Appeal No. UKEAT/0149/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE 2-6 SALISBURY SQUARE, LONDON EC4A 8AE

At the Tribunal
On 6 December 2018
Judgment Handed Down on 25 June 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR C HESKETT — APPELLANT

THE SECRETARY OF STATE FOR JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GORDON MENZIES (of Counsel) Instructed by: Baileyfields Thorne Estate Business Park Forge Hill Bethersden Ashford TN26 3AF
For the Respondent	MISS CLAIRE DARWIN (of Counsel) Instructed by: Government Legal Department Employment Team One Kemble Street London WC2B 4TS

SUMMARY

AGE DISCRIMINATION

Following funding cuts imposed by central government the Ministry of Justice made changes, among other things, to the rate at which certain Probation Officers progressed up an incremental salary scale. The effect was that progression to the top of the scale would take many years longer than had previously been the case.

The Tribunal found that the policy was *prima facie* discriminatory in favouring employees over the age of 50 as against younger employees. That finding was not appealed.

However, the Tribunal went on to find that the policy was, in all the circumstances, justified. The EAT rejected the Claimant's appeal against that finding, holding that the Tribunal was entitled to find, on the facts, that this was not a "cost alone" case (see **Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330 which held that cost alone could not amount to a legitimate aim capable of justifying discrimination). The EAT noted that following **HM Land Registry and Benson &Ors** [2012] IRLR 373 and **Edie &Ors v HCL Insurance BPO Services Ltd** [2015] OVR 713 it is legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources.

The present Tribunal had correctly identified the key questions before it and weighed the relevant factors in the balance. The resulting decision was one which it was entitled to make, and with which the EAT could not interfere.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against a decision of the Employment Tribunal sitting in Ashford (Employment Judge Crosfill sitting with lay members Mrs Serpis and Mr Clay) which held that the Respondent's pay progression policy (which applied with effect from 1 April 2011) was not discriminatory in relation to the Claimant's age, because the Respondent had shown that it was a proportionate means of achieving a legitimate aim within s.19(2)(d) of the **Equality Act 2010**. The written reasons were provided in September 2017.

2. The case was permitted to proceed by HHJ Eady QC on all three grounds following a hearing under Rule 3(10).

3. I shall refer to the parties as they were below. Each was represented by counsel who also appeared below, Miss Darwin for the Respondent and Mr Menzies for the Claimant. I am grateful to each for their succinct skeleton arguments and oral argument. I have had regard to all points raised in their respective arguments, and to the authorities cited, but will not cover every point raised each in this Judgment.

4. The Claimant is a Probation Officer. He is employed by the National Offender Management Service (NOMS), currently part of Her Majesty's Prison and Probation Service which is an executive agency of the Ministry of Justice and at all material times was on pay band 4.

5. Following the financial crisis in 2008, the Government announced a policy limiting pay increases across the public sector. As a result, the previous policy of a Probation Officer progressing 3 pay points within the very long scale applicable each year, it was reduced to progressing just one pay point per year. The effect was that it would take someone joining the scale towards the bottom 23 years to progress to the top, rather than just 7 or 8 years as had previously been the case. Older employees close to or at the top of the band would earn significantly more in salary and accrue greater pension benefits than those lower down the band, for as long as the policy persisted. As the Tribunal commented, at para 61 of the reasons, by 2015 the difference between the salary which the Claimant would have earned had the new policy not been implemented and that based on the former 3 points per year was about £5,000 per annum. He did the same work and has the same skills as the older employees who were fortunate to have accrued sufficient progression under the old scheme to progress to the top of the new one.

6. The Tribunal held that this progression policy was *prima facie* discriminatory in favouring employees over the age of 50 as against younger employees. Its reasoning is set out in detail in the written reasons, but as these findings are not the subject of the appeal it is not necessary to set them out in this judgment.

7. At paragraphs 47 and 48 and following, the Tribunal set out what it regarded as the task remaining and the legal approach which it had to take:

> **"47. It follows from our findings above that the issue central to this case is whether or not the Respondent can justify the prima facie discriminatory pay scheme. The parties were essentially in agreement as to the proper approach to justification. We have had regard to all of the authorities provided to us but take as a convenient summary the relevant principles as set out in Chief Constable of West Yorkshire & another v Homer [2012] ICR 708 in the opinion of Lady Hale where she said:**
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> **"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age**

discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

> **"". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.""**

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

> **""First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?""**

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

48.The manner in which the Respondent puts its case on justification in its ET3 is as follows:

> **""Even if, which is denied, the Claimant was to prove that the Respondent has indirectly discriminated against him on the grounds of his age, then the Respondent contends that this was a proportionate means of achieving a legitimate aim : i.e. the need to balance the ability to continue to award Probation Officers with an annual incremental annual pay rise in recognition of the difficult and valid role they undertake, and to thereby to retain these vital employees in employment; versus the significant reduction in public money available to run this vital service and remunerate its employees in light of the significant downturn in the economic climate from 2010 onwards"" .**

8. At the hearing before the Tribunal, the Respondent advanced further strands to that argument see para 49 of the decision. In further detailed reasons the Tribunal rejected the Claimant's argument that the principal driver for the changes introduced in 2012 was cost. Relying on **Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330 the Claimant had submitted that cost alone could not amount to a legitimate aim capable of justifying discrimination. (Reasons para 50).

9. Evidence had been received from Mr Jason Paskin, Head of Pay and Reward. Mr Paskin evidently impressed the Tribunal with his evidence, which was plainly heartfelt. (see Reasons,

A para 18 and 51.4). Mr Paskin had accepted that the existing pay system was unacceptable and that although it was hoped to move towards a new model, he had not made much progress to date.

B 10. I have seen the Employment Judge's notes of the cross examination of Mr Paskin. The following passage (I have copied it as written, with explanatory passages by the Employment Judge in parentheses) is of relevance to the issues:

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> **"A: [Prior to 2010] we worked to a remit. There was an increase on the pay bill sometimes up to 5%. I suspect that until the pay freeze the work was done through the negotiating committee. By 2011 there was a reduction to 1 progression point because of the pay freeze.**
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> **Q: We have not seen any evidence that the [issue of the age discriminatory effect of a long pay scale] had been discussed, was it?**
>
> D **A: When I saw this for the first time I immediately went "gasp" and raised concerns about the length of the pay scale. One of the [I have written 'decrees'] at work was to remedy it.**
>
> **Q: How far has that got?**
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> **A: Other priorities have taken over and work has slowed. It had been flagged before I took over in 2015. It is likely to change in the near future. We have a project team work on it. It isn't supporting the needs of the employer. It is not working for people. Your [that is thought to be a reference to me or the tribunal] concerns are shared."**

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11. At paragraphs 57 and 58 of the Reasons the ET said this:

> **"57. It seems to us that the aims of the Respondent cannot simply be described as cost cutting. That might have been the aim of central government in issuing a pay cap, but on a department level the aim was far more nuanced than that. The Respondent, like any private sector business, needed to live within its means. The measures it adopted were its means of doing so and not its objectives. As such we do not think that the Respondent is relying on cost to justify its discriminatory conduct. It was an absence of means which forced the Respondent to take the decisions it did but that is not the same thing.**
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> **58.In the circumstances we are persuaded that the implementation of the new pay policy was for the legitimate aims identified by the Respondent."**

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12. The first ground of appeal argues that the reason for the implementation of the policy was simply determined by cost and to comply with central government policy, and could not, without more, amount to the achieving of a legitimate aim. See **Woodcock**. It goes on to argue that the

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words "it was an absence of means which forced the respondent to take the decisions it did but that is not the same thing" amount to an error of law: it is a distinction without a difference.

13. In answer to the first ground of appeal the Respondent points out that the Tribunal held that the legitimate aims pursued by the Respondent were 'retain some incentive, reward loyalty and experience, avoid redundancies and preserve accrued rights', and it paraphrased the Respondent's legitimate aim as being an attempt to agree fair pay policy in straitened circumstances.

14. Miss Darwin points out that there is no definition of "legitimate aim" contained in domestic or European legislation. She refers to guidance contained in the **EHRC Statutory Code of Conduct**, at para 4.28 which provides as follows:

> **"The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence."**

15. Miss Darwin recognises that the EAT is bound by **Woodcock**, and accepts that any argument on the principles set out in that case must be for a higher court. However, she contends that there is a distinction between "cost" and "fair distribution of limited resources". Whilst on the state of the current law an employer cannot rely solely on the former, she says, it can rely on the latter as the **EHRC's Code of Practice** explains at 4.29:

> **"Although reasonable business needs and economic efficiency may be legitimate aims, an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination."**

She places reliance on **HM Land Registry and Benson** [2012] IRLR 373 and **Edie &Ors v HCL Insurance BPO Services Ltd** [2015] OVR 713.

Miss Darwin goes on to rely on para 4.30 of the Code:

> **"Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."**

16. Miss Darwin also submitted that the CJEU has recognised that budgetary considerations and constraints may underpin or influence decisions by an employer about the nature or extent of the measures that he adopts, and cites **Fuchs and Köhler v Land Hessen** [2012] ICR 93 and **Schmitzer v Bundesministerin für Inneres** [2015] IRLR 331.) So far as is relevant the latter case seems merely to incorporate a passage from the former, referring in very general terms to Member States not being precluded from taking into account budgetary considerations at the same time as political social and demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination. I have not found that principle of any assistance in the present case, in which the distinction between central government – which imposed the pay freeze – and the Respondent, which had to implement it, is stressed more than once on the Respondent's behalf.

17. Miss Darwin also reminded me of the trite principle that it is for a Tribunal to resolve the question of justification and that, absent any error of law in its approach, the EAT can only interfere with the decision if the Tribunal's decision is perverse: one which no Tribunal could reasonably have reached on the evidence before it.

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18. The second ground of appeal concerns the Tribunal's approach to the finding which it made as to the active consideration being given by the Respondent to change the policy to eliminate the lengthy pay progression. Mr Menzies for the Appellant argues that this is an error of law and says that the fact that the Respondent recognised the discriminatory impact is not a justification. He also argues that the ET erred in relying on **Naeem v Secretary of State for Justice** [2017] UKSC 27 for the proposition that active consideration of change could amount to justification.

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19. Miss Darwin argues that the Respondent had not relied on its intention to change the pay progression policy by shortening the bands as a legitimate aim, but, rather, as a matter relevant to proportionate means. This is different from **Naeem,** she says, because in that case the Respondent had expressly relied on the fact that it was transitioning to a new pay scale as constituting a legitimate aim. The Tribunal's conclusions at paras 60 to 71 of the Reasons were, she says, an adjudication on the Respondent's policy as it then stood, and not on a future policy.

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20. The third ground of appeal asserts that the ET erred in law in concluding, at para 69 of the Reasons, that it could infer that the Respondent reacted to the pay freeze on the assumption that it would be a temporary measure: the policy has never been viewed other than as a stop gap measure.

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21. It is argued by Mr Menzies that this was never referred to in evidence, and no basis for the inference is stated. Moreover, a policy which is 6 years old, and was not stated to be transitional (unlike in **Naeem**) cannot objectively be regarded as "stop gap".

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22. Miss Darwin retorts that Ground 3 has misstated para 69. She says that, correctly read, the "temporary measure" in question was the pay freeze – a policy of central government, not the Respondent, and that references to 'temporary or transient in nature' are a reference to the (then) ongoing pay freeze rather than to the Respondent's pay progression policy.

23. There is a letter from the Respondent's lawyers in the Supplementary bundle dated 1st August 2018 which sought production of the notes of evidence of Mr Paskin, to which I have referred above. The letter contains the following two paragraphs:

> **"The material is relevant to Ground 3 of the Appellant's Grounds of Appeal, in which it is alleged that the ET did not hear evidence from which it could have legitimately inferred that the pay policy operated by the Respondent from 2011 was a temporary measure. The Appellant contends that there was no evidence to support this inference and that this was not the Respondent's case at the hearing. Further, the Appellant argues that the ET failed to set out to the evidential basis for such an influence.**
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> **The Respondent does not accept that this is the case. It contends that, inter alia, in his evidence, Jason Paskins advised that changes to the current system would be occurring in the near future."**

24. Plainly, Mr Paskin's evidence was, indeed, as the last paragraph of the letter suggested.

25. In my judgment, having examined the case law with care, there is indeed a distinction to be made between an absence of means and a Respondent seeking impermissibly to placing reliance solely on cost. Through no fault of its own, the Respondent was compelled to find a way of squaring a circle brought about by central government policy. It is clear from **Benson** and **Edie** that it is legitimate for an organisation to seek to break even year on year and to make decisions about the allocation of its resources. It is for a Tribunal to weigh the relevant factors in the balance to decide the key question, as identified by the present Tribunal which, at para 52

of the Reasons, cited **Benson** in support of a proposition which, it noted, was not disputed as being a proper statement of the applicable law.

26. The Tribunal referred to negotiations which had taken place with the Unions which resulted in a series of steps being taken, the effect of which, as the Tribunal found, was to prioritise the progression of lowest paid employees through the relevant scale, whilst making no pay rise to those on the top of the scale, until 2015. There was also a shortening of the bands, achieved by elevating the entry point, which had the effect of mitigating the discriminatory effect on others. It may well be that people in Mr Heskett's position suffered financially more than others, and that was plainly a factor in the decision making process which the Tribunal undertook. See, e.g. at paragraph 65 where the Tribunal commented that:

> **"The new pay policy was crafted to distribute that pain in as fair and equitable a way as possible given the constraints the Respondent was subject to"**

27. This was considerably more "nuanced" (to use the Tribunal's language) than a policy arising from cost alone. Consequently, I reject the first ground of appeal.

28. As to the second ground, it seems to me clear that the temporal effect was indeed a matter which the Tribunal had regard to in the context of resolving the issue of proportionality – in its words, above paragraph 60 of the Reasons "Were the means adopted proportionate – no more than reasonably necessary?" In answering that question the Tribunal had regard to the fact that fundamental changes to systems of payment could take a long time to implement, not least because of resistance on the part of some employees. At para 68 of the Reasons the Tribunal noted that the Respondent was aware of the discriminatory effect of the policy, and was taking steps to reduce the discriminatory effect.

29. In my judgment, the approach taken by the Tribunal was a legitimate one, in the context of proportionality. The Tribunal's finding was self-evidently based on the policy as it then stood – see para 71 "….*at the present time*, the pay policy….is justified as a proportionate means of achieving the legitimate aims identified." (Emphasis added).

30. If I am right that the Tribunal was entitled to draw a distinction, in the present circumstances, between cost and an absence of means – as to which see my conclusion on Ground 1 – then it follows that a further step in the process which the Tribunal set itself involved examining the issue of proportionality. The fact that the discriminatory effect of the policy had been noted, and also that steps were being taken to address it within a short period were, in my judgment, legitimate considerations for the Tribunal in that regard. The "shot across the bows" in the final paragraph of the Reasons, which suggested that, unless further changes were made within the near future, the outcome of a further complaint might be different does not, in my judgment, amount to an error of law or support the argument that the wrong test was being applied.

31. Much the same applies to the third ground of appeal. The Tribunal's comment as to the Respondent's approach being predicated on the pay freeze being a "temporary measure" seems to me an unexceptional one, and the reason given, namely that years of below-inflation pay settlements are politically unsustainable perfectly logical. Again, the comment was made in the context of the temporal nature of the pay policy, which was never expected to be in place permanently. Given the further findings, namely that changes had been made and others were intended to be made to reduce the discriminatory effects, I reject the suggestion that a finding that the policy was intended to be of a "stop gap" nature vitiates the Tribunal's conclusions. I

also do not consider that the Tribunal's reference to **Naeem**, in which the relevant question was of whether steps towards a new scheme were proportionate, was a misapplication of that authority.

32. For these reasons, I dismiss this appeal.