SUMMARY

2012/26: Supreme Court rules on whether a requirement for academic qualifications is age discriminatory (UK)

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Facts

The employee was a retired policeman who from 1995 worked as a legal adviser for the Police National Legal Database (PNLD), which provides legal advice within the UK's criminal justice system. He did not have a law degree but was appointed on the basis of his police examinations and experience. To aid the retention of staff and recruitment in 2005 PNLD introduced a senior grade, which required a law degree or equivalent in order to qualify. In 2006 the employee was re-graded but kept below the senior grade because, although he met all the other criteria, he did not have a law degree. The employee appealed twice against the decision but without success.

By this time the employee was 62 years old. The normal retirement age in PNLD was 65, although it could be extended on a discretionary basis until the age of 70. However both

employee and employer anticipated retirement would be at 65. During the course of these appeals the Employment Equality (Age) Regulations 2006 ('the Regulations') came into force. This was the measure by which the UK gave (partial) effect to Council Directive 2000/78/EC ('the Directive'). Under the terms of the Regulations the employee brought proceedings in an employment tribunal, which held that he had been indirectly discriminated against on the grounds of age and that this was not objectively justified.

The employee did not argue that the reason for the discrimination was a general disadvantage based on the fact that those aged between 60 and 65 were less likely to have a degree but put his case on the basis that he would be unable to complete the degree course before he retired. It was accepted that this would take him four years working part-time. The tribunal found that those in his age group (60-65) had been put to a particular disadvantage and that whilst the aim of aiding recruitment and retention was a legitimate aim there was not sufficient evidence that the requirement for a degree and the failure to make an exception for the employee was proportionate.

The employers appealed to the Employment Appeal Tribunal, which held that there had been no discrimination. It held that the employee had not been treated differently than other employees but rather the same as them by requiring a degree for the highest grade. His difficulty was caused by the fact that he had less time to obtain a degree because he was closer to retirement than others, which was a consequence of age, but not age discrimination by the employer. Anyone who was contemplating leaving work within a similar period for any reason unconnected with age would be in the same position. The EAT also held, however, that if there had been discrimination it would not have been justified. A further appeal to the Court of Appeal reached the same conclusions (see EELC 2010/59).

The employee appealed to the Supreme Court against the decision that there was no discrimination and the employers cross-appealed against the justification decision.

Judgment

The Supreme Court dealt first with the issue of discrimination. Lady Hale gave the principal judgment with which, in large part, all of the other judges agreed. She rejected the analysis that the disadvantage had been caused by the closeness of the retirement age. She thought that this was to equate the disadvantage with a similar disadvantage suffered by others for a different reason unrelated to age and that such an approach was alarming for the law of discrimination. She also felt that it was wrong in principle to equate leaving work for an age related reason with other non-age related reasons. This was particularly so in this case where there was, at the time of the discrimination, the legal possibility of enforcing retirement at 65 (that

provision is now repealed). Her conclusion was that it was artificial to regard the comparative disadvantage as having been caused by anything but the employee's age and his appeal succeeded in establishing indirect age discrimination. Lady Hale also thought that the problem could have been solved another way without asking for favourable treatment for people of the employee's age by 'making arrangements' for people appointed before the new criterion was introduced.

The justification issue was then considered. Lady Hale pointed out that as had been established in *Bilka-Kaufhaus GmbH - v - Weber von Hartz* (C-170/84) the range of aims that can justify indirect discrimination is not limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive, but can include a real need on the part of the employer's business. There was then the requirement of proportionality, which could be analysed as a three-part test as follows:

"*First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?*"

This test also required an objective analysis, it was not sufficient for a reasonable employer to believe the criterion justified because the real needs of the undertaking had to be weighed against the discriminatory effect of the treatment.

Although the parties accepted as legitimate aims the retention and recruitment of employees, both elements had, according to Lady Hale, to be considered separately when determining proportionality. A distinction had to be drawn between the justification for recruitment and the justification for retention when considering the criteria for the thresholds beyond recruitment, particularly for the highest grading. The Employment Tribunal had also made the mistake of treating the terms "appropriate", "necessary" and "proportionate" as interchangeable, which is incorrect. The three-part test established in both domestic UK case law and the decisions of the ECJ/CJEU make it plain this is wrong. The measure has to be both appropriate to achieve the legitimate aim and reasonably necessary in order to do so. Some measures are simply inappropriate, as for example, in *Hennings* (C-297/10), which established that rewarding experience is not established by age-related pay scales and in *Kücükdeveci* (C-555/07) that the aim of making it easier to recruit the young is not achieved by applying a measure that applies long after employees cease to be young.

Then the exercise of balancing the impact on the employee against the legitimate objective of the employer had to be undertaken. The Employment Tribunal had not done that. This required consideration of possible non-discriminatory alternatives including a personal

exception being made for the employee. Accordingly, the issue of proportionality was remitted to the Tribunal for a detailed consideration of the issue of justification.

Whilst all the judges agreed the outcome of the decision Lord Mance made clear his view that making a personal exception for the employee would be an inappropriate step for an employer to take because all those affected adversely have to be treated equally. Making an exception for employees of his age group and with his experience may well discriminate unjustifiably against younger employees.

Commentary

The judgment has not commanded universal respect in the UK because many consider that the analysis of the Employment Appeal Tribunal and the Court of Appeal on the issue of whether there was indirect discrimination can be defended as logical. The Supreme Court treated the approach of retirement as attributable to age, which raises the possibility of other stereotypical assumptions being similarly treated. One commentator posed the example of an advertisement requiring the applicant having an excellent ability to remember names as being similarly treated, but perhaps the best view is that this case should be restricted to a connection between retirement and age. The comments in the judgments about the "technicality" of the employer's arguments make it fairly clear that it is going to be relatively difficult to defend an argument that any criterion is not indirect discrimination on the ground of age if in practice it can be shown to impact adversely on any particular age group. It would also be a mistake to presume that this resistance to technicality will be confined to older age groups, as the remarks made by Lord Mance and the judgment of the Employment Appeal Tribunal indicate.

Another consequence of the decision is that whilst the aim of the individual employer's business can be taken into account, the decision implies that the chances of that aim being held to be indirectly discriminatory are going to be greater than many might have expected. Also this decision emphasises the necessity for employers to produce detailed evidence when trying to prove justification. Every Tribunal dealing with these cases will have to deal expressly and separately with the requirements of appropriateness and necessity on an objective basis.

Whilst in *Seldon* it was said that the reasons for the justification of direct discrimination could be determined on an *ex post facto* rationalisation this was not mentioned in *Homer* and may be more difficult to apply in circumstances where the employer relies on a reason specific to its business rather than on public policy. It is also unclear how these tests will be judged in the future. It is relatively easy to say that the requirement is to balance the aim of the employer

against the detrimental impact on an employee. It is much more difficult to advise a client how this exercise should be done in practice and particularly what evidence needs to be brought to court to show balance has been achieved. There will be extreme cases, for example, where action has to be taken to preserve the continued existence of the business but most cases will not be in that category. It will be advisable for any employer introducing such a requirement to preserve records showing what other alternatives had been considered and why they were rejected. To require employers to achieve an appropriate balance of interests looks suspiciously like a way of ensuring the Court will always be able to substitute its own views.

Subject: Age discrimination

Parties: Homer – v - Chief Constable of West Yorkshire Police

Court: United Kingdom Supreme Court

Date: 25 April 2012

Case Number: [2012] UKSC 15

Internet publication: http://www.bailii.org/uk/cases/UKSC/2012/15.html

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Creator: UK Supreme Court
Verdict at: 2012-04-25
Case number: [2012] UKSC 16