

Dismissal to avoid early retirement benefits is age discrimination

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The Employment Appeals Tribunal has confirmed that it can be an act of unlawful age discrimination to fail to redeploy a redundant employee because he or she will shortly become entitled to an early retirement pension.

In the case of London Borough of Tower Hamlets v Wooster, the Employment Appeals Tribunal (EAT) has upheld a tribunal's decision that a 49-year-old employee was discriminated against on grounds of age when he was made redundant. The EAT agreed with the tribunal that there was strong evidence that the employer's failure to redeploy the employee was motivated by a desire to avoid the costs associated with him becoming entitled to an early retirement pension at age 50.

Mr Wooster was employed by the London Borough of Tower Hamlets, although he had been seconded to EEH, a provider of social housing. The pension scheme provided that he would be entitled to an early retirement pension if he remained employed until his 50th birthday, which fell in July 2007. His employer told him in October 2006 that the secondment arrangement was due to come to an end, attempts would be made to find him alternative employment, but if these were unsuccessful he would be dismissed for redundancy. In the event no alternative role was found and Mr Wooster's employment ended at the end of December, despite an offer by EEF to extend his secondment until he became entitled to his pension.

Mr Wooster then brought claims of unfair dismissal and age discrimination before an employment tribunal. The tribunal found that the dismissal was automatically unfair because the Council had failed to comply with the statutory dismissal procedure, which was still in force at the time. On the question of age discrimination, the tribunal noted that the Council had been explicit about its wish to avoid paying the early retirement pension – it was on record as stating “if he goes now we do save the pension” in connection with its decision not to accept EEH's offer to extend Mr Wooster's secondment. Plainly in the tribunal's view that meant the pension issue, which was inextricably linked to Mr Wooster's age, had been the 'tipping point' in the decision to dismiss. An employee who was not aged 49 would not have been treated in this way, and the tribunal therefore upheld the claim of age discrimination.

At the appeal, the Council argued that a decision to extend the secondment would have been ultra vires and therefore unlawful. Whilst it accepted this as true, the EAT said that this did not exonerate the Council. The tribunal had not upheld the age discrimination claim because the Council had refused to extend the secondment, but because the failure to redeploy Mr Wooster was less favourable treatment on the ground of his age. The Council's motivation, namely the ultra vires issue, was only part of the picture.

Although the case arose in a public sector context, any employer considering dismissing an employee in order to avoid having to pay an age related benefit should take note of it. That said, there was one important argument unexplored in the case, namely whether the Council's decision could have been justified as a proportionate means of achieving a legitimate aim. The Council did not raise a justification defence and the question of whether dismissing in order to minimise pension liabilities could be objectively justified will therefore have to await another case.

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