

Employment news: Justifying discrimination — is the tide turning?

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Christina Morton

PROFESSIONAL SUPPORT LAWYER | UK

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Employers who have been advised that they can adopt or continue a certain, potentially discriminatory, practice if they can objectively justify it will often assume that they can base a justification argument on cost. In fact the picture is more complex, but a recent case suggests that the law may start to become more favourable to employers.

In discrimination law, certain policies or practices that are potentially discriminatory will be lawful if the employer can show that they are objectively justified. The alternative way of describing this is that the policy or practice is a proportionate means of achieving a legitimate aim. It is possible for an employer to objectively justify indirect discrimination because of sex, race, religion, disability or sexual orientation and both direct and indirect discrimination because of age.

What is a legitimate aim?

Defining what this actually means in specific cases can be difficult. It is necessary to think first about what the employer's aim is. The aim might be to improve business efficiency or customer service, to encourage or reward employee loyalty or to promote health and safety – all examples of legitimate aims. On the other hand, a practice whose aim was to discourage women from applying for particular jobs would not be a legitimate aim (because the aim itself is discriminatory on grounds of sex). Nor would a practice aimed at ensuring that a particular racial group achieved faster promotion in the organisation than other racial groups (because that would be unlawful positive discrimination).

Proportionate means

The next stage is to consider whether the means the employer has chosen to achieve an aim is 'proportionate'. 'Proportionate' in this context has been interpreted to mean 'having the least possible discriminatory impact'. For example, if an employer wants to improve the professional image of the business (a legitimate aim) by introducing a dress code, there is potential for this to have an adverse impact on employees who wear particular clothing for religious reasons. To show that the means chosen for pursuing that aim were legitimate, the employer would have to show that it had considered various options (such as permitting employees to wear items of religious dress in corporate colours) and had not simply imposed a single uniform without attempting to adapt it for those with a particular religious belief.

Cost considerations

One controversial aspect of the law in this area is that the cases have suggested that an employer cannot justify a practice on the basis of cost alone. This principle comes from the 2005 case of *Cross v British Airways* in which the Employment Appeal Tribunal (EAT) said that an employer who wishes to justify a practice that is discriminatory is not entitled to rely solely on considerations of cost. However, the employer is entitled to put cost considerations into the balance with other arguments. In other words, cost alone is not an argument an employer can use when arguing that a practice is justified, but cost plus some other factor is.

This has led to difficulties for employers seeking to justify, for example, withdrawing benefits for employees who are kept on after retirement age: employers have not been able to argue that the cost of paying premiums for insurance related benefits for older workers is disproportionately high and therefore a valid reason for withdrawing the benefit.

The Woodcock case

A recent case may signal that the courts are about to change their approach. *Woodcock v Cumbria Primary Care Trust* involved the dismissal of the Chief Executive of an NHS Trust. His post disappeared in a reorganisation and he was not selected for the successor post. He took various temporary positions, but was then dismissed with 12 months' notice that expired prior to his 50th birthday. This date was critical because on his 50th birthday he would have become entitled to take early retirement, increasing the cost to the Trust of terminating his employment by at least £500,000.

He argued that the dismissal was discriminatory on grounds of age, as the Trust's reason for dismissing him when they did was to avoid paying him these retirement benefits. The Trust admitted that age was a consideration, though only once it had realised that the cost to the Trust of delaying the dismissal decision would be so significant. The tribunal decided that there was age discrimination – the question was 'did the cost involved justify it'? The tribunal decided that the discrimination was justified, particularly in view of the fact that there were clearly no jobs available for

Mr Woodcock that he was prepared to do. Moreover, it was legitimate for an employer to make a discriminatory decision in order to avoid an employee gaining a windfall.

Cost alone may be justified

Mr Woodcock appealed. He said that the tribunal had been wrong to take into account the question of the cost savings to the Trust that arose from the timing of his notice of dismissal. They had only considered cost and that was not enough to justify age discrimination. The EAT disagreed and said that the tribunal had not considered cost alone. It had also considered the windfall Mr Woodcock would have gained. Taken together the two factors justified the Trust's actions and the tribunal's endorsement of them.

The EAT then went on to comment more generally on the issue of 'cost alone' decision-making. Although it said that it would not change the law in its decision in Mr Woodcock's case, it did think that requiring employers to come up with a reason other than cost was resulting in employers having to engage in what it described as 'artificial game playing' in trying to find the 'other factor'. It thought that employers ought in principle to be able to defend their actions on the basis that the cost of alternatives was disproportionately high.

This is a welcome sign that the law in this area may in time become simpler for employers to apply, but further cases will be needed to clarify the position fully. In the meantime, employers need to continue to weigh up carefully their reasons for adopting or continuing with practices that have a discriminatory effect, particularly where cost is in reality the overriding factor.

Authors

Christina Morton

PROFESSIONAL SUPPORT LAWYER | LONDON

Employment

 +44 20 7597 6654

 christina.morton@withersworldwide.com