

# Age Discrimination Update (Pensions)

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# Content

- Recent Court of Justice of the European Union case law
- UK Appellate cases
- ET test case

# Court of Justice of European Union

- Two direct age discrimination cases
- Toftgaard
- Kristensen (Experian)
  
- Court considered the scope of the exception to the prohibition of discrimination contained in Article 6(2) and article 6(1) of the Directive 2000/78/EC

# Tofgaard

- Concerned entitlement to ‘availability pay’ where civil servants have been dismissed on grounds of redundancy
- Those redundant at 65+ were not entitled to it
- Those redundant at >65 were

# Toftgaard

- Court held that:
- The refusal to pay availability pay was discrimination on ground of age
- It did not fall within the exemption in article 6(2) because that applied only to occupational security schemes covering the risks of old age and invalidity
- Whilst the aims pursued were not unreasonable or inappropriate, they could be attained by less restrictive measures
- Accordingly the difference in treatment could not be justified under article 6(1)

# Kristensen

- Question here was whether the exception in 6(2) applied to a pension scheme that provided for pension contributions made by an employer to be increased with age.

# Kristensen

- The amount of contribution was determined by a percentage of basic salary and was graduated as follows:

- |            |                          |                          |
|------------|--------------------------|--------------------------|
| • Under 35 | 3% employee contribution | 6% Experian contribution |
| • 35-45    | 4%                       | 8%                       |
| • 45+      | 5%                       | 10%                      |

# Kristensen

- Accordingly, age-related increases in the pension contributions did not fall within the scope of article 6(2)
- Justification of the difference in treatment might be possible pursuant to article 6(1). Potential Grounds included enabling older workers entering late to build up a reasonable pension over a short period, including younger workers in the scheme at an early stage while making it possible for them to have a larger proportion of their income at their disposal and the need to cover risks the cost of which increased with age, such as death, incapacity and serious illness, all of which could be regarded as legitimate aims;



# Kristensen

- It was for the national court to establish whether the age-related increases in contributions met the requirement of genuinely reflecting a concern to attain those aims in a consistent and systematic manner whilst ensuring that they did not go beyond that which was necessary for achieving them.

# Lockwood v DWP

- Direct Age Discrimination

The issues for the ET were:

- Whether C was in materially comparable circumstances to employees aged 35 and above whose employment was terminated;
- If so, whether the payment of more compensation to those over 35 was justified i.e. was it a proportionate means of achieving a legitimate aim?

# Lockwood

- ET got comparative exercise wrong
- Ms Lockwood's age of 26 did not make the relevant circumstances of her case materially different from that of the comparator. Her case was that it was because of her age that she was being discriminated against. Just as a comparison between a black claimant and a white comparator is not invalidated because of their difference in race, so the comparison between the 26 year old Claimant and the 36 year old comparator is not invalidated either.
- On the contrary the comparison was relevant, valid and essential for the purposes of answering the question whether or not Ms Lockwood had suffered less favourable treatment on the ground of her age.
- CA concluded that ET was entitled to find the discrimination justified. It said it applied the correct test and gave the most careful consideration to the evidence.

# Budgen, Smith v MoJ

- Further illustration of the fact that the proper approach is for the court to look for the characteristic which governs the availability of the benefit.
- It is impermissible to use the protected characteristic – age- as the factor which makes the claimant and comparator different from each other.

# Heron v Sefton MBC

- EAT considered whether a local authority was required by an enactment to treat female employees aged over 60 less favourably than younger colleagues in calculating contractual redundancy payments set by reference to a statutory scheme.

# Heron v Sefton MBC

- The EAT held that the statutory scheme provides for the difference in treatment between employees dismissed by reason of redundancy who are over and 60 at the date of dismissal but it does not require that difference to be respected. A requirement is something which means that the person subject to it cannot do otherwise.”

# Sefton v MBC

- CSCS did not require the Minister to give effect to it, still less did it require Sefton to do so. The scheme did not apply directly to C's employment by Sefton. Its terms were incorporated into her contract of employment by Sefton when she was transferred. From that moment onward the terms became contractual not statutory so that even if the scheme must be interpreted as requiring Sefton to pay no more than 6mths pay, any requirement in relation to C was not a requirement of an enactment it was a requirement of a contract which incorporated the terms of an enactment.
- Even if the enactment did have direct effect upon the particular circumstances of C it would have to have been justified.

# Sefton v MBC

- Justification
- “In current circumstances when, as is notorious, men and women over 60 remain in large and increasing number members of the active labour force and may well require income from earnings to maintain their standard of living, the idea that the simple fact that a woman over 60 might be able to draw her state and civil service pension, so justifying a difference in treatment between her and a younger colleague will not do. Statistical evidence, no doubt collated by and available to Central Government, would be required to begin to justify the difference in treatment, especially now that the age of compulsory retirement in the civil service has been raised from 60 to 65.



# A19 Police Test Cases

- Instructive Re: ET's Approach to justification

# A19 test cases

- ET accepted that:-
- There may be multiple and interrelated aims that justify a PCP
- Sound management of public finances may be a legitimate aim. However, a discriminatory rule or practice cannot be justified by reference to a legitimate that is only the saving of cost.
- Costs plus i.e. the underlying justification may be the circumstances that led to the decision to cut costs
- A financial cushion available to disadvantaged workers can be taken into account in considering justification.
- It is not necessary that the justification is in the mind of the person at the time of the application of the PCP. However, the courts will treat with greater respect a policy that was carefully thought through: particularly when considering proportionality.
- Once a legitimate aim has been established it is still necessary to establish that its application was proportionate: that it was both appropriate and necessary. However, necessity does not mean that the application of the PCP must be the only way of achieving the legitimate aim. It is for R to establish this.
- Regulation A19 can be applied in the general interest of the efficiency of a force even where a cohort of officers is required to retire and individual consideration is limited to whether the officer can put forward some exceptional reason why he should not be retained.

# A19 Test Cases

- ET find that decision makers gave insufficient weight to the fact that most officers would be retiring in any event so the saving could not be considered to be all salaries of all officers who reached 2/3 APP.
- ET comment that obtaining legal advice is likely to be of more assistance in considering whether the forces' aims are likely to be held to be legitimate than in deciding proportionality.
- The determination of whether the application of a PCP is appropriate and necessary is essentially a factual question.
- Rs clearly thought that once legitimate aims had been established the matter needed little further consideration (wrongly)

# A19 Test Cases

- Justification requires more than a search for legitimate aims that can be put forward to support a decision that the force wishes to take and to protect against legal challenge.

# A19 Test Cases

- It is important to bear in mind that when one comes to the stage of justification there is already disparate impact on a group that shares a protected characteristic. That is why a defence of justification should be subject to detailed scrutiny.
- On facts, such scrutiny was not applied by decision makers in the Forces.