

SUMMARY

2010/59: Degree requirement was not indirect age discrimination (UK)

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Facts

Mr Homer worked as a police officer for 30 years before working as a legal adviser for the Police National Legal Database (‘PNLD’), a department of West Yorkshire Police.

At the time of his appointment, the requirement to work as a legal adviser with PNLD was either the possession of a law degree, the possession of the equivalent of a law degree, or, if neither of those applied, exceptional experience/skills in criminal law, combined with a lesser qualification in law. Mr Homer did not have a law degree and so qualified by the third route.

PNLD carried out a review of the legal adviser role as they wished to increase retention. A new career structure was implemented, with graded pay subject to three thresholds. Mr Homer, who was by now aged 61, successfully applied to be treated as having fulfilled the first two and then applied to qualify at the third level. A law degree was a mandatory requirement to qualify

for the third threshold so, despite fulfilling all other criteria, Mr Homer's application was unsuccessful.

Mr Homer submitted a claim to the Employment Tribunal for indirect age discrimination under the Employment Equality (Age) Regulations 2006, which implement the Framework Directive 2000/78/EC. He argued that people of his age group (60-65) would not have time to complete a degree course before reaching the age at which they would be required to retire, and so would not be able to enjoy the enhanced remuneration and status that qualification to the third threshold would bring.

The Employment Tribunal ruled in Mr Homer's favour, finding that he and others in his age group were effectively prevented from achieving the third threshold prior to the normal retirement age of 65. This was a 'particular disadvantage' as compared with those in the age group 30-59. The Tribunal went on to conclude that the requirement was not objectively justified as a proportionate means of achieving the legitimate aim of recruitment and retention of good quality staff. The employer appealed to the Employment Appeal Tribunal ('EAT').

The Employment Appeal Tribunal's decision

The EAT allowed the employer's appeal, ruling that there was no basis for concluding that there was any particular disadvantage which affected persons falling within the age bracket of 60-65. The disadvantage affected everyone in the same way and the requirement of a degree was not something required only of those over a certain age. The fact that Mr Homer would not have chance to enjoy the benefits of enhanced pay and status was by reason of his working life being limited, which was 'simply a consequence of age, not age discrimination'.

The EAT then considered whether, if indirect age discrimination had been established, the Employment Tribunal's finding on objective justification should stand. Despite having some criticisms of the Employment Tribunal's reasoning on this issue, the EAT upheld its conclusion.

Mr Homer therefore appealed to the Court of the Appeal, submitting that there was no legal error in the Employment Tribunal's approach to the issue of 'particular disadvantage'. The employer cross-appealed the EAT's decision in relation to justification.

The Court of Appeal's decision

The Court of Appeal identified the question before it as being: did the introduction and application of the law degree provision put Mr Homer and others in his age group at a particular disadvantage? The employer argued that it did not because it was not Mr Homer's age but proximity to retirement that stood in the way of him achieving the third threshold.

The Court of Appeal accepted this submission in relation to lack of opportunity to benefit from increased remuneration and also, after some initial doubts, in the context of loss of status. Whatever Mr Homer's age when the degree requirement was introduced, he would have failed to enjoy the higher status until he obtained the degree. The fact that he did not have time to enjoy the status between graduation and retirement was no different from the fact that he would have no opportunity to enjoy the enhanced remuneration.

The Court concluded that the EAT's judgment was correct. The disadvantage suffered by Mr Homer's age group – i.e. inability to obtain a law degree before retirement – resulted from their impending withdrawal from the workforce rather than age. The same result would follow for employees in the younger age group who also stopped working before obtaining a degree. Accordingly, Mr Homer had failed to show a disadvantage amounting to indirect age discrimination.

Because of this conclusion, the Court of Appeal did not need to give detailed consideration of the employer's cross-appeal relating to justification and proportionality. However, the Court briefly commented that it agreed with the EAT. The employer's policy was not proportionate as the same improvement in recruitment and retention could have been achieved with a relaxation of the degree requirement for Mr Homer's age group. Nonetheless, the appeal failed at the first hurdle.

Commentary

The Court of Appeal placed considerable emphasis on Mr Homer's retirement at 65 and the fact that the disadvantage resulted from that rather than the requirement to have a degree. The distinction between age and proximity to retirement may at first sight seem a fairly arbitrary one, since the two are undeniably connected. However, on a considered analysis, this is probably correct. Someone leaving the workplace because of a mid-life career change, or because of starting a family, would similarly not have time to complete a degree so as to be able to benefit from enhanced pay and status.

The UK currently operates a mandatory retirement system, under which employees can be

forced by their employer to retire at 65. However, the UK's new coalition government has announced plans to phase out this regime. In the absence of a set retirement age, Mr Homer would probably have met even greater difficulty in pursuing his claim. He would not have had to stop working at 65 and so potentially could have completed his degree and worked for as long as his health and motivation would allow, enjoying the enhanced remuneration and status he desired. In those circumstances, the Court of Appeal's comment that 'any disadvantage can properly be described as the consequence of age [É] not the consequence of age discrimination' would be even more persuasive.

Although Mr Homer lost, the Court of Appeal and EAT judgments both depended on the particular way in which he put his claim. His case was essentially that members of his age group would not have time to complete a degree before retirement. At no stage did Mr Homer advance the argument that requiring a degree in itself amounted to indirect age discrimination – on the ground that the growth in higher education has resulted in a significantly larger proportion of younger than older workers being in possession of a degree. Had the case been put in this way, Mr Homer could have adduced statistical evidence to back it up and may ultimately have been more successful.

In light of this, employers should be wary of rigid requirements that applicants must have a degree. In many situations, where such a requirement is considered desirable, the employer would be well advised to adopt a flexible approach. For example, a high level of experience may be an acceptable substitute.

Comments from other jurisdictions

Austria (Martin E. Risak): The arguments raised in relation to the legal situation in England and The Netherlands (see below) are interesting and it is quite surprising to me that – to my knowledge – they have never been raised in Austria. In the state sector, especially, a lot of emphasis is put on formal secondary and tertiary education for acquiring senior positions. I assume that there is not only a gender but also an age difference between employees with and without (in particular) degree level education and it would therefore be very interesting to know how an Austrian court would decide this question.

The Netherlands (Peter Vas Nunes): A point of interest in the case reported above concerns the requirement that the plaintiff hold a law degree in order to be promoted to a higher pay level. Such requirements can be discriminatory. An example is the *Gerrits – v – Zorggroep* case, on which the Dutch Supreme Court ruled in 1997. A female employee in a nursing home was

denied promotion to a management level because she lacked a certain certificate. One of her colleagues, a man, did get the promotion, because he had the certificate. The female employee challenged the denial of promotion all the way up to the Supreme Court. She was successful because the employees with the certificate were mainly men whereas those without the certificate were all women. This had to do with the fact that in the post WW II period it was uncommon for girls to attend the sort of colleges where one could obtain the certificate in question. Hence, the plaintiff was indirectly discriminated against on the basis of her gender. The question was whether this was objectively justified. The aim of the certificate requirement was to make sure that managers have a certain minimum level of higher education. This is a legitimate aim. Was requiring managers to have the certificate an effective means to achieve this aim? The court gave the employer the benefit of the doubt. Was the requirement necessary to achieve that aim? No, because it is perfectly possible for someone lacking higher education to be a good manager and, conversely, not all holders of the certificate are necessarily good managers. Transposing this Dutch judgment to the case of the West Yorkshire Police employee reported above, one could perhaps make the case that older employees in the police force are less likely to have a law degree than their younger colleagues and that therefore Mr Homer was indirectly discriminated against on account of his age.

Subject: Age discrimination

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