



The Cost of Age Discrimination

There is a defence to age discrimination cases in the UK if the employer can show that the discrimination was justified as a proportionate means of achieving a legitimate aim. This justification will always be case specific but traditionally, costs alone have not been capable of constituting a valid defence on this basis. It seems logical to the non-lawyer that costs must be relevant to decisions such as selection for redundancy, but in fact this has never really been a consideration that the Employment Tribunals will accept. Two recent decisions in this area have suggested the tide may be changing in the age discrimination context.

In *Woodcock v. Cumbria Primary Care Trust*, the Court of Appeal accepted that the actions of an employer who dismissed an employee by reason of redundancy in order to avoid the employee obtaining enhanced pension entitlements, did not amount to unlawful age discrimination.

There is a line of conflicting European judgments as to whether cost can be a legitimate aim in discrimination cases in general. The Employment Appeals Tribunal (EAT) in *Cross and others v. British Airways plc* tried to tackle this head on, and came up with the “cost-plus” approach—that cost can be justified, if it is considered along with other factors, but that cost alone is not justifiable. Following *Cross*, the “cost-plus” approach became an established principle for a number of years, until the case of *Woodcock*, where it was reviewed and ultimately reaffirmed.

Mr. Woodcock had been a chief executive of a primary care trust, and his position had disappeared as part of a reorganisation of the NHS. He had been unable to obtain another chief executive role and was notified that he was at risk of redundancy in September 2006, but there was a delay in giving him notice of dismissal in expectation that he would find alternative employment. It came to the employer’s attention that Mr. Woodcock would be entitled to an enhanced pension if he was still employed at the age of 50, which would have considerably increased the cost of the redundancy for the NHS. The primary care trust subsequently gave Mr. Woodcock 12 months notice of dismissal on redundancy grounds in May 2007, just shy of his 49th birthday and before the commencement of a formal consultation process. Mr. Woodcock subsequently brought a claim, which included a claim of direct age discrimination.

The Employment Tribunal found that Mr. Woodcock had been discriminated against when the notice of dismissal had been served, as this was due to his specific age, namely his impending 49th birthday. Nonetheless, they rejected his claim on the basis that dismissing Mr. Woodcock for redundancy, as well as to avoid further costs of Mr. Woodcock obtaining the enhanced pension entitlements, was a legitimate aim, and that the dismissal without a consultation process was still proportionate in the circumstances. In particular, the Employment Tribunal focused on the fact that Mr. Woodcock had been aware of redundancy for 10 months, that the primary care trust had delayed giving Mr. Woodcock notice which had given an extra year’s employment, that Mr. Woodcock was paid a large redundancy payment and that consultation would have achieved nothing—he had wanted a chief executive role where none were available and Mr. Woodcock did not consider any other job suitable.



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The Court of Appeal upheld the original Tribunal decision, holding that although discrimination cannot be justified “solely” on the grounds of costs, on the unusual facts of this case the dismissal of Mr. Woodcock could not be viewed as having been based solely on cost. In Mr. Woodcock’s case, the dismissal notice was served with the aim of giving effect to the primary care trust’s genuine decision to terminate his employment on the grounds of his redundancy, which was in itself a legitimate aim, rather than to save the trust the expense it would have incurred if Mr. Woodcock had still been employed at 50. Mr. Woodcock had “no right, entitlement or expectation” to the enhanced benefits that he would have received had he remained employed until the age of 50 and had he done so, it would have amounted to a “pure windfall.” The Court of Appeal went on to find on the “very particular circumstances” of the case, that the giving of the dismissal notice before any consultation had started did not affect the proportionality of the treatment, as the reality was that it would have deprived Mr. Woodcock of nothing of value, given that consultation would not have achieved anything. In determining the influence of cost when justifying discrimination, the Court of Appeal observed that there was “some degree of artificiality in the approach to the question of justification,” and in making a reference to the existing case law, “almost every decision taken by an employer is going to have regard to costs.”

In the EAT case of *HM Land Registry v. Benson*, the question was one of indirect age discrimination and specifically the whether the employer was justified in selecting employees for voluntary redundancy based on whom it would cost least to dismiss. The practical effect of this decision was that the age group 50-54 suffered an adverse impact or indirect discrimination. On the facts, the employer needed to reduce headcount, within a budget of GBP12 million. It had more applicants for its voluntary redundancy scheme than it could accommodate and so it selected the chosen redundancies based on set criteria, the chief criterion of which was cost of dismissal. The 50-54 age group would have been entitled to enhanced early retirement pension adding an extra GBP19.7 million to the budget. Reversing the original tribunal, the EAT accepted that the costs consideration of reducing headcount within its budget was a legitimate aim and was proportionate, even though the employer could have afforded it.

So, what does this all mean for employers? The facts of these two cases are fairly extreme and they do not by any means give employers free rein to justify discriminatory decisions based on pure costs considerations. However, they do highlight an increasing willingness by Employment Tribunals to take a pragmatic approach on the issue of cost considerations, and to treat cost as a significant factor in determining whether discriminatory acts can be objectively justified, which is a welcome and logical development.

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