

ARTICLE: Dismissal to avoid payment of early pension entitlement is unfair and age discrimination

January 2010

Introduction

The Employment Appeal Tribunal (EAT) has upheld the decision of the Tribunal that a man who was dismissed six months short of his 50th birthday (at which age he could have taken early retirement) was unfairly dismissed and suffered age discrimination. The EAT rejected all arguments put forward by the employer but noted that, in some cases, dismissal to avoid costs could be justified.

The facts

Mr Wooster had worked for the London Borough of Tower Hamlets (the Council) from 1973. In 2001, a restructuring "assimilation" exercise meant that some new posts were created but Mr Wooster did not manage to secure any of them. However, he was assured a post would be found for him and he went to work in an "unassimilated" role. This was followed by another unassimilated role as Community Consultation Officer for East End Homes (EEH), a registered social landlord.

Concerned about the vulnerability of his post, in 2003 Mr Wooster wrote to Ms McEleney, the Council's Director of Housing Management, to ask for advice. The response he received from the HR department was to do nothing until his secondment expired naturally. As such, he did not apply for permanent posts which came up over the next two years.

Ms McEleney's policy was that all secondments to registered social landlords would come to an end. In October 2006, Mr Wooster was advised by EEH that his work would be coming to an end. He was advised that he would be redundant unless redeployed within the 12 week redeployment period under the Council's Redundancy and Redeployment Policy.

Mr Wooster sought advice from the Council's pension office who told him that if he could remain in employment until after his 50th birthday, he would be entitled to an advantageous early pension. Mr Wooster expressed his concerns to Mr Bloss of EEH who was sympathetic. Mr Bloss wrote to Ms McEleney, offering to continue to employ Mr Wooster as well as fund half of his salary (which had previously all been paid by the Council). When this was rejected, Mr Bloss offered to fund the entirety of Mr Wooster's salary, plainly so that he could attain the age of 50 and retire. During a telephone conversation, Ms McEleney responded to Mr Bloss' offer by stating: "Paul, if you are going to pay his salary then you can pay his bloody pension when he is 50. If he goes now we do save the pension."

Mr Wooster eventually applied for voluntary redundancy since it offered payment of an extra £20,000 which he would not receive if made compulsorily redundant. Before his employment terminated, Mr Wooster applied for and was interviewed for two new roles. He did not get either and his dismissal took effect on 29 December 2006.

The Tribunal's decision

Mr Wooster brought a claim that he had been unfairly dismissed and suffered discrimination on the grounds of his age. The Tribunal upheld both elements of his claim.

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In relation to the unfair dismissal, the Tribunal found that:

- the Council had mishandled Mr Wooster's case since 2001, including its advice to him not to take action until his secondment came to its natural end;
- in light of this mishandling, the Council ought to have taken special effort to ensure Mr Wooster was redeployed;
- far from taking such special effort, the Council made no real effort to find alternative employment for Mr Wooster and instead proceeded on the erroneous belief that he really wanted to take voluntary redundancy; and
- if the Council had made such special effort, Mr Wooster would have found a permanent post or would have been further seconded pending permanent employment.

On the age discrimination issue, the Tribunal held that the first decision made by Ms McEleney – that all secondments should come to an end – was not discriminatory. However, following that Ms McEleney failed to take Mr Wooster's unique circumstances into consideration, consult with him or find meaningful alternatives. Mr Wooster's age (and the early pension to which it would entitle him) was clearly the tipping point that led to the dismissal.

The EAT's decision

The Council brought various appeals against the Tribunal's reasoning, all of which were dismissed. The EAT commented that the Tribunal's decision was adequate, if not particularly clearly expressed and went on to examine each of the appeals in turn.

The EAT identified two issues of discrimination: the Council dismissing Mr Wooster when it did (general case) and the Council failing to extend his secondment to EEH until his 50th birthday (specific case). The EAT accepted that it was not clear whether the Tribunal had decided if there was discrimination on the specific case, but held that this was irrelevant since it had found discrimination on the basis of the general case.

The Council argued that there had been three errors of law: that a decision not to dismiss would have been ultra vires, that the Tribunal had not dealt with the issue of a hypothetical comparator and that the decision had been inadequately reasoned.

For its ultra vires argument, the Council contended that it would have been unlawful for Ms McEleney to accede to a request to allow Mr Wooster to "hang on" until he was 50. The EAT commented that agreeing to extend employment for the sole purpose of achieving beneficial termination provisions for an employee would be ultra vires. It stated that "it is plainly a "legitimate aim" for an employer to dismiss employees who are genuinely redundant". However, the terms of the Redundancy and Redeployment Policy meant that it would not have been unlawful for the Council to extend Mr Wooster's employment for the purpose of facilitating his redeployment.

The EAT dealt with the issue of a hypothetical comparator quite swiftly. It stated that the Tribunal had compared Mr Wooster with a person who was the same as him in every respect, except that he was not aged 49. Since the Tribunal had found that Ms McEleney's decision was motivated by a desire to prevent him qualifying for early retirement at 50, the EAT stated that "it necessarily follows that she would have treated someone to whom that risk did not apply differently".

As to whether the Tribunal's decision had been adequately reasoned, the Council brought attention to the fact that it did not appear that the Tribunal had taken into account other employees in unassimilated positions who had also been dismissed for redundancy. However, the EAT held that there was no reason to suppose that they had suffered the same "mishandling" as Mr Wooster had at the hands of the Council's HR department, nor that they were anxious or fit to be redeployed. The EAT held that the Tribunal had had such issues generally in mind when it described Mr Wooster's circumstances as "unique and singular".

The Council also took issue with remedy. The Tribunal had stated that it had "little doubt" that Mr Wooster would have been able to obtain an alternative post within the Council. Even if it was one of a lower grade, he would have had the benefit of a ring-fenced salary for 2 years and the Tribunal again said that, given his record, it had "little doubt" that Mr Wooster would have obtained a promotion before those 2 years were up. The Council seized upon the phrase "little doubt", claiming that this indicated that the Tribunal must have had some doubt and so should have made a percentage evaluation of the chance.

Working against the Council in this argument was its late disclosure of evidence relating to the vacancies available at the time, having previously stated that no such vacancies existed. After examining the issues closely, the EAT concluded that there was no evidence to suggest that the Tribunal was not entitled to make the finding that it had done. As to the wording "little doubt", the EAT held that the Council were taking this too literally. This was simply an expression designed to show that the Tribunal considered it a practical certainty that Mr Wooster would have found suitable alternative employment. The EAT restated the authority that a Tribunal is not required to make discounts for those chances it deems as "too remote".

Conclusions

During its consideration, the EAT noted that pension entitlements are inherently dependent on age and that it did not follow that less favourable treatment of an employee on account of him attaining pensionable age was discriminatory, as such treatment might be justified. The Council had not run an argument of justification and the outcome may have been different if they had done so.

Unfortunately, no examples were given of what justifications the EAT had in mind and so further case law will be necessary to illustrate this point. Certainly previous case law has shown that cost can be used to justify discrimination, but only as one of a series of factors and not simply by itself.

If you would like further information on this case or how it might affect your workplace, please contact David Hill at [dhill@davidsonlarge.com](mailto:dhill@ davidsonlarge.com) or Lucy Bond at lbond@davidsonlarge.com.