SQUIRE SANDERS

# CAN COST CONSIDERATIONS ALONE JUSTIFY AGE DISCRIMINATION?

**The answer is still no, according to the Court of Appeal, but the good news is that they can still be taken into account.**

As a general rule employers cannot justify direct discrimination, i.e. less favourable treatment that is directly linked to a particular protected characteristic. Age discrimination is slightly different – the legislation makes it clear that even direct age discrimination can be justified, provided that the employer can point to a legitimate aim and the means of achieving that aim are proportionate, the same test that applies when considering whether acts of indirect discrimination can be justified. Until recently the advice to employers has always been that they cannot justify discriminatory behaviour solely on considerations of cost, i.e. that it would have been too expensive not to discriminate. They are, however, entitled to put cost into the balance together with other justifications, the "cost-plus" principle.

In 2010 the President of the EAT threw a spanner in the works in ***Woodcock v Cumbria Primary Care Trust***, when he suggested (albeit in passing and so not in binding form) that employers should be able to justify discrimination on the basis that the cost of doing otherwise would be disproportionately high. Last week the Court of Appeal had an opportunity to consider his comments.

Mr Woodcock, the Chief Executive of a NHS Primary Trust, was made redundant following a reorganisation and claimed that his dismissal was unfair and age discriminatory. He argued that the Trust had deliberately given him notice of dismissal before any formal consultation process to ensure that his 12-month notice period expired prior to his 50th birthday, when he would have been entitled to take early retirement with enhanced payments. The cost to the NHS of providing such benefits was estimated to be £500,000.

The Employment Tribunal accepted that the timing of Mr Woodcock's dismissal was on the face of it age discriminatory (after all if he had not been approaching his 49th birthday he would not have been served notice prior to the start of the formal consultation period), but said that its actions were justified. It said there was no need for the Trust to postpone giving notice because Mr Woodcock was clearly redundant (having already been kept in employment for 12 months after his job had disappeared), no alternative employment had been found and it would have been a "windfall" for him to be able to take early retirement in the last few weeks of his notice period. Mr Woodcock appealed, claiming that the Tribunal was wrong to rely on considerations of cost. The EAT disagreed. It was satisfied that the Trust had not relied on cost alone to justify its actions and that the prevention of a windfall and the avoidance of the corresponding loss to the Trust were legitimate aims going beyond the mere wish to reduce costs.

The Court of Appeal agreed with the EAT that the dismissal notice was not served purely and simply to avoid incurring costs. It was served with the aim of giving effect to the Trust's genuine decision to terminate Mr Woodcock's employment on the grounds of his redundancy. In considering the timing of the notice, it was legitimate for the Trust to take into account the additional costs it would have incurred if Mr Woodcock had remained in employment until he was 50. It went so far as to say that it would have been "irresponsible" of the Trust not to have had cost considerations in mind. When it came to proportionality, the Court of Appeal was comfortable that the Trust's treatment was proportionate to the detrimental effect upon Mr Woodcock, bearing in mind the slightly unusual facts of the case. It does beg the question of whether the outcome would have been the same if Mr Woodcock had less clearly been redundant, or if the enhanced pension had been triggered any nearer than the last few weeks of his 12 month notice period – in other words, if the injustice to him from his peremptory dismissal had been greater. And what if the extra cost of the enhanced pension had been not £500,000 but £100,000? It is tempting to think that the case would have gone the other way.

So where does this leave us? This case is not the groundbreaking decision that employers may have been hoping for. The Court of Appeal was keen to point out that it accepted ECJ case law which said that employers cannot justify discriminatory treatment "solely" because the elimination of such treatment would involve increased costs. But this simply means that employers cannot argue that it would have cost them more not to discriminate. This is not to say that cost factors cannot be taken into account when considering whether an employer's discriminatory conduct is justified. After all, as the Court of Appeal pointed out, almost every decision taken by an employer is going to have regard to costs. Preventing Mr Woodcock receiving a windfall and avoiding a loss to the Trust are just opposite sides of the same costs coin.

It remains the case that cost factors will not constitute a defence in themselves, but it is legitimate for employers to take them into account when seeking to justify any discriminatory conduct. Ultimately, it will still come down to a case of proportionality – striking a balance between the discriminatory effect of the treatment and the needs of the business. Any arguments as to cost are most likely to be relevant where employers can show, as in this case, that the cost of avoiding discrimination would be disproportionate to any benefit in terms of eliminating the discriminatory impact. The scope for running cost arguments is therefore still likely to be limited.

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