

Review

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JUSTIFYING PAY THAT DEPENDS ON LENGTH OF SERVICE



Paying employees more because they have longer service may indirectly discriminate against women, who tend to have shorter and/or more broken service due to childcare responsibilities, and against younger employees who have less time to build up years of service. An employer can, however, defeat a claim for indirect age discrimination under the Employment Equality (Age) Regulations 2006 ("the Age Regulations") and a claim under the Equal Pay Act relying on indirect sex discrimination by justifying the discriminatory arrangements. The arrangements must be necessary to achieve a legitimate purpose and proportionate. Rewarding experience is recognised as a legitimate aim. Two recent decisions give guidance as to how to decide if pay arrangements that are, on the face of it, discriminatory are justified as a proportionate way of rewarding experience.

Wilson v Health & Safety Executive (2009) EWCA Civ1074 concerned an incremental pay scale under which pay increased with years of service up to 10 years. The employer argued that due to the ECJ decision in *Danfoss* no evidence justifying service related pay was necessary because it is obvious that performance improves with experience. The Employment Tribunal accepted this and the Claimant appealed, relying on the ECJ decision in **Cadman v Health & Safety Executive (2006) ICR 1623**, in which the Court said that the employer did have to provide further justification if the employee raised serious doubts as to whether using length of service to determine pay in their particular case was appropriate. In some jobs further years of experience do not improve further the employee's performance.

'generally service related pay will be justified'

The Employment Appeal Tribunal and the Court of Appeal agreed. They said an employer could be required to justify both using length of service in determining pay and the way in which they use it if the employee brought evidence to persuade a tribunal that there were serious doubts about whether their case was an exception to the general rule. One would expect that the more straightforward the job the more likely it is that the Claimant can convince the tribunal that taking into account length of service beyond a very few years is not proportionate as employees with longer length of service do not perform the job any better.

They also said that even if they were wrong about EU law employees could challenge the use of service related pay and the way it was used under the UK's Equal Pay Act.

This means that generally service related pay will be justified (so that discrimination claims will not succeed) but there is a possible exception where the number of years taken into account is more than the number of years an employee needs to reach full performance levels or the difference in pay due to service is large.

In the case of **Pulham & Others v London Borough of Barking and Dagenham (UKEAT/0516/08/RN)** employees were paid an incremental payment when they had both 25 years service and had reached the age of 55. As this was potentially age discriminatory under the Age Regulations the Council agreed with the trade unions that it would be changed under the Single Status Agreement being negotiated to eliminate gender discrimination in local authority pay arrangements. This Agreement came into effect on 1st April 2007, closing the scheme to new members and freezing payments to those already in the scheme. When the Age Regulations came into force on 1st October 2006 Ms Pulham had 25 years service but was not yet aged 55. She argued that the age criterion was unlawful under the Age Regulations. Ms Pulham relied on an earlier Court of Appeal decision on equal pay in **Redcar and Cleveland Borough Council v Bainbridge 2009 (ICR 133)** to argue that where past discrimination has been recognised the pay protection arrangements continuing the discrimination cannot be justified.

The Employment Appeal Tribunal accepted that it was a legitimate aim to modify the scheme to remove the illegality but they did not accept that the Bainbridge decision applied to age discrimination. They agreed that as a matter of policy employers who had not corrected unlawful sex discrimination over many years should not be given yet more time by allowing discriminatory pay protection. However as age discrimination was new law they saw no reason why the employer should not be allowed to justify the continuation of some past discrimination in transitional arrangements to adjust to the new law.

‘An Employer cannot limit its obligations not to discrimination by the size of the budget chosen by him’.



In finding for Ms Pulham they said that the Tribunal had given too much importance to the fact that the arrangements were agreed with the unions. Although agreement with representatives of the workforce was indeed a relevant factor in justifying the arrangements the Tribunal must also make its own assessment of whether the arrangements were a fair balance between the needs of the Council and the discriminatory impact. Also the Tribunal had failed to consider the position of those, like Ms Pulham, who satisfied the service criterion but not the age criterion.

They also said the Tribunal relied too heavily on the fact that the Council’s budget for settling equal pay claims under the Single Status Agreement had been exhausted. An Employer cannot limit

its obligations not to discrimination by the size of the budget chosen by him. In any event the budget was for a different purpose, that is the settlement of equal pay claims and this was a case of age discrimination.

Note that cost cannot, in itself, justify discrimination but can be a factor that is taken into account together with other factors.

These two cases illustrate that service related pay can be lawful but the rationale behind it must be carefully considered in each case.



CASE UPDATE!!

TUPE

Simpson Millar LLP has been acting for the Communication Workers Union v Royal Mail Group Limited on the application of the Transfer of Undertakings (Protection of Employment) Regulations – referred to as TUPE – since the claim was first issued in the employment tribunal in 2007.

The Union's case was that the Respondent employer failed to inform and consult with it in connection with the transfer of a number of post offices to WH Smith. The employer thought that, on its interpretation of TUPE, no-one would transfer to WH Smith and accordingly it did not have to inform and consult with the Union about aspects of the transfer which related to WH Smith. The tribunal held that the employer's interpretation was wrong and that in any event, it did not inform and consult. The employer appealed to the Employment Appeal Tribunal claiming that it informed and consulted on what it genuinely believed the implications of the transfer to be. The Employment Appeal Tribunal decided that employers must inform and consult on what it believes i.e. it is a subjective not an objective test. It considered that there was not enough evidence to say that the employer's belief was not genuine and, as this was a serious allegation, there must be evidence to support it. The matter was further appealed to the Court of Appeal who confirmed that an employer only had to inform and consult on what it believes – even if that belief is wrong in law.

The matter is now to be re-heard by a fresh employment tribunal who will consider if the employer informed and consulted on what it genuinely believed the implications of the transfer would be.

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