

A Fine State of Affairs**Makbool Javaid**
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The Employment Equality (Age) Regulations 2006 allow employers to justify direct and indirect age discrimination where it can be shown that the method chosen was a proportionate means of achieving a legitimate aim.

The exception is allowed under Article 6.1 of the Equal Treatment Framework Directive which provides for justification of differences of treatment on grounds of age, but only if measures are justified by legitimate national social policy objectives, such as those related to employment policy and the labour market.

In *Seldon v Clarkson Wright & Jakes* reported on Page 3, Mr Seldon tried to argue that following the ECJ's judgment in *Palacios de la Villa v Cortefel Services SA*, Article 6.1 meant that a business aim cannot be legitimate if it only relates to the business itself – it has to be linked to national social policy objectives.

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The Court of Appeal, however, rejected Mr Seldon's argument. While national law must be linked to national policy, *Palacios* allowed flexibility for employers. However, the Court also held that while the business aim itself can relate to the organisation's specific requirements, the employer's actions must nevertheless be consistent with the social or labour policy of the United Kingdom.

The clear message is that for an aim to be legitimate in age discrimination cases, it can relate to a specific business requirement, but only if it is also consistent with the UK's social or labour policy. With the Government confirming that the national default retirement age of 65 will be abolished from October 2011 this brings a whole new 'State of affairs' to justifying age discrimination.

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Draft Code of Practice on Equal Pay

The Statutory Code of Practice on Equal Pay has been approved by the Secretary of State and was laid before Parliament on 27 July 2010. The Code provides a comprehensive guide to the new Equality Act's 'equality of terms' provisions to help employers observe their legal obligations.

In January 2010, the Equality and Human Rights Commission published three draft codes of practice on discrimination in: (i) employment, (ii) equal pay, and (iii) services, public functions and associations. The codes will replace the existing codes of practice published by the former equality commissions and provide guidance on the Equality Act 2010.

The [Statutory Code of Practice on equal pay](#) has now been approved by the Secretary of State and was laid before Parliament on 27 July 2010. This is an authoritative and comprehensive guide to the Act's provisions intended to ensure that women and men receive the same pay and other contractual benefits when doing equal work. The Commission has created this statutory guidance so that it will give individuals, businesses, employers and public authorities the information they need to understand the Act, exercise their rights, and meet their responsibilities. The remaining two codes dealing with employment and services, public functions and associations, are expected shortly.

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HSE dispels myths about disability and health and safety

A new fact sheet from the Health and Safety Executive (HSE) sets out facts designed to dispel myths about disability and health and safety, and provides links to various other pieces of disability-related information, including making reasonable adjustments, and information concerning work support schemes, such as Job Introduction and Access to Work.

With approximately 10 million disabled people in Great Britain covered by the Disability Discrimination Act, representing around 18% of the population, the HSE fact sheet, [Did you Know ...? Disability](#) points out that health and safety is sometimes used as a false excuse for not employing people with disabilities, but research conducted by the HSE has shown that disabled employees are as productive as their colleagues.

Among the key facts provided about disabled employees is that: (i) they have less time off sick, stay longer in their jobs and have fewer work accidents; and (ii) only 17% of people with a disability are born with that disability, the majority acquire their disability during their working life. The fact sheet highlights the importance of considering reasonable adjustments to support disabled people, and includes links to advice on making adjustments and the "5 steps to risk assessment" toolkit for employers to ensure health and safety issues are taken into account.

Links are also provided to various other sources of useful information including work support programmes such as Access to Work, the Job Introduction Scheme and the New Deal for Disabled People.



Acas publishes Equality Act guide for employers

Acas have published a short guide to the Equality Act 2010 for employers summarising the key changes the Act will introduce, as well the provisions that will remain the same, and providing examples of unlawful discrimination, victimisation and harassment.

As we reported in the July 2010 edition, the main employment provisions of the Equality Act 2010 are due to come into force in October 2010. Acas has published a short guide, [The Equality Act – What’s new for employers?](#), highlighting the changes and confirming the provisions which will remain unaltered.

The guide contains a useful table detailing the main changes, describes each unlawful act and explains how the new provisions differ from existing legislation. Acas recommends that employers review their policies and practices to ensure they are compliant with the new legislation. While this short guide provides helpful introduction to the Act, employers would be well advised to seek specialist advice before reviewing policies, etc., since some new provisions in the Act are not covered, e.g. combined discrimination: dual characteristics in S.14.

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Legitimate aims have to be consistent with social policy

In *Seldon v Clarkson Wright & Jakes* and *Secretary of State for Business Innovation and Skills*, the Court of Appeal held that a rule requiring partners to retire at 65 was a proportionate means of achieving a legitimate aim. In doing so, the Court ruled that a legitimate aim must be consistent with the social or labour policy of the United Kingdom.

In this age discrimination case, the Court of Appeal upheld a tribunal’s decision that a rule requiring partners in a law firm to retire at 65 was a proportionate means of achieving the legitimate aims of workforce planning and providing associates with promotion opportunities. While this decision rests on the particular circumstances of this employer’s needs, the Court’s examination of the meaning of a ‘legitimate’ aim is of major interest.



Mr Seldon argued that following the ECJ’s judgment in *Palacios de la Villa v Cortefel Services SA*, Article 6.1 of the Equal Treatment Framework Directive 2000/78/EC, which allows exceptions to the principle of non-discrimination on grounds of age, a business aim cannot be legitimate if it only relates to the business itself and is not linked to national social policy objectives, such as those related to employment policy, the labour market or vocational training.

The Court, however, rejected the interpretation of *Palacios*. That case confirmed that national legislation, such as the UK’s Age Regulations 2006, must be linked to national social and employment policy. But that is not the same as saying that a particular employer can only have ‘national’ social or employment policy aim, since *Palacios* also allowed discretionary powers or a degree of flexibility for employers. However, while the aim can relate to a specific requirement of the business, the employer’s actions must nevertheless be consistent with the social or labour policy of the United Kingdom. This brings an added dimension to justifying age discrimination - see the Editorial on Page 1 for further comment.

New Stonewall guide for prospective students

Stonewall has launched Gay By Degree, a guide which shows how gay-friendly every university is in the UK, in recognition of the fact that lesbian, gay or bisexual students will want to apply to a university that's doing everything it can to make students feel safe and welcome.

[Gay By Degree](#) , is an online guide, supported by Square Peg Media, aimed at lesbian, gay and bisexual (LGB) 16 and 17 year olds who are choosing which university to study at. The Guide measures how gay-friendly each university is based on a range of factors, including whether there is a student LGB Society, if LGB specific careers advice is offered, membership of Stonewall's Diversity Champions Programme, policies and practices that counter homophobic bullying and specific events for LGB students.

The Guide also contains gay-specific advice about the university experience and a ten point checklist Stonewall recommends every university should meet to recruit and retain the very best gay talent - both students and staff. Luke Tryl, Stonewall's Education Officer, said: 'With the introduction of tuition fees, students are increasingly consumers and as such expect universities to cater to their needs.'

"The guide shows how gay-friendly every university is in the UK, in recognition of the fact that LGB students will want to apply to a university that's doing everything it can to make students feel safe and welcome"

Malcolm test applies in disability-related employment cases

In *Aylott v Stockton on Tees Borough Council*, the Court of Appeal held that the House of Lords ruling in *London Borough of Lewisham v Malcolm*, a housing case, applies to disability-related employment discrimination claims and that Mr Aylott had not suffered direct disability-related discrimination as a non-disabled person with the same sickness record would have been treated the same way

Mr Aylott suffers from bipolar disorder and had a high level of sick absence. He was dismissed and was successful in bringing a disability discrimination claim to a tribunal. The Court of Appeal held that Mr Aylott had suffered direct disability discrimination, i.e. he was treated less favourably than a non-disabled person with the same abilities would have been treated in like-for-like circumstances, purely because he is disabled and for no other reason.

Mr Aylott, however, had not suffered direct disability-related discrimination. The House of Lords ruling in *London Borough of Lewisham v Malcolm*, concerning the identity of a comparator in disability-related discrimination claims, albeit a housing case, applied in employment claims. This meant that a non-disabled person with the same sickness record would have been treated the same way.

S.15 of the EA 2010 will introduce a completely new concept of "discrimination arising from disability" which will replace the current direct disability-related discrimination provisions. This is designed to address the decision in the *Malcolm* case which has made it near impossible for a claimant to establish disability-related discrimination. Under the new provisions: A discriminates against a disabled person B if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

