



Case Numbers: 2207205/2018  
2201502/2019

# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON CENTRAL  
**BEFORE:** EMPLOYMENT JUDGE ELLIOTT  
**MEMBERS:** MR S PEARLMAN  
MR S SOSKIN

**BETWEEN:**

(1) Mr S Tilley  
(2) Ms J Morsy  
(3) Ms D Suri

Claimants

AND

Egyptair Airlines Company

Respondent

**ON:** 10, 11, 12, 15, 16, 17 and 18 November 2021  
(In Chambers on: 17 and 18 November 2021)

**Appearances:**

**For the Claimants:** Ms B Venkata, counsel

**For the Respondent:** Mr R Bailey, counsel

**Interpreter in the Arabic language on days 2 and 3:** Mr H Bekhiri

## **RESERVED JUDGMENT**

The unanimous Judgment of the Tribunal is that:

1. The claim for indirect age discrimination is dismissed upon withdrawal.
2. The claims for direct age discrimination and unfair dismissal fail and are dismissed.

## **REASONS**

1. The claim forms were presented on the following dates: for the first claimant Mr Tilley on 21 December 2018, for the second claimant Ms Morsy on 29 April 2019 and for the third claimant Ms Suri on 3 November 2020.

2. The respondent is the national airline for the State of Egypt. It is registered at Companies House as an overseas company.

### **This remote hearing**

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended the hearing on day 4 only.
5. The parties and the member of the public on day 4 were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance. We were able to overcome the minor technical difficulties, often by the relevant person logging off and back on.
6. No requests were made by any member of the public to inspect any witness statements or for any other written materials before the tribunal.
7. The participants were told that it was an offence to record the proceedings.
8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence. Mr and Mrs Tilley were witnesses in the same location. When Mr Tilley gave evidence he confirmed he was alone in the room. When Mrs Tilley gave evidence, Mr Tilley sat behind her so he could continue to observe the hearing and he was in view at all times.

### **The issues**

9. The issues were identified at a case management hearing on 24 April 2019 before Regional Employment Judge Potter in case number 2207205/2018. There was a further case management hearing on 4 September 2019 before Employment Judge Grewal when the first and second claims were consolidated.
10. The full merits hearing in this case was due to take place in June 2020 and was affected by the pandemic. A case management hearing took place on 1 June 2020 before Employment Judge Tayler. The case was relisted for 24 March 2021. It was postponed on the respondent's application to which the claimants did not object.
11. A case management hearing took place on 24 March 2021 before

Employment Judge J Burns to deal with the third claim which as consolidated with the first and second claims.

12. The issues were identified by Regional Judge Potter on 24 April 2019 for the first claimant and the parties agreed that these issues applied to all three cases and are as follows:

Direct age discrimination - section 13 Equality Act

13. The respondent accepts that they subjected the claimants to less favourable treatment because of age, namely forcing them to retire/dismissing them due to reaching the age of 65.
14. The respondent relies upon the legitimate aims of encouraging intergenerational equality and dignity for retiring employees.

Indirect age discrimination – section 19 Equality Act

15. The claim for indirect age discrimination was withdrawn so we were not required to make a decision on it.

Unfair dismissal

16. The parties agreed that the reason for dismissal was forced retirement age of 65. Was the dismissal for a potentially fair reason? The claimant asserts that the respondent does not have a potentially fair reason for dismissal.

Remedy

17. The approach for the claims should be:
  - a. When with the claimant have retired in any event?
  - b. Would the claimant's employment had been terminated in any event because of redundancy or performance issues, or for any other reason and if so when?
  - c. What earnings as the claimant received since dismissal?
  - d. Has the claimant failed to mitigate loss?
18. It was agreed with counsel at the outset that we would deal with liability including the *Polkey* issue first and that we would consider at a subsequent hearing, any remedy issues that were then outstanding. There was therefore no cross-examination on issues such as mitigation of loss at this hearing.

**Documents**

19. There was an electronic bundle in sections A to H.
20. We had helpful opening submissions from both parties and a chronology

from the respondent. We had closing submissions from the parties to which counsel spoke. All submissions and the case law referred to were fully considered, whether or not expressly referred to below.

21. After the lunchtime adjournment on day 2, the respondent sought to introduce documents which appeared to be warnings in relation to two of the claimants. On day 3, the respondent said that they no longer intended to rely on those documents and we did not take them into account.

The third claimant's handwritten letter of 2 November 2014

22. At the start of day 4, the morning the third claimant Ms Suri was due to give her evidence, counsel for the claimant wished to introduce a document on her behalf. It was a handwritten note or letter dated 2 November 2014 addressed "*To Personnel Officer*" challenging the retirement age and it was part of the third claimant's pleaded case at paragraph 4 of her Particulars of Claim. The respondent denied receipt of this document and had been requesting disclosure of it. The respondent's pleaded case was that they had no record of receiving it (paragraph 9 Grounds of Resistance). It was clearly an important document as the respondent's case was that none of the claimants challenged the retirement policy.
23. In email correspondence, the respondent had requested a copy of this document. We were shown an email between the respondent's solicitor Mr Osborne and the respondent's counsel Mr Bailey dated 13 April 2021 in which Mr Osborne said he had asked the claimant's solicitor about it, saying: "*He seems to think that the date of 02.11.2014 is most probably an error in the POC, (and more likely a reference to the correspondence in 2019).*" This handwritten letter was not put to any of the respondent's witnesses.
24. There was a discussion as to whether any of the respondent's witnesses could be recalled. Both Mr Aziz and Mr Hamdy were in attendance by CVP on day 4. Mr Aziz required an interpreter and the tribunal had carefully checked with the parties at the end of day 3 for their confirmation that the interpreter was no longer required. We considered it unfair on Mr Aziz and not in the interests of justice for him to be recalled without the benefit of an interpreter when he required an interpreter. We were told that Mr Hamdy would not have knowledge of the letter. He was not working in London in 2014.
25. The parties took instructions over the lunch break. Ms Suri said that in November 2014 she gave the handwritten letter to a messenger to give to Mr Potts the personnel officer. She worked at Heathrow and Mr Potts worked in the Hammersmith office. Enquiries were made as to whether Mr Potts could be called to give evidence. The respondent was not able to contact him in the limited time available and did not seek an adjournment for this purpose. It was left that we would make a decision

during our deliberations as to whether to take the letter into account and if so, what weight we should attach to it.

### **Witnesses**

26. For the claimant, the tribunal heard from four witnesses:
  - a. Mr Stephen Tilley, the first claimant
  - b. Ms Christine Tilley, the first claimant's wife
  - c. Ms Janine Morsy, the second claimant
  - d. Ms Deep Suri, the third claimant
  
27. For the respondent the tribunal heard from six witnesses:
  - a. Mr George Gendy, the respondent's accountant and business adviser
  - b. Mr Ahmed Aziz, General Manager, UK
  - c. Mr Savy D'Sa, customer service agent
  - d. Ms Alma Fallaraia, cashier / accountant
  - e. Mr Mohamed Waziri, Deputy Station Manager
  - f. Mr Amer Hamdy Aly Saad, General Manager Finance, UK (referred to below as Mr Hamdy)
  
28. The respondent's witnesses Mr Aziz and Mr Waziri gave evidence through the interpreter.
  
29. We had helpful opening submissions from both parties and a chronology from the respondent.

### **Agreed facts**

30. The following facts were agreed between the parties:
  
31. The respondent is the national airline of Egypt. It is an Egyptian state-owned entity based in Cairo with satellite operations around the world in approximately 60 locations, including London. It is a member of Star Alliance. The London operation comprises an administration centre in Hammersmith Road, London W14 and at Heathrow, there is an airport office and a cargo office. It is registered at Companies House as an overseas company. The respondent's operation is very centralised with all important decisions being referred to the Head Office in Cairo.
  
32. The senior management of the respondent's satellite operations tend to be Egyptian nationals working as expatriates with other employees being engaged locally. There is a retirement age for Cairo based employees and for expatriate employees of 60.
  
33. The senior management team tend to serve for a term of about 2 years and they are rotated to other roles either in Cairo or elsewhere in the world. Mr George Gendy, an accountant, provides the respondent with

ongoing business and commercial advice and provides some continuity.

34. Mr Aziz was the General Manager of the respondent when the claimants were given notice of retirement.

#### The respondent's retirement policy

35. The 2003 contracts of employment provided for a retirement age of 60 (pages B10, B24 and B38). In 2006 the respondent increased the retirement age for its employees to 65 in line with the national default retirement age (page B27). Following the abolition of the default retirement age, the respondent introduced a retirement policy (page B26-B27). A memo to all staff dated 22 October 2014 attaching a copy of the proposed policy explained that there would be a two-week consultation period. The policy explained the aims of encouraging inter-generational fairness and dignity for retiring employees. None of the claimants made any objection to the policy or, indeed, any comment in relation to it until it was applied to them.
36. The retirement policy was applied to two employees: Ms Elshoura (page D1) and Ms Misquitta (page D2) in 2015, prior to the claimants' retirements and, subsequently to others.
37. In 2020 the policy was reviewed and it was decided to extend the retirement age to the later of age 65 or the date when employees would become eligible for a state pension (pages F1-F8).

#### The first claimant Mr Stephen Tilley

38. Mr Tilley, whose date of birth is 4 August 1953, was employed by the respondent as a Reservations / Ticketing Agent from 3 September 1984 (page B1) until his retirement on 31 August 2018 (page C1). Throughout his employment, he was based at their administrative office which, at the time of his retirement, was in Hammersmith. From about 1988 Mr Tilley worked on Group Reservations.
39. Mr Tilley's original terms and conditions of employment were set out in a letter dated 14 August 1984 (pages B1-B2), which made no reference to a retirement age. On 28 July 2003 he signed more comprehensive terms and conditions set out in a letter to him from the respondent dated 30 June 2003 (pages B3-B11). That letter provided for a retirement age of 60 (page B10). The retirement age was subsequently increased to 65 (page B27).
40. By a letter dated 17 January 2018 (page C1), the respondent notified Mr Tilley that, in accordance with the retirement policy, his employment would terminate at the end of August 2018. There is some dispute about exactly what happened and what was said in the immediate aftermath of that. The conversations took place between Mr Tilley and Mr Aziz who had recently transferred into the role of General Manager of the UK

operation. The respondent's case is that Mr Tilley asked if he could carry on for an extra year. It is common ground that the respondent suggested there might be a possibility that he might continue but at half his current rate of pay. Mr Tilley declined that. In any event Mr Aziz communicated to the Head Office in Cairo Mr Tilley's request for his employment to be continued but they declined to extend it. Mr Aziz agreed with that decision, not least because he knew that Mr Tilley could be replaced with another employee for half the cost.

41. There followed various exchanges between the parties (pages C2-C3 and C11). By a letter dated 30 May 2018 Mr Joe McGowan, Regional Officer for Unite the Union, wrote to the respondent (page C6) asserting that "*forcing Mr Tilley to retire would be unlawful*" and threatening themselves to bring a claim in the Employment Tribunal for unfair dismissal and age discrimination. Mr George Gendy, who acts as a financial and business adviser to the respondent's UK operation, spoke to Mr McGowan by telephone on 16 August 2018 in response to that letter and explained that Mr Tilley had been retired in accordance with the respondent's retirement policy (page C14). On 30 August 2018 Mr Tilley raised a grievance (page C17) which was responded to later that day (pages C15-C16). The grievance related to what the claimant considered to be his "*forced retirement*".
42. Mr Tilley has not been replaced. His job functions have been fully absorbed by a part time employee, Mrs Randa Daoud, who within her 3 day working week continues to perform all the claimant's job functions, in addition to her own. She is paid, pro rata, about 50% of Mr Tilley's former salary. It is to be noted that Mr Tilley claimed he needed to work overtime to fulfil his job functions (pages C12-C13).
43. Following the early conciliation process (page A1) Mr Tilley presented a claim form (pages A2-A20) alleging he had been unfairly dismissed and that his dismissal was an act of direct and indirect discrimination. The respondent defends the claim (pages A21-A28) contending that the reason for the dismissal was some other substantial reason and that dismissal for that reason was fair and that the retirement was less favourable treatment on grounds of age but that the discrimination was justified.

#### The second claimant Ms Janine Morsy

44. Ms Morsy, whose date of birth is 24 January 1954, was employed by the respondent as a Reservations / Ticketing Agent from 3 March 1986 (pages B15-B16) and was based at the respondent's administrative office which, at the time of her retirement, was at Hammersmith.
45. Her original terms and conditions made no reference to a retirement age but her later 2003 terms and conditions provided for a retirement age of 60 (pages B17-B25). The retirement age was subsequently increased to 65 (page B27).

46. By letter dated 21 June 2018 (page B30) the respondent notified Ms Morsy that, in accordance with the retirement policy, her employment would terminate at the end of January 2019. She asked for a meeting to which Mr Aziz agreed (page C29).
47. On 20 August 2018 Ms Morsy was involved in a workplace accident in which she and another employee collided (pages C30-C35). She was off work for some months (page C54). She made a claim for personal injury (pages C42-C45).
48. Unite raised the issue of the retirement policy on her behalf (page C36). On 21 November 2018 Ms Morsy raised a grievance (page C56) which related to her retirement, that she was not given a new uniform and her concern that some employees she perceived to be sceptical of her need for time off work. Mr Aziz responded (page C59) and a grievance meeting was arranged for 24 January 2018 attended by Mr McGowan of Unite, Mr Gendy, the respondent's business adviser and the respondent's solicitor (page C79-C80). It was agreed that Ms Morsy would not be required to work her final week. She was not replaced.
49. Following the early conciliation process (page A34) Ms Morsy presented a claim form (page A35-A50) alleging that she had been unfairly dismissed and that her dismissal was an act of direct and indirect discrimination. The respondent defends the claim (page A55-A69) contending that the reason for the dismissal was some other substantial reason and that dismissal for that reason was fair and that the retirement was less favourable treatment on grounds of age but that the discrimination was justified.

#### The third claimant Ms Deep Suri

50. Ms Suri was employed as a Ground Hostess based at Heathrow with effect from 17 September 1979 (page B31). Her 2003 terms and conditions provide for a retirement age of 60 (page B38) and it was subsequently increased to age 65 (page C27). In 2007 she was assigned to work at the administrative offices as a Customer Services Agent due to the lack of work at Heathrow (pages B41-B42). She returned to Heathrow in 2010 (page B43).
51. By a letter dated 22 January 2019 (page C114) the respondent notified Ms Morsy that, in accordance with the retirement policy, her employment would terminate at the end of August 2019.
52. In August 2019 Ms Suri requested that her employment be extended until she reached state pension age (page C118-C119). At that time the retirement policy was under review so her retirement was deferred (page C117).
53. Following the Covid outbreak Ms Suri agreed to be furloughed with effect



from 1 March 2020 (pages C120-C121) and she remained on furlough until her retirement on 6 July 2020 (page C125). She made no further request for an extension to her employment. She was not replaced.

54. Following the early conciliation process Ms Morsy presented a claim form (page A115-A134) alleging she had been unfairly dismissed and that her dismissal was an act of direct and indirect discrimination. The respondent defends the claim (page A139-A154) contending that the reason for the dismissal was some other substantial reason and that dismissal for that reason was fair and that the retirement was less favourable treatment on grounds of age but that the discrimination was justified.

#### Reduction in workforce/changes in employees

55. There has been an ongoing reduction in headcount. Prior to Mr Tilley's retirement there were 22 employees, not including the expatriate employees (page C28) comprising: at Hammersmith 16 employees, in the Station office (Heathrow) 3 employees and in the Cargo office (Heathrow) 3 employees making a total of 22.
56. As at November 2021 there were the following employees: 12 in Hammersmith and at Heathrow, 1 in the Station office and 2 in the Cargo office making a total of 15.

#### **Findings of fact**

57. As the respondent is State owned in Egypt, it operates very much as a public sector employer even in the UK and all major decisions are taken at the Head Office in Cairo.
58. There was a friendly and non-confrontational culture at the respondent and the witnesses spoke of having a high level of respect for one another. Whilst the concept of the workforce being like a "*family*" was not entirely agreed, it was not disputed that the respondent looked after its workforce and this was apparent from the following factors: annual above inflation pay increases; the avoidance of redundancies even when overstaffed; the avoidance of performance management of underperforming employees and the provision of a generous pension scheme. The respondent does not carry out an appraisal process. The three claimants in question all had over 30 years' service and in Ms Morsy's case, nearly 42 years' service. We find that the culture at the respondent contributed significantly to their long service.

#### Workforce changes

59. Since July 2020 four employees have either resigned or retired. Of the two retirements, one, Ms McM, was because she reached the respondent's retirement age and one was for other reasons, unrelated to age.

60. Mr Hamdy, the current General Manager of Finance joined in January 2020 so he did not have much historical knowledge of the workforce in London. His evidence in relation to the retirement age was that the respondent imposes this because their employees have the right to enjoy the rest of their lives and they provide a high amount of pension to enable them to do this.
61. Mr Hamdy said that the respondent had and has no plans to introduce redundancy or performance dismissals.
62. Mr Hamdy was asked what would happen to under-performing employees. He said that they would be given a warning and a chance to improve and this could be a verbal warning. There were no warnings in the bundle and the respondent chose not to rely on certain documents on the point that had been introduced late. We find that there was no formal performance management of the staff.
63. Mr Hamdy was also asked what would happen if there were complaints from one employee against another. He said it was “*obvious*” that he would have to hear from both sides as to what was going on.
64. Since the introduction of the recruitment policy and as at July 2020 there were 7 new recruits, 4 of whom have since left. This is over 50% of the new recruits. They were:
  - i. AA - recruited 1 November 2014 aged 26- resigned on 14 June 2017
  - ii. Mr Savy D'Sa (one of the respondent's witnesses) - recruited 10 August 2015 aged 42 - still employed
  - iii. DS - recruited 3 May 2016 aged 29 - still employed
  - iv. ES - recruited 17 June 2016 aged 33 - resigned 17 October 2017
  - v. HH - recruited 01 December 2019 aged 44 - resigned 7 August 2020
  - vi. MA - recruited 3 February 20 aged 23 - still employed
  - vii. YM - recruited 10 February 2020 aged 25 - resigned 17 September 2020
65. Three more long standing employees left in 2019/2020 without the application of the retirement policy, and we can add two further people, Mr B who resigned aged 82 and HH who was in her 40s when she resigned.
  - i. HA - resigned 30 April 2019 - family health reasons

- ii. LJ - resigned 24 May 2019 - voluntary retirement
  - iii. EG - resigned 29 February 2020 - voluntary retirement
66. Two employees Ms E and Ms M were compulsorily retired in 2015 at age 65 having asked to stay on. Ms E retired in August 2015 and Ms M in November 2015. Mr Aziz's evidence, in re-examination, was that they each made a request to stay on after age 65 and made this request to his predecessor, not to himself. It was a verbal and not a written request. This was acknowledged by Mr Aziz in his grievance response of 30 August 2018 at page C15, where he said "*Unfortunately it was objected as the same refusal with the colleagues whom retired a couple of years ago*".
67. Ms E and Ms M did not challenge their retirement dismissals.

#### Workforce ages

68. In October 2014 when the retirement age was increased to 65, out of the 22 employees in total in the UK, none were aged under 30; 4 were in their 30's, 2 were in their 40's, 10 were in their 50's and 5 were aged between 60-65. There was also Mr B who was well over 65.
69. In shorter form: 6 were under 50 and 16 were over 50 - across the Hammersmith and Heathrow sites.
70. There were four retirements between October 2015 and July 2020 – These were Ms E, Ms M and claimants Mr Tilley and Ms Morsy.
71. After the third claimant Ms Suri retired on 6 July 2020, there were 18 employees in total, of whom 2 were in their 20's, 3 in their 30's, 4 in their 40's, 5 between 50-59 and 4 aged between 60-65. Mr B who was 82 had retired in February 2020 so there was no-one over 65. The age profile had become more balanced including two employees in their 20s.
72. In shorter form, by July 2020: 9 were under 50 and 9 were over 50, across the Hammersmith and Heathrow sites.
73. The claimants accepted that prior to their retirements the respondent was under-represented by younger employees and that it became more balanced after Ms Suri's retirement in July 2020.

#### Employment extended beyond the respondent's retirement age

74. Two employees had their employment extended beyond the age of 65. As set out in the agreed facts above, Ms Suri requested an extension until she became eligible for her State Pension which was in July 2020. This was granted.

75. The other employee who continued well past the age of 65 was Mr B who remained working for the respondent until he was 82. He worked as the respondent's Director of PR, he managed the link between Head Office and the office in London and is a bilingual Arabic/English speaker. His work included dealing with pilots' training requirements and any complaints from cabin crew. Mr Aziz's evidence was that Mr B was able to sort out most customers problems.
76. The retirement policy of October 2014 provided for a discretion to be exercised in the case of exceptional specialist work (page B27): "*If an employee is doing exceptional specialist work at the time he or she reaches retirement age, then we may ask him/her to continue for a specified period*".
77. Based on the unchallenged evidence as to the work that he did and the fact that he was bilingual, we accept the respondent's position and find that Mr B was in a unique role and he was retained under the discretion set out above.

#### Review of the retirement policy

78. The respondent reviewed its retirement policy between the summer of 2019 and early 2020. The policy had been in place for five years and in the respondent's view it was achieving its objective. The UK workforce now has a more balanced age profile although the predominance remains towards older employees.
79. Following the review, the respondent chose to maintain its retirement policy but to extend retirement age to the later of age 65 or when the employee became eligible for State Pension.

#### Mr Tilley

80. As set out in the agreed facts above, on 17 January 2018 Mr Tilley was informed that his employment would terminate at the end of August 2018 due to retirement. There is a dispute of fact as to whether Mr Tilley sought a 1 year extension. On 23 April 2018 he emailed Mr Aziz to say he did not wish to retire on 31 August "*or in the near future*" (page C4).
81. On 18 May 2018 Mr Tilley's union representative wrote to Mr Aziz to say that retiring him at age 65 "*would be unlawful.*" On 31 May Mr Aziz replied setting out the respondent's reasons as to why they considered the retirement policy to be justified – with reference to intergenerational fairness and dignity for retiring employees (page C9). Mr Aziz referred to Mr B who had been allowed to stay on under the terms of the policy relating to exceptional specialist work.
82. On 14 August 2018 Mr Tilley sent an email to Mr Aziz (page C10) saying "*Further to our conversation yesterday, when you rejected the suggestion of a meeting with my Union representative, I write to advise*

*you that I cannot accept your proposal of a one year's contract for less pay" (page C10). Mr Aziz replied an hour latter saying he did not refuse or accept because he had to take advice from solicitors and from Head Office. Mr Aziz referred in that email to "your [Mr Tilley's] request to extend 1 year more against the retirement policy...."*

83. In evidence it was put to Mr Tilley that he said he wanted to work for one more year; he replied "*I think so yes*". As this was such an important response, the Judge checked this with him and he confirmed it.
84. As a majority, (Employment Judge and Mr Pearlman) we find based on his oral evidence, that Mr Tilley only wished to continue working for one more year. The minority decision (Mr Soskin) based on the contemporaneous documents C4 and C17 (the grievance) was that Mr Tilley wanted to continue working and that he did not want to retire at the end of August 2018 or in the near future. Mr Soskin's finding is that Mr Tilley's reply in cross-examination was in response to what he thought he had been offered by Mr Aziz, namely one more year at a reduced salary.
85. Mr Tilley accepted that the cost of a replacement for himself would be about half of his cost to the respondent.
86. Mr Aziz's evidence was that even by 2018, the year of his retirement, Mr Tilley was not using a computer extensively and was doing much of his job by writing things down manually. He was given extra time to do his job through to his retirement dismissal.
87. As set out in the agreed facts above, from 1988 Mr Tilley was assigned to Group Reservations. It was put to Mr Tilley that he had no IT skills and he said "*I am not great on any of that*" and accepted that in general he had no IT skills. Computerisation was introduced at the respondent in 2008. Mr Tilley accepts that he was sent on at least one training course in Cairo. The respondent says he was sent on two courses in Cairo and we find that he was sent on two courses. Mr Tilley's CV, at page E14, said "*Attended various training courses in Cairo*", plural. Mr Tilley accepted in evidence that he made no complaint that he had not been given proper training on the systems.
88. Mr Tilley could not issue tickets, he could not issue an EMD, which was a form of receipt and he could not calculate the difference in fares and taxes on the reissue of a ticket.

#### The circumstances leading to Mr Tilley's retirement dismissal

89. Mr Tilley accepted that he received, read and signed the Memo of 22 October 2014 proposing to introduce the retirement policy. He accepts he said nothing about it and made no objection to the policy when it was introduced. The Memo said there would be a two week consultation period and said "*Please feel free to ask any questions on the policy or*

*make any suggestions during the next two weeks and we will address any concerns.*” Queries were to be addressed to the Personnel Officer.

90. Mr Tilley said that the reason he made no objection to the proposed policy was because the then General Manager Mr Kadri was “*inflexible, obstinate and obstructive*” and could not be persuaded to change his mind and this was going to go through regardless. Mr Tilley did not say this in his witness statement. In his statement (paragraph 5) he gave the reason that he felt there was no point, because the respondent had gone to the trouble of having revisions drawn up by solicitors and he thought it must be lawful. He said he felt that the respondent would not amend or retract the clauses even if he did raise concerns.
91. When Mr Kadri was replaced by Mr Aziz in December 2017, Mr Tilley did not raise the matter with him, despite getting on well with him. Of all the managers Mr Tilley worked with, he said he liked Mr Aziz “*more than anybody else*”. It was put to Mr Tilley that the reason he raised no objection was because he was happy with it.
92. We did not accept Mr Tilley’s reason as being the inflexibility of Mr Kadri because this was not in his statement and was mentioned for the first time in oral evidence. Even if he had difficulties with Mr Kadri, he was told that if he had queries he could go to the Personnel Officer whom we understood to be Mr Potts. He did not do so. He did not raise it when Mr Aziz came into post, a manager with whom he got on well. We find that Mr Tilley and the other claimants were given the opportunity to challenge the policy, make alternative suggestions or to raise questions and they did not do so. They did not say that they raised any concerns with their trade union about it, when it was introduced.
93. Mr Tilley knew that Ms E and Ms M had retired in 2015 under the terms of the policy at age 65. He knew that they had asked to stay on and this was refused. When they retired, he did not raise the matter in relation to his own retirement age.
94. As set out in the agreed facts above, Ms D absorbed Mr Tilley’s job into her part time 3 day per week position along with her role as a marketing assistant. Ms D carries out on computer the role previously done manually by Mr Tilley.
95. Mr Tilley’s evidence was that when he was given his retirement letter on 17 January 2018 (page C1) this came as an “*immense shock*” and caused him to withdraw into himself. We did not accept Mr Tilley’s evidence that it was an “*immense shock*”. He had signed the Memo of 22 October 2014 telling him about the retirement age; two people had retired aged 65 in the four year intervening period in this very small workforce and he knew about this and with just under 13 months to go to retirement he was emailing his pension adviser about the placing of his occupational pension funds and had been discussing it with his wife. He said in evidence: “*I knew that the standard retirement age was 65 but I*

*was hoping to stay on*". It was not, on our finding, an "*immense shock*" to him.

96. Mr Tilley was offered an ex gratia payment of 1 month's salary and a Christmas bonus as a token of appreciation (his statement paragraph 10) but he refused this offer.
97. The letter of 17 January 2018 notifying Mr Tilley of the termination of his employment, (page C1) thanked him for his loyal and dedicated service over 34 years and said that he was held in high regard.
98. Mr Tilley had full national insurance contributions towards his State Pension. He had been contributing to the respondent's pension scheme for 35 years. It was a Scheme in which the employer contributed 7% and the employee contributed 3%, or more if they wished, so it was a minimum 10% contribution against gross salary. Mr Tilley accepted that the respondent operates a generous pension scheme and he said he was happy to be in their pension scheme. Mr Tilley's pension fund was in the region of £250,000 at retirement.

#### Ms Morsy

99. The respondent's case was that Ms Morsy was not a good performer. We saw in the bundle at pages E50, E51 and E53, three commendations from customers as to her help with their bookings. These were in 2016 and 2017. Ms Morsy had also been involved with the training of newer employees.
100. We heard evidence from Ms Alma Fallaria, who works for the respondent as a cashier/accountant. She worked with Ms Morsy. Ms Fallaria said that up until two years before Ms Morsy's retirement she had been a good employee but her performance declined in the last two years of her employment.
101. Ms Morsy was asked about the introduction of the retirement policy in 2014. She agreed that she was told that there was a two week consultation period and that she was told she could ask any questions about it. Ms Morsy did not raise any challenge to the introduction of the policy. She took the same position as Mr Tilley, that it would have been pointless to do so with the then General Manager Mr Kadri, although like Mr Tilley she had not said anything about this in her witness statement. She did not raise it when Mr Aziz became the General Manager, despite regarding him as "*very affable*".
102. As set out in the agreed facts above, in August 2018 Ms Morsy was involved in a workplace accident. When she returned to work in about October 2018, she raised a complaint about colleagues mocking her. Ms Fallaria agreed that Ms Morsy spoke to her about this but Ms Fallaria denied that she was one of the people involved in mocking Ms Morsy. In 2018 Ms Morsy brought a personal injury claim in connection with her

workplace accident.

103. On 5 August 2019 Ms Fallaria wrote a document which was critical of Ms Morsy's performance saying things like it was "*common knowledge that she was difficult to work with*" and that she "*made numerous mistakes*".
104. The document was prepared by Ms Fallaria at the request of Mr Aziz. Ms Fallaria said in paragraph 4 of her statement: "*Mr Aziz asked me for my comments about Mrs Morsy's performance and about the quality of her work. I believe it was in the context that Mrs Morsy had asked to continue working after her retirement age and was threatening to bring claims, or had brought claims, against the company.*" She said she was "*a bit reluctant to become involved*" but she wrote the document which was critical of Ms Morsy's performance.
105. Ms Morsy accepted in evidence that Ms Fallaria, as cashier/accountant, would balance the books at the end of the day and if there was an error in a ticketing transaction, she would know who the error was attributable to.
106. A similar document was produced by Mr Savy D'Sa, a Reservations and Ticketing Agent who worked with Ms Morsy. His document was at page C88. It was not dated, but Mr D'Sa said he prepared it at about the same time that Ms Fallaria prepared her document so we find it was prepared on or about 5 August 2019.
107. In relation to Ms Morsy's performance Mr D'Sa wrote: "*What surprised me most about her is that being a senior member at Egypt air with 30 years plus experience in the company her work knowledge was not up to date and she was hesitant and always asked colleagues help in her work.*" Mr D'Sa was asked whether he thought Ms Morsy was a poor performer. He said: "*She was not a poor performer, she was hesitant, she cannot make a decision by herself. She used to hesitate a lot.*"
108. On 21 November 2018 Ms Morsy raised a grievance (page C56) about her proposed retirement date of 24 January 2019 – it was put to Mr Aziz that the criticism of her performance only arose after she complained about her retirement. Mr Aziz said that the retirement plan was already in place, prior to the grievance. Mr Aziz did not give Ms Morsy any warnings, he said he could have done but he did not do so because she was heading towards retirement.
109. Mr Aziz said at paragraph 36 of his witness statement that when he investigated her grievance, other staff members, unprompted by him, made observations about her ability and performance. He agreed that these staff members were Ms Fallaria and Mr D'Sa. They provided statements about Ms Morsy's employment in August 2019. It was put to Mr Aziz that the comments from Ms Fallaria and Mr D'Sa were not "*unprompted*". He confirmed that he asked them to give the comments and asked them to tell the truth. We find he did not tell them what to



say.

110. Mr Aziz said in oral evidence that he could have criticised Ms Morsy during her employment but he did not take any action against her and the other two claimants because they were heading towards retirement.
111. By a majority (Employment Judge and Mr Pearlman) we find that Ms Morsy's performance had tailed off in the last two years of her employment. We found this on the evidence of Ms Fallaria which was corroborated by Mr D'Sa and Mr Aziz's view. We accepted Mr Aziz's evidence that he asked for their statements but that he did not tell them what to say; he asked them to tell the truth. We took account of the fact that in her role as cashier/accountant, Ms Fallaria found out the source of any mistakes.
112. The minority decision (Mr Soskin) was that Ms Morsy was not a poor performer because there was nothing to record this against and there was no system in place for recording performance. The minority decision was also that the reason for the inquiry as to her performance came out of Ms Morsy's grievance which had nothing to do with her performance. This cast doubt in the minority view, as to the comments on her performance. Ms Fallaria did not give any comparison with mistakes made by other employees.
113. It was put to Ms Morsy in cross-examination that given that she and Mr Tilley were not replaced, it followed that the respondent had a surplus of employees. She replied: "*I would agree with that yes*". On this evidence we find that prior to the retirements of Mr Tilley and Ms Morsy, the respondent was overstaffed.
114. Ms Morsy had made full national insurance contributions so that she was entitled to full State Pension. She accepted, as did Mr Tilley, that the respondent had a very generous pension scheme to which she and the respondent had been contributing for 33 years. Ms Morsy's pension fund was at around £200,000 at retirement. The letter notifying her of the termination of her employment (21 June 2018 page B30) thanked her for her loyal and dedicated service over 33 years and said she was held in high regard. Ms Morsy was offered a leaving party which she refused.

#### Ms Suri

115. Ms Suri originally joined the respondent to work as a Traffic Officer at Heathrow. It is part of the agreed facts (above) that in 2007 she was assigned to work at the administrative offices as a Customer Services Agent due to the lack of work at Heathrow. Rather than making Ms Suri redundant, they found an alternative role for her and assured her that if the position changed she would have first priority to return to her role at Heathrow (letter at page B42). She moved back to Heathrow in 2010.

Did Ms Suri challenge the introduction of the retirement policy?

116. There was a dispute as to whether Ms Suri challenged the introduction of the retirement policy in October 2014. The agreed facts on the point are set out above and were as follows: Following the abolition of the default retirement age, the respondent introduced a retirement policy (page B26-B27). A memo to all staff dated 22 October 2014 attaching a copy of the proposed policy explained that there would be a two-week consultation period. The policy explained the aims of encouraging inter-generational fairness and dignity for retiring employees. None of the claimants made any objection to the policy or, indeed, any comment in relation to it until it was applied to them.
117. As we have set out above, on day 4, the final day of witness evidence and just before Ms Suri gave her evidence, she sought to introduce a handwritten letter dated 2 November 2014 which she said she gave to a messenger at her workplace at Heathrow to give to Mr Potts, the personnel officer, in the Hammersmith office. The handwritten letter we saw said:
- “To,  
Personnel Officer  
Dear Sir  
If the Government retirement is 67 who will pay between 65-67. As pension will start at 67.  
Other companies have policy if you are health & fit to continue after retirement they will not force you out.  
Thanking you  
Deep Suri”*
118. The 2 November 2014 letter was referred to in the claimant’s Particulars of Claim and in the respondent’s Response to her claim they said they had no record of it. The respondent requested disclosure of it but it was not forthcoming, the claimants’ solicitor telling the respondent’s solicitor that it was an error.
119. Mr Aziz covered the matter in paragraph 39 of his second witness statement saying that he noted in Ms Suri’s Particulars of Claim that she contended that she objected to the policy by letter of 2 November 2014 but a copy of that letter had never been disclosed and did not appear on her personnel file. His unchallenged evidence was that at no time in any of their discussions did Ms Suri refer to having challenged the policy in 2014.
120. Ms Suri was asked how she came to have a copy of the handwritten letter. At first she said that when she was notified of her retirement in 2019 she asked Mr Aziz for a copy of it and he sent it to her by fax. When Ms Suri was asked to confirm this, she said, no, it was not by fax and she could not recall how he sent it to her. Ms Suri made no reference to it in any email correspondence in 2019 or otherwise.

121. We find that the handwritten letter of 2 November 2014 should not be admitted in evidence, because the respondent had no proper opportunity to deal with it appropriately and call any necessary witness to deal with it, such as Mr Potts. The claimant (Ms Suri) knew as far back as the date of ET3 on 3 May 2021 that this was in issue and the respondent had requested a copy of it. Her solicitors said it was an error and probably related to correspondence in 2019. It was also an agreed position at the outset of the hearing, that no claimant had raised any objection to the retirement policy and we find on a balance of probabilities that this was on each claimant's instructions.
122. If we are wrong in making this decision, we find that even if Ms Suri had given this handwritten letter to a messenger, when she received no response she did not chase it up. Our finding would have been that she did not take proper steps to ensure that the 2 November 2014 letter had been communicated to the respondent. We saw Ms Suri's email of 8 August 2019 (page 118) sent to Mr Aziz and Mr Potts, requesting an extension of her employment past her 65<sup>th</sup> birthday. In this email she made no mention of the letter of 2 November 2014 and her previous objection.
123. We find that the claimants did not raise any objection to the retirement policy when it was introduced in 2014.

#### Ms Suri's performance

124. We heard evidence from Mr Mohamed Waziri, the Deputy Station Manager at Heathrow. Ms Suri was a long server, having commenced employment with the respondent on 17 September 1979. She worked at the Hammersmith Office from 2007 to 2019. Mr Waziri accepted that if a flight was delayed and arrived late, Ms Suri would always stay late to deal with the flight.
125. Mr Waziri said that Ms Suri was difficult when it came to working a shift pattern and that she expected preferential treatment. He accepted that she sought a different shift pattern in order to care for her father-in-law who was unwell. He understood this but said that when her father-in-law passed away, he believed this was in 2016, she did not wish to go back to the original shift pattern which affected her colleagues.
126. There was medical evidence dated 11 May 2018 (page C111) from Ms Suri's GP saying that the GP would be grateful if Ms Suri could be given "*her normal shifts*" in her medical interests. Also in 2019 Ms Suri had a problem with her leg and had difficulty walking and had to take some time off work.
127. Mr Waziri said that Ms Suri was a poor performer and not team player and she regularly made mistakes that "*had to be corrected for her*".

128. Mr Aziz said that the reports he got from her direct superior Mr Ayman Ahmed, the London Station Manager, was she took too much time off and was not contributing.
129. On 7 August 2019 Ms Suri called Mr Aziz to say that she wanted an extension of her employment beyond her 65<sup>th</sup> birthday. On 7 August Mr Aziz emailed Mr Ahmed, the London Station Manager to ask for a report on her performance. Mr Ahmed gave this on 10 August 2019 – page C116. It was a negative report on her performance, including that she was not a team player, took too much time finishing her paperwork and was “*less than average*”.
130. We find that there were absences supported by medical evidence and we accept that an employer is entitled to manage absences should they choose to do so. The respondent did not take steps to manage her absences. We find that Ms Suri had become less effective in her work since she had some health problems in 2018 and the respondent chose not to performance manage her.
131. Ms Suri complained to Mr Aziz by email on 8 August 2019 (page C118) about her retirement because she had reached her 65th birthday, she asked for an extension to July 2020 when she would reach her State pensionable age. She said any agreement to extend her employment was without prejudice to her right to bring a claim arising out of her dismissal for reaching her retirement age. The extension was granted as requested. At that time the respondent was reviewing the retirement policy to consider amending it to apply at the later of age 65 or state pension age and they granted Ms Suri’s request.
132. Mr Aziz did not make the decision, he had to refer this to the Head Office in Cairo who granted the extension. He said that this was done to give her the dignity in her retirement at the age when she could take her State pension and have enough income. It was put to Mr Aziz that the extension was granted because she was a good employee but he denied this. He said that they did not benefit from the extension because of the time off Ms Suri took in her final year of employment for sick leave and holiday. From March 2020 until her retirement on 6 July 2020 Ms Suri was furloughed and not attending work.
133. Ms Suri retired at her State pensionable age and when her occupational pension fund was at around £200,000.
134. The letter notifying her of the termination of her employment (22 January 2019 page C114) thanked her for her loyal and dedicated service over 40 years and said she was held in high regard.

#### Other matters

135. The respondent chose not to performance-manage the claimants even though they considered each of them to be underperforming. Mr Gendy’s

evidence (statement paragraph 12) was that without the retirement policy he would have advised the respondent to take a tougher line with underperforming employees and it enabled them to take a more compassionate or “softer” approach. They were able to rely on “*natural wastage*” (Mr Gendy’s statement paragraph 6). Mr Tilley and Ms Morsy had not kept up with technological changes. Ms Suri had some time off sick in her last two years of employment and became unwilling to work the required shift patterns.

136. The respondent chose to avoid redundancies even when they were overstaffed. For example, they avoided redundancy with Ms Suri in 2007 by redeploying her from Heathrow to the Hammersmith office.
137. Ms Morsy’s evidence was that prior to the pandemic there had been a reduction in sales because of the situation in Egypt which had caused some loss of confidence for the tourism industry there. Ms Morsy accepted that there was a surplus of employees. The situation was not helped by the restrictions brought about by the pandemic.
138. The respondent made incremental pay rises over the years, often above inflation. All three claimants accepted that as a result of this they were well paid for their roles. They accepted that each of them could be replaced by new employees for around half of their salary cost.
139. The claimants accepted and we find that the respondent made generous pension provision and they were all in the pension scheme for over 30 years.

### The relevant law

140. The burden is on the employer show the reason for the dismissal. It must be for one of the fair reasons set out in section 98(1)(b) or (2) of the Employment Rights Act 1996 (ERA).
141. Section 98(4) ERA provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.
142. Procedural issues should not be considered in isolation from the broad question under section 98(4) ERA - ***Taylor v OCS Group Ltd. [2006] ICR 1602, CA.***
143. In ***Whitbread plc v Hall 2001 ICR 699***, the Court of Appeal held that the requirement of reasonableness applies not only to the outcome in terms of the penalty imposed by the employer but also to the process by which the employer arrived at that decision. The range of reasonable responses test applies to both procedural and substantive fairness, ***Sainsbury’s***

***Supermarkets Ltd v Hitt 2003 IRLR 23, CA.***

144. Section 13 of the Equality Act 2010 provides as follows:
- (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.*
145. ***Bilka-Kaufhaus GmbH v Weber von Hertz 1986 IRLR 317*** is one of the leading authorities on objective justification. It holds that an employer is required to justify a PCP by showing that it corresponds to a real need; is appropriate with a view to achieving the objective in question; and is relevant and necessary to achieve the aim.
146. It is possible for an employer to put forward evidence that the PCP achieved its objective of a legitimate aim after the PCP was put in place, because the objective of achieving a legitimate aim is an ongoing one. The employer does not have to show that the aim was achieved at the time of the complaint. It remains necessary to show that there was some basis and a real need for the PCP at the time it was put into place
147. Age discrimination is the only category of direct discrimination that is capable of being objectively justified. To be lawful, a fixed retirement age must be a proportionate means of achieving a legitimate aim. The Supreme Court in ***Seldon v Clarkson Wright & Jakes 2012 IRLR 785*** held that the justification test for direct discrimination is narrower than for indirect discrimination. It can only be justified by reference to legitimate objectives of a public interest nature, rather than purely individual reasons for that employer, such as reducing costs or improving competitiveness.
148. The ***Seldon*** case concerned a firm of solicitors in partnership. Under the partnership deed, Mr Seldon was compulsorily retired when he reached the age of 65. Ultimately through its progress from the Employment Tribunal to the Supreme Court, Mr Seldon's retirement dismissal was found to be objectively justified. The objectives had to be of a public interest in nature within the meaning of the Equal Treatment Directive 2000/78 and were consistent with the social policy aims of the state; proportionate to that aim and reasonably necessary to achieve it. The aim need not have been articulated or realised at the time the measure was adopted.
149. ***Seldon*** identified a three stage test to justify age discrimination: identifying an accepted legitimate aim of a public interest nature; whether in the particular circumstances the legitimate aim applies and proportionality.
150. The relevant ECJ decisions were reviewed in ***Seldon*** including the

following:

151. ***Petersen v Berufungsasschuss fur den Bezirk Westfalen-Lippe 2010 IRLR 254***, a case concerning the retirement of a panel dentist at the age of 68. In that case the Grand Chamber, in considering possible legitimate aims it was said that the sharing out of employment opportunities between the generations, could be regarded as an employment policy measure under the Directive. It was said that it might be necessary to impose such an age limit where there were too many panel dentists or the risk of such.
152. ***Rosenblatt v Oellerking Gebaudereinigungsgesellschaft GmbH 2011 IRLR 51*** concerned a clause in a collective agreement in the commercial cleaning sector which provided for termination of employment when employees became entitled to their state pension and at the latest, the end of the month when they reached 65. The Court held that the aims of sharing employment between the generations, making it easier for younger workers to find work, particularly in a time of chronic unemployment, while protecting the rights of older workers whose pensions serve as replacement income, and not requiring employers to dismiss them on grounds of incapacity, which may be humiliating were in principle capable of objectively and reasonably justifying a difference in treatment on grounds of age
153. ***Georgiev v Tehnicheski Universitet - Sofia, Flilal Povdic 2 CMLR 179*** held that Article 6(1) did not preclude national legislation under which university professors were compulsorily retired when they reached 68 and were only allowed to work on one year contract beyond the age of 65, provided it pursued a legitimate aim linked to employment and labour market policy – such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations. In that case the average age of Bulgarian professors was 58 and younger people were not interested in entering the career. The Court acknowledged that a State may legitimately attempt, by setting an age limit, to guarantee that a balanced mix of ages exists and that it was reasonable to take the view that a maximum age would facilitate younger people entering the profession.
154. ***Fuchs v Land Hessen 2011 IRLR 1043*** upheld legitimate aims of achieving a balance between the generations by the creation of a favourable age structure, the efficient planning for the departure and recruitment of staff, encouraging the recruitment or promotion of young people and avoiding disputes about older employees' abilities to perform their duties.
155. ***Prigge v Deutsche Lufthansa AG 2011 IRLR 1052*** found that a collective agreement for the employment of Lufthansa pilots to retire at 65 could not be justified as the suggested aims were related to health, safety and security within air travel and were not related to employment and social policy under Article 6.
156. At paragraph 50 of the ***Seldon*** decision, the principles were summarised

as follows below. References to paragraph numbers in that case are in square brackets. References to article 6 are to article 6 of the Equal Treatment Directive, Council Directive 2000/78 on Justification of differences in treatment on grounds of age.

*50. What messages, then, can we take from the European case law?*

- (1) All the references to the European Court discussed above have concerned national laws or provisions in collective agreements authorised by national laws. They have not concerned provisions in individual contracts of employment or partnership, as this case does. However, the Bartsch case, mentioned at [2] above, did concern the rules of a particular employers' pension fund; and the Prigge case, [49] above, concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.*
- (2) If it is sought to justify direct age discrimination under article 6(1), the aims of the measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. These are of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (Age Concern, Fuchs).*
- (3) It would appear from that, as Advocate General Bot pointed out in Küçükdeveci , that flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.*
- (4) A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims:
  - (i) promoting access to employment for younger people (Palacios de la Villa, Hütter, Küçükdeveci);*
  - (ii) the efficient planning of the departure and recruitment of staff (Fuchs);*
  - (iii) sharing out employment opportunities fairly between the generations (Petersen, Rosenblatt, Fuchs);*
  - (iv) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (Georgiev, Fuchs);*
  - (v) rewarding experience (Hütter, Hennigs);*
  - (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed (Ingeniørforeningen i Danmark);*
  - (vii) facilitating the participation of older workers in the workforce (Fuchs, see also Mangold v Helm, Case C-144/04 [2006] 1 CMLR 1132);**



(viii) *avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned (Rosenblatt); or*  
(ix) *avoiding disputes about the employee's fitness for work over a certain age (Fuchs).*

- (5) *However, the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so. Measures based on age may not be appropriate to the aims of rewarding experience or protecting long service (Hütter, Küçükdeveci, Ingeniørforeningen i Danmark).*
- (6) *The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (Fuchs).*
- (7) *The scope of the tests for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under article 6(1) is not identical. It is for the member states, rather than the individual employer, to establish the legitimacy of the aim pursued (Age Concern).*
157. As set out in the quote of paragraph 50(2) of **Seldon** above, cost alone does not amount to objective justification. See also **Woodcock v Cumbria PCT 2012 ICR 1126**.
158. In terms of the legitimate aims relied upon in this case of intergenerational fairness and dignity, Baroness Hale said in **Seldon** (at paragraphs 56 and 57):

*“Two different kinds of legitimate objective have been identified by the Luxembourg court. The first kind may be summed up as inter-generational fairness. This is comparatively uncontroversial. It can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers.*

*The second kind may be summed up as dignity. This has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance. Either way, it is much more controversial....”*

159. Baroness Hale went on to say at paragraph 62: *“The means have to be carefully scrutinised in the context of the particular business concerned in*

*order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.”*

160. Relevant cases subsequent to **Seldon** are:
161. **Seldon (No.2) 2014 IRLR 748** in which Langstaff P confirmed that there might be a range of ages triggering retirement which could all be justified, Mr Seldon having argued for a specific age of 68. A retirement age of 65 was upheld in this case.
162. **Chief Constable of West Midlands Police v Harrod EAT/0189/14** in which Langstaff P confirmed (a) that aims and means are often conflated – see judgment paragraphs 24-25 and (b) that if a general rule is justified, it is not necessary to go on to justify the application of that rule in individual case - see paragraph 36. This was a case which concerned the Police Pensions Regulations 1987 under which a police officer could be required to retire in the interests of efficiency if he or she had an entitlement to a pension worth two thirds of his/her average pensionable pay, an entitlement reached after 30 years’ service. The case went to the Court of Appeal at case reference **2017 ICR 869**
163. **Air Products plc v Cockram 2018 IRLR 755** - where the Court of Appeal (Bean LJ) considered the nature of the evidence required to be adduced by an employer in support of a justification defence in an age discrimination case. This case concerned a Long Term Incentive Plan (LTIP) and pension benefits and was not about retirement age. The expression “*Cockram obvious*” which was referred to in closing submissions, comes from paragraph 30 of the Judgment, which said “*the proposition is surely so obvious that it barely requires evidence at all.*” In that case the proposition was that a rule excluding retiring employees under the age of 55 from the right to take unvested options under a LTIP tended to encourage them to stay until that age, was said to be an obvious proposition.
164. The two conjoined EAT cases of **Pitcher / Ewart v University of Oxford EAT/0083/20** and **EAT/0032/20** (also at **2021 IRLR 946**) – in which Eady J upheld decisions of two Employment Tribunals, despite them reaching opposite conclusions on the University’s retirement policy. The nature of the proportionality assessment meant that it was possible for different ETs to reach different conclusions when considering the same measure adopted by the same employer in respect of the same aims. In considering the question of proportionality both the employees’ agreement to the policy and the availability of pensions were legitimate considerations.
165. On proportionality, in **Hampton v Lord Chancellor 2008 IRLR 258** the ET held that a mandatory retirement age of 65 years for Recorders was not a proportionate means of achieving the legitimate aim of obtaining a reasonable flow of new judicial candidates, because the evidence showed that there would still be an adequate pool of candidates with a retirement age of 70 years.

## Conclusions

166. The respondent admits that the decision to retire the claimants at age 65, or State pension age in the case of Ms Suri, was an act of age discrimination (respondent's opening submission paragraph 42). The issue in the case is whether there is justification under section 13(2) Equality Act 2010 – was it a proportionate means of achieving a legitimate aim.
167. The respondent relies on two legitimate aims, as set out in their retirement policy, of encouraging intergenerational equality and dignity for retiring employees. The claimants accept (closing submissions paragraph 44) that these are capable of being lawful legitimate aims so that in that sense stage one of the **Seldon** justification test is satisfied. The claimants do not accept that in this particular case the objectives were justified.
168. The claimants say that stages two and three of the **Seldon** justification test are not met.

### Stage 2: Whether in the particular circumstances the legitimate aim applies

#### Intergenerational fairness

169. In terms of intergenerational fairness Baroness Hale in **Seldon** commented that this can mean different things depending on the circumstances of the employment. It can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers. The claimants said that intergenerational fairness could not be a legitimate aim in itself. The respondent submitted that it could.
170. The respondent relied upon paragraph 61 of **Seldon** where Baroness Hale said "*Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned.*" Baroness Hale said in terms that the recruitment of young people to achieve a balanced and diverse workforce is in principle a legitimate aim so we find that it is. What we have to consider is whether it was a legitimate aim for this respondent.
171. The claimants accepted that the age profile when the policy was introduced in October 2014 was unbalanced and that by the time it was applied to Ms Suri in July 2020 it had become more balanced. In October 2014, 6 employees were under 50 and 16 were over 50. By July 2020 9 were under 50 and 9 were over 50. There was more balance across the age groups generally as we set out in our findings above.

172. The policy resulted in a substantial reduction in the dominance of older workers in that workplace. Had the policy not been in place and all 3 claimants plus Ms E and Ms M had been allowed to stay, there would have been 9 employees in the 60-70 age bracket instead of 4.
173. Considering paragraph 61 of **Seldon**, this is not a case where the respondent had problems in recruiting the young or retaining the older more experienced workers. We saw that they were able to recruit younger workers and by July 2020 had a much more balanced age profile.
174. We find that intergenerational fairness was a legitimate aim in this workplace. The respondent needed a balance of age and experience to benefit everyone. New and younger members of staff came in who had come through into the workforce in a more technological age and were more proficient in the technological side of things, such as Mr D'Sa and Ms D. Ms D was able to take on Mr Tilley's job as well as her own in a three day week.
175. The older employees were able to give the younger employees the benefit of their knowledge and experience in the industry and the particular airline. Ms Morsy did some training with younger employees and we saw from the documents at E50, 51 and 53 that she had a good manner with customers and skills which she could pass on. We accept that this is not a case where younger people were being held up from achieving promotion, because this was not a case about promotion opportunities. If older employees did not retire, this would prevent recruitment into new roles for younger employees.
176. Whilst we accepted the claimants' submission that cost was involved in the decision making; the claimants being on a much higher rate of pay than newer recruits, we find that this was not the only factor and that intergenerational fairness played its part in being a legitimate aim in this workplace.
177. The claimants submitted that their case was unlike cases such as **Georgiev** and **Fuchs** where it was a legitimate aim to have a mix of different generations to promote the exchange of experiences and innovation and thereby the development of teaching and research. These cases concerned Professors and State Prosecutors. The claimants submitted that this did not hold weight in terms of selling airline tickets (first and second claimants) or assisting passengers at Heathrow (third claimant). We have dealt with this above, in terms of the benefits of the knowledge and experience of the older employees as against the more contemporary skills of the younger employees.

#### Dignity of employees

178. In terms of the dignity of employees, Ms Venkata for the claimants pointed out that the Supreme Court said that this was much more controversial (paragraph 57). It was described by Baroness Hale as being put as avoiding the need to dismiss older workers on the grounds of incapacity

or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance.

179. Baroness Hale said at paragraph 61, that avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.
180. This respondent did not have sophisticated performance management measures; it did not have any at all. We were not taken to any performance management policy and we had no evidence of anyone in this workplace being performance managed.
181. The claimants submitted that the respondent would not have changed its culture and introduced performance management, in the absence of being able to rely on a retirement policy. We accepted the respondent's evidence that the very reason they did not performance manage the claimants was because they were coming up to retirement and they were prepared to tolerate this and take a softer, more compassionate approach.
182. The claimants found the references in these proceedings to their poor performance to be "*painful*" and "*hurtful*" – (closing submissions paragraph 73). The respondent explained that they had to put this evidence forward in order to defend the claims. We find that the aim of preserving their dignity to avoid the painful and hurtful references to their performance, is an aim which was legitimate for this particular respondent. The straightforward application of the retirement policy would have enabled them to leave having been thanked, lauded and in Ms Morsy's case with the offer of a party and without any reference to performance concerns.
183. It was submitted that financial incentives might have been given to encourage them to leave, such as three months' salary (closing submission paragraph 66.2). Mr Tilley was offered one month and a Christmas bonus and refused it. Set against the high salaries and pension provision, our view was that an offer three months' salary was not likely to achieve the same result as the retirement policy.

### Stage 3 - proportionality

184. It was submitted for the claimants that the retirement policy was disproportionate and the legitimate aims, such that we have found, could be better met by less restrictive measures such as: introducing an annual appraisal to monitor performance; informing employees of performance issues, listening to them and providing them with support or providing them with the option to work until age 70. The first two suggested options go to performance management and we have made findings above as to this. We deal with the question of age 70 below.
185. On proportionality there are a number of factors to be considered.

186. One such factor is whether there is adequate pension provision – as per **Rosenblatt** and **Fuchs**. The generous pension provision available to these claimants is relevant. All the claimants accepted that the respondent provided them with a generous pension and they had all been in it for at least thirty years, and in Ms Suri's case, rather longer. When the State Pension age was increased, the respondent reviewed and amended the policy to accommodate this. Ms Suri's employment was extended to her State retirement age while the policy was under review. None of the claimants were put in the position of having to retire without a pension income.
187. The claimants were and are not prevented from working because they have been retired. Mr Tilley was offered a new contract on lower pay and as he was quite entitled to do, he refused it. They all have the option of seeking work if they wish.
188. We have considered whether the legitimate aim could be achieved by choosing a different retirement age. **Seldon No2** dismissed the ground of appeal that a retirement age of 68 years instead of 65 years should have been selected. It was held not to be an error of law for the ET to have found a retirement age of 65 years as opposed to 68 years to be justified. The EAT said that the fact that the respondent in that case might have identified a different retirement age within very much the same age range, did not mean that there was an error of law. We agree with the respondent's submissions that the authorities generally approve of the linking of a retirement age to the State Pension age.
189. The claimants' submission was that the respondent could have chosen the age of 70. They could have done, but this does not mean that the later of age 65 or State retirement age was disproportionate. State retirement age is gradually increasing to 68 in line with continuing increases in life expectancy. The claimants did not say why they put forward 70 as the suggested age and we were not aware of any case law upholding a retirement age as high as this. If the respondent had chosen age 70 they would have been left with the same difficulties in having a dominance of older workers in a 60-70 age group and the need to deal with performance issues.
190. Case law shows that a relevant factor is the consent of the claimants and others to the retirement age – **Seldon No 2** (paragraph 34) and **Pitcher** (paragraph 113). We have found in this case that the claimants were informed about the introduction of the policy and the consultation process and they did not object. In Ms Suri's case our alternative finding (were we wrong about the inadmissibility of the document) was that she did not take proper steps to ensure that her 2 November 2014 letter had been communicated to the respondent and she did not raise the matter again when she received no response. We did not accept the evidence of Mr Tilley and Ms Morsy that they did not engage in the consultation because of their perception of Mr Kadri as "*inflexible*". They had the option to go to the Personnel Officer and/or seek the intervention of their union. Although there was no express consent to the introduction of the policy, they took

no steps to oppose it.

191. It is also relevant to consider the balancing of the burdens and opportunities between the older and younger generations. We have made findings above as to the age profile of staff before and after the implementation of the retirement policy and this has resulted in the balance of burdens and opportunities being spread within this respondent.
192. It was suggested by the claimants that there should have been some discretion in the imposing of a retirement dismissal. Our finding is that a general discretion leads to uncertainty and risks arguments of discrimination, or as the respondent put it, lends itself to a "*pick and choose approach*". The respondent had a discretion in very specific circumstances which were applied to Mr B as we have found above and to Ms Suri to allow her to reach State retirement age pending the review of the policy.
193. We find that the retirement policy was a proportionate means of achieving a legitimate aim.
194. The justification defence succeeds and the claim for direct age discrimination fails.

#### Unfair dismissal

195. The parties agreed at the Case Management Hearing before Regional Judge Potter on 24 April 2019 that the reason for dismissal was the "*forced retirement*" at the age of 65. Did this constitute a fair reason for dismissal under section 98 ERA 1996? Mr Bailey for the respondent relied upon section 98(1)(b) ERA which states that a potentially fair reason for dismissal is, "*some other substantial reason of a kind, such as to justify the dismissal of employee holding he position which the employee held*".
196. Mr Bailey, who appeared for the respondent at the case management hearing in April 2019, said that the parties agreed that the unfair dismissal claim stood or fell with the age discrimination claim. Ms Venkata did not appear at that hearing so she was not in a position to comment on what had been agreed.
197. The reason for the dismissal of the three claimants was that they had reached retirement age and in Ms Suri's case she had been given an extension until her State pensionable age whilst the policy was under review. In the case of ***Pitcher v University of Oxford***, at Employment Tribunal level (Case no. 3323858/2016) the tribunal found that that the reason for Professor Pitcher's dismissal was some other substantial reason, namely retirement.
198. Ms Venkata submitted that unlawful age discrimination is not a fair reason to dismiss an employee within section 98(1) – closing submissions paragraph 75 - so it appeared to us that it was accepted that the unfair dismissal claim stood or fell with the age discrimination claim.

199. In case it was not, we considered the analogy given in the *Pitcher* case (at ET level) that if an employee is in a redundancy situation and is unsuccessful in an application for alternative employment, is the reason for dismissal that they were unsuccessful in the job application or was it redundancy? That tribunal agreed that the reason would be redundancy and in that case where Professor Pitcher did not meet the requirements for an extension of his employment, the reason was some other substantial reason.
200. We find that the reason for dismissal was retirement and was some other substantial reason under section 98(1)(b) ERA.
201. On procedure, the submission from the claimants was that fairness required the respondent to consider an alternative to dismissal, such as the possibility of extending the contract until 70 years. We have dealt with this above and find that this does not form part of procedural fairness.
202. The unfair dismissal claim therefore fails and is dismissed. As a result it is not necessary for us to deal any further with the *Polkey* point.
203. The tribunal wishes to thank counsel for the high standard of their advocacy and submissions for which we were most grateful. We also wish to express our thanks to the interpreter Mr Bekhiri who greatly assisted the tribunal.

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**Employment Judge Elliott  
Date: 18 November 2021**

Judgment sent to the parties and entered in the Register on: 19/11/2021.

For the Tribunal