Age discrimination and objective justification: acting reasonably

The recent case of Witham v Capita Insurance has reinforced the need for any age-discriminatory conduct to be properly objectively justified.

Sarah Bull elaborates on the implications of this case

The case

Mr. Witham had been receiving benefits from Capita under a Permanent Health Insurance (‘PHI’) scheme, but these benefits were stopped when Mr. Witham reached 55 years of age. He had been denied the opportunity to join a more favourable scheme in 2002, which would have entitled him to PHI payments until the age of 65, as he was not ‘actively at work’ at the time. Mr. Witham claimed that stopping the benefits at 55 was directly discriminatory on grounds of age and that refusing to allow him to join the more beneficial scheme was an indirectly discriminatory practice.

The employment tribunal agreed entirely with Mr. Witham, saying that stopping the benefits on reaching the age of 55 was an inherently discriminatory act, and that Capita’s insurers would not indemnify Capita in respect of the PHI payments for those aged over 55, but the tribunal noted that this did not prevent Capita from paying for Mr. Witham’s cover itself, and that its refusal to do so appeared to be based solely on the cost of doing so.

Similarly, the requirement to be ‘actively at work’ to qualify for the other scheme was held to be indirectly discriminatory. Statistics were produced to demonstrate that this requirement disadvantaged those aged over 45, and Capita could not objectively justify refusing to allow Mr. Witham to join the more beneficial scheme, for the reasons outlined above.

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The principles

The most important take-away from this case for employers is the further indication that cost reduction alone is generally not considered by the courts to be a legitimate aim capable of justifying discriminatory acts. In fact, where direct age discrimination is concerned, the legitimate aim pursued must be a ‘social policy objective’. As such, when taking decisions that are based on age, or that could affect people differently based on their age, employers must be clear: such policies are discriminatory, and must be justified by reference to an aim that is more than simply cost-saving.

The future for cost as a justification for indirect discrimination is unclear, as several decisions of the EAT seem to have moved away from the principle that cost alone cannot justify indirectly discriminatory conduct. In another recent case, Land Registry v Benson, it was held to be justifiable to choose for early retirement those whose early retirement would be cheapest. The Land Registry’s aim to break even was a legitimate one, and it had no alternative to adopting the ‘cheapness criterion’ as a way of selecting which employees to make redundant.

It has also been held to be legitimate to consider cost on top of other factors, and the EAT has given other indications that cost alone could potentially be considered to be a legitimate aim. We are still awaiting a definitive decision on this point, however, and for the time being it will generally be safest for employers to ensure that their policies can be justified by reference to something other than cost reduction.

Age discriminatory practices – what is lawful?

The best way to avoid discrimination claims, and the uncapped damages that can potentially follow, is of course to avoid discriminatory policies. However, it is sometimes necessary to discriminate on the basis of age, and this was explicitly recognised in the Equality Act 2010: age is the only protected characteristic for which direct discrimination can potentially be justified. Indirect discrimination can also be objectively justified and the only difference between the two tests is that the legitimate aim pursued when directly discriminating must be ‘a social policy objective’. Examples of aims that have been held to
be social policy objectives include encouraging the recruitment of younger workers and avoiding the need to performance manage older workers so that they can retire with dignity.

So how can employers who are faced with difficult decisions about their older workers ensure that they remain within the law? Prevention is always the best solution, and involving employees from the beginning to ensure that they know what is planned and why it is necessary can persuade them not to pursue a discrimination claim. In case that strategy is not successful, though, employers should carefully look through the age-discrimination checklist before proceeding with a given policy.

**Age discrimination: employer checklist**

1. Is the policy directly discriminatory? In other words, is the criterion for treating people differently their age?

2. Is the policy indirectly discriminatory? This can be more difficult to decide, but if a policy seems likely to cause greater detriment to one age group than another, then it may be indirectly discriminatory. In these circumstances it may be wise to investigate further what the impact of the policy is likely to be.

3. If the answer to either of the above questions is yes, then can the policy be objectively justified? This question can be split into two parts:

   a. Does the policy pursue a legitimate aim? There are several different kinds of legitimate aim, and it would be impossible to list them all here. The key thing to remember is that for indirect discrimination a ‘real business need’ will suffice, but for direct discrimination a ‘social policy objective’ must be identified.

   b. Is the policy a proportionate means of pursuing that aim? This is a balancing act between the needs of the employer and the rights of the employee, and an investigating tribunal will need to be able to find that the policy was ‘reasonably necessary’ to achieve that aim. This means that if there is a less discriminatory way of achieving the same outcome, then the policy will not be proportionate, although this is not the only criterion.

If these three conditions can be satisfied, then the employer will have a robust defence in the event that an employee affected by their policy takes them to the employment tribunal.

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For more information about issues raised in this article, please contact Sarah Bull.