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Citation: Bengtsson, Lyndsey (2019) Age stereotyping: a legal and fieldwork analysis. International Journal of Law and Management, 61 (3-4). pp. 485-504. ISSN 1754-243X

Published by: Emerald

URL: <https://doi.org/10.1108/ijlma-12-2017-0296> <<https://doi.org/10.1108/ijlma-12-2017-0296>>

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Age stereotyping: a legal and fieldwork analysis

Abstract

Purpose – The purpose of this paper is to report on fieldwork observation of direct age discrimination cases within employment tribunal hearings over a 3 year period. The observation focussed upon whether the witness evidence revealed age stereotyping by employers and whether the employment tribunal panel addressed the stereotyping in its questioning and in its judgments. The observation was combined with an analysis of jurisprudence relating to direct age discrimination over an 11 year period.

Design/methodology/approach – This research analysed a sample of 90 employment tribunal judgments concerning direct age discrimination, which included 5 fieldwork observation cases concerning direct age discrimination in an employment tribunal.

Findings – This paper opens a window on age stereotyping in the workplace, illuminating the existence of age stereotypes in the context of employment tribunals and the approach of the courts towards stereotypes in the sample is analysed.

Research limitations/implications - The fieldwork observation is limited to one employment tribunal and may not necessarily be representative of all tribunals however the findings are supported by a wider qualitative analysis of ET Judgments.

Practical Implications – The article provides pertinent learning outcomes for claimants, employers and key implications of legal decisions for human resource policy and practice in organisations.

Originality/Value – The paper is the first to conduct fieldwork observation on age stereotyping in an employment tribunal, combined with a profile of direct age discrimination claims over the period studied.

Keywords -Age Stereotyping, Direct Age Discrimination, Fieldwork, Case law, Employment legislation

Paper type - Research paper

Introduction

Inequality on grounds of age has been ingrained in the workplace, particularly as historically a person's age was considered by employers (and courts) to be a legitimate factor in decision making. Numerous studies exist which reveal the existence and extent of age stereotypes (Taylor and Walker, 1994; Loretto and White, 2006; Parry and Tyson, 2009). The link has also been made between negative stereotypical attitudes and employment practices affecting workers (Taylor and Walker, 1998). It is a widespread stereotype that older persons are often assumed to lack the ability to absorb new ideas and are less motivated (Doering et al, 1983), are less likely to accept new technology (Lyon and Pollard, 1997) and may resist training/be resistant to change (Snape and Redman, 2002). Another stereotype frequently encountered is that physical and mental abilities decrease with age (Metcalf and Meadows, 2006). Loretto and White (2006) conducted a review of employer's attitudes, practices and policies towards older workers, which revealed that employers continue to hold stereotypical views towards older workers, and therefore little progress had been made since Taylor and Walker's research (1998).

The age stereotypes in the workplace are inaccurate and do not reflect the true diversity of workers (Benjamin and Wilson, 2005). The legitimacy of stereotypes has been examined and gerontological research suggests that using a person's age is a poor proxy for determining whether they can perform a role and/or have the requisite flexibility and/or possess the ability to absorb new ideas (Doering et al, 1983).

The Equality Act 2010 states that an act of direct age discrimination will be lawful if an employer can point to a legitimate aim and the means of achieving that aim are proportionate[1]. The challenge for the law and the courts is to tackle these entrenched stereotypes and in particular, ensure

that the definition of direct age discrimination does not perpetuate age stereotyping by employers. Indeed as Lady Hale highlighted in the well-known case of *Seldon v Clarkson Wright and Jakes*[2];

These assumptions no longer hold good (if they ever did) in times of increasing longevity, where there are benefits both to individuals and to the wider society if people continue to work for as long as they can[3].

This article draws upon cases analysed in this study with a focus upon age stereotyping and reports on a sample of court judgments (from the employment tribunal (ET) and the Employment Appeal Tribunal (EAT)) on direct age discrimination over the last 11 years, from the period 2006-2017. Fieldwork observation has also been conducted over a period of 3 years, from the period 2011-2014, to gain a deeper insight into the ETs approach to age stereotyping. The research seeks to contribute to existing knowledge in three respects. Firstly, it illuminates how stereotyping operates in practice in the context of ET claims and how employers can recognise situations in which they can fall foul of the legislation in this regard. Secondly, an analysis of these cases opens a window on how effectively ETs tackle age stereotyping in their judgments and in their questioning of witnesses during the fieldwork. Thirdly and more generally, the analysis will reveal the factors that influence the decision making process in direct age discrimination cases and chart the development of challenging age stereotypes in employment. It is vital that employers are aware of the circumstances in which they can fall foul of the legislation by stereotyping and use these court decisions to inform not just their equal opportunities policies but also their practice on a daily basis.

Methodology

Analysis of direct age discrimination cases heard by Employments Tribunals: 2006-2017

This research has analysed a sample of 90 direct age discrimination cases heard by ETs in full merits hearings from 1st October 2006 to 1st October 2017. To place the ET cases in context; the EAT, Court of Appeal and Supreme Court decisions relating to direct age discrimination were also considered.

At the outset of this study there was no online database of ET judgments for general search by the public. The website for searching ET judgments only became available in February 2017 and it contains a selection of decisions from 2015 and 2016[4]. The webpage allows the public to locate first-instance ET judgments from England, Wales and Scotland using drop-down menus and a text search. The search term '*direct age discrimination*' was used to locate all direct age discrimination judgments online on this database and those judgments which did not include full reasons did not form part of the sample. For earlier ET judgments which are not available on the ET website a search was carried out through Michael Rubenstein Publishing, which publishes some (but not all) ET judgments in the Equality Law Reports[5]. The same search term '*direct age discrimination*' was used.

A qualitative case by case analysis of the case records highlights age stereotyping by employers in the context of the claims brought to the ET and a range of literature has adopted this methodology (Leonard, 1987; Rosenthal and Budjanovcanin, 2011; Lockwood, Rosenthal and Budjanovcanin, 2011). A qualitative legal analysis was conducted in an effort to understand whether age stereotypes are being tackled by the ET and what factors, if any, are being used by the ETs which may reinforce stereotyping.

Fieldwork observation of direct age discrimination cases: 2011-2014

Fieldwork observation was conducted in the Newcastle upon Tyne ET from the period 1st December 2011 to 28th February 2014. This observation provided useful data in relation to claims in the area of Newcastle, Northumberland, Gateshead, South Tyneside, North Tyneside, Sunderland, Durham and Cleveland, representing a large geographical area covering the North East of England. Limiting the fieldwork observation to one ET venue did place limitations on the extent to which generalisation across England and Wales are possible. The fieldwork observation in the Newcastle upon Tyne ET may not necessarily be representative of other ETs. However, the fieldwork observation is combined with a qualitative analysis of a wider research sample of ET published judgments to include direct age discrimination in ET cases across England and Wales, and therefore the findings are reliable.

During the fieldwork research the clerk of the Newcastle upon Tyne ET assisted by providing each week details of the direct age discrimination claims which were scheduled to be heard. A total of 5 cases were observed during this period. To promote consistency in recording the evidence extensive

shorthand notes were taken during each ET hearing (Emerson et al, 2011). This notetaking technique was also considered important in order to reduce any potential bias that fieldwork observation may bring to the research. Not taking a selective note of the evidence allowed a deeper and more objective analysis of the fieldwork evidence.

Fieldwork observation had the added benefit of hearing witness evidence in full. This meant that the witness's evidence in chief, cross examination answers, responses to questions from the ET panel and re-examination answers could all be observed. During an ET hearing the witness evidence is given under oath and subject to cross examination by the other party's representative and questioning by the ET panel to assess the accuracy of the evidence. This, in principle, would make it very difficult for an employer to present a more favourable picture of their actual view on older and younger workers/job applicants or fabricate their response to hide stereotypical views. The witness may also refer to the employer's policy or procedure and other key documents within the ET bundle of documents, allowing for the observation of both the questioning and the evidence relating to the documents. The value of fieldwork observation was also the level of detail that it would bring. Although an ET judgment is considered to be '*often rich in detail about individual cases*' (Lockwood, 2008 p320), it does not include everything that is said during an ET hearing.

Age stereotyping - main research findings

The decisions demonstrate to employers, management and other stakeholders the range of circumstances in which stereotypical assumptions can manifest in the workplace and how crucial it is to proactively challenge age stereotyping. Although ET cases themselves probably represent '*the tip of the iceberg*' (Macnicol, 2005 p257) they nevertheless reveal the nature and existence of stereotyping in the context of ET claims. The decisions are also helpful in determining the types of action and inaction which constitute unlawful age stereotyping under the Equality Act 2010 and in turn, what employers might do to prevent falling foul of the legislation. An analysis of the cases reveals the legal basis on which a claimant may proceed and the ways in which employers can protect themselves from litigation. The decisions also demonstrate the extent to which, if at all, the ETs and the courts are tackling age stereotyping in their judgments and in the questioning of witnesses.

Age stereotyping in the context of ET Claims

Stereotypical assumptions by employers were apparent in the research sample, particularly in the early cases but less so in the later cases. The most notable stereotype was that older workers cannot do the role by reason of physical or mental decline. This supports earlier studies (Taylor and Walker, 1994) which suggested that the most prevalent negative stereotype held by employers was that older workers cannot do heavy physical work. A theme throughout, particularly in the early cases, was the absence of any attempt by the employers to obtain evidence to support the conclusion that the claimant could no longer perform the role and assumed the physical or mental decline solely by age. For example in *Hibbert v West End Working Mens Club & Institute*[6] and *Martin v SS Photay and Associates*[7] the claimants were aged 64 and 70 years respectively and were both informed that they were to be dismissed from their roles because of a perceived increased risk to health and safety linked to their age. In *Kerr v (1) O'Hara Brothers Surfacing Limited (2) Mr O'Hara*[8] the claimant was, put simply, '*too old for that type of work*'[9].

Another stereotypical view that arose in the research sample was that older workers are resistant to change. This was apparent where the employer made reference to senior workers being in their '*comfort zone*'[10]. The use of phrases such '*going for a younger man*'[11], '*set in his ways*'[12], '*hungry/ fresh blood*'[13] and '*unlikely to change*'[14] were all indicative of this stereotypical view. Such phrases are unlikely to be used in relation to a 25 year old. Indeed, this proposition was put forward during cross examination in the fieldwork observation and the respondent's witness gave evidence that '*my approach would be the same if he were a 25, 35 or 55 year old*'[15].

Linked to the resistance to change stereotype is the assumption that older workers cannot adapt to new technology. The comments were blatant in the case of *James v Gina Shoes Ltd*[16], which concerned a 58 year old claimant. The director expressed his view that '*you can't teach an old dog new tricks*'[17]. Evidence during the fieldwork case of *Dixon v (1) Croglin Estates Ltd (2) Michael George and (3) Angus Gunning*[18] revealed that the claimant was considered to be unlikely to perform '*GPS computer work*'[19]. The employer displayed the negative age stereotype that older workers lack the

ability to absorb new ideas so that they cannot be trained. When asked whether the comments were viewed as compliments the claimant gave evidence that it *"reads as though I'm too old to do my job"*[20]. Using the word *'traditional'* can also be indicative of this stereotypical view. In the recent case of *Gomes v (1) Henworth Ltd t/a Winkworth Estate (2) Graham Gold*[21] the employer said that the claimant was *'better suited to a traditional estate agency'*[22] and could be thought of as being old fashioned.

Another apparent stereotype was that older workers are costlier to employ than younger workers. In the case of *Court v Dennis Publishing Limited*[23] the employer stated in a published book that *'by the time talent is in its mid to late forties or early fifties, it will have become very, very expensive. Young talent can be found and underpaid for a short while, providing the work is challenging enough'*[24]. In *Jessemey v Rowstock Ltd and Mr Davis*[25] the claimant was informed that it *'would cost too much in insurance premiums to continue employing him'*[26]. However there was no reference within the ET judgment to evidence submitted by the respondent in support of the comment.

Workers were also considered *'too young'* for employment within the research sample as the stereotypical link between youth and maturity/inexperience was apparent. In one case the claimant gave evidence that she was informed that she was too young for the job at the age of 19[27]. In another case the claimant alleged that she was told that at 18 years she was too young[28]. However even if those words had not been said, stereotyping was the predominant reason for the decision to dismiss and the employer had relied upon the stereotypical assumption that capability equals experience and experience equals older age. Stereotyping towards younger workers was not as prevalent as negative stereotypes affecting older workers. This supports a recent study, which demonstrates that although those aged between 25 and 34 feel most affected by age discrimination, this age group are more likely to take action by leaving their jobs and finding alternative work (CMI, 2017). This may therefore provide an answer why there were not many instances of younger worker stereotyping in this research sample.

Finally, in two of the fieldwork cases the claimants appeared to rely upon society's negative stereotypical views of older workers in making out arguments in support of their duty to mitigate loss. In *Dixon* the claimant gave evidence that *"At 58 I will never get another job as a head game keeper. Simple as that"*[29]. One witness for the respondent who was an agent with experience in the relevant field of the claimant's work initially commented that the claimant *"would be top of the pile with his experience"*[30] and that he would consider him for a role. However later in the questioning, the witness acknowledged that looking purely at the ages without knowing the candidates by recommendation, he would be unlikely to recruit a 58 year old. In the case of *Mr P Hickman v Astral Control Services Ltd*[31] the claimant considered that he was left on the *'scrap heap'*[32] and that at his age of 67 the opportunity to find work would be slim, stating that *"I'm at an age where not many opportunities come up. I have tried to find work"*[33]. It was accepted by the respondent in that case that it would be *"more difficult to bounce back into the employment market"*[34] but it was *"not impossible given his skills set"*[35].

How old is 'too old'?

The research demonstrates that the assumed link between age and ability may potentially span a wide age range, therefore it is only right that the legislation applies to all ages. Employers may well consider a worker to be *'too old'* as young as 36 on the basis of a stereotypical view, which was the case for air traffic controllers[36]. By contrast the younger comparator relied upon in the *Dixon* case for the physically demanding role of Head Gamekeeper was 42 years of age[37]. This demonstrates that it is extremely difficult to identify at what age you may be subject to a stereotypical view that you are *'too old'* and that it may span a wide age range.

However, by far the most common age subject to age stereotyping in the research sample and considered *'too old'* were those aged 65 and over. This is a slightly higher age than the earlier study by Taylor and Walker (1992) which indicated that 60% of employers felt that at the age of 60 an individual would be *'too old'* to employ. This suggests that there may have been a shift in view as to what age an individual is more likely to be assumed to be *'too old'*.

How the age stereotyping manifested

Age stereotyping was most likely to manifest in the form of verbal comments by the employer to the individual concerned, particularly where there had been an assumed decline in their physical or mental ability. In one case the employee was specifically told that the employer would not employ anyone over a particular age due to assumed concerns over health and safety[38]. In some cases the stereotype manifested in a malevolent way. For example in *Berrill v W Corbetts and Company (Galvanising) Ltd*[39] the employer openly mocked the claimant that he was '*past it granddad*' who should '*move on*'[40] and in another the employee was to be replaced by a '*young, fit blonde*'[41]. Where the employer wanted '*fresh blood*'[42] the claimant's evidence was that he was threatened by his employer that if he brought an ET claim he would not receive more compensation than the payment they were offering him[43].

In some cases, age stereotyping manifested in written communication. One employer had an '*age category*' within their interview notes[44]. In another case the stereotyping was apparent in two letters sent by the respondent to the claimant, one of which enquired whether she was tired after her shift and '*if so, considering your age, perhaps you are telling me you would wish to cut your hours back*'[45]. In the *Court* case[46] the ET considered a book that the owner had written and sections of that book were quoted during the hearing, in particular:

Young talent can be found and underpaid for a short while, providing the work is challenging enough. Then it will be paid at the market rate. Finally, it will reach a stage where it is being paid based on past reputation alone. That is when you must part company with it[47].

In a number of cases the stereotyping was masked by a retirement age or recruitment age limit, the purpose of which was an attempt by the employer to plan their workforce. Linked to this is a reliance upon the '*fair innings*' argument that older workers have had their time in employment and should make way for younger workers. On this basis the concept of equality does not turn on a direct comparison between a 60 year old and a 20 year old but assumes that a 60 year old has had their time in employment and should allow the 20 year old to step into their role. This argument, in itself, is based upon a stereotype as older workers may well have not had their '*fair innings*' and has been the subject of criticism by academics (Manfredi and Vickers, 2009; Fredman, 2003; Vickers and Manfredi, 2013). Some individuals may have qualified in their profession later in life. Women may have had inactive years in employment due to childcare commitments and may not have had their '*fair innings*.' Connected to this is the '*job blocking*' argument, that older workers block the way for younger workers. This argument was put forward in support of the now repealed default retirement age[48] however the Government has now said that it considers it is not often the case that younger and older workers are direct substitutes (DBIS, 2011) However the argument may be made, with evidence, at the level of an individual firm (Dewhurst, 2013). The consequences of the '*job blocking*' and '*intergenerational fairness*' aim are that they result in the competing interests of different age groups, a conflict between the older worker and the younger worker. It also assumes that the rights of a younger staff member to work are greater than that of an older worker.

Tackling age stereotypes in ET Judgments

The ET judgments often contained detailed facts and reasoning. They largely demonstrate the ETs tackling stereotypical assumptions displayed by employers. Similarly, in the fieldwork observation the ETs were conscious of the existence of stereotyping and in both their questions and judgment addressed age stereotypes. This supports a recent study by Dewhurst (2015) who, in the context of whether claimants have received adequate remedy, has concluded that the courts have moved towards an acceptance of individualisation and seek to protect older workers from the negative effects of age stereotyping.

In many of the early judgments the ETs were focussed upon the employer's stereotypical views and reached the decision that there was unlawful direct age discrimination[49]. In the case of *Koh v Sainsburys Supermarkets*[50] the ET held that the comments referred to the claimant's age '*in a way that stereotyped someone in their early 50s as flagging in some way and unsuitable for the job of duty manager*'[51]. In *Wilkinson v Springwell Engineering*[52] the ET held that in dismissing the claimant the respondent was assuming a link between age and experience and '*they were thus making a*

stereotypical assumption to the prejudice of the claimant'[53]. More recently in *Gomes*[54] the ET tackled stereotyping by connecting the word 'traditional' to other stereotypical phrases, namely: 'old fashioned' and 'set in his ways' and held that the comment would not have been said to a younger assistant.

In the fieldwork observation case of *Dixon*[55] the ET provided a detailed judgment and this was an excellent example of the ET applying the legislation so as to tackle stereotypical assumptions. Despite uncovering that the claimant had lied under oath with regards to his employment post dismissal, the ET did not lose sight of the use of stereotypical assumptions held by the employer that were a theme throughout the evidence. The ET held that:

The use of phrases such as 'set in his ways to change' and 'he is keeper not an organiser-you cannot see David Dixon doing all the GPS computer work' indicated that the Respondent's directors had formed the view that the Claimant was old fashioned and either unable or unwilling to learn more modern methods. No evidence was produced by the Respondent to support these conclusions[56].

The ET focussed on the use of these phrases by the employer, linked these phrases to the age of the claimant and reached the decision that the respondent's directors had formed the view that the claimant was unable or unwilling to learn more modern methods because of his age. Based upon the stereotypical assumptions, the ET found that some 21 months before the claimant's dismissal the respondent's directors had already begun to form the view that they wanted a younger, fresher Head Keeper to replace the claimant. This is when the respondent produced a report known as the 'Maxcap' report, which stated the claimant was 'unlikely to change', 'is very set in his ways' and they could not see him doing 'GPS computer work'[57]. The ET did not however address the use of another stereotypical phrase obtained from the fieldwork evidence that the directors were looking for a "dynamic keeper" which arose from the evidence[58]. It is therefore unclear what the ET thought of the use of this phrase and indeed, whether the same decision would have been reached if this were the only phrase referred to in the evidence. Nevertheless in the ET's words the claimant had been 'the victim of a grave injustice at the hands of his employer'[59].

In the other fieldwork cases there was no evidence to suggest the employers were acting on the basis of stereotypical assumptions. Although there was no stereotyping in the fieldwork case of *Hickman*[60] it is nevertheless an example of the ET directing its questions to actions and comments to determine the existence of an age stereotype (Martin, 2016). The claimant was allocated an apprentice in March 2011 to help him with his work. The claimant felt he did not need help with his work and considered that this was evidence that his dismissal was because of his age. The potential existence of a stereotypical link between age and the claimant's ability was explored by the ET in its questioning and it uncovered that the claimant had certain difficulties with his feet in accessing required spaces and climbing ladders, which the apprentice would help with. Due to the questioning, the ET determined that the employer was not acting upon any stereotypical assumption. At one point during the hearing, the ET questioned whether the claimant would be made redundant in due course if he had not been dismissed. Evidence given by a witness for the respondent was that it would be unfair to score a 67 year old worker for efficiency on a redundancy matrix, however the Employment Judge challenged the assumed link between age and ability and highlighted that "some judges go on working well when they are 80"[61].

Tackling age stereotyping – reliance upon a legitimate aim

The approach of the ETs in tackling age stereotyping should be praised, particularly when placed in the context of the vague definition of direct age discrimination. In *Baker v National Air Traffic Control*[62] the ET acknowledged that it was unclear 'what exactly is meant by legitimate in the legislation'[63] but despite the confusion, it went on to tackle the age stereotyping. As the case law has evolved it has been clarified that a social policy objective must be attached to the aim relied upon, thus limiting the scope of what may be classed as legitimate. Notably in *Martin & Others v Professional Game Match Officials Limited*[64] the ET held that the aim must have a 'social policy objective' and not simply relate to the individual respondent's needs. It is important to highlight that this is the position of the CJEU who has held that a legitimate aim must have a social policy objective[65].

In the early cases it appeared that, on the whole, employers found it difficult to successfully argue that a particular fixed retirement or recruitment age was a proportionate means of achieving a legitimate aim. The ETs will critically consider the respondent's evidence in support of the legitimate aim relied upon and there should be a clear correlation between any age limit and the achievement of the aim. The ETs have signalled that they are looking for evidence to support the argument for an age limit (and indeed, why that particular age has been chosen) and made it clear a stereotypical assumption would not suffice. Although trade union agreements may be a factor to take into account in assessing proportionality, the EAT has held that any agreement with trade unions should be critically appraised by the ETs and courts to ensure that the employers are not influenced by stereotypical views[66]. The EAT cautioned that there is *'always the risk that the parties will have been influenced, consciously or subconsciously, by traditional assumptions relating to age'*[67].

Further, ETs also expect employers to consider other ways of achieving the aim, or minimising the discrimination. If there has been little or no consideration by employers as to alternatives and an alternative is clearly available, then the ET judgments suggest that the employer's arguments will fail at the proportionality stage. So, for example, in *Baker*[68] there were other more appropriate ways of achieving the aim relied upon such as testing suitable candidates whatever their age.

However, six years after the introduction of the legislation, ETs were still expressing their confusion about the circumstances in which employers can successfully argue whether a retirement age is a proportionate means of achieving a legitimate aim. The ET asked itself the question *'What evidence do we need of the appropriateness of the selected retirement age?'* in the case of *Engel v Transport and Environment Committee of London Councils*[69]. The ET acknowledged that it had reviewed the case law from the national courts but they could not find *'anything that clearly directs us on the sort of evidence or the quantity of evidence we should expect. Therefore we have had to reach a view of our own'*[70]. The ET stated that they required more than a mere assertion but evidence in support of why the age was chosen. There was insufficient evidence for the ET to conclude that the retirement age of 70 was appropriate and necessary. The ET's observations in this regard were as follows:

We are concerned that if we were to assume that age 70 is a reasonable retirement age for parking adjudicators, without some evidence as to why that age is appropriate, we might be falling into the trap of stereotyping and/or discrimination ourselves[71].

In *Engel* before delving into its conclusions, the ET had some words of warning for the respondent with regards to its use of language in its written submissions. The respondent had used the words *'old age'* twice which, in the ET's view, was *'unfortunate language in the context in question'*[72]. The ET considered that there are some terms which offend people and it would be *'respectful not to use that terminology'*[73]. Therefore, despite acknowledging confusion as to the boundaries of direct age discrimination the ET nevertheless tackled the use of inappropriate language and sent a warning to the respondent that age stereotyping will be tackled.

Endorsing age stereotypes

A small number of worrying cases were identified in the analysis of the ET judgments. In these cases there was some evidence that claims were hampered by ETs own stereotypical views and in some cases this was facilitated by the definition of direct age discrimination.

In the early cases of *James v Gina Shoes*[74], *Fryett v Sunburst Bakery*[75] and the well-known case of *Seldon v Clarkson Wright and Jakes*[76] each ET endorsed age stereotyping in its judgment. In *James* the ET surprisingly felt there was insufficient evidence to raise a prima facie case of age discrimination as the comment *'you can't teach an old dog new tricks'* was taken out of context. However on appeal to the EAT the stereotyping was ultimately tackled by the finding that it plainly raised a prima facie case[77].

Fryett and *Seldon* illustrate the extent to which the definition of direct age discrimination gives ETs flexibility in judging whether an act is unlawful direct age discrimination, resulting in the stereotyping not being tackled. In the former case, the employer assumed because of the claimant's age, that she was tired and wanted to reduce her hours. However, the ET considered that the employer acted out of concern about the claimant's health and welfare. In the latter case the respondent law firm relied upon a number of aims, one of which was the controversial *'dignity'* aim. The argument made was that

because an individual's mental and/or physical capacity declines with age and having a retirement age avoids the need to performance manage that partner out of the workplace. No evidence was adduced by the respondent that partners of around the age of 65 had particular difficulties with their performance and the ET considered that it was not unreasonable to link age and performance:

It is also not unreasonable to assume that some partners who have reached the age of 65 are not able to make as great a contribution as they had done in the past. In the absence of a compulsory retirement age it will become necessary to confront such a person with his or her underperformance[78].

The EAT, however, held that Mr Seldon had the right to say that there had been a stereotypical assumption that partners will, by the age of 65, be underperforming and therefore reliance upon the aim was not proportionate[79]. It is interesting, therefore, that the EAT acknowledged that there had been stereotyping by the law firm, a point the ET had not previously made.

The 'dignity' aim has been subject of academic criticism (Vickers and Manfredi, 2013) and the acceptance of this aim as legitimate in a number of cases has endorsed age stereotyping as it conflates age with capacity. Hepple (2014) highlights that the legislation attempts to reconcile two conceptions of age inequality. The first being that age discrimination is wrong to individual dignity and the second being that it is a 'social wrong to particular age groups, which must be balanced against the rights and interests of others' (Hepple, 2014, p38 and 39). Adopting this second approach, the definition of direct age discrimination provides a 'mechanism for balancing competing interests' (Hepple, 2014, p39). Competing interests include government social policy, an employer's workforce planning needs and the interests of other disadvantaged groups such as women and younger workers. It is difficult to see how the 'dignity' aim achieves this balance. Furthermore the aim assumes that it is more dignified for an individual to be retired at a particular age rather than be subject to performance management, however it does not acknowledge the indignity experienced by individuals when they are forced to leave employment against their will.

It is important to highlight that the case law of the CJEU has been particularly influential upon the UK courts and ETs as to what may or may not be a legitimate aim. Indeed, it has repeatedly held that the 'dignity' aim is legitimate[80]. However, as the UK case law evolved the courts have tried to rein in the application of this aim, in particular by the cautioning that reliance upon the aim will not be proportionate if the employer has a performance management system in place which employers would be well advised to have in any event. The appeal decisions in *Seldon* demonstrate that the ETs and courts are conscious of the risk and will try not to allow reliance upon a legitimate aim to mask age stereotyping. Lady Hale in the Supreme Court acknowledged that the assumptions underlying the 'dignity' aim look 'suspiciously like stereotyping'[81]. She gave the example that 'most women are less physically strong than most men'[82] and this does not justify refusing a job to a woman applicant based upon this stereotypical assumption. However, she deferred to the higher authority of Europe[83] and acknowledged that the CJEU had approved the aim as legitimate in principle. Lady Hale also cautioned that there must be an evidential basis for assuming that performance would diminish at the age of 65 for there to be a need for a retirement age of 65.

Seldon must be considered in the social context at the time of the judgment. In particular, it was decided when the former default retirement age of 65 was in force, which was considered at that time to be an appropriate retirement age and this public policy influenced the courts. Nonetheless, *Seldon* is important for future cases in reining in the application of this controversial aim. Lending support to this proposition is the case of *Engel* where the ET reluctantly accepted the aim as potentially legitimate however the respondent's retirement age of 70 failed the proportionality stage. It failed due to the lack of evidence to support why the age of 70 was appropriate in the circumstances. This case demonstrates the extent to which the prohibition against age discrimination has evolved. The ET considered the retirement age of 70 was not proportionate, acknowledging that it would have been easy for it to 'fall into the trap'[84] of considering it an appropriate age given it is five years older than the former default retirement age.

Furthermore, in the more recent case of *Willey and Sharpe v England and Wales Cricket Board Limited*[85] the ET gave a careful judgment in respect of a retirement age of 65 for umpire officials. The ET acknowledged the 'dignity' aim to be legitimate, as it was bound by the decision in *Seldon*,

however the respondent failed to demonstrate that the retirement age of 65 for cricket umpires was appropriate and necessary to preserve the dignity of umpire officials. The ET highlighted that it had not seen '*any evidence that there is a pattern whereby umpires start to make more mistakes as they enter their 60s*'[86] and they had been '*shown no medical reason*'[87] why 65 years old needed to be '*saved from themselves*'[88]. The compulsory retirement age must '*be at a point before major problems start to occur, but no problems had started to manifest by the age of 65*'[89]. The claimants did not wish to outstay their welcome but they felt that at age 65 they still had plenty to give. There was no medical evidence before the ET to demonstrate that the retirement age of 65 was appropriate to ensure that the dignity of the umpire officials were protected. For the ET '*it would obviously be unnecessarily discriminatory to cut off their career too soon*'[90].

However in contrast, in *White v Ministry of Justice*[91] no problems had started to manifest in the judiciary by the retirement age of 70 and the careers of the claimants in this case were ended whilst they were still '*in good health mentally and physically*'[92]. The retirement age was lawful and one of the aims relied upon was to preserve the '*dignity*' of the judiciary by avoiding the need for individual assessment of health and capacity. Relying upon society's stereotypical views on age and capability it was held that the retirement age for the judiciary must be set at a point where they were not perceived by the public to be '*past it*' and that age was 70. The aim of maintaining the public confidence in the capacity and health of the judiciary was also proportionate. This case demonstrates inconsistency in the judgments with regards to what needs to be proven and when assumptions are sufficient. The difficulty with this case is the unique role of the judiciary and how to devise a procedure that achieves judicial independence, does not jeopardise the rule of law but also does not stereotype judges on grounds of age and lead to a loss of judicial expertise.

Finally, another aim which has been accepted as legitimate in the research sample, albeit classed as '*comparatively uncontroversial*'[93] is the '*intergenerational fairness*' aim. This is the need to facilitate workforce planning by giving younger workers a realistic expectation as to when vacancies arise. The argument is closely linked to other aims referred to as '*checking unemployment*', '*job blocking*' and '*fair innings*'. This aim has also been accepted by the CJEU as legitimate in a number of judgments[94]. The assumption underpinning this is that there are a fixed number of jobs available within the economy and that a person's lifespan will be 40 years and upon completion of the 40 years they have earned enough to retire (Vickers and Manfredi, 2013). It also presumes that older staff block the employment of younger workers and should therefore leave employment to make way for those younger workers. It would be a stereotype to rely upon such aims without evidence to support the contention that there was a difficulty in recruiting younger workers.

However, the application of this aim has resulted in decisions where evidence was not submitted. In particular in *Macculloch v Imperial Chemical Industries Plc*[95] the respondent relied upon the '*job blocking*' aim that a more generous redundancy package for older workers gives support to them leaving the employment market and thereby make way for younger workers. This may encourage a worker to leave and in turn increase turnover, but it was unclear exactly why it was necessary for older workers to be targeted. It was also unclear in that case how there was a job blocking problem arising from older workers being in employment. On the one hand in the first instance decision of *Galt and others v National Starch and Chemical Limited*[96] the need for statistical evidence was emphasised but on the other hand the EAT considered in *Macculloch* that an ET is entitled to draw from its own experience.

Conclusion

The Equality Act 2010 gives courts and ETs the flexibility to determine the boundaries of the prohibition against direct age discrimination and therefore this left a question whether age stereotyping would be tackled through legislation. As the path of UK age discrimination legislation has been left to the ETs and courts to interpret the vague concepts of what is a legitimate aim and proportionality, this makes it even harder for employers to understand the extent of their potential legal liability. An analysis of direct age discrimination cases is helpful in informing any discussions a worker may have with their employer about their treatment at work, whether it is likely to be unlawful and in preparing their ET case. Fieldwork observation is further helpful to gain that deeper insight into the questioning by the ET and whether the judgments ultimately tackle any evidence of age stereotyping that was apparent during

the fieldwork observation. This article reveals some pertinent learning outcomes for workers and employers and can assist in their understanding of the legislation.

Firstly, some important messages have emerged from the research for workers. The signal from ETs is that age stereotyping is not tolerated and the ET will focus its questioning during the hearing so as to determine whether employers have acted on the basis of a stereotypical assumption. Also the ETs have, on the whole, tackled age stereotyping in their judgments. However, an uncomfortable message to workers, especially older workers, is that there is some evidence that the definition of direct age discrimination allows stereotyping to be endorsed by ETs and courts. This is particularly so given that the interests of older workers in remaining in employment are treated as subordinate to the interests of younger workers in the acceptance of the '*intergenerational fairness*' and '*dignity*' as legitimate aims. Although the claimant was unsuccessful in *Seldon*, the decision has laid down important principles for future cases in tackling age stereotyping. One reason the ET in 2007 may have failed to tackle the stereotyping is that the Employment Equality (Age) Regulations 2006[97] had just come into force against the history of age being frequently used in decision making (Martin, 2016). The case law had evolved alongside public policy so as to tackle age stereotyping. As a result of the limitations placed upon the '*dignity*' aim and the definition of direct age discrimination in general by the Supreme Court in this case, a message has been sent to society that age stereotyping is not tolerated.

Turning next to employers, they should be aware of the range of stereotypical assumptions that were apparent from the research sample. The most common stereotype being an assumed link between age and the mental or physical ability of the worker. Although those over 65 were most at risk of being subject to age stereotyping, stereotyping occurred across a very wide age span. Therefore, it is right that legislation does not specify a particular age group that is covered by the protection as it makes a wide age range vulnerable to the assumption that they are '*too old*.'

It is evident from the ET judgments that employers must be alert to age stereotyping manifesting in verbal comments in particular, as age stereotyping was more likely to manifest in verbal communication to the worker, even when they consider that they are acting out of genuine concern for the individual in question. Employers would be well advised to train all managers to be extremely careful how they communicate with their workforce and ensure they do not link age with ability, without there being evidence in support. Training all members of staff, especially those responsible for recruitment and dismissal, is the key to challenging stereotypes and to change entrenched views. In particular employers must adopt a practice that actively challenges assumptions that age does not necessarily reflect a person's ability. Employers must also be careful in their use of terminology, not just in reference to '*old age*' but also the subtler words that connote stereotyping such as '*traditional*', '*fresh*' and '*dynamic*'. Those over the age of 65 are particularly vulnerable to being subjected to age stereotyping within the research and therefore particular focus should be made by employers to this age group to ensure any assumed link between age and capability is not made. Should the employer find themselves before an ET in a claim for direct age discrimination, the signal from the ET is that it will critically consider all the evidence including instructions to any expert and all information written by the managers which could suggest stereotyping. If there is any suggestion of stereotyping, then the fieldwork observation demonstrates that ETs will question this and ultimately tackle these unlawful views in its judgment. Further fieldwork observation in this area in other ETs would be beneficial to build upon this fieldwork research.

Going forward the '*dignity*' argument does require greater reflection by the courts, in particular whether it should be a potentially legitimate aim for employers. Unfortunately the inconsistent decisions in *Willey*[98] and *White*[99] demonstrate that Lady Hale's words remain true in 2017 that '*we all have a lot of learning to do*'[100]. The abolition of the default retirement age (which could be applied by each and every employer regardless of the job role) was a major step in tackling age stereotyping. Employers can no longer mask stereotyping by relying upon the default retirement age of 65. However, to effectively tackle age stereotyping the aims which are considered potentially legitimate should be narrower. Furthermore, employers should be alert to the nature of stereotyping in the workplace and how it can manifest so as to adopt more proactive measures to challenge entrenched views about age, particularly for those over 65.

Notes

1. Section 13 Equality Act 2010.
2. [2012] UWSC 16.
3. Ibid [15] (Lady Hale).
4. <https://www.gov.uk/employment-tribunal-decisions>.
5. <http://www.rubensteinpublishing.com/>
6. ET Case Number 1402145/2007.
7. ET Case Number 1100242/2007.
8. ET Case Number 3302349/2012.
9. Ibid [22].
10. *Court v Dennis Publishing* ET Case Number 2200327/2007 [38].
11. *Dixon v (1) Croglin Estate Co Ltd (2) Michael George and (3) Angus Gunning* ET Case Number 2502955/2011.
12. Ibid.
13. Ibid.
14. Ibid.
15. Day two of the hearing on 6th December 2011.
16. ET Case Number 3204495/2009.
17. Ibid [58].
18. ET Case Number 2502955/2011.
19. Day three of the hearing on 7th December 2011.
20. Ibid.
21. ET Case Number 3323775/2016.
22. Ibid [4.1.2].
23. ET Case Number 2200327/2007.
24. Ibid [37].
25. ET Case Number 2700838/2011 and 2701156/2011.
26. Ibid [3.5].
27. *Thomas v (1) Eight Members Club (2) Killip* ET Case Number 2202603/2007.
28. *Wilkinson v Springwell Engineering Ltd* ET Case Number 2507420/2007
29. Day three of the hearing on 7th December 2011.
30. Ibid.
31. ET Case Number 2505011/2012.
32. Day one of the hearing on 26th November 2012.
33. Ibid.
34. Ibid.
35. Ibid.
36. *Baker v National Air Traffic Control* ET Case Number 2203501/2007.
37. *Dixon v (1) Croglin Estates Ltd (2) Michael George and (3) Angus Gunning* ET Case Number 2502955/2011.
38. *Hibbert v West End Working Mens Club* ET Case Number 1402145/2007.
39. ET Case Number 1302495/2010
40. Ibid [4.9].
41. *Perrin v Fred Christopher Ltd* ET Case Number 1401278/2014.
42. *Dixon v (1) Croglin Estate Co Ltd (2) Michael George and (3) Angus Gunning* ET Case Number 2502955/2011.
43. Day one of the hearing on 5th December 2011.
44. *Frost v David Harber Ltd* ET Case Number 2703446/2009.
45. *Fryett v Sun crust Bakery* ET Case Number 1501483/2008 [36].
46. ET Case Number 2200327/2007.
47. Ibid [37].
48. *The Queen on the Application of the Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Innovation and Skills* Case C-388/07.

49. *Koh v Sainsburys Supermarkets* ET Case Number 2312267/2008, *Court v Dennis Publishing Ltd* ET Case Number 2200327/2007, *Wilkinson v Springwell Engineering* ET Case Number 2507420/2007, *Baker v National Air Traffic Services* ET Case Number 2203501/2007, *Hampton v The Lord Chancellor and The Ministry of Justice* ET Case Number 2300835/2007, *Berrill v Corbetts and Company (Galvanising) Ltd* ET Case Number 1302495/2010.
50. ET Case Number 2312267/2008.
51. *Ibid* [77].
52. ET Case Number 2507420/2007.
53. *Ibid* [10.5].
54. ET Case Number 3323775/2016.
55. ET Case Number 2502955/2011.
56. *Ibid* [9.10].
57. *Ibid*.
58. The comment was contained in the minutes of a management meeting on 14th January 2011 disclosed on the first day of the hearing.
59. ET Case Number 2502955/2011 [8.7]. For a discussion of this case in the context of compensation reduction see Dewhurst, E. (2015), "Are Older Workers Past Their Sell-by-Date? A View from UK Age Discrimination Law", *Modern Law Review*, Vol. 78, Issue. 2, pp 189-215.
60. ET Case Number 2505011/2012.
61. Day two of the evidence on 27th November 2012.
62. ET Case Number 2203501/2007.
63. *Ibid* [7.5].
64. ET Case Number 2802438/2009.
65. *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* Case C-388/97.
66. *Loxley v BAE Systems (Munitions and Ordnance) Limited* EAT/0156/08/RN and *Pulham and Others v London Borough of Barking and Dagenham* UKEAT/0516/08/RN.
67. *Loxley v BAE Systems (Munitions and Ordnance) Limited* EAT/0156/08/RN [43].
68. *Baker v National Air Traffic Services* ET Case Number 2203501/2007.
69. ET Case Number 2200472/2012 [62].
70. *Ibid* [64].
71. *Ibid* [69].
72. *Ibid* [40].
73. *Ibid*.
74. ET Case Number 3204495/2009.
75. ET Case Number 1501483/2008.
76. ET Case Number 1100275/2007.
77. UKEAT/0384/11.
78. ET Case Number 1100275/2007 [59.8].
79. UKEAT 0063_08_1912
80. *Gerhard Fuchs, Peter Kohler v Land Hessen* Case C-159/10 and Case C-160/10 and *Hörnfeldt Torsten Hörnfeldt v Posten Meddelande AB* Case C-141/11.
81. [2012] UKSC 16 [57].
82. *Ibid* [58].
83. *Gisela Rosenbladt v Oellerking Gebäudereinigungsges* Case C-45/09 and *Gerhard Fuchs, Peter Kohler v Land Hessen* Case C-159/10 and Case C-160/10
84. ET Case Number 2200472/2012 [69].
85. ET Case Number 2201406/2014 and 2201407/2014.
86. *Ibid* para [46].
87. *Ibid* para [45].
88. *Ibid*.
89. *Ibid* [47].
90. *Ibid* [45].
91. ET Case Number 2201298/2013.

92. Ibid [25].
93. [2012] UKSC 16 [56].
94. *Dominica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* Case C-341/08 ; *Georgiev Tehnicheski Universitet – Sofia* Case C-250/09 and Case C-268/09 and *Gisela Rosenblatt v Oellerking Gebäudereinigungsges* Case C-45/09
95. ET Case Number 2201406/2014 and 2201407/2014.
96. ET Case Number 2101804/2007.
97. The Employment Equality (Age) Regulations 2006, SI 2006/1031.
98. ET Case Numbers 2201406/2014 and 2201407/2014.
99. ET Case Number 2201298/2013.
100. *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15 [27] (Lady Hale).

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