Okonomforbund v Indenrigs –og Sundhedsministeriet Case C546/11
5. Dominica Petersen v Berufungsausschuss fur Zahnarzte fur den Bezirk Westfalen-Lippe C-341/08
6. European Commission v Hungary C-286/12
7. Felix Palacios de la Villa v Cortefield Servicios SA C-411/05
8. Hutter v Technische Universitat Graz C-88/08
9. Gerhard Fuchs and Peter Kohler v Anor v Land Hessen C-159/10 and C-160/10
10. Georgiev v Tehnicheski universitet – Sofia Case C250/09, C268/09
11. Gisela Rosenblatt v Oellerking Gebäudereinigungsges mbH C-45/10
12. Gorka Salaberria Sorondo v Academia Vasca de Policia y Emergencias Case C-259/15
13. Ingeniorforeningen I Danmark, acting on behalf of Andersen v Region Syddanmark Case C-499/08
14. Kucukdeveci v Swedex Case C-555/07
15. Lindorfer v Council of the European Union C-227/04
16. O v Bio Philippe Auguste SARL Case C-432/14
17. Odar v Baxter Deutschland GmbH Case C-152/11
18. Ole Andersen v Region Syddanmark C-499/08
19. Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa C-297/10 and C-298/10
20. Sabine Hennings v Eisenbahn-Bundesamt and Land Berlin v Alexander Mai
21. Seda Kucukdeveci v Swedex GmbH & Co KG C-555/07
22. Specht and ors v Land Berlin cases C-501/14 to C506/12
23. The Queen on the application of: The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform C-388/07
24. Torsten Hornfeldt v Posten Meddelande AB C-141/11
25. Werner Mangold v Rudiger Helm C-144/04
26. Werner Fries v Lufthansa Cityline GmbH Case C-190/16

27. Vasil Ivanov Georgiev v Tehniceski univesitet-Sofia, filial Plovdiv Case C-250/09 and Case C-268/09
28. Vital Perez v Ayuntamiento de Oviedo Case C-416/13