SUMMARY

2015/21 Mental processes of those influencing the sole decision-maker not relevant to discrimination claim (UK)

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Background

The legislation applicable to this case was contained in the Employment Equality (Age) Regulations 2006, which provided protection against direct discrimination on the grounds of age prior to the enactment of the Equality Act 2010.

Under these regulations, any discriminatory act by an employee in the course of his employment was to be treated as carried out by his employer as well as by him (Regulation25). Further, that employee could then be personally liable (Regulation 26(2)).

Under Regulation 37, where the complainant proved facts that, in the absence of an adequate

explanation by the employer, could lead the tribunal to find discrimination, the burden of proof shifted to the employer. In other words, the employer then had to prove that it did not discriminate, rather than the complainant proving that discrimination occurred.

There are now similar provisions to these in the Equality Act.

Facts

Dr Mary Reynolds provided services to CLFIS ('Canada Life') under a consultancy agreement, having been previously employed by them for 20 years. Her agreement was terminated when she was 73 years old by Mr Gilmour, the UK general manager. He made the decision to terminate following a presentation given to him by several directors which highlighted issues with Dr Reynolds' performance. Dr Reynolds subsequently brought a claim for unfair dismissal (which was rejected on the basis that she was not an employee) and a further claim alleging direct age discrimination. Employment Tribunal decision

The Employment Tribunal ('ET') which heard the case was mainly concerned with Mr Gilmour as the sole decision-maker and his motives in terminating the agreement. It did not concern itself with the thought processes of those who had potentially influenced his decision by delivering the presentation.

The ET found that Dr Reynolds had established facts that showed, in the absence of a reasonable explanation by Canada Life, that the decision to terminate was influenced by her age, so the burden of proof shifted to Canada Life to show a non-discriminatory explanation for its decision.

Following Canada Life's explanation, the ET concluded that, although Mr Gilmour took the issues raised by the presentation into account, there was no obvious age bias. His decision was not taken for a discriminatory reason, but because he felt Dr Reynolds was not performing adequately and was incapable of change. The ET found various reasons, unrelated to age, for Mr Gilmour's belief:

Dr Reynolds was unable to attend the company's Bristol office due to her caring responsibilities (her sister was disabled), which meant she had limited access to training and development opportunities.
She was completely inflexible in her methods of communication. For example, she refused to use email and required papers to be faxed or posted to her, but would not accept anything sent by recorded delivery.
She was slow in turning round work and would not provide any advice in writing, insisting on

dictating it over the phone to others instead.

Employment Appeal Tribunal decision

Dr Reynolds appealed to the Employment Appeal Tribunal ('EAT') on three grounds:

The ET was wrong in saying it was necessary only to consider Mr Gilmour's motivation: it should not have disregarded the involvement of the other individuals in the process.
Having decided that the burden of proof had shifted, the ET failed to take into account the fact that one of the directors had not given oral evidence and another had not been called to give evidence at all.
The ET failed to address adequately whether Mr Gilmour's belief that she was incapable of changing the way in which she worked was itself age-related.

Allowing the appeal on the first ground, the EAT considered whether an ET is entitled to focus on the mental processes of the decisionmaker alone. The EAT disagreed with the ET's decision, ruling that discrimination could be established if a prohibited ground (such as age) in the minds of those advising the decision maker had a "significant influence" on the outcome. The EAT sent the case to be reheard by a different ET.

Court of Appeal decision

Canada Life then appealed to the Court of Appeal, on three main grounds:

The ET was right in law to focus exclusively on the mental processes of Mr Gilmour as the sole decision-maker and the EAT should not have reversed its decision on this point.
Even if the mental processes of the others were in principle relevant, Dr Reynolds did not advance any claim in the ET of this kind and so was not entitled to complain now about the failure to consider it.
Even if the mental processes of the others were relevant, there had been no finding of discrimination relating to them under the burden of proof provisions which would shift the burden to Canada Life to show a non-discriminatory motive.

The Court of Appeal split its reasoning into two parts. First, it observed the ET's focus on Mr Gilmour as the sole decision-maker. The Court agreed with the ET that the others had not been party to Mr Gilmour's decision, stating that, "supplying information or opinions used for the purpose of a decision does not constitute participation in this decision". The Court instead described the case as one of "tainted information", in which an act harmful to a claimant is

done by an employee innocent of discriminatory motivation but who has been influenced by the information of an employee with discriminatory views.

The Court of Appeal discussed two different approaches to dealing with such cases:

The "composite" approach: This brings together the decisionmaker's act with the informant's motivation. Under this approach the informant's discriminatory motivation could be treated as a ground for the claimant's dismissal, despite the fact that another was the actual decision-maker.
The "separate acts" approach: Under this approach, the informant's report is treated as an isolated discriminatory act for which the employer is potentially liable. The claimant here is able to recover for losses caused by their dismissal as a consequence of the act, rather than because the dismissal itself was unlawful.

The Court favoured the separate acts approach, regarding the composite approach as unacceptable. This was because it was central to the scheme of the legislation that liability could only attach to an employer where an individual employee for whose act it is responsible has acted in a way that satisfies the definition of discrimination. Making the employer liable for a composite discriminatory dismissal by the decision-maker would also make the latter liable for discrimination (under Regulation 26(2)), even though he was innocent of any discriminatory motive. The separate acts approach prevented this potential unfairness.

The second part of the Court of Appeal's reasoning concerned Dr Reynolds' alleged inability to change. As mentioned above, Dr Reynolds had contended that the ET's reasoning was flawed when it rejected the contention that Mr Gilmour's belief that she was incapable of change was based on age-related stereotypes. The Court dismissed this argument, noting the ET's emphasis on how Mr Gilmour's belief was derived from his personal knowledge and judgment of Dr Reynolds.

Without going into any detail on the other two grounds of appeal, the Court of Appeal allowed Canada Life's appeal. The Court restored the ET's decision that it did not have to consider the mental processes of those influencing the decision-maker and held that it had been entitled to reject Dr Reynolds' claim.

Commentary

While this judgment appears to limit the scope of discrimination claims, it is important to note that it was very fact specific. The Court of Appeal pointed out that, if the decision to terminate

had been made jointly, the motivation of all involved would have been relevant. Further, Dr Reynolds might perhaps have succeeded in her claim if she had made the motives of the advisers relevant by specifically pleading that the presentation to the decision maker was itself an act of discrimination.

On a practical level, employers should take care to ensure bias is challenged at all levels of their organisation, for example through diversity training and monitoring. This will help ensure that all aspects and stages of the decision-making process are free from bias, even where one person is ostensibly making the decision in question alone.

Comments from other jurisdictions

Austria (Thomas Pfalz): Assuming that Dr Reynolds would have qualified as an employee under Austrian labour law, the termination of her contract would have been assessed on the basis of section 17 of the Equal Treatment Act (*Gleichbehandlungsgesetz*). It provides protection, inter alia, against discrimination on grounds of age. Courts in Austria do not use the 'separate acts approach' as the English Court of Appeal did in the case reported above. Instead, they focus exclusively on whether the termination objectively results from an act of discrimination. The motives of the employer/decision-maker and/or any other subjective elements are therefore not taken into account. Thus, it seems possible that Dr Reynolds would have succeeded with a claim for unfair dismissal before an Austrian labour court, even though the individual who actually terminated her contract acted without discriminatory motives.

For the sake of completeness it is worth noting that section 19(3) of the Equal Treatment Act provides that there is also discrimination where one person is instructed to discriminate by another person. In the legal literature, it has been argued that the term 'instruction' covers any situation where one person can influence the behaviour of another. However, it seems this provision is only directed towards situations where superiors influence members of their staff and not vice versa, so section 19(3) would not apply in this particular case.

Creator: Court of Appeal
Verdict at: 2015-05-30
Case number: A2/2014/1837