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Original Citation

Lane, Jackie (2012) 'Cost Controls': What are the limits to the defence of objective justification in age discrimination? CILEX Journal. pp. 38-39. ISSN 2050-0580

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What are the limits to the defence of objective justification in age discrimination? A consideration of the recent cases of *Woodcock v Cumbria PCT* and *Seldon v Clarkson Wright and Jakes*.

Age is the most recent addition to the list of characteristics protected by law and now contained within the Equality Act 2010; it is perhaps this newness that has promoted a plethora of judicial decisions relating to the interpretation of the defence – unique to direct age discrimination – of objective justification. But what are the limits, if any, to the defence? Have the courts in England and Wales and the Court of Justice of the European Union (CJEU) already gone too far in allowing objective justification as a defence and thereby diminished the protection of the law in this area? And can costs ever be used to justify age discrimination?

In *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330, Mr Woodcock, a former Chief Executive of the NHS Trust, appealed to the Court of Appeal when his action on the grounds that he suffered direct discrimination by way of less favourable treatment because of his age was not upheld, since the action of the Trust had been found to be objectively justified by a legitimate aim. His appeal was partly on the basis that cost saving could not a legitimate aim in justifying age discrimination. Certainly the parent EC Directive 2000/78 appeared to permit only specific examples of defences to direct age discrimination, namely “legitimate employment policy, labour market and vocational training objectives”, although the UK consultation papers on age discrimination suggested there could be other legitimate aims such as health, welfare and safety concerns and the particular training requirements of the job in question. The main criterion was that to be a legitimate aim, it had to correspond to a real need on the part of the employer, which could include cost. Can cost alone, however, justify direct age discrimination?

The employer must show not only that he has a legitimate aim for his use of an age-based distinction, but must also show that the action was proportionate, that is that the use of the age factor was “appropriate and necessary”. Having a legitimate aim which is obtained by proportionate means constitutes the test of objective justification.

The Supreme Court gave its decision in the case of *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16 shortly after the Court of Appeal had delivered its judgment in *Woodcock*. This case also concerned the scope for justifying discrimination

on the grounds of age, although it differed from *Woodcock* in that it concerned mandatory contractual retirement ages which at the time of the incident in question were still potentially lawful. Lady Hale, giving the judgment of the Court, commented on the subject of what constitutes a 'legitimate aim' within Directive 2000/78, saying that these were social policy objectives and therefore distinguishable from reasons that related purely to the employer's personal situation such as a desire for cost reduction, although accepted that a national rule may recognise that an employer would have a degree of flexibility. A number of legitimate aims have been recognised in various cases before the CJEU, including the efficient planning of the departure and recruitment of staff, promoting access for younger people, ensuring a mix of generations, rewarding experience and facilitating the participation of older people in the workplace, although none were concerned with cost saving for the employer. Lady Hale in *Seldon* categorised these as *intergenerational fairness* aims. The outcome of this case was the dismissal of Mr Seldon's appeal against his enforced retirement from the firm of solicitors where he worked as a partner, as the aims identified by the firm (none of which were linked to cost) were found to be legitimate by the Supreme Court.

Mr Woodcock was given his contractual period of twelve months notice of redundancy by his employer, Cumbria Primary Care Trust (PCT), just before his 49th birthday and before formal consultation had commenced. Had the PCT waited until after his birthday, he would have been able to continue to work until after the age of 50 and would therefore have received greatly enhanced pension benefits. Woodcock's comparator colleagues *were* formally consulted before notice of their redundancy was given and he considered that he had therefore been subjected to less favourable treatment because of his age. His claim failed in both the Employment Tribunal and the EAT, but went on to a further appeal in the Court of Appeal where it was confirmed that, even though the action of the PCT was directly discriminatory, there was a defence because, in certain limited circumstances, financial considerations could provide justification for what would otherwise constitute unlawful direct discrimination.

This finding was in spite of the orthodox position taken by cases such as *Cross and others v British Airways plc*, UKEAT/0572/04, which was that considerations based on cost alone cannot justify treatment which is discriminatory on grounds of age. In his reserved judgment in *Cross*, Burton J (the then President of the EAT) gave the following

observations in relation to certain decided cases that appeared to accept costs as justification for discriminatory treatment:

It seems to us, as a matter of obvious common sense...that, albeit in the weighing exercise, costs justifications may often be valued less ... economic justification such as the saving, or the non-expenditure, of costs...must be considered.

Burton J referred to the case of *Hill and Stapleton v The Revenue Commissioners and Department of Finance, C-243 95*, a case in which the European Court of Justice (ECJ) considered an economic justification put forward by the employer for discriminating between full-time and part-time civil servants, in which the ECJ said: 'So far as the justification based on economic grounds is concerned, it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs.'

The European Court had not before used the word 'solely' in the context of rejecting cost as a justification for age discrimination, but used the same reasoning in the later cases of *Kützbauer* [2003] IRLR 368 (ECJ) and *Stienicke* [2003] IRLR 892 (ECJ). Burton J concluded that, 'A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely *solely* on considerations of cost. He can however, put cost into the balance, together with other justifications if there are any.'

This meant that employers could apply the 'cost plus' principle to justification. The key question in *Woodcock* was essentially whether this was a cost-plus case, in other words that cost could only be considered to be a legitimate aim if linked to a non-cost factor. It was argued for Mr Woodcock that there was no apparent 'plus', and that the aim in giving the dismissal notice when it did was simply an attempt to avoid costs that it would otherwise incur. Nonetheless, Rimer, LJ, giving the decision of the Court, thought that there was 'some degree of artificiality about such an approach to the question of justification' since 'almost every decision taken by the employer is going to have regard to costs.' He went so far as to say that it would have been 'irresponsible' of the Trust to have acted otherwise, and dismissed the appeal.

The question now is whether the courts have now gone too far now in accepting that cost considerations can be justification for direct age discrimination? In the Government consultations on the age regulations, it was stated that the test of objective justification

would not be an easy one to satisfy. The cases heard by the European Court unequivocally show that cost considerations alone cannot be justification for age discrimination; the decision in *Woodcock* might, however, encourage employers in future to attempt to justify direct age discrimination on the basis of cost which will further erode the protection for workers from discrimination because of their age which, it is submitted, was not the original intention of the legislation.

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