

Employment Rights Update

January 2010



We start the New Year off with a report on two recent European Court of Justice (ECJ) decisions which serve to illustrate how easily employers can justify acts which are discriminatory to certain age groups.

Unlike the other “flavours” of discrimination, direct age discrimination can be objectively justified – an employer can successfully defend a proven claim of direct age discrimination, if there is a good reason for it. At the time the UK Regulations were first available many people hoped that this justification defence would be strictly interpreted by the courts (i.e. that employers would have to go a long way to satisfy a tribunal that they were justified in discriminating). The two recent decisions below suggest otherwise.

Wolf -v-

Stadt Frankfurt am Main

Mr Wolf applied to join the German Fire Service, but was told that his application would not be considered as he was over 30 years old.

He brought proceedings in the German Court on the basis that the law restricting applications to those under 30 years of age represented direct age discrimination. The German court referred the matter to the ECJ.

The ECJ had to consider whether direct age discrimination could be justified as a “genuine and determining occupational requirement”. The objective of such justification had to be legitimate and proportionate. The Court held that the proper functioning of the German Emergency Service was a legitimate objective. The German government had produced evidence that it was a

requirement that fire-fighters had to be in top physical condition in order to perform their job properly. It also submitted unchallenged evidence that few people over 45 would have the exceptionally high physical capacity needed to fight fires. The ECJ concluded that a maximum recruitment age of 30 was therefore proportionate.

It is arguable that one of the aims of the age discrimination legislation was to challenge these preconceptions about a person's capabilities after a certain age. Could the objective not have been met by a rigorous physical fitness test?

Petersen -v- Berfungusschuss für Zahnärzte für den Bezirk Westfalen-Lippe

This is another German case. This time the ECJ had to consider the maximum age of 68 which applied to dentists working in the German National Health Service. Ms Petersen argued that it was direct age discrimination. The age limit did not apply to dentists in private practice.

The German Government argued that the age limit was necessary for the protection of health, which is one of the exceptions to the rules on equal treatment under the Equality Directive.

The ECJ considered two different objectives which might be considered necessary for the protection of health. They were: -

- (a) Ensuring the competence of dentists.
- (b) Ensuring the financial viability of the system.

The ECJ held that these were both legitimate aims – at least potentially.

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The next question was whether the restriction was a proportionate means of achieving those aims. In relation to the aim of protecting the public from incompetent dentists, the ECJ held that it was not proportionate. Their decision was based upon the fact that private sector dentists were not subject to the same age limit, nor indeed any age limit. This clearly undermined the state's reasoning – why ought state dentists to pose a greater risk to the public than those in the private sector?

However, the objective of ensuring the health service remained financially viable was potentially justifiable; as it gave a means of limiting the number of dentists in the system.

The ECJ also endorsed the argument that the rule was a proportionate means of giving younger generations the opportunity to work in the service.

This argument that age limits in employment ensure a flowing labour market has proved a popular argument for the domestic courts as well. However, with an ageing workforce one wonders how long it can remain properly arguable. With more older employees, and proportionately fewer younger ones, in the modern workplace, will it remain possible to say that there are no jobs for the up-and-coming generation, unless the older workforce gives way?

For further discussion on this topic please see our employment law blog on <http://morrishsolicitors.blogspot.com>

We welcome your feedback on our Employment Rights Update. Please feel free to email us with any comments or

suggestions for improvement to jayne.phillips@morrishsolicitors.com

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