



# Justifying age discrimination on grounds of cost

Regarding cost as a justification to age discrimination alongside 'other factors' involves unsatisfactory game playing for both employees and employers, says **Deshpal Panesar**

The Court of Appeal ruling in *Woodcock v Cumbria PCT* [2012] EWCA Civ 330 was expected to provide clear guidance on whether cost can justify age discrimination and other forms of discrimination where a justification defence applies. Regrettably, the guidance that emerged is not clear.

The express legal position with regard to justification is deceptively simple: for states seeking to justify their legislation, cost cannot amount to a legitimate aim; for employers, cost alone cannot amount to a legitimate aim but it can be a factor – a principle re-stated by the Court of Appeal in *Woodcock*.

However the facts of *Woodcock* appear to be difficult to reconcile with those principles, and indicate a more flexible approach being taken to cost as a justification.

Before his dismissal as chief executive of a PCT, Mr Woodcock spent his entire working life in the NHS. He accrued two particular rights in that time: a 12-month notice period and an enhanced pension entitlement if he reached the age of 50 while employed.

In 2006 several PCTs merged and Mr Woodcock was not successful in his application for the role of chief executive of the new PCT. He was told that chief executive posts could well arise in a year's time, and in the meantime, he continued to work on secondment.

It came as a surprise to Mr Woodcock when before the proposed date for consultation he was sent a letter by the trust giving him 12 months' notice. He was 48, and soon to be 49, and had notice not been served then, would have become entitled to the enhanced pension.

The employment tribunal found the reason for the advanced notice was that "The chief executive felt she had a duty to look after the financial side of the Trust which was the tax payer's money."

The ET found further as to the role of cost in the decision to treat Mr Woodcock less favourably, that "the reasonable need of the respondent was to bring about the end of Mr

Woodcock's employment without incurring cost to the taxpayer".

## Differential treatment justified

Those findings would appear to indicate a tolerably clear decision based on cost alone and therefore not capable of being justified. However notwithstanding that factual and legal context the ET found that the differential treatment of Mr Woodcock on the grounds of his age was justified, and that the less favourable treatment was not due to cost alone.

What may have been an influential factor against Mr Woodcock was the fact that on dismissal he had already received a lump sum of £220,000 and that an enhanced pension would have entailed further significant cost to the trust. The decision may also be a function of the current economic climate, and there appears to be a growing momentum towards the idea that cost alone can justify discrimination.

The ostensible way that the judges categorised the discrimination against Mr Woodcock was that it was not solely to avoid cost, but it was to avoid him receiving a windfall. In *Loxley v BAE Systems Land Systems (Munitions and Ordnance Ltd)* [2008] ICR 1348 the claimant claimed age discrimination due to his exclusion from a redundancy scheme that limited or expunged the redundancy benefits of those nearing pensionable age.

That scheme had been in existence for some years and had been agreed after lengthy talks between the employer and the unions. It provided payments calculated on the basis of the amount of years worked, increasing with the service an employee had accrued. This increased to a point, but then tapering provisions applied as employees neared pensionable age. The agreed basis for those tapering provisions was that the scheme was intended to cushion the effect of redundancy, the need for which lessened as one neared retirement. If employees in the last three years of their employment received both the redundancy

payment and pensions, they would receive a greater sum than if simply they had worked up until the normal retirement age.

The circumstances in *Woodcock* appear distinct from those in *Loxley*. Mr Woodcock's right to an enhanced pension on reaching 50 was contractual, earned over a lifetime of service. In *Loxley* the provisions would have led to employees being better off by reason of receiving redundancy pay than if they worked to retirement age.

It is difficult to rationalise the comparison of Mr Woodcock's entitlement to an enhanced pension with a windfall as expressed in *Loxley*. Critics of the judgment have categorised the use of windfall as an example of using the 'find another factor' approach to justify what is in reality a cost based decision.

In contrast the courts in *Woodcock* were of the view that the accrual of an enhanced pension by an employee who was redundant is a windfall. It is therefore important to be aware of the development of thought in relation to the role of cost in justification defences.

## Cost as justification

The test of justification was originally developed in the context of indirect sex discrimination and equal pay. Over the years the test of justification was set out in a series of EU directives.

A very similar definition is used in the Equality Act 2010 in relation to direct age discrimination, indirect discrimination generally, and discrimination arising from a disability namely, treatment is justified where it is a proportionate means of achieving a legitimate aim.

In the early development of justification defences there was some suggestion that cost alone might suffice as a justification. Examples of the factors found potentially capable of providing justification included efficiency and lower ancillary costs.

Two separate strands of European Court of Justice (ECJ) authority dealt more directly with cost as a justification in itself.



In *Roks* (case C-343/92) the Luxembourg court found that an EU member state cannot rely on budgetary considerations to justify a discriminatory social policy.

In *Hill v Revenue Commissioners* (case C-243/95), the ECJ held 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."

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Those lines of authority were considered in detail by Mr Justice Burton P in the EAT in *Cross v British Airways PLC* [2005] IRLR 423 where he stated: "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."

Accordingly we arrive at the current ostensible position with regard to justification of age discrimination and (by extension) indirect discrimination. Namely that cost alone cannot justify age discrimination, however it can be a factor, among others used to justify discrimination. That principle is the now well-known 'cost plus' principle.

It should be recognised however that, while to date the courts have adhered to the principle that cost alone cannot justify discrimination, they have sometimes done so only with some reluctance, and there is undoubtedly momentum towards finding that cost alone can justify discrimination.

### Game playing

In Mr Woodcock's case the EAT, made it clear that, while they felt constrained by the

authority to apply the 'costs plus' approach, if they were not so constrained they would say that cost alone could amount to justification. They stated: "We find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised. The adoption of such a rule, it seems to us, tends to involve parties and

tribunals in artificial game-playing – 'find the other factor' – of a kind which is likely to produce arbitrary and complicated reasoning: deciding where 'cost' stops and other factors start is not straightforward".

The approach set out in *Woodcock* has already been applied in relation to other areas of discrimination where a justification defence is available. In *Cherfi v G4S Security Services* UKEAT/0379/10/DM, a religion and belief claim, the EAT found that refusing an employee permission to leave work to attend Friday prayers at a Mosque was a proportionate means of achieving the legitimate aim of meeting the operational needs of the business. Notably the EAT in *Cherfi* reiterated the comments of the EAT in *Woodcock*.

Furthermore, the Court of Appeal finding that the reason for Mr Woodcock's treatment was not cost alone, because he would have been dismissed in any event is somewhat difficult to reconcile as the less favourable treatment of Mr Woodcock was not his dismissal, but the advancement of the date of his dismissal, and that was clearly solely on the basis of avoiding his enhanced pension.

Where does that then leave those advising on whether the actions of employers who have taken cost consequences of age into account in the treatment of employees. In light of *Woodcock* the context in which questions of justification will fall to be determined is as follows:

- (i) The ostensible position for employers is that, cost alone cannot be used as a legitimate aim to justify less favourable treatment on the grounds of age or indirect discrimination.
- (ii) However there is a growing express momentum in favour of the notion that cost alone should be a permissible reason, and that view is manifesting itself in the very wide approach that is being taken as to what amounts to a 'costs plus' justification.

Such a malleable position is unsatisfactory. Employees are left in a position where sophisticated and nuanced rationales, that are sometimes hard to reconcile as anything other than cost, are used to justify differential treatment on the grounds of age, sometimes only made known to them retrospectively.

It also leaves employers in the position that cost alone having notionally been disavowed as a permissible justification, can sometimes succeed where there is another factor which can be deployed, albeit sometimes somewhat artificially. As such they risk the inevitable litigation that a lack of clarity can give rise to when faced with the choice between discriminating on the grounds of age and expending large sums of money.

It remains to be seen whether *Woodcock* is the high watermark for cost as a justification for discrimination, or whether it is a temporary bulwark before the rising tide in favour of cost alone washes away the need for even the appearance of a 'cost plus' rationale. That is not an attractive position, nor one that lends itself to certainty.

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