Supplementary written evidence submitted by Declan O'Dempsey, Barrister at Cloisters Chambers [ROP0062]

NOTE

1) I am grateful for the opportunity to provide further detail on certain points from my oral evidence.

2) I, of course, am giving this evidence in a purely personal capacity as a practitioner in age discrimination cases.

3) I think I said that I would provide some further written material on two aspects.

(a) Models for a "reasonable steps duty" of positive action which could be brought in, particularly in relation to employment, in both private and public sector cases, as an alternative to strengthening PSED by requiring outcomes rather than having due regard under PSED. I do not disagree with Professor Blackham's point that PSED could be strengthened (a) by introducing specific duties (as per the evidence of all three witnesses) (b) by requiring outcomes which are stronger than merely "due regard" being had to the equality objectives.

(b) Justification: its complexity and the underlying assumptions of justification of direct age discrimination.

Reasonable steps duty

4) Whilst this note concentrates on employment, a similar duty can be crafted in respect of provision of public functions, and of goods facilities, services and for associations (i.e. matters that need to be litigated in the courts).

5) Whilst there is a very persuasive argument that there ought to be a reasonable steps duty for all protected characteristics, the Committee would be justified in recommending introduction of a duty of this nature in respect of age, at this point in time, due to the pervasive, and untackled, nature of the discrimination.

6) In my evidence I suggested that one way of strengthening the culture change which is needed to eradicate age discrimination was to introduce a duty on private and public sector employers to take reasonable steps to eliminate age discrimination. I said that I could provide some models of legislation in part based on the work that has already been done in relation to sexual harassment (i.e. the Worker Protection (Amendment of Equality Act) Act 2023) (and which comes into force in October 2024).

7) Here are the models that I had in mind. The Equality Act 2010 would need to be amended in something along the following lines:

Model 1 – EHRC enforcement and uplift for successful individual claimant

“40B Employer duty to prevent discrimination because of age

(1)An employer (A) must take reasonable steps
(a) to prevent age discrimination of employees of A in the course of their employment; and
(b) to prevent harassment related to age of employees of A in the course of their employment.
(2) “age discrimination” has the meaning given in section 25(1), and “harassment” the meaning given in section 26.
(3) A contravention of subsection (1) or (2) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)or (2)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8) and (9), is enforceable only by the Commission under that Part or by an employment tribunal in accordance with section 124A[1])”

7) The above model would require the employer to have taken reasonable steps. There is a political debate as to whether that should be “all” reasonable steps which would be a stronger and clearer duty in terms of law. A stronger model again would be “all reasonably practicable steps”. However I am merely setting out the various ways in which a reasonable steps duty could be implemented by legislation.

8) This model works with the existing enforcement mechanisms well. If a Commissioner model was adopted consideration could be given as to whether the power to enforce would be better given to the Commissioner than with the EHRC. My own view is that it would lie better with the EHRC.

9) This model should be aimed at ensuring that the enforcing body (EHRC for example) has the power to take action, issue notices, investigate or make sectoral inquires.

Uplift

10) It also means that where a breach has occurred and an unlawful act of age discrimination is established there is a compensation incentive for employers to take action to eliminate age discrimination.

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[1] *As amended:* S124A will apply in sexual harassment cases from October 2024, and this model will require wording inserted to cover age discrimination together with similar consequential amendments of the Equality Act 2006 (s 21 and 24A)

Transparency

11) The duty, which would need some technical or statutory guidance concerning compliance, would also aid transparency as to what employers are doing to eliminate age discrimination. If the objective justification model is retained, it would lead to a greater transparency on justification issues.

Model 2 – alternative – penalty for employer not taking reasonable steps – paid to secretary of state.

"40C

(1) In proceedings before an employment tribunal, if A does not prove that A has taken relevant reasonable steps under section 40B(1)(a) or (b), and if the tribunal makes a declaration that an unlawful act under this Act has taken place, the failure by A shall be treated as an aggravating feature for the purposes of section 12A Employment Tribunals Act 1996, and the employment tribunal shall consider ordering a financial penalty under that section.

(2) In the circumstances in (1), the employment tribunal shall issue a judgment specifying whether a penalty was ordered to be paid by the respondent, the amount of that penalty if any and giving reasons why the penalty was or was not ordered and as to the amount ordered, if any."

12) This model of enforcement builds on the (rarely used) power of the employment tribunals to order a penalty to be paid to the Secretary of State where an unlawful act is found by the tribunal and it considers that there are "aggravating factors". This model moves away from individual enforcement in the sense that there is no incentive for the individual to bring a claim because it may result in compensation. However it deems failure to take reasonable steps to be an aggravating feature, and hence for a (very modest) penalty to be paid. I consider this to be a weaker model of enforcement as penalties are rarely imposed by tribunals and I am not aware of them having any particular effect on the behaviour of employers.

13) The uplift element relating to compensation combined with this penalty aspect may create greater culture change.

Model 3 – alternative - shift of burden of proof – individual enforcement model

"40C **Shift of burden of proof where reasonable steps not shown to have been taken**

(1) In proceedings before an employment tribunal, if A does not prove that A has taken relevant reasonable steps under section 40B(1)(a) or (b), in the application of section 136 to the proceedings, the particulars of the complaint

> are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision."

14) This is perhaps the most radical form of enforcement using the individual model. It shifts the burden of proof to the employer where reasonable steps to eliminate have not been taken. It has several problems however. It can easily, in my view, act unfairly towards employers where the act of discrimination alleged has little relevance to the steps which it would be reasonable for an employer to take. Likewise, if the model of objective justification remains, it simply leads into the complex area of justification of direct age discrimination; the burden of justification rests on the employer in any event.

Justification

15) I told the committee I would provide an analysis of how the defence of justification works in the light of the precedents that have been generated. From this it can be seen how complex justification defences are. This creates additional uncertainty for litigants. In employment tribunals most claimants represent themselves. In the county courts the uncertainty of this law is also accompanied by the risk of paying the defendant's costs should the claim fail (together with the fact that the damages that are likely in a goods and services case are very small).

The justification defence as developed in the context of employment.

16) First, in relation to the types of aims that can justify direct age discrimination; despite the fact that in Seldon the UKSC emphasised the need for an employer to show that they are actually pursuing the aim cited in justification, the following analysis of selection of aims is typical:

(1) The types of aim which are capable of being treated as legitimate are those which involve social policy objectives of a public interest nature, as opposed to purely individual reasons particular to the employer's situation.

(2) The aim need not have been articulated, or even realised, at the time when the measure was first adopted. It can be a rationalisation after the event.

(3) The means chosen to achieve the aim must be both appropriate and reasonably necessary. The means should be carefully scrutinised in the context of the business concerned to see whether they do meet the objective and that there are no other, less discriminatory, measures which would do so.

(4) Where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.

17) For a litigant in person to understand what types of aims are "social policy" type aims and which are "purely individual reasons particular to the employer's situation"

is very hard, and creates immediate uncertainty. Second the employer is permitted to derive an aim which was not realised at the point when the act of discrimination started. In other words a litigant in person is faced with a situation in which an aim which no one dreamt of at the time of the act can be invoked in justification. Items (2)-(4) are derived from justification in indirect discrimination cases, where there is a lower incidence of intentional discrimination (in the sense of taking the protected characteristic as the reason for the treatment).

18) In general indirect discrimination cases are more difficult for a litigant in person to understand, and to run; in the context of age discrimination the amorphous and retrospective concept of legitimate aims creates a high degree of uncertainty when a person is deciding whether to start a claim, and the retrospective nature of selection of aims means that even if a case is started, the response selecting one of the "social policy" aims such as "intergenerational fairness" or "dignity at work" may result in uncertainty as to prospects. Uncertainty at both these stages will result in cases not being pursued.

19) Second in relation to justification here is a typical analysis (taken from the same multiple claim relating to a scheme in the civil service):

(1) The use of age as a factor in decision-making is not intrinsically demeaning. While it requires rational justification, it is not subject to the same strictness of scrutiny that would apply to certain other forms of discrimination. In relation to concepts such as a normal retirement age (or a normal pension age), it is necessary that a line has to be drawn somewhere: Carson [41], [58]-[60]. {*Carson was a human rights case}*
(2) The key question is whether the discriminatory scheme is a proportionate means of achieving a legitimate aim: Lockwood [46].
(3) A summary of the general principles as to justification is as follows – MacCulloch [10]:
(a) The burden of proof is on the respondent to establish justification.
(b) The measures adopted must correspond to a real need, be appropriate with a view to achieving the objectives pursued and reasonably necessary to that end.
(c) An objective balance should be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification.
(d) It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the measure and make its own assessment as to whether the former outweigh the latter.
(4) In general, tapering provisions may be very readily justified, as necessary to ensure equity between those close to retirement and those in retirement receiving pensions. However, the question whether justification is in fact made will of course depend on the nature of the schemes in question: Loxley [39].
(5) It is relevant to take into account any agreement with trade unions, as well as the fact of the timing at which the employee is entitled to take his pension: Loxley [42].
(6) There is a need for critical appraisal by the Tribunal to ensure that no "traditional assumptions" relating to age have influenced the employer: Loxley [43].
(7) There is, depending on the facts, a potential justification on the basis that employees who lose out under the terms of one scheme because of an age-related

provision are sufficiently compensated by reference to their pension entitlement: Hastie [11(b)].
(8) In considering whether any particular aspect of the scheme is justifiable, it is necessary for the Tribunal to focus on the scheme (or schemes) in question as a whole, in order to decide whether it was a proportionate way of achieving a number of different (but all legitimate) aims, some of which may be in tension: MacDowell [60]-[65].

20) What can be seen from this is (a) the complexity of the process of understanding justification; (b) various points where the culture of acceptance of age discrimination influences the process of justification. The starting point is the assertion that the use of age as a factor in decision making is not intrinsically demeaning. This is an assertion of a cultural attitude, and the very one which anti-discrimination legislation is aimed to change. The reference to the use of general rules also brings into play cultural assumptions about age; it should be remembered that stereotypes often underlie the use of general rules. The reference to situations in which one advantage can be seen as compensating for the disadvantage about which the complaint is being made also indicates an attitude to discrimination which is not generally permissible in direct discrimination cases. Thus in relation to pensions, these are schemes which form part of the bargain between employer and employee rather than additional benefits conferred gratuitously; they are something to which the employee is entitled due to having worked for the employer (or another employer). The underlying assumption is that because these pensions exist, discrimination in relation to age (particularly in relation to benefits) is acceptable. The warning that a tribunal gives itself to engage in critical thinking to avoid "traditional assumptions" in relation age must be seen in the light of the poor understanding of what are assumptions about aging and what the evidence about aging actually shows. An individual claimant seeking to alert a tribunal to "traditional age assumptions" is in effect left with the burden of educating the tribunal as to the statistics and facts about the effects of aging. This rarely happens. The understanding of the tribunals, as of society, as to what are the "traditional assumptions" are is limited.

21) If the Committee has any further questions arising from this Note I will be happy to respond, and I hope the above material assists its deliberations.

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