

SUMMARY

2016/22 Failing to offer voluntary redundancy because it triggered a right to early retirement is directly discriminatory (UK)

<p>Following a restructure of his employer, an over 50 year old employee was deprived of the opportunity to apply for voluntary redundancy, compared to his under 50 year old colleagues, because it would have triggered early retirement resulting in a higher redundancy package. The Employment Tribunal ('ET') held that the use of under 50 year old comparators was not appropriate because the comparators were not entitled to early retirement and were therefore in materially different circumstances compared to the claimant. On appeal to the Employment Appeal Tribunal ('EAT'), the EAT held that the fact that the comparators were not entitled to early retirement was not a "relevant circumstance" making the comparators invalid. A prima facie case of direct age discrimination was therefore made out. The EAT remitted the case back to the original ET to determine if the employer's direct discrimination could be justified.</p>

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Following a restructure of his employer, an over 50 year old employee was deprived of the opportunity to apply for voluntary redundancy, compared to his under 50 year old colleagues, because it would have triggered early retirement resulting in a higher redundancy package. The Employment Tribunal ('ET') held that the use of under 50 year old comparators was not appropriate because the comparators were not entitled to early retirement and were therefore

in materially different circumstances compared to the claimant. On appeal to the Employment Appeal Tribunal ('EAT'), the EAT held that the fact that the comparators were not entitled to early retirement was not a "relevant circumstance" making the comparators invalid. A prima facie case of direct age discrimination was therefore made out. The EAT remitted the case back to the original ET to determine if the employer's direct discrimination could be justified.

Background

The European Equal Treatment Framework Directive prohibiting direct discrimination, indirect discrimination, harassment and victimisation in the workplace as a result of a 'protected characteristic' is implemented in the UK through the Equality Act 2010 ('EQA').

There are nine protected characteristics; age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Section 13(1) EQA makes clear that an employer directly discriminates against its employee if, because of age, the employer treats the employee less favourably than the employer treats or would treat others. However there is a defence to direct age discrimination where the employer can show that its treatment of the employee was 'justified' i.e. that it was a "proportionate means of achieving a legitimate aim" (section 13(2) EQA). 'Legitimate aim' in this context is limited to social or employment policy aims, not just the employer's private interests.

Comparators

In order to successfully bring a direct age discrimination claim, the employee needs to show that they have been treated less favourably than a real or hypothetical comparator whose 'circumstances' are not materially different to theirs (section 23 EQA). Case law has determined two things in relation to the use of comparators in age discrimination claims:

that the 'circumstances' surrounding the comparator are those factors which the employer took into account in deciding to treat the employee as it did (excluding the employee's age);

and

that age (or age related factors) cannot be used to argue that the comparator and the employee are materially different.

Facts

Mr Donkor worked as a Regional Director for Royal Bank of Scotland ('RBS'). In 2012, during a

restructure, RBS decided to create what was seen as a new Regional Director role. It further decided that none of the existing Regional Directors would automatically transfer into this new position but instead would take part in a selection process. Those selected during this process would be offered an interview for the new role and those not selected would be given the option to apply for voluntary redundancy. In addition to the voluntary redundancy, employees aged over 50 would also be given the option to take early retirement.

Mr Donkor was one of four existing Regional Directors who were not selected to interview for the new role ('Outgoing Directors'). Of these four, Mr Donkor and one other were aged over 50 and the remaining two were aged under 50.

RBS calculated the voluntary redundancy package costs for all of the Outgoing Directors. It wasn't until then that RBS realised that the majority of the redundancy costs (£1.25 million of the £1.4 million) were accounted for by the two Outgoing Directors aged over 50. This is because, in addition to the voluntary redundancy package being offered to all Outgoing Directors, the over 50 Outgoing Directors, due to their age, had a right to take early retirement. The costs arising from this right were fairly significant and meant that the majority of each of their redundancy packages was made up of the early retirement pension contribution. In Mr Donkor's case, this resulted in an early retirement pension contribution of £460,275 and a total redundancy package of over £500,000. As the redundancy awards to the over 50 Outgoing Employees were over £500,000 each, they gave rise to the need for higher level approval within RBS.

Following its calculations, and its realisation of the costs involved, RBS decided to offer the Outgoing Directors the opportunity to interview for the new Regional Director role after all; one of the four (the second over 50 Outgoing Employee) was successful. This left Mr Donkor and the two under 50 Outgoing Employees. Meanwhile, discussions progressed regarding Mr Donkor's potential redundancy package but there was a risk that the package would be refused by the approvers at RBS if there were redeployment opportunities within the organisation that were not explored instead.

Following unsuccessful interviews, the two under 50 Outgoing Employees were given the opportunity to apply for voluntary redundancy. This left Mr Donkor as the only remaining Outgoing Employee. Mr Donkor however was not given the opportunity to apply for voluntary redundancy and was instead given the opportunity to apply for an alternative role. RBS further told Mr Donkor that he did not have the option of voluntary redundancy while this role was on offer. Mr Donkor interviewed for and was appointed to the alternative role.

The following year a similar situation occurred except that Mr Donkor successfully applied for

voluntary redundancy. However, he was no longer eligible for early retirement as the pension scheme rules had changed in the interim so that only those aged over 55 were entitled. This meant that his redundancy package was significantly lower compared to that originally on offer in 2012. Mr Donkor brought a claim in the ET arguing that RBS's decision in 2012 not to allow him to apply for voluntary redundancy was unfavourable treatment and directly discriminatory based on age. He compared himself to the two under 50 Outgoing Directors who were given the opportunity to apply for voluntary redundancy.

The ET held that the comparators, who were offered voluntary redundancy, were not appropriate comparators as they were not entitled to early retirement benefits (as compared to Mr Donkor, who was entitled). This factor was held by the ET to be a material difference in the circumstances of the comparators to those of Mr Donkor, making the comparators invalid.

The ET also held that even if there was not a material difference in their circumstances, Mr Donkor had not been treated less favourably than the comparators because, like Mr Donkor, the comparators were not entitled to take early retirement.

Judgment

On appeal to the EAT, it was held that the fact that the comparators were not entitled to early retirement was a material difference in their and Mr Donkor's circumstances, but this difference was, in reality, simply one of age (i.e. the comparators were too young to qualify for early retirement). As stated above, case law has shown that age related factors can not be used to show that a comparator is materially different. The comparators were therefore held to be valid which meant that the reason for not being offered voluntary redundancy (i.e. the less favourable treatment) was that, because of his age, Mr Donkor was entitled to early retirement which increased the cost of the redundancy package making it more difficult to obtain approval.

The EAT further found that the ET had erred in its finding that Mr Donkor did not suffer less favourable treatment; the less favourable treatment was not that Mr Donkor was not offered early retirement (as found by the ET), it was because he was not offered voluntary redundancy. As such the EAT found that there was a case of direct age discrimination against Mr Donkor.

The EAT has now remitted the case back to the original ET to make a determination on whether RBS has a defence to direct age discrimination against Mr Donkor; specifically that it acted proportionately to further a legitimate aim.

Commentary

The decision of the EAT was not particularly surprising here but this case is a good example of a tribunal which put too much emphasis on whether an individual was an appropriate comparator or not, when the key issue in direct discrimination should always be the reason why the employer has treated the employee in the way that it did.

It further demonstrates to employers that they must be careful when attempting to distinguish between the employee and the comparator and ensure that the circumstances which they think render the comparator materially different to the employee, are not factors that are themselves related to the protected characteristic, as this will be discriminatory. The question that the ET will now have to answer is whether or not RBS can justify the prima facie act of discrimination. As cost alone is rarely enough to amount to justification, this seems unlikely.

Subject: Age discrimination

Parties: Donkor – v – Royal Bank of Scotland

Court: Employment Appeal Tribunal

Date: 16 October 2015

Case number: UKEAT/0162/15

Internet publication: http://www.bailii.org/uk/cases/UKEAT/2015/0162_15_1610.html

Creator: Employment Appeal Tribunal

Verdict at: 2015-10-16

Case number: UKEAT/0162/15