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# Objective Justification: where are we?

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# Introduction

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- Importance of the defence:
    - Indirect discrimination
    - Direct age discrimination
    - ECHR

# Initial Development



- “correspond to real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end”
- “a formidable hurdle for a respondent seeking to justify indirectly discriminatory conduct... if reasonable alternative means are available to the respondent to achieve the objective, the behaviour will breach the non-discrimination principle.” (Ellis (2012), *EU Anti-Discrimination Law*)

Strasbourg Court Approach: *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (judgment of 28 May 1985, Series A, No. 94, paragraph 72)

- ‘... a difference in the treatment of persons in relevantly similar situations ...is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a **legitimate aim** or if there is not a reasonable relationship of **proportionality** between the means employed and the aim sought to be realised’

# Directive approach



- ETD 2006/54/EC Art 1 (b): unless that provision, criterion or practice is objectively justified by a **legitimate aim**, and the means of achieving that aim are **appropriate** and **necessary**
- FD 2000/78/EC
  - Art 2(2)(b): objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
  - Art 6(1): 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.

# Equality Act 2010 Approach



- Section 13(2): If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a **proportionate** means of achieving a **legitimate aim**.
- Section 19(2)(d): A cannot show it to be a **proportionate** means of achieving a **legitimate aim**

# A difference between EU and UK approach?

- "...Means that are 'proportionate' must be 'appropriate and necessary'... Both concepts are included in the test that we have used, but they need not be necessary in the sense of being the only possible means of achieving a legitimate aim. It is sufficient that the means are not more discriminatory than any other means that could have been chosen to achieve the same end..."
- There is a risk that changing language well established in British law could lead to an excessive narrowing of the scope of justification beyond what the directive requires, because that change could be - and 'necessary' has been - interpreted very strictly by our courts. However, they are obliged to interpret the legislation compatibly with the directive and they know how to do that. In a nutshell, this is well-trying and well-used language that everybody understands."

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# Approach under sex discrimination

On to the case law...



# Sex Discrimination/Equal Pay



## INDIVIDUAL FACTORS

- Seniority/Length of Service
- Case C- 1/95 *Gerster* ECR I-5253:
  - In *Nimz*, moreover, the Court took the view that it is impossible to identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience, since such a claim amounts to no more than a generalization concerning certain categories of worker. Although experience goes hand in hand with length of service, and experience enables the worker in principle to improve performance of the tasks allotted to him, the objectivity of such a criterion depends on all the circumstances in each individual case, and in particular on the relationship between the nature of the work performed and the experience gained from the performance of that work upon completion of a certain number of working hours. [para 39]

# Sex Discrimination/Equal Pay



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## COLLECTIVE AGREEMENTS

- Case C-127/92 *Enderby* [1993] ECR I-5535
- Case C-400/93 *Danski Industri* [1995] ECR I-1275

# Sex Discrimination/Equal Pay



## STATE POLICY/LEGISLATION

- Case 171/88 *Rinner-Kuhn* [1989] ECR 2743- alteration to the test
- **Margin of Appreciation important**
- Case 167/97 *R v. Secretary of State for Employment, ex parte Seymour Smith* [1999] ECR I-623:

Case 167/97 *R v. Secretary of State for Employment, ex parte Seymour Smith* [1999] ECR I-623



- 74. It is true that in paragraph 33 of the *Nolte* case the Court observed that, in choosing the measures capable of achieving the aims of their social and employment policy, the Member States have a **broad margin of discretion**.
- 75. However, although social policy is essentially a matter for the Member States under Community law as it stands [however it] cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women.
- 76. Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough...

# Dilution of the Test?

- C-444/93 *Ursula Megner and Hildegard Scheffel*:
  - “it should be noted that the social and employment policy aim relied on by the German Government is objectively unrelated to any discrimination on the grounds of sex and that, in exercising its competence, the national legislature was reasonably entitled to consider that the legislation was necessary in order to achieve that aim”

## *Allonby v Accrington and Rossendale College and Others* [2001] ICR 1189, CA

- "Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter."

*R (Elias) v Secretary of State for Defence*,  
Court of Appeal, 2006, per Mummery LJ



- "...the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

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# Moving on to age discrimination...

How does this differ, if at all?



# Age Discrimination: C-388/07 *Age Concern England* [2009] ECR I-1569

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- National Policy, even where employer discretion!!!
- ‘Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough ... and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim’

## COLLECTIVE AGREEMENTS

- Case C-45/09 *Rosenblatt* [2010] ECR I-9391:
  - Member States and social partners at national level had a broad discretion in relation to the pursuance of justifiable aims in the field of social and employment policy, so long as the ‘aims are legitimate within the meaning of Article 6(1) thereof and are appropriate and necessary to achieve those aims. ALSO see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531
  - social partners at national level are afforded a wide discretion to pursue a given aim in the area of social policy, and also to define the measures required to implement it [PARA 69]
- Case C-297/10, C-298/10 *Hennigs and Mai-* akin to national laws

- Case C-160/10 *Köhler und Fuchs*
  - Professions: retirement often appropriate to achieve stated aims
  - Nb. needs balanced consideration of interests
  - National authorities important role in this determination
  - Statistics and precise data?
  - Mere generalisations are not enough!!!
  - High standard of proof
  - National court crucial role
  - ‘genuinely reflects a concern to attain it in a consistent and systematic manner...’

# Age discrimination, a weakened approach?

- Initially weak, but strengthening- Case C-546/11 *Dansk Jurist- og Økonomforbund* [2013]; Case C-476/11 *HK Danmark* [2013]

# *Homer v Chief Constable of West Yorkshire Police* [2012] SC



- "As the Court of Appeal held in *Hardy & Hansons plc v Lax* [...], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement." (Para 20)

- 'The ET [Employment Tribunal] ...regarded the terms "appropriate", "necessary" and "proportionate" as "equally interchangeable".... It is clear from the European and domestic jurisprudence cited above that this is not correct. Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.' (Para 22).

# The end...



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- I hope you enjoyed
  - Any questions?
  - Thank you