THE INDUSTRIAL TRIBUNALS

CASE REF: 356/12

CLAIMANT: **Ian Hampton Lindsay**

RESPONDENT: **Department for Employment and Learning**

DECISION

The unanimous decision of the tribunal is that the claimant's claim of unlawful direct discrimination on the ground of age is dismissed.

Constitution of Tribunal:

Chairman: **Mr S A Crothers**

Members: **Mr J Barbour**
Mr N Jones

Appearances:

The claimant was represented by Ms S Bradley, Barrister-at-Law instructed by the Equality Commission for Northern Ireland.

The respondent was represented by Mr P McAteer, Barrister-at-Law instructed by the Departmental Solicitors Office.

THE CLAIM

1. (1) The claimant claimed that the respondent directly discriminated against him unlawfully, contrary to Regulation 13(1) and/or Regulation 13(3) of the Employment Equality (Age) Regulations (Northern Ireland) 2006, ("the Regulations"), in reappointing him as a panel member of the Industrial Tribunals on 22 December 2011 until 28 March 2012, being his 70th birthday, rather than for a five year term, and in the arrangements made for determining who should be appointed to the office of tribunal panel member and the duration of that appointment. The respondent conceded that the policy of compulsory retirement of panel members at age 70 is directly discriminatory on the ground of age but contended that the respondent was objectively

justified in applying the policy in furtherance of legitimate aims and that the application of the policy was a proportionate means of achieving those aims.

(2) The respondent had applied for a postponement of the hearing. This was refused at a Case Management Discussion held on 11 October 2013. A copy of the Record of Proceedings of the Case Management Discussion is annexed to this Decision (Annex 1).

ISSUES BEFORE THE TRIBUNAL

2. An agreed statement of issues was provided to the tribunal at a Case Management Discussion held on 19 April 2003 as follows:-

LEGAL ISSUES

1. Did the respondents unlawfully directly discriminate against the claimant contrary to Regulation 13(1) and or Regulation 13(3) of the Employment Equality (Age) Regulations (Northern Ireland) 2006, in re-appointing him on 22 December 2011 until 28 March 2012, being his 70th birthday, rather than for a five year term and in the arrangements made for determining who should be appointed to the office of tribunal panel member and the duration of that appointment?

2. Is the treatment of the claimant and the policy applied by the respondent a proportionate means of achieving a legitimate aim?

FACTUAL ISSUES

1. The respondent accepts that it applies a policy of not appointing tribunal panel members beyond their 70th Birthday (save insofar as is necessary to complete the hearing of any matter which is ongoing on that date) and that this resulted in the treatment complained of which would, in the absence of justification, constitute discrimination on the grounds of age. The factual issues in this case therefore can be succinctly stated as follows:-

2. Does that policy pursue legitimate aims?

3. Are any or all of the aims relied upon by the respondent capable of being legitimate aims for the purposes of justifying direct age discrimination namely;

- the introduction of new talent to the panel by encouraging a turnover of panel members.

- the encouragement of recruitment of younger panel members in order to address a disparity in the current age profile of panel members in that there are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.

- the updating of knowledge and skillsets in relation to modern workplace issues of the tribunal panel generally?

4. Is the policy of fixing a retirement age a proportionate means of achieving those aims?

5. Were other means considered capable of achieving the respondent's aims?

6. Is the choice of 70 years of age as retirement age a proportionate means of achieving those aims?

SOURCES OF EVIDENCE

3. The tribunal heard evidence from Tom Evans, an Assistant Director with the respondent, and from the claimant. The tribunal was also presented with bundles of documentation, including a bundle containing authorities. A copy of the list of authorities is annexed to this decision. (Annex 2).

LEGAL PRINCIPLES TO BE APPLIED

4. (1) At this stage in its decision, the tribunal considers it beneficial to set out the relevant questions it will have to consider in assessing whether the treatment of the claimant and the policy applied by the respondent was a proportionate means of achieving a legitimate aim. These questions are as follows:-

(i) Is the aim capable of being a legitimate aim?

(ii) Is the aim in fact being pursued? (This also involves consideration of what is termed ex post facto rationalisation).

(iii) Is the aim legitimate in the particular circumstances of the employment concerned?

(iv) Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

(2) In formulating the above questions, the tribunal gave careful attention and consideration to the leading case of **Seldon v Clarkson Wright and Jakes (2012) UKSC 16 ("Seldon")**. The main issue in **Seldon** was whether a law firm could justify the directly discriminatory mandatory retirement of a partner at age 65. In her leading judgement Lady Hale made the following observations in relation to objective justification:-

"(2) If it is sought to justify direct age discrimination under art 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' (the *Age Concern* case [2009] All ER (EC) 619, [2009] ICR 1080, *Fuchs v Land Hessen.* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043, [2012] ICR 93) …

(3) It would appear from that, as Advocate General Bot pointed out in *Kücükdeveci v Swedex GmbH & Co KG* [2010] All ER (EC) 867, 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 v Cortefiel Servicios SA* Case C-411/05 [2008] All ER (EC 249, [2009] ICR 1111, *Hütter v Technische Universität Graz, Kücükdeveci v Swedex GmbH & Co KG*);

(ii) the efficient planning of the departure and recruitment of staff (*Fuchs v Land Hessen* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043);

(iii) sharing out employment opportunities fairly between the generations (*Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* C-341/08 [2010] All ER (EC) 961, *Rosenbladt v Oellerking Gebäudereinigungsges mbH* Case C-45/09 [2012] All ER (EC) 288, *Fuchs v Land Hessen*);

(iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv.* Joined cases C-250/09 and C-268/09 [2011] 2 CMLR 179, *Fuchs v Land Hessen*);

(v) rewarding experience (*Hütter v Technische Universität Graz, Hennigs v Eisenbahn-Bundesamt*);

(vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeniørforeningen i Danmark (acting on behalf of Andersen) v Region Syddanmark* C-499/08 [2012] All ER (EC) 342);

(vii) facilitating the participation of older workers in the workforce (*Fuchs v Land Hessen,* see also *Mangold v Helm* Case C-144/04 [2006] All ER (EC) 383, [2005] ECR I-9981);

(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 v Oellerking Gebäudereinigung sges mbH*); or

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

(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 v Technische Universität Graz,*

Kücükdeveci v Swedex GmbH & Co KG, Ingeniørforeningen i Danmark (acting on behalf of Andersen) v Region Syddanmark).

(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 v Land Hessen).*

(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 (the *Age Concern* case) …"

At paragraph 51 of her judgement, Lady Hale points out that …

"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 … must be read accordingly".

Applying the European principles to the domestic situation Lady Hale also addressed a number of important principles as follows:-

(i) **Is the aim capable of being a legitimate aim?**

Seldon, paragraphs 55-57.

"**[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 ..."

(ii) **Is the aim in fact being pursued (this also involves consideration of what is termed ex post facto rationalisation)?**

Seldon, paragraphs 59-60.

"**[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 (*Schünheit v Stadt Frankfurt am Main, Beckett v Land Hessen.* Joined cases C-4/02 and C-5/02 [2004] IRLR 983, [2003] ECR I-12575; see also *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] IRLR 934, [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 at [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 v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] All ER (EC) 961. 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 it pursues' (para 42) (our emphasis). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation."

(iii) **Is the aim legitimate in the particular circumstances of the employment concerned?**

Seldon, paragraph 61.

"**[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."

(iv) **Are the means chosen appropriate and necessary?**

Seldon, paragraph 62.

> "**[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."

As stated at paragraph 55 of the judgement, the requirement that the means chosen be necessary should be read as "reasonably" necessary. Paragraph 31 of *Engel v Transport and Environment Committee of London Councils* (*"Engel"*) explains why that is the case by reference to the Supreme Court judgement of Baroness Hale in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15.

(v) **The measure does not have to be justified in its application to the particular individual**

Seldon, paragraph 63-66.

> "**[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. … 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 2006 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 v Oellerking Gebäudereinigungsges mbH, Hennigs v Eisenbahn-Bundesamt*).

[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."

FINDINGS OF FACT AND DISCUSSION

5. (1) Having considered the evidence, insofar as same was relevant to the issues before it, the tribunal made the following findings of fact:-

(i) The claimant, (date of birth 28 March 1942) is a retired Chartered Accountant. He was appointed as a panel member of the Industrial Tribunals as an employer's representative to serve from 1 January 1999. He is an office holder as defined by the Regulations. The appointment was by way of nomination rather than public competition. The respondent intends to conduct any future appointment exercises by way of open competition.

(ii) The system pertaining towards the end of 2011 was that panel members were automatically reappointed for five years and, if upon reaching the age of 70, they had to complete work on a particular case, their appointment was extended to cover that period. There was no documentary evidence available as to how or when the policy of retirement at age 70 was devised.

(iii) A comparative table containing the age profile of lay members of Industrial Tribunals on 1 January 2011 and 21 October 2013 was prepared for the tribunal and is set out below:-

COMPARATIVE TABLE: Age profile of lay panel members of industrial tribunals 01/01/11 and 21/10/13						
	Lower age	**Upper age**	**No. of Members (01/01/11)**	**%**	**No of Members (21/10/13)**	**%**
	71	75	1	0.74%	3	2.75%
	66	70	30	22.06%	30	27.52%
	61	65	37	27.21%	20	18.35%
	56	60	22	16.18%	26	23.85%
	51	55	25	18.38%	20	18.35%
	46	50	14	10.29%	6	5.50%
	41	45	6	4.41%	4	3.67%
	36	40	1	0.74%	0	0.00%
	31	35	0	0.00%	0	0.00%
	26	30	0	0.00%	0	0.00%
	21	25	0	0.00%	0	0.00%
TOTAL			**136**	100.00%	**109**	100.00%

Note: does not include individuals appointed only to the Fair Employment Tribunal, but includes those appointed to both tribunals.

(iv) Following an aborted [proposal] to recruit additional panel members in 2010, agreement was obtained from the majority of existing Industrial Tribunal panel members to sit on the Fair Employment Tribunal and vice-versa to meet any additional capacity required. The tribunal, however, had to focus on the reasons for the respondent's maintenance of the current policy. In 1999, there were 299 panel members which has now reduced to 109. Statistical information before the tribunal demonstrated a reduction in work for panel members. In 2012-13, 1,380 hours were claimed in the context of 117 panel members currently in post. This shows an average of 11.8 days per panel member which falls short of the anticipated 15 days contained in the most recent Memorandum of Terms of Appointment of Members.

(v) The tribunal is satisfied that there is currently no resource requirement for additional panel members and that the respondent keeps itself updated with any such requirements through periodical liaison with the tribunal secretariat. There has also been consideration at ministerial level of recruiting new panel members for two five year terms without an upper age limit. However, this proposal has not been taken forward. It does not relate to existing panel members such as the claimant and, if implemented, would create a dichotomy in panel membership thereby affecting the application of the current policy which, in the respondent's view, is the main means of reducing panel members to a level whereby it may have to consider recruitment by open competition.

(vi) Against this background, the claimant was reappointed on 22 September 2011 until 28 March 2012, being his 70th birthday. His

term was in fact extended to 31 July 2012 to permit his continued participation in an unfinished case before the tribunal.

(vii) On 28 December 2011 the claimant wrote to the respondent in the following terms:-

"Dear Mr Scott

Your Ref DL1-11-354

Reappointment to Industrial Tribunals Employer Panel

Thank you for your letter of the 22 December. I note I have been reappointed until my 70th birthday and that this is in (sic) line with the terms and conditions which you attached. This appears to me to be a breach of the age discrimination legislation. Please amend the reappointment so that it ceases on 31/12/2016. Alternatively, provide me with chapter and verse of the legal authority which permits you to act in this manner, explaining why it overrides the age discrimination legislation.

Yours Sincerely

I H Lindsay"

(viii) The respondent replied on 11 January 2012 in the following terms:-

"Dear Mr Lindsay

REAPPOINTMENT TO INDUSTRIAL TRIBUNAL EMPLOYER PANEL

I refer to your letter of 28 December.

The Department's policy of appointing industrial tribunal panel members until they reach the age of 70 has the legitimate aim of encouraging a turnover of panel members to introduce new talent. The existing policy is consistent with provisions operating in other tribunals as well as the provisions governing judicial retirement enshrined in section 26 of and Schedule 5 to the Judicial Pensions and Retirement Act 1993. The Department takes the view that its policy in relation to the retirement age of panel members is objectively justified and therefore does not contravene prohibitions on age discrimination.

As you know, efforts are currently underway to develop a more unified courts and tribunals system for Northern Ireland, and the Department will be paying close attention to the outcome of a consultation by the Department of Justice on a range of issues, including whether a statutory retirement age should be applied consistently across all tribunals.

In the interests of consistency and fairness, it would be inappropriate to review the Department's policy in isolation from these wider developments.

Yours sincerely

Alan Scott"

(ix) The claimant contended that only one aim had been mentioned by the respondent at the date of the alleged unlawful direct discrimination against the claimant in December 2011, and argued that the tribunal should consider this aim only in the context of the respondent's justification defence.

(2) The aims relied on by the respondent before the tribunal in its objective justification defence were as follows:-

(i) The introduction of new talent to the panel by encouraging a turnover of panel members.

(ii) The encouragement of recruitment of younger panel members in order to address a disparity in the current age profile of panel members in that there are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.

(iii) The updating of knowledge and skill sets in relation to modern workplace issues of the tribunal panel generally.

(iv) Responding to changing demographics and social attitudes, and

(v) Establishment of a level of predictability to facilitate succession planning.

(3) (i) Aims (i)-(iii) were articulated in the respondent's Response to the tribunal. It was contended by the respondent that aims (i) and (iii) were clearly traceable in correspondence preceding December 2011, and, although the second aim had not been articulated previously in the terms set out in the response, it was clearly being pursued by the respondent. It was also acknowledged by the respondent that Tom Evans' witness statement was the first time the respondent had linked the policy in question with aims (iv) and (v) above.

(ii) In considering these aims, together with the justification arguments put forward for the maintenance of the policy of retirement at age 70, and the remainder of the justification defence generally, the tribunal carefully considered all of the evidence from both parties together with the helpful oral and written submissions from both counsel. The written submissions are contained in Annex 3.

(4) Subject to its final conclusions set out at paragraph 8, in relation, particularly, to the proportionality aspect of the case, the tribunal proposes to deal with each aim relied on by the respondent, in turn, following Lady Hale's analysis in the **Seldon** case.

Aim 1

The introduction of new talent to the panel by encouraging a turnover of panel members.

(i) **Is the claim capable of being a legitimate aim?**

Promoting access to employment for young people, sharing out employment opportunities fairly between the generations, and ensuring a mix of generation of staff so as to promote the exchange of experience and new ideas, referred to, inter alia, in paragraph 54(4) of *Seldon,* are relevant to this case. In paragraph 56 of *Seldon*, Lady Hale states:-

"**[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".

As the European Court of Justice stated in the case of **Petersen v Berufungsausschuss [2010] IRLR 254**:-

"67. In accordance with Article 6(1) of the Directive, the aims which may be regarded as 'legitimate' within the meaning of that provision are inter alia legitimate employment policy, labour market or vocational training objectives.

69. It remains to be ascertained whether, in accordance with Article 6(1) of the Directive, the means used to achieve that aim are 'appropriate and necessary'".

The tribunal is satisfied that this aim is capable of being a legitimate aim.

(ii) **Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances concerned?**

This aim was being pursued, and within the respondent's contemplation as evidenced by correspondence dated 14 and 19 July 2011 placed before the tribunal. The introduction of new talent and encouraging turnover of panel members is in the interests of the operation of panels, and, although overlapping with other aims involving disparity in age profile across

members, and up to date practical workplace experience in panel members, is a legitimate aim in the particular circumstances concerned.

(iii) **Are the means chosen proportionate, that is appropriate and (reasonably) necessary?**

(a) In addressing this question, the tribunal was mindful of the need not to conflate the concepts of legitimate aim and proportionality and to consider them fully as separate issues.

(b) In correspondence dated 7 December 2007 to a Panel Member, Gus Close, for the respondent, states as follows:

"Dear _____

LAY MEMBERSHIP OF THE INDUSTRIAL TRIBUNALS/FAIR EMPLOYMENT TRIBUNAL

Thank you for your letter of 30th November 2007 and your response to our questionnaire. The purpose of the questionnaire was twofold, firstly to find out more information about existing members' availability and so ease the administrative burden of the tribunal staff setting up a tribunal and secondly to help us, in consultation with tribunal staff, to determine if there was a need to recruit new lay members. No new members have been appointed since 1999 and there is a general view that we need to refresh the panels.

You also raised the matter of remaining a panel member after age 70. It has been and still is the Department's policy that lay membership of the tribunals ends at age 70 and this term of appointment is set out in the terms and conditions of appointment. This age limitation is in line with the statutory requirement for the judicial members of the Industrial Tribunals and the Fair Employment Tribunal to retire at age 70. Since reappointment to the panel is automatic up to age 70, unless there is good cause not to, there is little opportunity to add new persons to the panels and by imposing this limit opportunities for new recruitment are created.

It is also the Department's view that lay panel members should have relatively recent workplace experience of their designated status (employer/employee representation) and therefore to go beyond 70 would, it is felt, diminish that recentness. This is not a reflection on anyone's capacity to fulfil the role of lay panel member merely an indication of the need to ensure that members are working or have recently worked in the current employment relations climate.

For these reasons the Department has no plans to revise it's policy and regrettably in the circumstances cannot comply with your request.

Yours sincerely

GUS CLOSE"

(c) In further correspondence to a panel member dated 24 January 2008, the Minister for Employment and Learning states:-

"Dear _____

Thank you for your letter of 18 December 2007. I have noted with interest the points that you have made.

Lay members are currently appointed for a five year term and thereafter automatically reappointed until their seventieth birthday unless there is good cause not to reappoint. Exceptionally, where a case, in which a member is involved, runs beyond the seventieth birthday the Minister may reappoint for temporary periods until that particular case is disposed of.

It is the Department's policy that all tribunal members should retire at the age of seventy. This is in keeping with the general retirement arrangements of the Northern Ireland Court Service, other Northern Ireland Tribunals and the Employment Tribunals in Great Britain with which we maintain parity.

In addition I also believe that with the changes in legislation that have taken place since 1999 when most panel members were recruited, it is important that parties at tribunal recognise that panel members are likely to have relatively recent experience of workplace employment relations. Additionally the automatic reappointment arrangement means that retirement at seventy is the only means by which the number of panel members is reduced. Therefore by operating the "retirement-at-seventy" policy the Department will be able to refresh the pool of panel members accordingly.

Appointments to non-departmental public bodies other than tribunals are for fixed terms regardless of age. The terms of your appointment as an Equality Commissioner would compare to those appointment(s) made by this Department to the Board of Labour Relations Agency – a fixed term of three years, renewable once after which the term of office ends regardless of age but which may go beyond the seventieth birthday.

I am advised that your appointment ends on 29 January 2008 and I should like to take this opportunity to express the Department's appreciation of the valuable contribution you have made to the important work of the Industrial Tribunals since your appointment in 1999. I hope you have found your time with the Tribunals both an interesting and rewarding experience.

Please accept my best wishes for the future."

(d) Again, on 15 July 2011 in correspondence from June Ingram of the respondent to the current Minister for Employment and Learning concerning compulsory retirement at 70, it is stated at paragraph 5:-

"The removal of the default retirement age in April this year means that a requirement to cease service as a panel member at the age of 70 constitutes age discrimination unless it can be objectively justified, the policy must have a legitimate aim and the means of achieving that aim must be appropriate and reasonably necessary".

In the remainder of the letter she also points out that:-

"6. The legitimate aims associated with requiring retirement at 70 include encouraging a turnover of panel members to introduce new talent and encouraging the recruitment of individuals who may have practical knowledge of modern theories of industrial relations and recent experience as members of the workforce or management.

7. Retirement at the age of 70 (including the exception noted at paragraph 4) is appropriate in that it is capable of achieving the above aims. There is arguably no other way of achieving those aims and the policy is therefore reasonably necessary.

8. … However, until an adverse decision is made, it has been considered appropriate to maintain the policy, which is in keeping with the general retirement arrangements for panel members and judiciary operated by the Northern Ireland Courts and Tribunals Service, other Northern Ireland Tribunals and the Employment Tribunals in Great Britain.

9. A work capability assessment of the sort suggested by Mr Lyttle would arguably have significant resource implications and has the potential to give rise to disputes/litigation where unfavourable capability assessments are challenged. The existing regime establishes clear rules and expectations and has objective justification."

(e) The tribunal accepts that there has been no need expressed for new panel members during the ongoing liaison between the respondent and the tribunal secretariat. Furthermore, the statistics referred to earlier at paragraph 5(1)(iv) of this decision reveal that there is a reduction in work for panel members and that the average of 11.8 sitting days for panel members falls short of the minimum of 15 days specified in the most recent Memorandum of Terms of Appointment of Members. On this basis it is not unreasonable to conclude that there may be a surplus of panel members. Paragraph 4 of the same Memorandum confirms that at the end of the five year appointment, renewal for further periods of five years is automatic "subject to the individual's agreement and the upper age limit unless a question of cause for non-renewal is raised or the individual no longer satisfies the conditions or qualifications for appointment". The Memorandum further specifies that "the upper age limit is on a member's 70th birthday".

(f) The possibility of work capability assessments was also considered in 2011 and is specifically referred to in June Ingram's correspondence of 15 July 2011 referred to previously. The tribunal accepts the respondent's evidence that there is no proportionate and suitable means of assessing, on a regular basis, the continuing fitness of panel members to remain in post beyond the age of 70, having regard to the necessary investment of time and money, the possibility of litigation, the impact on the dignity of an individual panel member found incapable of continuing in post, and the fact that a close scrutiny of performance required by such an assessment process could lead to issues of independence being raised, as panel members must remain totally free from outside influence and exercise functions for which independence is a requirement. Moreover, the desire to avoid capability assessment can constitute a legitimate aim (paragraph 57 if Lady Hale's judgement in *Seldon*).

(g) Among the categories identified at paragraph 50(4) of *Seldon* are the following:-

"(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 v Oellerking GebäudereinigungsgesmbH); or*

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

(h) The desire to avoid capability assessment is therefore a valid reason for ruling it out as an alternative to compulsory retirement as is the proposal to move to two five year terms with no upper age limit for new future appointments only with the consequent unsatisfactory dichotomy between the existing Panel Members and new appointees.

(i) The recruitment of new Panel Members was also considered in a Draft Information Pack for Lay Members dated, 11 March 2010. It states that:-

"There are presently 100 vacancies: 50 employee members and 50 employer members".

However, for reasons relating mainly to an unidentified timeframe, the Department chose the alternative of conflating the Lay Panel Membership of the Fair Employment and Industrial Tribunal Panels. There is also the overarching context of continuing uncertainty relating to the future transfer of Industrial Tribunals and the Fair Employment Tribunal to the Northern Ireland Courts and Tribunals Service. This has led to a reluctance by the respondent to proceed further with a new recruitment exercise. Moreover, since 2012, the respondent has been undertaking a review of Employment Law generally, which includes consideration of whether there is a continuing need for lay members to have any role in particular tribunal jurisdictions.

(j) It is clear to the tribunal that the existing panel membership reflects an older age demographic. Should the respondent proceed with a recruitment exercise, and at the same time abolish the upper age limit for the new and existing members, the age disparity is likely to continue. Such recruitment in this context would not make sense as there is a sufficient complement of panel members to cope adequately with existing workloads, and any increase in this number is likely to reduce the amount of available work for existing panel members.

(k) In support of the proportionality of 70 as the retirement age, the respondent also sought to rely on data suggesting that individuals are less likely to possess recent work experience as they get older. The respondent also contended that a retirement age of 70 is more favourable than the expectation of retirement at 65 which in most instances is associated with the current state pension age. Labour force survey figures for April-June 2013 estimated that 9.3% of those aged 65 plus were economically active, compared with 63.7% of those age 55-64. The 2001 Census shows that 7% of those aged 70-74 were economically active, compared with 31% of those aged 60-64. The respondent also referred the tribunal to the limiting impact of long-term health conditions and disabilities on older people. Health data was referred to from the 2011 Census suggesting that, in the 50-54 age group, day-to-day activities are not limited by long-term health problems or disabilities in 75% of cases, whereas the figure for the 70-74 age range is 47%.

(l) The respondent also contended that the policy was consistent with the majority of tribunals in Northern Ireland and Great Britain, and with the statutory provisions applying to judicial office holders.

(m) The claimant's case as amplified in the written submissions at Annex 3, was that in 2007, when consideration was given to a recruitment exercise, there were 173 panel members in post (a reduction of 126 from 1999). This has been further reduced to the current number of 109. In 2010 there were 100 vacancies referred to in the draft Public Appointments Pack referred to earlier in this decision when a recruitment exercise was actively contemplated. Subject to the contention that the tribunal should consider only one of the five aims relied on by the respondent, it was argued by the claimant's counsel that if the recruitment exercise had proceeded the respondent could have satisfied the first four aims. However, instead of progressing the recruitment exercise and seizing the opportunity of introducing new talent, encouraging turnover of panel members, and recruiting younger members to address the disparity in the age profile of members and to update the knowledge and skills of panel members, the respondent conflated membership of the Fair Employment Tribunal and the Industrial Tribunals panels, thereby extinguishing the option of filling the vacancies with desirable appointees. The claimant's counsel also contended that the only reason advanced for the failure to conduct an appointment exercise was an unidentified timeframe.

(n) The argument was also advanced by the claimant that it was not necessary to retire panel members at 70 in order to create vacancies. As the numbers are now significantly diminished it was asserted that there was no need to maintain the policy and that there could be a reasonable flow of appointments without the policy. It was part of the claimant's case that the appropriate means to achieve the aims would be for the respondent to make a small number of appointments on a regular ongoing basis using essential criteria to ensure that appointees have the requisite experience. This could be combined with welcoming statements to encourage applicants from poorly represented groups. Counsel also contended that there was no evidence that the respondent has conducted an exercise since 2010 to determine the number of panel members required to trigger a recruitment exercise, and that the respondent could not therefore sustain its contention that in order to achieve the aims it needed to maintain the retirement at 70 policy to create vacancies.

(5) Aim 2

The encouragement of recruitment of younger Panel Members in order to address a disparity in the current age profile of panel members in that there are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.

(i) **Is the aim capable of being a legitimate aim?**

(a) Paragraph 56 of *Seldon* is relevant to this aim ie inter-generational fairness.

(b) Among the categories identified by Lady Hale at paragraph 54, of *Seldon* are the following:-

- Promoting access to employment for younger people.
- Sharing out the employment opportunities fairly between the generations.
- Ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas.

The tribunal is satisfied that this aim is capable of being a legitimate aim.

(ii) **Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?**

(a) As is evident from the table reproduced earlier in this decision that the average age of panel members is rising. A disproportionate number of lay members are aged above 50 and in particular above 60. Furthermore, as pointed out in the correspondence from June Ingram to Dr Stephen Farry MLA, Minister for Employment and Learning, dated 15 July 2011:-

> "The legitimate aims associated with requiring retirement at 70 including encouraging a turnover of panel members to introduce new talent and encouraging the recruitment of individuals who may have practical knowledge of modern theories of industrial relations and recent experience as members of the workforce or management".

The tribunal is satisfied on the evidence that there is a clear link between this aim and aims 1 and 3 and, although not previously articulated in the manner set out at the beginning of this paragraph, it was in fact being pursued. Alternatively, in the event of any doubt, the tribunal is satisfied that it was in fact being pursued when considered on an ex post facto rationalisation basis, and was legitimate in the particular circumstances concerned.

(iii) **Are the means chosen proportionate, that is appropriate and (reasonably) necessary?**

(a) The tribunal accepts that the removal of the upper age limit without introducing a restriction on the members' length of service would exacerbate the current situation, would lead to a further delay in recruitment of new members, and further skew the current panel membership disproportionately towards older people.

(b) The considerations relating to proportionality of the means in respect of Aim 1 also apply to Aim 2. It is apparent to the tribunal that the aim is only achievable by the retirement of sufficient panel members in order to create the capacity for recruitment of new members so as to achieve the aim which is in fact being pursued.

(6) Aim 3

The updating of knowledge and skill sets in relation to modern workplace issues of the tribunal panel generally.

(i) Is the aim capable of being a legitimate aim?

(a) Paragraph 50 of *Seldon* is directly relevant in this context:-

> "(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". (the *Age Concern* case [2009] All ER (EC) 619, [2009] ICR 1080, *Fuchs v Land Hessen,* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043, [2012] ICR 93).

(b) This aim is clearly linked to the membership and age of Panels and to ongoing or recent practical experience in the workplace.

It pursues a social policy objective in that it is linked to employment policy and especially vocational training. It also clearly relates to the public interest. The very existence of Panels split between those reflecting employer's interests and employee's interests is in itself a pursuit of the public interest as employees and employers interests are represented in various tribunal jurisdictions. The respondent's evidence emphasised the need for recent practical experience. This can be achieved by introducing new members to the Panels.

The tribunal is satisfied that this aim is capable of being a legitimate aim.

(ii) Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

(a) The tribunal accepts that this aim has been in the contemplation of the respondent from December 2007. It is reflected in the correspondence from Gus Close dated 7 December 2007 and from the Minister for Employment and Learning in correspondence dated 24 January 2008, both of which are reproduced earlier in this decision. Practical knowledge of modern theories and recent experience is also highlighted in paragraph 6 of the correspondence from June Ingram to the Minister dated 15 July 2011, in correspondence from the Minister to Chris Lyttle MLA dated 14 July 2011, and in correspondence from Alan Scott dated 19 July 2011. This aim was therefore being pursued by the respondent. The tribunal is also satisfied that this aim is a legitimate aim in the particular circumstances concerned.

(iii) Are the means chosen proportionate that is appropriate and (reasonably) necessary?

(a) Again, the considerations applying to this heading under Aim 1 are relevant. Additionally, although the claimant's suggestion of training of panel members by way of CPD is commendable, practical experience is essential. The aim can only be achieved should panel members retire in sufficient numbers to facilitate a new recruitment exercise in order to achieve the aim pursued. The claimant's suggestion of a system of retirement from panel membership five years after retirement from primary employment would not meet this aim and would limit the amount of recent experience, increase unpredictability, and further exacerbate the ongoing disparity in relation to age.

(7) Aim 4

Responding to changing demographics and social attitudes

(i) Is the aim capable of being a legitimate aim?

(a) This is clearly a social policy objective in the terms described in paragraph 52 of *Seldon* and is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness".

(b) The tribunal is satisfied that this aim is capable of being a legitimate aim.

(ii) Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

(a) This aim was first linked to the policy in Tom Evans' witness statement. It can only be considered in the context of a recruitment exercise. This in turn depends on achieving the necessary reduction to membership of the panels. Representative membership of various demographics across the publicly appointed members of the panels sitting in various tribunal jurisdictions is important in the employment context.

(b) The tribunal is satisfied that this aim was in fact being pursued when considered on an ex post facto rationalisation basis, and is a legitimate aim in the particular circumstances concerned.

(iii) Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

The considerations regarding proportionality under Aim 1 are relevant.

(8) Aim 5

Establishment of a level of predictability to facilitate succession planning.

(i) Is the aim capable of being a legitimate aim?

(a) This relates directly to one of the categories identified by Lady Hale in paragraph 54 in *Seldon*, ie, the efficient planning of the departure and recruitment of staff.

The tribunal is satisfied that this aim is capable of being a legitimate aim.

(ii) Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

(a) As with aim 4, the first time the policy in question was linked with these aims was in Tom Evans' witness statement before the tribunal. The claimant contended that the increased accuracy and predictability by maintaining the policy was small.

The claimant contended that an analysis of previous resignations and deaths would facilitate sufficient accuracy without the policy. The tribunal accepts that the policy does provide a more accurate mechanism for planning future needs than the formula suggested by the claimant.

(b) The tribunal is satisfied that this aim was in fact being pursued when considered on an ex post facto rationalisation basis, and is a legitimate aim in the particular circumstances concerned.

(iii) Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

The considerations regarding proportionality under Aim 1 are also relevant under aim 5. It would appear that there is no other measure which provides the accuracy and predictability necessary to achieve this aim.

THE LAW

6. RELEVANT LEGISLATION

(1) The relevant domestic provisions are contained in the Employment Equality (Age) Regulations 2006 ("the Regulations"). The relevant parts of regulations 3 and 13 are as follows:-

"*Discrimination on grounds of age*

3. (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if -

(a) on the 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.

Office-holders etc

13. (1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this regulation applies, to discriminate against a person -

(a) in the arrangements which he makes for the purposes of determining to whom the appointment should be offered;

(b) in the terms on which he offers him the appointment; or

(c) by refusing to offer him the appointment.

(2) It is unlawful, in relation to an appointment to an office or post to which this regulation applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person -

(a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or

(b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this regulation applies, to discriminate against him -

(a) in the terms of the appointment;

(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;

(c) by terminating the appointment; or

(d) by subjecting him to any other detriment in relation to the appointment.

…

(7) In paragraph (3)(c), the reference to the termination of the appointment includes a reference -

(a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination

immediately after which the appointment is renewed on the same terms and conditions; and

(b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(8) This regulation applies to -

(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department, but not to a political office or a case where regulation 7 (applicants and employees), regulation 8 (discrimination by persons with statutory powers to select employees for others), regulation 10 (contract workers), regulation 17 (barristers), or regulation 18 (partnerships) applies, or would apply but for the operation of any other provision of these Regulations.

…

(10) In this regulation -

(c) "relevant person", in relation to an office or post, means -

(i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment,

(ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit, and

(iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;"

…

5. Council Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation ("the Directive").

Articles 1, 2 & 6 provides as follows:-

"Article 1

Purpose

The purpose of this Directive 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 or equal treatment.

Article 2

Concept of discrimination

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;

Article 6

Justification of differences of treatment on grounds of age

(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."

(2) The leading case of *Seldon* has been considered previously in this decision. The tribunal also considered the additional legislative provisions and authorities, insofar as relevant, referred to in the list annexed to this decision, and in the written submissions annexed to this decision (Annex 3).

SUBMISSIONS

7. (1) The tribunal was assisted by the written submissions prepared by both counsel which are appended to this decision (Annex 3). It also carefully considered supplemental oral submissions on 23 October 2013, and the further clarification provided by the parties' representatives on two further issues raised by the tribunal and considered on 8 November 2013.

(2) (i) The respondent's counsel, Mr McAteer, urged the tribunal not to rely on the **Engle** decision as it was not binding and was fact specific. Furthermore, he submitted that there was a clear link between Aim 2 and Aims 1 and 3 and that the correspondence from Alan Scott to the claimant dated 11 January 2012 could have been more detailed. He contended that the respondent did not agree that this specified a single legitimate aim but did agree that it was a reference to a single legitimate aim in correspondence. He contended that all five aims were intact as at December 2011. Counsel also raised the ex post facto rationalisation approach as articulated by Lady Hale in paragraphs 59-60 of *Seldon* and further submitted that the respondent had to establish a defence in relation to only one of the five aims to succeed. He also submitted that there was no tension as between Lord Hope and Lady Hale in the *Seldon* case as contended by the claimant's counsel Ms Bradley in her written submissions, as it was clear that Lord Hope agreed with Lady Hale's judgement. He further relied on the judgements of Lord Hope and Lady Hale in **O'Brien v Ministry of Justice (2013) IRLR 259 (UKSC)** to substantiate his arguments relating to ex post facto rationalisation. Mr McAteer recited some of the arguments put forward in his written submissions and contended that, contrary to Ms Bradley's argument, the respondent did not have absolute discretion in relation to retirement age but did have absolute statutory discretion, the exercise of which could be challenged, especially if it was "cross-cutting" the policy followed by other

Departments. In any event it was subject to 'Wednesbury' rationality in the context of judicial review proceedings.

(ii) Counsel also relied on paragraphs 63 and 64 of *Seldon* to argue that 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 argument. It had been argued in *Seldon* that the partnership should have to show, not only that the mandatory retirement age was a proportionate means of achieving a legitimate aim, but that applying it to Mr Seldon could be justified at the time.

(iii) Mr McAteer also referred to the claimant's argument that adverse inferences should be drawn against the respondent for failure to reply to a questionnaire and failure to call relevant witnesses. On the latter point, he submitted that Tom Evans gave his evidence in the capacity as a representative of the respondent. The questionnaire had been overlooked after the case had been stayed at an earlier stage. Furthermore, he contended that no inference should be drawn in any event. The case was not about credibility or the honesty of witnesses and the issue of failure to reply to the questionnaire had never been raised in advance of its mention in the claimant's submissions.

(iv) Mr McAteer contended that the issues were much more detailed in the **O'Brien** case than in the case before the tribunal and urged the tribunal to find in the respondent's favour.

(3) Ms Bradley relied mainly on her written submissions, and therefore made limited oral submissions. She did, however, refer the tribunal to her written submissions and, specifically, to paragraph 11 in relation to ex post facto rationalisation. Furthermore, she reiterated that the correspondence to the claimant of 11 January 2012 specified only one aim at the time at which the direct discrimination took place and that the tribunal should only consider this aim. She also referred the tribunal in this regard to Lord Hope's judgement at paragraph 76 and 77 of *Seldon*, and submitted that the respondent's justification argument had been considerably undermined by its failure to recruit for new panel membership at an earlier stage. This, she submitted would arguably have allowed the respondent to achieve the aims being relied on, as a recruitment exercise was the only appropriate way of achieving Aims 1-4. She contended that the merger of the two panels extinguished any opportunity of bringing new talent to panel membership and that the aims relied on by the respondent could not have had the importance the respondent is now seeking to attach to them. Counsel reiterated that the only reason provided by the respondent for not proceeding with the recruitment exercise was that the timeframe might be longer than expected.

CONCLUSIONS

8. The tribunal, having considered the totality of the evidence together with its findings of fact, the relevant law, and the submissions from both parties, concludes as follows:-

(i) The five aims are capable of being legitimate aims, and the tribunal refers to paragraph 5 of its decision in this regard.

(ii) The five aims were in fact being pursued and the tribunal again refers to paragraph 5 of its decision in this regard.

(iii) The five aims are legitimate in the particular circumstances concerned. Other potential means were explored including the possibility of a recruitment exercise in 2010, the subsequent conflation of the panel membership of the Industrial Tribunals and the Fair Employment Tribunal, (which increased capacity), and the possibility of two five year fixed terms without an upper age limit. For the reasons set out in the Findings of Fact and Discussion section of this decision, the options relating to recruitment and two five year fixed plans without an upper age limit were disregarded. The tribunal is also satisfied, on the evidence, that there is no resource need for panel members.

(iv) The tribunal carefully considered the evidence, the findings of fact, and submissions from both parties' representatives in the context of the relevant legal principles governing proportionality as set out previously in this decision. The tribunal finds itself persuaded by the respondent's case as set out therein and concludes, on the balance of probabilities, that the respondent has shown that the policy of retirement at 70 for panel members is a proportionate means of achieving the legitimate aims, and therefore its defence of objective justification has been established.

(v) The tribunal was not satisfied that the claimant had laid a sufficient basis for it to consider drawing inferences against the respondent due to its alleged failure to reply to the claimant's questionnaire and to call further relevant witnesses to give evidence.

(vi) As reflected in the Case Management record of proceedings dated 15 October 2003 (Annex 1), this decision turns on the specific facts of the case before the tribunal and the nature of the evidence before it.

(vii) The claimant's claim of unlawful direct discrimination on the ground of age is therefore dismissed.

Chairman:

Date and place of hearing: 21-23 October and 8 November 2013, Belfast.

Date decision recorded in register and issued to parties:

Annex 1

THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION

CASE REF: 356/12

CLAIMANT: **Ian Hampton Lindsay**

RESPONDENT: **Department for Employment and Learning**

DATE OF HEARING: **11 October 2013**

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: **Ms S Bradley, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland**

RESPONDENT BY: **Mr P McAteer, Barrister-at-Law, instructed by the Departmental Solicitor's Office.**

Case Management Discussion
Record of Proceedings

The purpose of this Case Management Discussion was to consider the respondent's application for the hearing of the claimant's case, listed from **21 to 23 October 2013**, to be postponed pending the determination of a claim by a full time salaried Circuit Judge in Great Britain. The hearing of that case has been fixed for "final" hearing in January 2014. The claimant objected to the application.

Having considered the detailed written and oral submissions of the parties, I refused the application for the following reasons:-

1. The issue in this case has already been determined in Great Britain in the **Engel** case. Although the decision of the Employment Tribunal in that case has not been appealed, it has not led to the resolution of the claim in this case because it was considered to be fact specific.

2. On the basis of the representations made to me I am satisfied that this case is also fact specific and it does not therefore need to await the outcome of the claim by the salaried Circuit Judge in respect of whom there is a statutory requirement that he retire at 70 which statutory requirement does not apply to the claimant in this case.

3. Mr McAteer very properly and fairly accepted that it is possible that the decision of the Employment Tribunal in the case of the salaried Circuit Judge could be appealed like the **O'Brien** case which took approximately eight years before a final decision on liability was reached.

The Hearing will therefore proceed as listed from **21 to 23 October 2013**.

E McBride CBE
President

Date: 15 **October 2013**

IT10A

ANNEX 2

CASE REF NO: 356/12 IT

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

IAN HAMPTON LINDSAY

CLAIMANT

-and-

DEPARTMENT FOR EMPLOYMENT AND LEARNING

RESPONDENT

CASE REF NO: 356/12 IT

LIST OF AUTHORITIES ON BEHALF OF THE CLAIMANT(*) & RESPONDENT

STATUTORY AUTHORITIES:

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; 1
- Employment Equality (Age) Regulations (Northern Ireland) 2006 (Extracts Only) 11
- * Industrial Tribunals (Constitution and Rules of Procedure) Regulations N1 1996 & 2005 Reg 4 14A- B
- * Fair Employment Tribunal (Rules of Procedure) Regulations s 2005 Reg 5 14C

CASES:

- *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16 15
- *Fèlix Palacios de la Villa v Cortefiel Servicios SA*. C-411/05 41
- *Petersen v. Berufungsausschuss* [2010] IRLR 254 55
- *Gisela Rosenbladt v Oellerking Gebaudereinigungsges mbH* [2010] All ER (D) 101 (Oct) 95
- *Fuchs and Kohler v Land Hessen* [2011] All ER (D) 97 (Sep) 109

- *European Commission v Hungary* C-286/12 125
- *Engel v Transport and Environment Committee of London Councils* (Unreported, ET, 26th April 2013) 137

* O'Brien v Ministry of Justice [2013] IRLR 259 158

* Hampton v Lord Chancellor [2008] IRLR 258 171

* Chief Constable of Yorkshire v Homer [2012] UKSC 15 177

* MacCulloch v ICI PLC[2008] IRLR 846 183

* Lynch v MoD [1983] NI 216 190

*** TEXTBOOKS**

Harvey on Industrial Relations and Employment Law / Division L Equal Opportunities/ Section 3 (A) (3) Justification paras 359- 365 208

Annex 3

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

IAN HAMPTON LINDSAY

CLAIMANT

-and-

DEPARTMENT FOR EMPLOYMENT AND LEARNING

RESPONDENT

CASE REF NOS: 356/12 IT

SUBMISSIONS ON BEHALF OF THE CLAIMANT

THE CLAIM

1. The Claimant is Ian Hampton Lindsay, dob 28.03.1942, retired Chartered Accountant who was appointed as a panel member of the Industrial Tribunals representative of employers to serve from 1 January 1999. He was reappointed on the 22 December 2011 terminating on 28 March 2012 (his 70th birthday). His term was extended to 31.07.2012 to permit conclusion of an ongoing case.

2. On 28 December 2011 he wrote to the Respondent Department stating that in his view he was the victim of age discrimination and asking them to extend the appointment for the normal 5 year term to 31 December 2016. The Department replied on the 11 January 2012 stating their reasons for not doing so;

   "The Department's policy of appointing industrial tribunal panel members until they reach age 70 has the legitimate aim of encouraging a turnover of panel members to introduce new talent. The existing policy is consistent with provisions operating in other Tribunals as well as the provision governing judicial retirement enshrined in section 26 and schedule 5 of the Judicial pensions and Retirement Act 1993. The Department takes the view that its policy in relation to the retirement age of panel members is objectively justified and therefore does not contravene prohibitions on age discrimination."

3. The Claimant lodged an IT1 on 9th February 2012 claiming age discrimination. The claim is one of direct age discrimination. The Respondent concedes that the policy of compulsory retirement of panellists at 70 is directly discriminatory on grounds of age but that the Department was objectively justified in applying the

1

policy in furtherance of legitimate aims and that the application of the policy was a proportionate means of achieving those aims. The legitimate aims relied upon have evolved during the course of this claim and at the time when the decision regarding the Claimant's reappointment was notified (in the letter of 11 January 2012 (page 113-4)) a single aim of " *encouraging a turnover of panel members to introduce new talent*" was relied upon. By the stage of the provision of the witness statement from Tom Evans (Assistant Director DEL) the aims relied upon had been expanded to comprise those which are set out in para 4 of the Factual Issues in the agreed CMD issues document (page 30-31).

4. The agreed issues for the determination of the Tribunal are;

LEGAL ISSUES

1. Did the Respondents unlawfully directly discriminate against the Claimant contrary to Art 13(1) and or 13(3) of the Employment Equality (Age) Regulations (Northern Ireland) 2006, in re-appointing him on 22nd December 2011 until 28th March 2012, being his 70th birthday, rather than for a five year term and in the arrangements made for determining who should be appointed to the office of Tribunal Panel Member and the duration of that appointment.

2. Is the treatment of the Claimant and the policy applied by the Respondent a proportionate means of achieving a legitimate aim?

FACTUAL ISSUES

The Respondent accepts that it applies a policy of not appointing Tribunal Panel Members beyond their 70th Birthday (save insofar as is necessary to complete the hearing of any matter which is ongoing on that date) and that this resulted in the treatment complained of which would in the absence of justification constitute discrimination on the grounds of age. The issues in this case factually therefore can be succinctly stated as follows:

3. Does that policy pursue legitimate aims?

4. Are any or all of the aims relied upon by the Respondent capable of being legitimate aims for the purposes of justifying direct age discrimination namely;
    - the introduction of new talent to the panel by encouraging a turnover of panel members,
    - the encouragement of recruitment of younger panel members in order to address a disparity in the current age profile of panel members in that there are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.
    - The updating of knowledge and skillsets in relation to modern workplace issues of the tribunal panel generally.
    - responding to the changing demographics and social attitudes
    - establishment of a level of predictability to facilitate succession planning.

5. Is the policy of fixing a retirement age a proportionate means of achieving those aims?
6. Were other means considered capable of achieving the respondent's aims?
7. Is the choice of 70 years of age as retirement age a proportionate means of achieving those aims?

5. LEGISLATIVE BACKGROUND AND CASE LAW

Reg 4(2) of the Industrial Tribunal (Constitution and Rules of Procedure) Regulations NI 1996 (and subsequently 2005) provide for the appointment of Industrial Tribunal Lay Panel members (Employer and Employee Representatives)

4(2) *Members of the panels constituted under these Regulations shall hold and vacate office under the terms of the instrument under which they are appointed but may resign their office by notice in writing to the Department; and any such member who ceases to hold office shall be eligible for reappointment.*

Reg 5(2) of the Fair Employment Tribunal (Rules of procedure) Regulations NI 2005 makes similar provision;

5 (2) *Members of the panel of chairmen shall hold and vacate office under the terms of the instrument under which they are appointed, but may resign their office by notice in writing to the Lord Chancellor, and any such member who ceases to hold office shall be eligible for reappointment.*

Neither provision imposes any statutory requirement for retirement at 70 by contrast with the provisions providing for the appointment of FET chairs (page 179)

6. **Employment Equality (Age) Regulations (NI) 2006**

Discrimination on grounds of age
3.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if—
(a)on the 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.

7. **EU Directive 2000/78**

Article 6

Justification of differences of treatment on grounds of age

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;

4

(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.

8. **Harvey on Industrial Relations and Employment Law (Div L Section 4 (C) (1) (b)** provides a synopsis of what the European Court of Justice considers to be legitimate aims;

[690]

*Under the Framework Directive 2000/78/EC, compulsory retirement ages are necessarily unlawful unless they can be objectively justified. Article 6 of the directive allows member states the freedom to provide that differences of treatment on grounds of age are not unlawful, to the extent that 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'(** emphasis added)*

9. **JUSTIFICATION**

The Supreme Court's guidance in **Seldon** and **Chief Constable of West Yorkshire Police v. Homer [2012] UKSC 15 (para 22 – 26) Lady Hale ;** required justification to be considered in a structured way by: (i) setting out the aims of the policy; (ii) considering whether the policy is appropriate with regard to its aims; and (iii) considering whether the policy was reasonably necessary with regard to its aims.

The European jurisprudence is set out in the extract from Harvey (pages 208-214 of the Bundle of Authorities) and is comprehensively reviewed in the judgment of Lady Hale in **Seldon v Clarkson Wright and Jakes [2012] UKSC 16, [2012] IRLR 590**, SC paras 32- 49.. While the type of aims relied upon by the Respondent could arguably fall within the broad social policy type of aims identified in the European case law to justify direct age discrimination para 50 Seldon sets out a number of additional principles applicable to this case and the concept of intergenerational fairness as defined at para 56 should be borne in mind in assessing the legitimacy of the aims in this case.

LEGITIMATE AIMS

10. What constitutes a legitimate aim in domestic case law is set out at Para 50(2) Seldon (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).

Particular legitimate aims which have a bearing on this case are set out in para 50 (4) and include ;

(i) promoting access to employment for younger people (*Palacios de la Villa, Hütter, Kücükdeveci*);

(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*);

(vii) facilitating the participation of older workers in the workforce (*Fuchs*, see also *Mangold v Helm*, case C-144/04 [2006] IRLR 143);

11. While some of the aims may be capable of being a legitimate aim Lady Hale cautions that that is only the beginning of the story; –

*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] IRLR 934), **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.

12. This issue is central to the instant case as;

    a) we do not know what aim was in the mind of the person(s) who devised the policy pre 1999 (TE para 3.4.

    b) Mr Evans has conceded that only a single aim was in the mind of the author of the letter of 11.01.12 to the Claimant

    c) the additional aims are therefore ex post facto rationalization .

13. Ex post facto rationalisation is permissible (para 60 Seldon) However Lord Hope at paras 76&77 clarifies;

    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, reg. 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.*

14. It is clear that no matter what aims may have been in the minds of the policy makers pre 1999 that it is the aim which was relied upon as the justification for the treatment of Mr

Lindsay on 22 December 2011 which must be looked at to determine if the treatment Mr Lindsay received was discriminatory at the time he was subjected to it. It has been agreed that it was a single legitimate aim - a turnover of panel members to introduce new talent. The additional aims now added were not in the contemplation of the alleged discriminator. It is contended that the only aim which should concern the Tribunal is the "*encouraging a turnover of panel members to introduce new talent*" .

15. If however the tribunal determines that it can look at the additional (post discriminatory decision) aims then the dicta of Lord Hope and Lady Hale in **O'Brien v Ministry of Justice 2013 IRLR 259 (UKSC)** – the following extracts (with emphasis added) apply to the facts of this case;

paras 45-48 ,

45

.....The second sentence of paragraph 64 repeats the familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so.

46

The opinion of Advocate General Kokott is slightly more expansive at paragraph 62:

'62. The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued. .....[36]

47

The Ministry of Justice face the difficulty that they have not until now articulated a justification for their policy. *It is clear from the history that when the 2000 Regulations were made the Lord Chancellor took the view that judges were not 'workers' for this purpose, a view which was maintained until this court rejected it following the renewed hearing of this case in July 2012.* ***This does not preclude the Ministry from now advancing a justification for maintaining the policy: see Seldon v Clarkson Wright & Jakes [2012] UKSC 16, [2012] IRLR 590, paragraph 60,*** *citing Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (case C-341/08) [2010] IRLR 254. It is also clear from the history that, in so far as there was a reason for ensuring that fee-paid part-time judges were not covered by the 2000 Regulations, it was to save cost. By itself, of course, this cannot constitute justification.* ***But once again, this does not preclude the Ministry from now advancing a different and better justification:***

see Finalarte Sociedade Construção Civil Lda v Urlaubs-und-Lohnausgleichskasse der Bauwirtschaft (cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98) [2001] ECR I-7831.

48

However, in this as in any other human rights context, this court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted: *see Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19, [2007] NI 89, paragraphs 26 and 37; R (on the application of SB) v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100, paragraph 31. In particular, as Mummery LJ pointed out in R (on the application of Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] IRLR 934, at paragraphs 128–132,* ***it is difficult for the Ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time.***

16. There is no evidence that the justification for the policy was carefully thought through by reference to the relevant principles at the time when the policy was adopted (in or about 1999 – see para 3.4TE - the Respondent has been unable to source documentation regarding the policy. The Respondent is now seeking to rely on the additional aims but again there is no evidence that the aims underlying the policy were carefully thought through at the time when the policy was applied to the Claimant . The Respondent has adduced little evidence of the existence of any strategic plan or document setting out the precise, concrete factors which necessitated the continued application of the policy in December 2011. Mr Evans conceded in evidence that notwithstanding quarterly workforce planning exercises having taken place that the first three aims were not the focus of any discussion at these meetings. If these were aims being pursued by the Respondent some insight as to why these aims were considered legitimate in the context of panel appointments would have been expected. Examples of the type of information we would have expected to have been provided with would have included;

    - The target number of panel members, with maximum and minimum variances acceptable – the memo of Gus Close 20 June 2007 (pg 17) refers to " determine the numbers needed" – there is no evidence that the Respondent has at any stage made such a determination.
    - The number of new members the Department wished to appoint and timescale;
    - The desired representation of various groups on the panels – the Department was unaware of the composition of its panels and they could

only guess at this. They never did the monitoring exercise which would have properly informed them of the need to attract appointees from underrepresented groups. (Gus Close page 19);

- Qualifications and desired characteristics of panel members
- Set out periods of appointment, terms and conditions, reasons for dismissal etc.

As regards the 4th and 5th aims, Mr Evans acknowledges that these emerged for the first time in his witness statement and there is no evidence that they had been given any thought prior to then.

17. The Respondent has produced a paucity of statistical evidence to justify the proportionality of the continued application of the policy. They have not provided evidence that they gathered the necessary evidence to inform their view that the policy will achieve the critical mass of vacancies (not defined – Tom Evans Para 4.19) to trigger a recruitment. When the Respondent was requested to provide statistical additional information of the retirees from 1999 (page 49 Tribunal bundle) they could only provide information in relation to 99 notwithstanding that by September 2013 when the information was provided 190 were no longer in post.

18. PROPORTIONALITY

The discriminatory scheme must be a proportionate means of achieving a legitimate aim (see regulation 3(1)); and the judgment of the EAT delivered by Elias J (the President), as he then was, in **MacCulloch v. Imperial Chemical Industries plc [2008] ICR 1334,** paragraph 10 , provides comprehensive guidance as to the application of that test and the rigour with which tribunals must apply it. Mr Justice Ekias in para 12 notes that the discriminatory effect of direct discrimination in general rules or policies will necessarily be greater than where a rule is case in apparently neutral tems but has indirect discriminatory adverse effects. Direct discrimination may be hrader to justify. The concepts of legitimate aim and proportionality must not be conflated but must be fully considered as two separate issues. . In **Chief Constable of West Yorkshire v Homer** Lady Hale emphasised (para 22 that to be proportionate a measure has to be **both** appropriate and necessary and the Respondent must satisfy both elements of the test.

19. APPLICATION OF THE CASE LAW

Once an aim has been identified it still has to be asked if it is legitimate in the particular circumstances of the employment concerned – para 61 Seldon Lady Hale) Lady Hale draws on an example that 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. It

cannot be claimed by the Respondent in this case that a problem exists in recruiting the types of panellist to satisfy aims 1-4 as they have not attempted to recruit for 14 years.

20. When considering these aims and indeed the additional two aims the Tribunal must consider these aims against the recognised concept of inter- generational fairness -

para 46 Seldon " 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. This interest must be taken into account in respecting the other potentially divergent interests

21. Looking at the aims, the first three aims pursued are conflated in Mr Evans's witness statement at para 4.3 ...." *the introduction of new talent, encouraging turnover of panel members and the recruitment of younger members to address current disparity in the age profile of members and the updating of knowledge and skills*".

It is submitted that in the context of the appointments to and composition of the Tribunal panels comprising part-time lay members there is little evidence of deficiencies in the composition / profile of the panel members. There is an age disparity but only due to the fact that no appointments have occurred since 1999. There is no evidence of deficiencies in the capabilities of the current panellists to undertake their role as lay panellists that the aims relied upon are unnecessary and not legitimate.

22. Is the retirement at 70 policy an appropriate means of achieving those aims? These aims can only be achieved through an appointments procedure. There has been no appointments process/ recruitment since 1999. The respondent contends (on the basis of a document produced for the first time during the hearing and only after Mr Barbour queried the Respondent's statistics) that the tribunal is adequately resourced in terms of the sitting days requirement and that no vacancies exist. It is the Claimant's contention that opportunity has existed for the Respondent to initiate a recruitment / public appointment procedure by reason of the reducing number of panellists in post from 1999 when there were 299 appointees. Those numbers have decreased as is evidenced by the partial statistics provided in the replies at page 49 & 50 Tribunal bundle. In 2007 when consideration was given to an appointments exercise there were 173 in post (a reduction of 126) and have continued to do so to the present when there are 109 in post (page 207(a reduction of). While the reduced number of 173 was recognised in the consideration of an appointments exercise in June 2007 (pgs 17-19) the Department did not determine the numbers it needed (page 17). Advanced preparations for an appointment procedure was underway in March 2010. In the draft public appointments pack March 2010 (pg60) it was stated that there were 100 vacancies – while this exercise did not proceed this figure appears to have reflected the

need at that time. Had the Respondent had those aims in mind the opportunity to recruit to satisfy all the aims existed in 2007 and 2010. Instead of grasping the opportunity to introduce of new talent, encourage turnover of panel members and recruit younger members to address the disparity in the age profile of members and update the knowledge and skills the Respondent merged the FE & IT panels thus extinguishing the option of filling those vacancies with their desired type of appointees. The only reason advanced for the failure to conduct an appointment process / recruitment exercise is due to unidentified timeframe (June Ingram pg 78 para3 .

23 There is no evidence that the Department has since conducted an exercise to determine what number of panellists it requires. If it has not determined the number of vacancies it requires to trigger a recruitment it cannot therefore sustain the contention that in order to achieve those aims it needs to maintain the retirement at 70 policy in order to create vacancies.

24 The appropriate means to achieve the aims is to make a small number of appointments on a regular ongoing basis with the use of a) essential criteria to ensure appointees have the requisite experience and b) welcoming statements to encourage applicants from poorly represented groups.

25 Is it necessary to maintain the policy? It is not necessary to retire panellists at 70 in order to create vacancies – the statistics in the Claimant's witness statement at para 38 set out the decreasing numbers in post and the table provided at page 207 shows that between 1.01.11 and 21.10.13 27 further appointees have left. The numbers are now so significantly diminished (109 remaining) that there is no need to maintain the policy. There is a reasonable flow of appointments without the policy – the replies at page 49 & 50 of the Tribunal bundle show that out of 99 appointees 37 had resigned in 12 years (if this pattern is replicated in the 299 appointees from 1999 one would expect in or about 100 resigned)

26 JUSTIFICATION OF THE SETTING OF THE RETIREMENT AGE AT 70

Consistency – there is no requirement to act consistently – the Department has absolute discretion to decide on the terms for lay panel members –page 164. The assertion that the policy is consistent with Tribunal and Judicial practice is merely an observation which is in fact not borne out by DOJ document on Future Administration and Structure of Tribunals in Northern Ireland (undated) (page 115-116 bundle) states at para 5.45 that the provision governing the retirement of office holders is currently inconsistent.

Para 5.48 *" there are however a number of office holders appointed by the Department for whom there is currently no statutory retirement age"*
5.49 As arrangements have developed piecemeal in accordance with different Departmental approaches, terms and conditions of appointment presently vary between Tribunals"

While consistency may have been an aspiration it was clearly not the reality.

If a policy is discriminatory it is no justification that the Respondent is mirroring discriminatory measures adopted in other GB and NI tribunals to achieve consistency.

27. ALTERNATIVES

Lady Hale at para 48 O'Brien *"it is difficult for the Ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time.*

Less discriminatory means to achieve the aims could include the appointment of panellists for a number (2 or 3) fixed terms as commended to the Minister – This combined with a ring fencing of the current panellists would achieve the aims without discrimination. While the Respondent has provided evidence (pages 169-174) that a proposal to move to two five year terms was looked at we have no insight as to what examination was undertaken of the proposal and what evidence was gathered to enable consideration of the proposal. We do not know why the proposal was not accepted other than it was "arguably a cross cutting policy" – however as the Department has absolute discretion (page 164) in relation to the terms of panellists this non discriminatory alternative could have been adopted. but rather than gathering evidence to inform choice on this option it was merely shelved in the interests of ensuring a consistent approach with other governmental bodies would emerge.

28. BALANCING EXERCISE

It is submitted that the Tribunal, when evaluating the justification defence must examine whether the Respondent has undertaken the balancing exercise required to establish proportionality. There has been no apparent consideration by the Respondent of the impact that the policy had on the Claimant as against the importance of the aim to the employer – **Para 24 Chief Constable of West Yorkshire v Homer 2012 IRLR 605 Lady Hale.** The Claimant was being denied participation in the labour force and thus in economic, cultural and social life which contributes to him realising his potential and to his quality of life. These are matters of considerable importance to him and was apparent from his evidence relating to injury to feelings. This has to be balanced against the importance of the aims to the respondent – it is submitted that the fact that there has been no recruitment / appointments within 14 years even when the opportunities presented demonstrated that the aims are of little importance to the respondent.

29. There is little evidence that the Respondent has carried out any meaningful exercise of examining the alternatives or gathering the necessary evidence to inform choice either at the time of the adoption of the policy or at the time of application of the policy to the Claimant. Indeed even at the stage of the IT3 and witness statement of Tom Evans no evidence has been adduced to elevate the "aims" to anything other than statements of principle / unsupported aspirations – there is no evidence that there were recognised deficiencies with the

composition of the panels and the attributes of the members to necessitated adoption of those aims.

30. In her concluding remarks in **O'Brien** Lady Hale remarked;

71. *Conclusions*

We agree with the arguments advanced on behalf of Mr O'Brien. The Ministry have struggled to explain what they are seeking to achieve by denying a pension to part-timers while granting one to full-timers. One aim seems to be to give a greater reward to those who are thought to need it most. ***This might be a legitimate aim, but (as Advocate General Kokott explained) the unequal treatment of different classes of employees must be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria. An employer might devise a scheme which rewarded its workers according to need rather than to their contribution, but the criteria would have to be precise and transparent. That is not so here.***

In light of the foregoing and the absence of those precise, concrete factors characterising how the retirement policy was the appropriate and necessary means to achieve the aims is submitted that the Respondent has not established that the proportionality.

31. A flaw permeates the respondent's reasoning that the retirement policy which will achieve its aims when it fact it is demonstrably clear that what is required is a properly devised strategic appointments policy informed by evidence gathered from monitoring of the panels and the Tribunal requirements. .

32 INFERENCES OF UNLAWFUL DISCRIMINATION

In addition to the foregoing it is submitted that inferences of unlawful discrimination should be drawn from the following:

- Failure to reply to the statutory questionnaire – the SQ was served on 24.02.12 pg 11 Tribunal Bundle – the respondent did not reply to it – it is submitted that an inference of discrimination should be drawn.

Reg 46. (1) Employment Equality (Age) Regulations (NI) 2006

In accordance with this regulation, a person ("the person aggrieved") who considers he may have been discriminated against, or subjected to harassment, in contravention of these Regulations may serve on the respondent to a complaint presented under regulation 41 (jurisdiction of industrial tribunals) or a claim brought under regulation 44 (jurisdiction of county courts) questions in the form set out in Schedule 2; and the respondent may if he so wishes reply to such questions by way of the form set out in Schedule 3.

(2) Where the person aggrieved questions the respondent (whether in accordance with paragraph (1) or not)—

(b) if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within eight weeks of service of the questions or that his reply is evasive or equivocal, the court or tribunal may draw any

inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.

- Failure by the respondent to provide in discovery the statistical document (page 205 (upon which they seek to place considerable reliance in refuting that vacancies exist without the need for the maintenance of the retirement policy) was only provided on the first morning of hearing .

- The failure to call the witnesses who identified the four additional (ex post facto) to give evidence as to the what evidence they had gathered to inform their decision that these aims were justified – Mr Evans when asked who devised the additional aims responded that they were cleared with senior management and he specifically referred to his lie manager, Colin Jack. None of the persons who settled the policy and developed the defence of justification for continued application of the policy gave evidence. It is submitted that we were left to speculate as to their evidence in circumstances where their evidence would have been extremely material to the core issues in the case. Failure to call such witnesses may give rise to an inference – Hutton J - ***Lynch v Ministry of Defence [1983] NI 216***

> *" ... Where a party without explanation fails to call as a witness a person whom he might be expected to call, if that person's evidence would be favourable to him, then although the jury may not treat as evidence what they may, as a matter of speculation, think that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that person's evidence would not have helped that party's case; if the jury drew that inference, then they may properly take it into account against the party in question for the purposes, namely:-*
>
> *(a) in deciding whether to accept any particular evidence which has in fact been given either for or against that person and which relates to a matter with respect to which the person not called as a witness could have spoken; and*
>
> *(b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken."*

33. Should the Tribunal hold that Mr Lindsay was subjected to an unjustified discriminatory policy he is entitled to his financial loss of £4223.82 and compensation for the injury to feelings. The injury to feelings as described in paras 40 & 41 of his witness statement should attract an award comparable to that awarded to Mr Engels £6,000 (**Engel v Transport & Environment Committee of London Councils** (page 137-157 bundle of authorities)

Suzanne Bradley BL
22 October 2013.

16

CASE REF NO: 356/12 IT

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

IAN HAMPTON LINDSAY

CLAIMANT

and

DEPARTMENT FOR EMPLOYMENT AND LEARNING

RESPONDENT

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT

INTRODUCTION

1. The Respondent applies a policy of not appointing Tribunal Panel Members beyond their 70th Birthday (save insofar as is necessary to complete the hearing of any matter which is ongoing on that date). The application of this policy resulted in the re-appointment of the Claimant on 22nd December 2011 until 28th March 2012, being his 70th birthday, rather than for a five year term (notwithstanding a subsequent extension to complete ongoing work).

2. The Respondent accepts that in the absence of objective justification the said treatment would constitute direct discrimination by it against the Claimant on the ground of age. The question for the Tribunal is whether the Respondent has objectively justified the policy in question.

3. References herein to the bundles take the forms:

   (i) AB followed by a page number – referring to the identified page number in the Authorities Bundle;
   (ii) WSB followed by a page number – referring to the identified page number in the Witness Statement Bundle;
   (iii) TB followed by a page number – referring to the identified page number in the Trial Bundle;
   (iv) TE followed by a page number – referring to the identified paragraph number in the witness statement of Tom Evans.
   (v) IL followed by a page number – referring to the identified paragraph number in the witness statement of Ian Lindsay.

LEGISLATIVE BACKGROUND

4. The relevant domestic provisions are contained within the Employment Equality (Age) Regulations 2006 ("the Regulations", AB11). The relevant parts of regulations 3 and 13 are as follows (emphasis added):

   Discrimination on grounds of age

3. —(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if-

(a) on the 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.

Office-holders etc.

13. —(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this regulation applies, to discriminate against a person—

(a) in the arrangements which he makes for the purposes of determining to whom the appointment should be offered;

(b) in the terms on which he offers him the appointment; or

(c) by refusing to offer him the appointment.

(2) It is unlawful, in relation to an appointment to an office or post to which this regulation applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person—

(a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or

(b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.

(3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this regulation applies, to discriminate against him—

(a) in the terms of the appointment;

(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;

(c) by terminating the appointment; or

(d) by subjecting him to any other detriment in relation to the appointment.

…

(7) In paragraph (3)(c), the reference to the termination of the appointment includes a reference—

(a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or

circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and

(b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.

(8) This regulation applies to—

…

(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a Northern Ireland Minister, the Assembly or a government department,

but not to a political office or a case where regulation 7 (applicants and employees), regulation 8 (discrimination by persons with statutory powers to select employees for others), regulation 10 (contract workers), regulation 17 (barristers), or regulation 18 (partnerships) applies, or would apply but for the operation of any other provision of these Regulations.

…

(10) In this regulation—

…

(c) "relevant person", in relation to an office or post, means—

(i) any person with power to make or terminate appointments to the office or post, or to determine the terms of appointment,

(ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit, and

(iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;

…

5. The underlying directive in the light of which the Regulations must be considered is Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Directive", AB1). Most salient are articles 1, 2 & 6 (relevant extracts, emphasis added):

Article 1

Purpose

The purpose of this Directive 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.

Article 2

Concept of discrimination

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;

…

Article 6

Justification of differences of treatment on grounds of age

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.

THE PRINCIPLES TO BE APPLIED

6. The leading case in the area, which considered the issues in the specific context of the question of objective justification of a compulsory retirement age, is *Seldon v Clarkson Wright & Jakes* [2012] 3 All ER 1301 ("*Seldon*", AB15). For a general statement of all relevant principles one need look no further.

7. Mr Seldon was a partner in a solicitor's firm who was obliged to retire at the end of the year in which he reached the age of 65 under the applicable partnership deed. He claimed his expulsion from the firm was an act of direct age discrimination. The firm claimed the treatment was justified, relying on a number of legitimate aims. The firm succeeded at all levels although neither the Employment Appeals Tribunal or the Court of Appeal was asked to consider whether the aims could be achieved by a different retirement age, which said issue was remitted to the Tribunal. Lady Hale SCJ delivered the leading judgment.

8. Having reviewed the jurisprudence in the area Lady Hale considered what messages could be derived from the European case law. Having satisfied herself that it was appropriate for a Court to consider individual contracts of employment or partnership in the manner set out in the authorities she made a number of observations on objective justification in these cases as follows (*Seldon*, paragraph 50, AB32, emphasis added):

> "(2) If it is sought to justify direct age discrimination under art 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' (the *Age Concern* case [2009] All ER (EC) 619, [2009] ICR 1080, *Fuchs v Land Hessen* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043, [2012] ICR 93*)*.
>
> (3) It would appear from that, as Advocate General Bot pointed out in *K¸c¸kdeveci v Swedex GmbH & Co KG* [2010] All ER (EC) 867, 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 v Cortefiel Servicios SA* Case C-411/05 [2008] All ER (EC) 249, [2009] ICR 1111, *H¸tter v Technische Universit‰t Graz, K¸c¸kdeveci v Swedex GmbH & Co KG)*;
>
> (ii) the efficient planning of the departure and recruitment of staff (*Fuchs v Land Hessen* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043);
>
> (iii) sharing out employment opportunities fairly between the generations (*Petersen v Berufungsausschuss f¸r Zahn‰rzte f¸r den Bezirk Westfalen-Lippe* Case C-341/08

[2010] All ER (EC) 961, *Rosenbladt v Oellerking Geb‰udereinigungsges mbH* Case C-45/09 [2012] All ER (EC) 288, *Fuchs v Land Hessen*);

(iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* Joined cases C-250/09 and C-268/09 [2011] 2 CMLR 179, *Fuchs v Land Hessen*);

(v) rewarding experience (*H¸tter v Technische Universit‰t Graz*, *Hennigs v Eisenbahn-Bundesamt*);

(vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (*Ingeni¯rforeningen I Danmark (acting on behalf of Andersen) v Region Syddanmark* Case C-499/08 [2012] All ER (EC) 342);

(vii) facilitating the participation of older workers in the workforce (*Fuchs v Land Hessen*, see also *Mangold v Helm* Case C-144/04 [2006] All ER (EC) 383, [2005] ECR I-9981);

(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 v Oellerking Geb‰udereinigungsges mbH*); or

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

(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 (*H¸tter v Technische Universit‰t Graz, K¸c¸kdeveci v Swedex GmbH & Co KG, Ingeni¯rforeningen I Danmark (acting on behalf of Andersen) v Region Syddanmark*).

(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 v Land Hessen*).

(7) The scope of the tests for justifying indirect discrimination under art 2(2)(b) and for justifying any age discrimination under art 6(1) is not identical. It is for the member states, rather than the individual

employer, to establish the legitimacy of the aim pursued (the *Age Concern* case)."

9. Lady Hale noted at paragraph 51 (AB33) that clearly the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination and regulation 3 must be read accordingly. Applying the European principles to the domestic situation she addressed a number of important principles.

Is the aim capable of being a legitimate aim?

10. *Seldon*, paragraphs 55 – 57, AB34, emphasis added:

> **[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. …"

Is the aim in fact being pursued (ex post facto rationalisation)?

11. *Seldon*, paragraphs 59 – 60, AB35, emphasis added:

> **[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 (*Schˆnheit v Stadt Frankfurt am Main, Beckett v Land*

Hessen Joined cases C-4/02 and C-5/02 [2004] IRLR 983, [2003] ECR I-12575; see also *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] IRLR 934, [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 at [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 v Berufungsausschuss f¸r Zahn‰rzte f¸r den Bezirk Westfalen-Lippe* [2010] All ER (EC) 961. 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 it pursues' (para 42) (our emphasis). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation.

Is the aim legitimate in the particular circumstances of the employment concerned?

12. *Seldon*, paragraph 61, AB35:

> **[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.

Are the means chosen appropriate and necessary?

13. *Seldon*, paragraph 62, AB35, emphasis added:

> **[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.

14. It will be recalled from paragraph 55 of the judgment, quoted at paragraph 10 above, that the requirement that the means chosen be necessary should be read as "reasonably" necessary. See also paragraph 31 of *Engel v Transport and Environment Committee of London Councils* ("*Engel*", AB147) for a fuller explanation of why that is the case by reference to another Supreme Court judgment of Baroness Hale.

The measure does not have to be justified in its application to the particular individual

15. *Seldon*, paragraph 63 - 66, AB35 - 36, emphasis added:

> **[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. … 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, which is 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 2006 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 v Oellerking Geb‰udereinigungsges mbH, Hennigs v Eisenbahn-Bundesamt*).

[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.

16. Applying the various principles to the facts of the case the Supreme Court dismissed Mr Seldon's appeal.

APPLICATION TO THE FACTS OF THIS CASE

17. It is clear therefore in light of the immediately foregoing that the policy in question does not need to be justified in its particular application to the Claimant.

18. I therefore now turn to address the five aims relied upon by the Respondent as justifying the imposition of a policy requiring (save for the purpose of continuing outstanding work) a panel member's appointment to end on reaching the age of 70 and ask in turn:

    (i) Is the aim capable of being a legitimate aim?
    (ii) Is the aim in fact being pursued?
    (iii) Is the aim legitimate in the particular circumstances of the employment concerned?
    (iv) Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

19. The last point breaks down in each instance into a consideration of the proportionality of both the fixing of a retirement age and of the choice of 70 years as that age. Whether there are means are available to achieve the same aims will also fall to be considered in this regard.

20. The aims relied upon and which will be addressed in this manner in turn are:

    1. the introduction of new talent to the panel by encouraging a turnover of panel members,
    2. the encouragement of recruitment of younger panel members in order to address a disparity in the current age profile of panel members in that there

are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.

3. The updating of knowledge and skillsets in relation to modern workplace issues of the tribunal panel generally.
4. Responding to changing demographics and social attitudes, and
5. Establishment of a level of predictability to facilitate succession planning.

21. First of all however a brief consideration of the overall position is helpful.

22. Sizeable numbers were appointed in 1999 to panels of representatives for employees and employers separately for both ITs and FETs. The rationale for appointing such sizeable numbers remains unclear as does the assessment of need at that time that prompted or permitted that level of appointment. Those appointments occurred by nomination rather than following a public competition. In line with good practice future appointments will be carried out by open competition. (TE, 2.3, WSB 17).

23. There was no need to recruit additional members in the interim. When further recruitment was eventually considered additional capacity required was met in the end by obtaining agreement from a majority of existing IT panel members to sit on FET panels and vice versa. (TE 2.3.2) This action also addressed other more general concerns:

> "In the past persons have been appointed to the ITs of the FET but not to both. In the last round of p/t chair appointments we decided to appoint to both. It would be more straightforward for us in making appointments and it would surely be easier fro OITFET when selecting persons for panels." (Memo from Gus Close, 20/1/07, WSB18)

24. Various matters present difficulties for the Department in planning recruitment, including uncertainty over the future transfer of ITs and the FET to NICTS, uncertainty over resource implications arising out of *O'Brien* and a wide ranging review of employment law (TE2.3.3 – 2.3.5). The primary driver however in there having been no competition for new panel members has been the number of panel members currently appointed, the lack of any objective business requirement for new panel members and the difficulties and reasons militating against recruitment in circumstances where there is no resource requirement. This is apparent from the evidence as is set out in greater detail under the individual consideration of the various aims.

25. Whether the Claimant now disputes whether the conflation of the panels in 2010 was a sensible or not the steps taken then are now historical and cannot be undone. In considering the justification of the maintenance of the policy at this point we can only consider the facts as now exist.

26. Aims 1 to 4 in particular will be proportionately met by recruitment in due course once fresh recruitment is a viable option as dictated by resource requirement. They will then continue to be met by the predictable turnover of staff effected by the ongoing application of the policy (until such times as change might be introduced in terms applicable to new panel members if

considered appropriate in due course). That predictability will also achieve the fifth aim pursued.

27. Now turning to each of the aims in turn:

Aim 1. The introduction of new talent to the panel by encouraging a turnover of panel members:

Is the aim capable of being a legitimate aim?

28. Paragraph 56 of *Seldon* clearly applies:

> **[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.

29. This further touches upon a number of categories identified by Lady Hale at paragraph 50(4) of *Seldon*, most specifically those identified at (i), (iii) and (iv):

> (i) promoting access to employment for younger people (*Palacios de la Villa v Cortefiel Servicios SA* Case C-411/05 [2008] All ER (EC) 249, [2009] ICR 1111, *H¸tter v Technische Universit‰t Graz, K¸c¸kdeveci v Swedex GmbH & Co KG)*;
>
> (iii) sharing out employment opportunities fairly between the generations (*Petersen v Berufungsausschuss f¸r Zahn‰rzte f¸r den Bezirk Westfalen-Lippe* Case C-341/08 [2010] All ER (EC) 961, *Rosenbladt v Oellerking Geb‰udereinigungsges mbH* Case C-45/09 [2012] All ER (EC) 288, *Fuchs v Land Hessen*);
>
> (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* Joined cases C-250/09 and C-268/09 [2011] 2 CMLR 179, *Fuchs v Land Hessen*);

30. Petersen:

> "67 In accordance with Article 6(1) of the Directive, the aims which may be regarded as 'legitimate' within the meaning of that provision are inter alia legitimate employment policy, labour market or vocational training objectives.

68 The Court has previously held that the encouragement of recruitment undeniably constitutes a legitimate social policy or employment policy objective of the member states, and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers (see *Palacios de la Villa*, paragraph 65). Similarly, a measure intended to promote the access of young people to the profession of dentist in the panel system may be regarded as an employment policy measure.

69 It remains to be ascertained whether, in accordance with Article 6(1) of the Directive, the means used to achieve that aim are 'appropriate and necessary'.

70 In this respect, in view of developments in the employment situation in the sector concerned, it does not appear unreasonable for the authorities of a member state to consider that the application of 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. As to the setting of the age limit at 68, that age, as observed in paragraph 52 above, would appear to be sufficiently high to serve as the endpoint of admission to practise as a panel dentist.

71 The question arises, however, of whether the application of an age limit is appropriate and necessary for achieving the aim pursued. Where the number of panel dentists in the labour market concerned is not excessive in relation to the needs of patients, entry into that market is usually possible for new practitioners, especially young ones, regardless of the presence of dentists who have passed a certain age, in this case 68. In that case the introduction of an age limit might be neither appropriate nor necessary for achieving the aim pursued.

72 The German government stated at the hearing, without being contradicted, that the age limit at issue in the main proceedings did not apply in regions in which there was a shortage of panel dentists. It also submitted that, in the field of health, it is important that the state is able to make use of its discretion to take the necessary measures, not only when faced with a current problem of excess medical supply, but also where there is a latent risk of such a problem occurring.

73 On this point, having regard to the discretion available to the member states recalled in paragraph 51 above, it must be acknowledged that, faced with a situation in which there is an excessive number of panel dentists or with a latent risk that such a situation will occur, a member state may consider it necessary to

impose an age limit such as that at issue in the main proceedings, in order to facilitate access to employment by younger dentists.

74 However, it is for the national court to ascertain whether such a situation exists.

75 If that were the case, it would still remain to be ascertained whether the measure at issue in the main proceedings is consistent, taking into account the four exceptions set out in paragraph 16 above.

76 The first three exceptions, designed either for specific situations in which there is a shortage of panel dentists or for a limited period of time, do not interfere with the objective of promoting the entry to the labour market of young panel dentists. The fourth exception concerns the non-panel sector and has no effect whatever on the entry to the labour market of young dentists practising in the panel system.

77 It follows that, if the aim of a measure such as that at issue in the main proceedings is the sharing out of employment opportunities among the generations within the profession of panel dentist, the resulting difference of treatment on grounds of age may be regarded as objectively and reasonably justified by that aim, and the means of achieving that aim as appropriate and necessary, provided that there is a situation in which there is an excessive number of panel dentists or a latent risk that such a situation will occur."

Is the aim in fact being pursued? / Is the aim legitimate in the particular circumstances of the employment concerned?

31. This aim has clearly been in the contemplation of the Respondent prior to the facts grounding this case – see in particular WSB147, para 6, echoed in the letters of 14/7/11 (WSB149) and 19/7/11 WSB152.

32. The Witness Statement of Tom Evans which is of course indicative of and evidence of the Department's official position in the matter, not his own personal view, makes it clear that this aim is being pursued by the Respondent (TE4.1 & 4.2, 4.4 - 4.13).

33. The aim is clearly legitimate in the circumstances of the employment concerned. Refreshment of the panels (introduction of new talent / encouraging turnover of panel members) can only serve the interests of the operation of the panels for various reasons most of which overlap with the other aims pursued – the requirement to address the current disparity in age profile across members, the necessary maintenance of up to date practical workplace experience in panel members.

Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

34. As is evident from the letter of 7/12/07 already cited above (WSB139) "lay panel members should have relatively recent workplace experience in their designated status (employer/employee representation) and therefore to go beyond 70 would, it is felt, diminish that recentness. This is not a reflection of anyone's capacity to fulfil the role of lay panel member merely an indication of the need to ensure that members are working or have recently worked in the current employment relations climate." (my emphasis).

35. Letter of 24th January 2008 - " … it is important that parties at tribunal recognise that panel members are likely to have relatively recent experience of workplace employment relations. Additionally the automatic reappointment arrangement means that retirement at seventy is the only means by which the number of panel members is reduced. Therefore by operating the "retirement-at-seventy" policy the Department will be able to refresh the pool of panel members accordingly." (WBS141, my emphasis)

36. Having considered this question in 2011 the Department noted "Retirement at the age of 70 … is appropriate in that it is capable of achieving the above aims. There is arguably no other way of achieving those aims and the policy is therefore reasonably necessary." (WSB147, para 7).

37. As is evident from the oral evidence of both Tom Evans and the Claimant and the documents referred to on cross-examination:

    (i) there is an ongoing of review through liaison with the Tribunal Secretariat (albeit that same is not minuted) and there is no indication of any need for new panel members;
    (ii) A surplus of necessary panel members continues to exist. The most relevant statistics here (as accepted by the Claimant on cross-examination) are not those relied upon by the Claimant in his witness statement at paragraph 38 (statistics relating to cases heard and determined which includes cases heard by chairmen sitting alone). The relevant statistics are those at WSB205 collating the number of days claimed by panel members year on year.
    (iii) These statistics (WSB205) demonstrate a reduction in work for panel members to the extent that in 2012 – 13 1380 hours were claimed. Against a background of some 117 panel members currently remaining in post this indicates an average of 11.8 days per panel member, short of the anticipated 15 days per panel member anticipated as the minimum number of each should sit (WSB125, clause 12, being the most recent Memorandum of Terms of Appointment of Members, cf WSB 119, 121)

38. In the 2011 submission the possibility of work capability assessment was also considered – "A work capability assessment of the sort suggested by Mr Lyttle would arguably have significant resource implications and has the potential to give rise to disputes/litigation where unfavourable capability assessments are

challenged. The existing regime establishes clear rules and expectations and has objective justification". (WSB147, para9, echoed in the letters of 14/7/11 (WSB149) and 19/7/11 WSB152)

39. Other issues arising out of capability assessment are also addressed in detail (TE6.2 – 6.9). In a nutshell were the retirement age to be removed some form of capability assessment would be required. There would however be no proportionate or suitable means of such assessment having regard to resources of time and money, the potential for litigation (TE6.6), the impact on the dignity of individuals (TE6.7) and issues of independence (TE6.8).

40. Paragraph 57 *Seldon* also addresses issues surrounding the desire of an employer to avoid capability assessment, even going so far as to say that in its own right the desire to avoid it could constitute a legitimate aim:

> **[57]** The second kind [of legitimate objective] 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. …"

41. The following categories identified at paragraph 50(4) of *Seldon* confirm the same thing as derived from European cases:

> (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 v Oellerking Geb‰udereinigungsges mbH*); or
>
> (ix) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs v Land Hessen*).

42. Given that the desire to avoid capability assessment can itself be a legitimate aim it is undeniable that it can be a valid reason for ruling it out as an alternative to compulsory retirement.
43. In 2012 the Minister asked that options be explored for changing the current T&C of lay panel members with particular consideration of whether it was within the Respondent's remit to change the compulsory retirement age of 70 and exploration of a preference to move to two five-year terms with no upper age limit (WSB 161, 163, 164 and 167).

44. The fact that this was arguably a cross-cutting matter prevented independent unilateral decision-making on the issue by the Respondent (TE6.11). Other matters further impinged on further consideration of that issue (TE 6.12 – 6.14). It will be noted that the Respondent has not ruled out the possibility of change in the future, for example to a policy of two fixed-term appointments in the future (for future appointments only, not existing members) as an

alternative to the impugned policy. That cannot be advanced in the immediate interim for the reasons set out.

45. More importantly in the context of this case however such a change could only apply to newly recruited members of the panels and not to current panel members. This could create an unwelcome dichotomy and more importantly would mean that such a change (affecting new appointees only) would not address the main problem facing the Respondent, that the reduction in numbers presented by the application of the current policy was the main means by which numbers were reduced to a level such as to properly permit a new recruitment exercise, and on an ongoing basis is the main mechanism to create vacancies to ensure the ongoing satisfaction of this aim.

46. Immediate recruitment of new panel members was also considered (TE6.15 – 6.16). This option is not viable mainly because of the already existing surfeit of panel members to meet the existent need.

47. A substantial panel compliment remains, skewed towards an older age demographic. Resource requirement neither dictates nor permits recruitment at this time. Unnecessary recruitment in conjunction with an abolition of the retirement age for all, including current members (as proposed by the Claimant), would result in a prolongation of the existing disparity, an increase in panel membership when there is already more than enough members for the work required and a consequent and unacceptable dilution of the available work. If recruitment was limited to numbers such that the negative effects were minimised the positive effect of the recruitment in addressing the existing disparity would be proportionately minimised so as to fail to meet the aims pursued.

48. The following matters also relied upon as supporting the proportionality of 70 as the retirement age:

    (i) Data related to economic activity as set out at TE4.10,
    (ii) Comparison with the State Pension Age (TE5.6 and 5.7)
    (iii) Health data (TE5.8)
    (iv) Consistency with practice and policy in the majority of Tribunals in Northern Ireland, Tribunals in GB and the statutory provisions applying to judicial office holders. (TE5.2-5.5, as elaborated upon in oral evidence)

49. Taking all matters into account the Respondent concluded that it "is satisfied that its policy properly accounts for wider expectations regarding working age and takes into account trends in health and economic activity." (TE5.9)

Aim 2. the encouragement of recruitment of younger panel members in order to address a disparity in the current age profile of panel members in that there are a disproportionate number of panel members over 50 years of age and in particular over 66 years of age and none below the age of 40.

Is the aim capable of being a legitimate aim?

50. Again paragraph 56 of *Seldon* applies (see paragraph 28 above).

51. The categories identified by Lady Hale at paragraph 50(4)(i), (iii) and (iv) directly apply and are repeated for clear illustration of that point:

> (i) promoting access to employment for younger people (*Palacios de la Villa v Cortefiel Servicios SA* Case C-411/05 [2008] All ER (EC) 249, [2009] ICR 1111, *H¸tter v Technische Universit‰t Graz, K¸c¸kdeveci v Swedex GmbH & Co KG)*;
>
> (iii) sharing out employment opportunities fairly between the generations (*Petersen v Berufungsausschuss f¸r Zahn‰rzte f¸r den Bezirk Westfalen-Lippe* Case C-341/08 [2010] All ER (EC) 961, *Rosenbladt v Oellerking Geb‰udereinigungsges mbH* Case C-45/09 [2012] All ER (EC) 288, *Fuchs v Land Hessen*);
>
> (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev v Tehnicheski universitet - Sofia, filial Plovdiv* Joined cases C-250/09 and C-268/09 [2011] 2 CMLR 179, *Fuchs v Land Hessen*);

Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

52. The Witness Statement of Tom Evans again makes it clear that this aim is being pursued by the Respondent (TE4.1 & 4.2, 4.4 on). Whilst this aim had not previously been articulated in this way it is clearly being pursued. The reasonableness of the aim and the way in which it is obviously apparent from the unchallenged statistics relied upon TE4.4, as corrected during the course of the hearing to the table that now appears at WSB207, further support the fact that this aim is genuinely relied upon. Indeed for the Respondent not to have cognisance of the clear disparity in age profile in panel membership would be wrong.

53. See also TE 4.12, 4.13.

54. That the aim is a legitimate one and a legitimate one in the context of the employment concerned is obvious to the point that the Claimant conceded that it was a legitimate aim in cross-examination. His only argument is that there are other ways to achieve the aim. Turning to that:

Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

55. All of the matters set out above in relation to the proportionality of the means in respect of Aim 1 apply. The aim is only achievable by the retirement of sufficient panel members achieved by the policy in question to generate and

the immediate and ongoing need for new members and thereby permit recruitment to effectively achieve the aim pursued.

56. Furthermore, in the specific context of the disparity in age profile Mr Evans states "Removal of the upper age limit without introducing restriction of members' length of service would exacerbate this situation, postponing recruitment of new members and further skewing the current cohort disproportionately towards older people." (TE4.8)

Aim 3. The updating of knowledge and skillsets in relation to modern workplace issues of the tribunal panel generally.

Is the aim capable of being a legitimate aim?

57. The aim is tied to issues of age and membership of panels in that it is directly tied to ongoing or recent practical experience in the workplace. As such paragraph 56 of *Seldon* applies in general terms. It is otherwise not specifically addressed in the authorities as obviously most of them in which the trigger for consideration of the issues in imposition of retirement on a person's ongoing and main employment where this issue could not possibly arise.

58. Paragraph 52 of *Seldon* (in which Lady Hale summarised principles derived from the European jurisprudence) is directly relevant, going back to first principles:

> "(2) If it is sought to justify direct age discrimination under art 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' (the *Age Concern* case [2009] All ER (EC) 619, [2009] ICR 1080, *Fuchs v Land Hessen* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043, [2012] ICR 93*)*.

59. This aim pursues a social policy objective in that it is related to employment policy and in particular vocational training. It relates directly to the public interest. The existence of the panels split between those who reflect the interests of employers and those who reflect the interests of employees is itself clearly pursuing the public interest in having employees' and employers' interests represented on the various panels determining individual employment disputes in appropriate jurisdictions. It is clear from the evidence, particularly the oral evidence at hearing that great stock is placed on recent practical experience in this regard.

60. The updating of knowledge and skillsets by introducing new members ensures this updating of practical experience knowledge and skillsets in relation to the modern workplace.

Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

61. This aim has clearly been in the contemplation of the Respondent for some time. See in particular:

    (i) Letter of 7/12/07 – "lay panel members should have relatively recent workplace experience in their designated status (employer/employee representation) and therefore to go beyond 70 would, it is felt, diminish that recentness. This is not a reflection of anyone's capacity to fulfil the role of lay panel member merely an indication of the need to ensure that members are working or have recently worked in the current employment relations climate." (WSB139)
    (ii) Letter of 24th January 2008 - " … it is important that parties at tribunal recognise that panel members are likely to have relatively recent experience of workplace employment relations." (WBS141)
    (iii) WSB147, para 6 referencing both practical knowledge of modern theories and recent experience, (WSB147, para9, echoed in the letters of 14/7/11 (WSB149) and 19/7/11 WSB152)

62. The Witness Statement of Tom Evans again makes it clear that this aim is being pursued by the Respondent (TE4.1 & 4.2, 4.4 on).

63. The aim is not only legitimate in the particular circumstances of the employment concerned, it is almost particular to it alone for the reasons set out.

Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

64. All of the matters set out above in relation to the proportionality of the means in respect of Aim 1 apply. Again the aim is only achievable by the retirement of sufficient panel members achieved by the policy in question to generate and the immediate and ongoing need for new members and thereby permit recruitment to effectively achieve the aim pursued.

65. Particular to this aim is the Claimant's assertion that it could be met by training, for example by way of CPD. The Respondent whilst acknowledging the importance of CPD emphasises the absolute necessity of practical experience as set out above. Mr Evans convincingly emphasised that on cross examination and the Claimant on cross-examination did not dispute the importance of practical experience and that the entire panel system presupposed this practical experience rather than simply theoretical knowledge. Otherwise anyone could be trained to sit on either panel and the rationale underpinning separate panels representing employees and employers would be undone.

66. The other suggestion made by the Claimant in this regard, that introducing a system of retirement from the panel five years after retirement from primary employment, would not meet the aims pursued in that it exacerbates a lack of

recency in practical experience albeit by a set amount, creates unpredictability and further serves to prolong the ongoing disparity and other issues noted under the other aims pursued.

Aim 4. Responding to changing demographics and social attitudes.

Is the aim capable of being a legitimate aim?

67. Again it clearly is. This is a social policy objective 'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness' (*Seldon*, para 52).

Is the aim in fact being pursued? / Is the aim legitimate in the particular circumstances of the employment concerned?

68. The Witness Statement of Tom Evans again makes it clear that this aim is being pursued by the Respondent (TE4.1 & 4.2, 4.14 on). It is acknowledged that Mr Evans' witness statement was the first time that the Respondent has linked the policy in question with these aims (notwithstanding that it was touched upon in a memo as far back as 20/6/07, WSB19).

69. Whilst this has not in fact been considered in any great detail other than as set out in the witness statement it is something that can only be looked at properly when the opportunity for recruitment actually arises, which depends on the ongoing application of the impugned policy to achieve the necessary reduction in numbers to permit refreshment of the panels and all of the foregoing aims already addressed in detail.

70. The aim is particularly important in the context of the employment concerned, ie representative membership of various demographics across the panel of publicly appointed members of panels sitting in judgment on individual employment disputes.

Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

71. All of the matters set out above in relation to the proportionality of the means in respect of Aim 1 apply. Again the aim is only achievable by the retirement of sufficient panel members achieved by the policy in question to generate and the immediate and ongoing need for new members and thereby permit recruitment to effectively achieve the aim pursued.

Aim 5. Establishment of a level of predictability to facilitate succession planning.

Is the aim capable of being a legitimate aim?

72. The category identified by Lady Hale at paragraph 50(4)(ii) directly applies:

(ii) the efficient planning of the departure and recruitment of staff (*Fuchs v Land Hessen* Joined cases C-159/10 and C-160/10 [2011] IRLR 1043);

Is the aim in fact being pursued? Is the aim legitimate in the particular circumstances of the employment concerned?

73. The Witness Statement of Tom Evans again makes it clear that this aim is being pursued by the Respondent (TE4.1 & 4.2, 4.21). It is acknowledged that Mr Evans' witness statement was the first time that the Respondent has linked the policy in question with these aims. Oral evidence on cross-examination however made it clear that the policy is being relied upon and properly relied upon. The only real issue the Claimant took with the point was that he felt the increased accuracy and predictably by maintaining the policy was small and that analysis of previous resignations and deaths would facilitate sufficient accuracy although he did acknowledge that the majority of departures were by resignation and that was the more predictable matter under the current policy. Clearly the policy facilitates an accurate mechanism for planning of future need.

74. The accountability of government and the need for efficient planning and use of public resources all dictate that this is a legitimate concern in the particular circumstances of the employment concerned.

Are the means chosen proportionate, that is appropriate and (reasonably) necessary?

75. See discussion in respect of Aim 1. There is no other measure which provides the accuracy and predictability necessary to achieve this aim.

CONCLUSION

76. The aims cited are being pursued by the Respondent, are legitimate in the circumstances of the employment concerned and the policy of retirement at seventy is the only reasonable method of meeting those aims. Other potential means have been explored and properly and properly disregarded. The application of the policy is a proportionate means of meeting the legitimate aims pursued in that it is both reasonably necessary and appropriate.

Philip Mc Ateer BL
23rd October 2013