



EMPLOYMENT TRIBUNALS

Claimant: Mr. D McGonagle

Respondent: Jaguar Land Rover Limited

Heard at: Birmingham Employment Tribunal via CVP

On: 17-20 August 2020

Before: Employment Judge Mark Butler
Mr. R White
Mr. M Pearson

Representation

Claimant: Mr. Bain (Solicitor)

Respondent: Ms. Badham (Counsel)

JUDGMENT

1. This is the unanimous decision of this tribunal in the case of Mr McGonagle v Jaguar Land Rover Limited that:
 - a. Although the age criterion in the Retired Manager's Loan Agreement Plan (hereinafter 'RMLAP') was an act of direct age discrimination, in our judgment it was a proportionate means of achieving a legitimate aim.
 - b. The decision not to delay the claimant's leaving date was not because of his age, and therefore direct age discrimination was not established.
2. The claim for age discrimination is dismissed in its entirety.

Oral reasons were handed down at the hearing. However, this is the full written reasons following a request for written reasons by the claimant at the end of the hearing.

Introduction

3. The claimant presented his claim form on 09 June 2019. He brought a claim for direct age discrimination.

4. This claim, and what we were asked to determine in this hearing, was focused on Mr McGonagle not having been given access to a Retired Manager's Loan Agreement Plan (hereinafter 'RMLAP') when his employment came to an end, which was following the respondent's acceptance of the claimant's application for voluntary redundancy.
5. There are two parts to this direct age discrimination claim
 - a. First, was the decision not to give the claimant access to the Retired Manager's Loan Agreement Plan due to an age restriction forming part of the eligibility criteria and act of direct age discrimination, and
 - b. Secondly, was a refusal to extend the claimant's leaving date until the end of September 2019, which would have resulted in him qualifying for the RMLAP, an act of direct age discrimination.
6. In considering this matter, we were assisted by a bundle that ran to 153-pages. Pages 141-153 were additional documents that were in addition to the main bundle. Ms Badham raised no issue with these documents being presented before the tribunal and the tribunal could not see any prejudice caused to the respondent by considering these documents, and so these were admitted and considered.
7. The tribunal did hear submissions by both Mr Bain and Ms Badham as to whether an unredacted version of the document found at pages 125-140 of the bundle ought to be disclosed and considered. The tribunal considered the unredacted version of the document in order to assess the relevance of the document to the claims. In essence, Mr Bain submitted that the document was important as it would help explain the profitability of the RMLAP scheme. Whereas, Ms Badham submitted that the document does not do this, that the data contained on it is not relevant to the matters to be determined, and that the data was commercially sensitive. Having considered this matter, the tribunal was satisfied that the document did not contain evidence that was relevant to the issues in this case. It did not contain evidence relating to profitability of the scheme. At most, it contained indications of where criteria were satisfied for individual car models which was used to inform the respondent as to which models should be offered as part of the RMLAP scheme. This was sufficiently covered in Mr Falshaw's witness statement. There was no need for the unredacted version of the document to be disclosed.
8. We were assisted by the claimant, who gave evidence on his own behalf. There were no other witnesses for the claimant. And we heard evidence from Mr Falshaw, who is head of Human Resources at the respondent's Castle Bromwich Manufacturing Facility, and from Mr Bowron, who is the respondent's Record to Report Senior Manager Finance and who was line manager to the claimant, and who was in essence the person who considered whether to extend the claimant's leave date.
9. We were impressed with the evidence of both Mr McGonagle and of Mr Falshaw. They were both clear in the evidence that they gave. Each conceded on matters where what was being put to them was accurate or where they accepted that the position put to them was agreeable. We have

no reason to question the credibility or the reliability of either of these two witnesses.

10. We were less satisfied with the evidence of Mr Bowron. An individual who was involved in decisions concerning leave dates for voluntary redundancy leavers, who had held various meetings and discussions with Mr McGonagle and his line manager Ms Olexa concerning the claimant's redundancy, and had known what this case was about and that he would likely be called as a witness to give evidence on those matters, provided, at times, evidence under cross examination that can only be described as evasive and vague. He explained to the tribunal that he had no written notes of matters that involved discussions and making decisions that could and would have a significant impact on the claimant and others; this is poor practice at best, and one that we would strongly suggest the respondent addresses moving forward. Although that really is a matter for them. Parts of Mr Bowron's oral evidence was inconsistent with his written evidence. For example, his evidence concerning when he had discussed matters with Mr McGonagle, and concerning when Mr McGonagle had discussed with him and sought an extension to his leave date. Although we do not think this was enough to doubt the credibility of the witness, insofar as we did not consider him to be trying to deceive the tribunal, we do doubt his reliability. And this is a factor that we have considered when making our findings of fact.
11. This did lead us to the conclusion when reviewing the evidence that where there was a conflict in the evidence between Mr McGonagle and Mr Bowron, in the absence of contemporaneous notes, then we preferred the evidence of Mr McGonagle. Although, I do note here, that these factual disputes are few and far between.

Issues the tribunal are asked to determine?

12. Was denying Mr McGonagle access to the MRLAP for not having reached the age of 55, despite satisfying the requisite experience criterion, an act of direct age discrimination? If it was an act of direct age discrimination, was it justified?
13. Was the refusal to extend Mr McGonagle's leaving date until September 2019 from 31 March 2019 an act of direct age discrimination? If it was an act of direct age discrimination, was it justified?
14. Ms Badham was made aware on both the first day and the second day of this hearing that the pleaded legitimate aims for the purposes of justifying age discrimination were not entirely clear. These were clarified and I record the legitimate aims that were being put forward here. There are three individual aims being submitted as being part of the legitimate aim of intergenerational fairness when looked at objectively, and the approaches adopted being an appropriate means of achieving those aims:
 - a. Not sustainable to offer legacy schemes to all leavers, therefore needed to place restrictions on access

- b. Reduction in the size of the respondent's salaried headcount and associated costs- incentivizing
 - c. Provide a comfortable exit for successful voluntary redundancy scheme applicants.
15. It was important that these aims were fully understood by the tribunal, hence why I sought such clarification. And we will be considering each of those in turn in due course.

Submissions

16. We were grateful to the parties for their closing submissions. Although I am not going to repeat that said by the representatives in this judgment, we have taken care to review those submissions and consider them in making this judgment.

Law

17. Protection against direct age discrimination is provided for at s.13 of the Equality Act 2010, which provides that

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(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.

18. We were reminded of the burden of proof in discrimination cases by Mr Bain, with reference to section 136 of the Equality Act 2010.

19. In assisting the tribunal, we were taken to a number of relevant cases, each of which have been considered by the tribunal when reaching this decision.

20. Ms Badham, in her closing submissions identified the following as relevant:

- a. **Seldon v Clarkson Wright & Jakes (Secretary of State for Business, Innovation and Skills and another intervening)** [2012] UKSC 16, with particular reference to paragraph 56.
- b. **Air Products Plc v Michael Cockram** [2018] EWCA Civ 346. The tribunal was asked to consider entirety of the case, but in particular paragraphs 27, 59 and 60.

21. Mr Bain in his closing submissions, took us to the following cases:

- a. The 'Heyday' case, which is **The Incorporated Trustees of the National Council on Ageing (Age Concern) v Secretary of State for Business, Enterprise and Regulatory Reform (C-388/07)**. In particular Mr Bain focused on the need for the a legitimate aim to have a public interest aspect.

- b. **Seldon** (citation above), where Mr submitted that there was an extra burden on the respondent when dealing with justifying direct discrimination rather than indirect
- c. **Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330, concerning use of costs as a legitimate aim
- d. **Homer v Chief Constable of West Yorkshire** [2012] UKSC 15, in developing the test that needs to be applied when considered objective justification.
- e. **Enderby v Frenchay Health Authority** (C-127/92), when discussing the test for objective justification. Although we were quite surprised to hear this case being cited, as this is an equal pay case, we do accept a similar formulation of the test, with the added need for a public interest aspect.

22. Para 65 of **Seldon** was also considered by the tribunal, when considering justification of a general scheme that has discriminatory impacts on individuals. And Mr Bain was asked for comment on this particular paragraph.

Findings of Fact

We make the following findings of fact, on the balance of probability based on all the matters we have seen, heard and read. In doing so, we do not repeat all the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues. For ease of navigating our findings of fact, they are presented in three sections: (i) voluntary redundancy; (ii) the request to delay the leaving date, and (iii) the RMLAP scheme.

Voluntary Redundancy

23. Mr McGonagle commenced working for the respondent, Jaguar Land Rover, on 03 October 2011. He was employed as a Finance Manager.

24. Early in 2019, the respondent decided that it would need to reduce head count by approximately 4,500, and in pursuance of this it introduced a voluntary redundancy programme. As part of explaining the scheme and presumably to advertise it, the respondent released a document entitled 'Jaguar Land Rover Voluntary Redundancy Programme 2019: Frequently Asked Questions'. This document detailed the rationale behind the scheme, the terms that applied to the scheme, the application process and the impact voluntary redundancy would have on employee benefits including on the MLAP and RMLAP schemes, amongst other things. (see pp 91-102 of the bundle).

25. The scheme had an effective date of termination for successful applicants of 31 March 2019. However, '...In exceptional circumstances in order to support the business through this transformation period, employees may leave on a different date.' This could result in a later date of termination. Mr McGonagle explained under cross examination that he understood this to mean that a change to the leave date would be the exception to the standard

position of 31 March 2019, and would be determined based on business need. The parties were consistent on this fact.

26. Mr McGonagle, as an LL6 employee, was eligible to apply for the voluntary redundancy scheme, and did so before the deadline for applications, which was set at 25 January 2019.
27. Mr McGonagle was aware throughout the process that he could withdraw his application for voluntary redundancy. There was no deadline set for opting out of the scheme once entered (see p.152 of the bundle). Mr McGonagle at no point decided to opt out/revoke his application.
28. Mr McGonagle left the employ of the respondent on 31 March 2019 in accordance with the VR programme, at which point the claimant was 54 years and 8 months old.
29. The details of Mr McGonagle's redundancy package is at pp66-69 of the bundle. The separation payment package is significantly above the statutory minimum redundancy payment that he would have been entitled to.

Request to delay leaving date

30. At the time of applying for Voluntary Redundancy, Mr McGonagle was working on a project known as Release 3 of the F@ST replacement project.
31. Delaying the claimant's leaving date was a discretionary decision. This decision rested with an applicant's line manager, but it could include input from the individual
32. On at least 2 occasions, Mr McGonagle raised with Mr Bowron the possibility of extending his leave date. This was for two reasons. First, due to Mr McGonagle wanting to see the project through to its end to ensure that the project was completed without any problems. Secondly, as by delaying his leave date, Mr McGonagle would be brought within the RMLAP scheme.
 - a. The first time extending the leave date was raised by Mr McGonagle was shortly after he had applied for the Voluntary Redundancy scheme in January 2019. This was raised with Mr Bowron. Mr Bowron accepted under cross examination that this had taken place in January 2019, despite his witness statement at paragraph 6 suggesting otherwise.
 - b. The second time was by email dated 07 March 2019 (see pages 80 and 81 of the bundle).
33. Consideration of whether to recommend extending the end date for Mr McGonagle rested with Mr Bowron, who was Mr McGonagle's line manager at the time. In deciding whether to recommend extending Mr McGonagle's end date, Mr Bowron consulted with Ms Anne Olexa on 2 separate occasions. The first occasion took place at the end of January 2019, following extension being raised by Mr McGonagle (see para 32(a) above). The second occasion took place on the morning of 01 February 2019.

During these discussions, a position was reached with respect extensions to end-dates for Mr McGonagle, and for three other persons from the Accounting team. This was a position reached jointly by Mr Bowron and Mr Olexa. Although Mr Bowron's evidence was that he discussed the four individuals with Ms Olexa, without discussing whether to extend their end dates and any reasoning, this is simply implausible. We do not accept that the four individuals were discussed without discussing extensions and matters surrounding it, as the timeline suggests that that is the context in which these conversations took place, and a recommendation was committed to paper immediately following these discussions. It is more likely that the four individuals, whether to extend end dates along with reasoning were discussed fully during these conversations between Mr Bowron and Ms Olexa. And a joint position was reached.

34. The recommendations and reasons insofar as they related to extending the end date were recorded by Mr Bowron in an email that was sent to Ms Olexa on the morning of 01 February 2019 (pp.64 and 65 of the bundle):
 - a. With respect the claimant, it was not recommended to extend his leave date beyond the 31 March 2019. This was because the work for which he was specifically required for would come to an end within the couple of weeks subsequent to this email, and the remaining matters of the F@ST replacement project could be fulfilled by others.
 - b. With respect Ms Lucy Fenton (the chosen comparator for the part of the claim relating to delaying the end date), no specific end-date was recommended; however, it was recorded that Ms Fenton would need to be retained for a period to get the company through year end and to allow the respondent to reorganize role sin Product Accounting.
35. These are the reasons for not extending Mr McGonagle's end date and for extending Ms Fenton's end date. This in effect was the decision, and the decision was made based on business need and business reasons.
36. The claimant had a strong knowledge in the legacy system of F@ST. However, he was not essential to the completion of the F@ST replacement project. There was no business reason to support him staying beyond 31 March 2019. He accepts this in paragraph 47 of his witness statement where he states that "...I am not arguing it was essential that I was maintained on the project but it was a strange decision in the circumstances". And, under cross-examination, he further accepted that he was not "critical" to the completion of the F@ST replacement project. Further, under cross-examination the claimant accepted that there was no business reason to extend his leave date as all the work could be covered without him remaining, and that Mr Bowron had weighed up the business factors which led to the decision.
37. For completion purposes, we do find that there was a business case to extend Ms Fenton's contract until the end of September 2019. This was accepted by Mr McGonagle under cross examination when he explained that he could not contest that there was a business reason for this extension, that Ms Fenton was only one of two LL6 managers in her team, and that there was no capacity for others to assist when she left.

38. For the avoidance of any doubt. There was no business reason to extend the claimant's end date. There was therefore no extension. There was a business reason to extend Ms Fenton's end date, and she was granted an extension.

The RMLAP Scheme

39. The respondent previously offered a Defined Benefit (hereinafter 'DB') Pension Scheme to its employees. However, this was no longer open to new members from around 2009. Although there is no documentary evidence on this, we accepted the evidence of Mr Falshaw on this point, as he explained that he commenced work with the respondent in 2008, and was one of the last intake to join the DB scheme. From 2009, all new employees or those that had not joined the DB scheme who wished to join the company pension scheme, would enter the Defined Contribution (hereinafter 'DC') Pension Scheme. Even if we are wrong on the closing to new members of the DB scheme in 2009, the switch to the DC scheme took place in advance of April 2011, as can be seen in the standard terms and conditions (p.50 of bundle). And whether it was 2009 or 2011 has no material impact on this decision.
40. For those employees in the DB scheme, access to the RMLAP was restricted to individuals that had reached the age of 55 and who retired and immediately drew a Jaguar Land Rover DB pension. Although there was an exception to this which affected a small number of employees, with RMLAP still accessible by those that retired before the age of 55 but who still retired and immediately drew a Jaguar Land Rover DB pension. This was plainly an incentive to retire on reaching the age of 55 with limited exceptions, whilst also encouraging those in management roles to provide service up to that age and for a specific period of time during their employ. This is clear from the face of the RMLAP document itself (p.103) and implicit in the witness statement of Mr Falshaw (paras 18-20) and explicit in Mr Falshaw's oral evidence.
41. The RMLAP was revised following the move from offering a DB to a DC pension scheme. The eligibility criterion of being 55 years of age was retained for those in the DC scheme in order to match and align access to the scheme with those in the DB scheme. In other words, limiting the advantage of one group over another. This is the unchallenged evidence of Mr Falshaw.
42. There are still some 8,000 employees of the respondent in the DB scheme, including Mr Falshaw. We accept Mr Falshaw's evidence on this, at least in so far that there is a reasonable number of employees still in the DB pension scheme. We accept this as a reasonable guesstimate. We note that Mr Falshaw did give evidence on there being employees still in the DB scheme, which was unchallenged in cross examination, and nor did Mr Bain make any submissions that this was not or unlikely to be the case. Further, we took account of Mr McGonagle's evidence that at the time of him leaving the employ of the respondent, he knew that Mr Kevin McGrath was on the DB scheme; this further reinforced our view, that on the balance of

probability, there was still a portion of the workforce on DB pension terms.

43. The respondent amended the RMLAP scheme to allow employees leaving employment through the voluntary redundancy programme to have access to the RMLAP scheme, so long as the eligibility criteria was satisfied.
44. Although we make no findings on whether the scheme was profitable or not, we do make the finding that the scheme had to be cost neutral at worst. And that the scheme was carefully managed to ensure that this was achieved as a minimum. And that to do so the respondent used various mechanisms to restrict the scheme. One of which was through the eligibility criteria. The cost of the scheme clearly influenced how the scheme operated and what restrictions were to operate.

Conclusions

45. The reason why Mr McGonagles' leaving date was not extended was due to there being no business reason to support extending. This was nothing to do with his age.
46. It is unfortunate that Mr McGonagle fell just the wrong side of the line in terms of eligibility for this scheme. The claimant has not satisfied us that there are primary facts which establish a prima facie case that this decision was because of or was motivated by his age. It is for that reason that we conclude that this is not an act of direct age discrimination.
47. This brings us to the age criterion that was applied to the scheme itself. We are reminded that where there is a general rule, as is in application here, that if the general scheme is justified then this will usually justify the treatment which results from it. This appears to be the position, unless there is good reason to depart from it. There does not appear to be any good reason as to why this approach, as laid down by Lady Hale in **Seldon**, should not be followed, as this is a simple bright lines case which often appear in benefits designed for retirement purposes.
48. It was conceded, albeit late on in these proceedings, by the respondent that the application of the age criterion in order to access the RMLAP was an act of direct age discrimination. And this was a conclusion that this tribunal would have found easy to make.
49. The question therefore outstanding for the tribunal is whether the application of that criterion was a proportionate means, or in other words an appropriate and necessary means, to achieve the legitimate aim of intergenerational fairness.
50. In considering this matter, we as a tribunal have to ensure that there is adequate scrutiny of the aim, the ability of the rule to meet the aim, matters pertaining to proportionality, and whether the rule in question is necessary (which is sometimes flipped to ask whether there are less discriminatory ways of achieving the same aim). And this is the approach that we have adopted in our analysis.

51. Turning first to the third of the aims put forward, that being the aim of providing a comfortable exit for successful voluntary redundancy scheme applicants. We conclude that the respondent had not satisfied the evidential requirement in establishing that this aim was legitimate in these circumstances, nor that the aim when considered objectively, was connected and went some way to meeting the public policy aim of intergenerational fairness. There was no evidence put forward of the number of persons that were successful in their application for the voluntary redundancy scheme that also benefitted from the RMLAP. There was no evidence provided as to why voluntary redundancy terminations were being included in the RMLAP scheme.
52. Interestingly, in her closing submissions, Ms Badham tried to put forward the argument that the clear intention behind the policy as it currently stands would be to ensure a comfortable exit for those leaving into retirement. First, that would be quite some change to the pleaded case, which the tribunal would have not entertained without an application to amend, but secondly, although we made a finding that this may have been the intention at the time of the policy being introduced, we have to consider the aim of the policy at the time of the less favourable treatment. At that point, the aims of the policy had developed away from focusing on those retiring. This therefore would have led to the conclusion that that aim was not a legitimate one at the time of the less favourable treatment.
53. Turning to the second of the aims, the reduction in the size of the respondent's headcount and associated costs. There was dispute between the parties as to whether the application of an age criterion to RMLAP would increase, have no impact or decrease the costs of the RMLAP to the respondent. In our judgment, it is not necessary for us to make any findings on this point. Put simply, we were not satisfied that the reduction of costs had any connection with the legitimate aim of intergenerational fairness. This has been pleaded in relation to the reduction of the respondent's headcount and associated costs. And although we did hear some evidence of how the reduction in the number of LL6 managers has led to recruitment in some areas and promotion. Which could have given rise to a legitimate aim of intergenerational fairness in the sense of incentivizing older workers to leave the company through the RMLAP being an inducement, which opened up roles for younger workers to either fill or be promoted into, however, this was not the respondent's pleaded case, nor was there sufficient evidence presented that would have supported this tribunal reaching such a conclusion. This pleading, when looked at objectively, is about reducing costs. And we are mindful of the case law that precludes reduction in costs being a legitimate aim for the purposes of justifying direct age discrimination.
54. And turning finally to the first of the aims pleaded, that being that it is not business reasonable or commercially sustainable to offer legacy schemes to all leavers. Although we remain critical as to the way that this aim is pleaded, we do consider it broad enough to consider matters pertaining to the selection of criteria to restrict the numbers of employees eligible to the scheme. Part of which relates to the age criterion, which clearly has the underlying intention of encouraging retention of individuals up to the age

laid down in the RMLAP, but also then to incentivize retirement or at the very least, the leaving of the company at the age set down.

55. The DB scheme is the legacy pension scheme. This introduced a minimum age of 55 as criterion to have continued access to the car loan plan post leaving employment by reason of retirement. In its initial guise, as understood by the tribunal, is that this scheme was set up with retiring employees in mind. This is evident in the title of the scheme itself, evident in the eligibility for DB workers in that they could only access the scheme when they started to draw a JLR Company pension benefit. Furthermore, the age of 55 is important, as this remains, at least in normal circumstances, the earliest age at which an individual can start to draw an occupational pension. And therefore, in this tribunal's opinion is a rational choice. Although we note that this does increase to 57 in 2028, something worth noting by the respondent, as this may have an impact on the future eligibility criterion of this scheme.
56. The DB scheme closed to members in 2008, although there remains employees working for JLR still in this scheme. It is common sense that such workers, on the whole, are more likely than not to be older than workers joining JLR on the DC scheme, or at least as an average, be older. The respondent in seeking to restrict eligibility for the RMLAP, although for its own individual reasons relating to trying to avoid potential increase in costs, decided to align its restrictions to DC pension members with that of DB pension members. This in our judgment achieves parity of treatment between the two schemes which will include a different average age that will, we say inevitably, be existence in the two different member groups. In other words, it achieves intergenerational fairness by treating those likely older workers in the DB scheme equally in terms of eligibility criteria with the likely younger workforce in the DC scheme.
57. In terms of appropriateness and necessity, where the aim is for parity between the DB and DC scheme, adopting the same age criterion is clearly both appropriate and necessary. It achieves parity in treatment and there would be no other less discriminatory way of doing this. As to adopt any other approach would remove such parity and have the consequence of the inequality that such an approach is trying to avoid. The selection of 55 in the current RMLAP is therefore both appropriate and necessary to achieve the legitimate aim of intergenerational fairness, that being to ensure fairness in the access to the RMLAP between those in the DB scheme and those in the DC scheme.
58. We have taken account that the claimant voluntarily applied for VR, was aware that he did not qualify for RMLAP, had the opportunity to revoke his application throughout, and entered this agreement with full knowledge of the eligibility criteria. These were all means of alleviating the disadvantage that the rule could cause to individuals because of age.
59. For the reasons above, we dismiss the claims in this case.

Employment Judge **Butler**
08 September 2020

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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