



HR Bulletin

E-Update 58 - February 2016

Age Discrimination

The Equality Act 2010 makes it unlawful to discriminate against employees, job seekers and trainees because of age. For example, this may include because they are 'younger' or 'older' than a relevant and comparable employee. In this month's bulletin new case law discusses a number of decisions made by the employer; to avoid paying extortionate pay-outs to long serving employees. Is this discriminatory? Or is it 'a proportionate means of achieving a legitimate aim?'

A council spending public money in making people redundant will naturally want to make sure that the exercise, while fair, is carried out as cost effectively as possible. Meanwhile employees coming to the end of a long career will want to time their eventual exit to the maximum possible advantage. The tension between these two sets of priorities will be resolved to some extent later this year when the Government clamps down on what it views as excessive severance payments. The gross exit package for public sector employees will be capped at £95,000. Crucially and unless representations from interested parties and amendments being proposed by Members of the House of Commons Committee, are accepted at the Committee Stage, this overall cap will include any costs incurred by the employer in providing early, unreduced access to the employee's pension.

The prospect of losing out on early retirement benefits may prompt many employees who qualify to volunteer for redundancy before the cap comes into force. This is potentially a significant expense for employers and the temptation might be to refuse to make employees redundant if they are simply too expensive to let go. The trouble is that such a refusal is almost certain to amount to age discrimination.

Take a recent case from the private sector. In *Donkor v Royal Bank of Scotland* a senior employee was denied the option of applying for voluntary redundancy that was given to two of his colleagues. The reason for this was that since he was over 50, a redundancy would enable him to take early retirement at an undiscounted rate – with a direct cost to his employer of some £460,000. Given that price tag it is not surprising that the employer was keen to find him some alternative work to do. Soon after he accepted the alternative role the pension rules changed so that the early retirement option was only available to employees aged 55 or over. There was a new restructuring exercise and this time his application for voluntary redundancy – without the early retirement option – was accepted.

His claim for direct age discrimination was initially rejected by the Tribunal, which held that the reason he was at first denied voluntary redundancy was not his age, but the astronomical cost of letting him take early retirement. The EAT overturned this finding. The huge expense in allowing him to take voluntary redundancy was simply a consequence of the fact that he was over 50. The reason for the employer's refusal was age – even if the motivation lying behind that reason was an understandable urge to save money.

Age discrimination is, however, unique in the Equality Act in that it is possible for an employer to argue that direct discrimination is justified – a proportionate means of achieving a legitimate aim. The *Donkor* case has now been sent back to the Tribunal to decide whether the test of justification was met. At first sight this would seem to be an open and shut case. Any employer would want to avoid spending a significant amount of money on making one employee redundant and, in any event, the discrimination consisted of finding the employee alternative work rather than making him redundant – which is hardly the most oppressive form of discrimination one can imagine.

In previous cases involving employers seeking to avoid making huge pension payments, the issue has turned on whether the employee had any reasonable expectation of being allowed to reach early retirement age. In *Woodcock v Cumbria Primary Care Trust*¹ the employer brought forward the employee's notice of dismissal so that it expired before he qualified for an enhanced pension that would have cost the employer at least half a million pounds. The direct age discrimination involved was held to be justified by the Court of Appeal, but in that case the employee had managed to delay his redundancy significantly by spending a year on secondment and then repeatedly postponing a consultation meeting. In bringing forward his dismissal the employer was simply preventing him from enjoying a windfall.

That case was, however, decided before the decision of the Supreme Court in *Seldon v Clarkson Wright and Jakes*². The facts of that case were very different, involving the forced retirement of a partner in a law firm, but Baroness Hale reviewed the European case law and concluded that to justify direct age discrimination, the employers aim had to be a social policy objective 'such as those related to employment policy, the labour market or vocational training'. The aim had to be of a

'public interest' rather than a purely individual reason 'such as cost reduction or improving competitiveness'.

So we cannot take it for granted that a local authority seeking to avoid making people redundant who qualify for enhanced pension rights would be able to show that such discrimination was justified. Certainly it will not simply be enough to point to the exorbitant cost of the exercise – something more than that is needed. One option, for example, could be looking at what else could be done with the money. Perhaps fewer people could be made redundant or a more generous redundancy package could be provided for all. Viewed in that context the aim of the discrimination is not to save money per se but to achieve fairness in protecting jobs and public services or compensating those who lose their jobs more generously. Although there are many policy and practical hurdles to such an option within the local government context, it may be enough to persuade a tribunal that there is a 'legitimate aim' and that the employer's approach was proportionate in all the circumstances.

The problem will, of course, go away to some extent by the end of the year when the Public Sector Exit Payments Regulations 2016 come into effect. On the other hand, I wouldn't rule out a legal challenge to the Regulations, which are obviously more likely to affect the severance payments of older employees. Attempts to strike down Regulations through Judicial Review are not usually successful, but they can lead to a year or two of uncertainty. It may be that this issue will not go away as quickly as we might hope.

Keep in Touch

Twitter - @DazNewman

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¹ [2012] EWCA Civ 330

² [2012] UKSC 16



Do you want to know what type of person you're hiring?

Walt Bettinger, CEO at the investment and online trading firm Charles Schwab says "I'm most concerned with the kind of person they are, their character," Bettinger said.

The CEO has a trick up his sleeve to see whether or not a jobseeker is a good fit for his company: take candidates for breakfast and ask the restaurant ruin their order.

Bettinger explained: "I'll get there early, pull the manager of the restaurant aside, and say, 'I want you to mess up the order of the person who's going to be joining me. It'll be ok, and I'll give a good tip, but mess up their order'.

"I do that because I want to see how the person responds. That will help me understand how they deal with adversity. Are they upset, are they frustrated or are they understanding? Life is like that, and business is like that. It's just another way to get a look inside their heart rather than their head."

This approach is very telling!

WME thought of some weird and wacky selection ideas to assess potential talent, however as good as they sound – we wouldn't recommend it.

- Candidates are asked to make a wacky video of them doing the weirdest and wonderful things they can imagine?
Competency assessed: creativity and Initiative

- Before the interview starts; the candidate is asked to make a cup of tea for all panel members. (Well why not? - Interviewing is a thirsty job)

Competency assessed: modesty, communication, organisation skills and thoughtfulness – 2 sugars please!

- Interviews could be structured so that at any time during the interview, the panel members may show disapproval to the candidate by pressing a buzzer which lights a large red "X". If all the panel members press their buzzers, the interview ends immediately. Sorry you're fired!

Competency assessed: Resilience, Working under pressure

Happy Recruiting!



In the **SPOTLIGHT**



Aspire Showcasing HR

Tuesday 12th April 2016



WME is hosting our **first** ever national event in London, in partnership with the **CIPD** and **LGA** on the 12th April, as part of our Aspire Showcase, we have representatives from **Penna**, **Hay** and the **NHS** attending too.

The event is **FREE** to attend and is being held at West Ham Football Club.

The full programme can be found at www.wmemployers.org.uk/aspire-london

The event will give you the opportunity to hear How HR and Business Partnering can be a mechanism to address some of the **BIG** 'Strategic Business' challenges facing the public sector today.

There will be **4 presentations** throughout the day where delegates will be presenting their project outcomes to an impressive Aspire panel. The panel will consist of inspiring leaders in our field **Stephen Moir** (Chief People Officer, NHS England), **Yvonne Skingle** (Director Local Government & Housing, Penna), **Debbie Morris** (Director of Human Resources, London Borough of Hammersmith and Fulham) as well as **Hay Group** who are supporting the event.

Booking

Places are free and limited so please book now on the link below to avoid disappointment.



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