
Age discrimination: The correct approach to comparators

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In this case, the EAT decided that (unless it could be justified) it was discriminatory not to offer an older employee voluntary redundancy on the basis that, unlike younger employees who were offered VR, he would be entitled to early retirement pension enhancements.

The facts

As part of a redundancy exercise, the Royal Bank of Scotland offered the opportunity to take voluntary redundancy to two regional directors who were younger than 50. It did not offer voluntary redundancy to Mr Donkor, who was older, because he would become entitled to severance payments costing around £500,000, most of which was related to early retirement pensions enhancements.

The tribunal decided that Mr Donkor's circumstances were materially different from the two younger directors because they were not entitled to early retirement benefits. On this basis, the tribunal considered that the younger directors were not appropriate comparators, and there was no direct discrimination.

The EAT disagreed. The extra cost was a direct result of Mr Donkor's age, and was not a relevant circumstance that would invalidate a comparison with the two younger directors. Unless it could be justified, denying Mr Donkor the opportunity to apply for voluntary redundancy was direct age discrimination. The EAT sent the case back to the tribunal to decide if the bank's actions could be objectively justified.

What does this mean for employers?

Where employers are treating employees of disparate ages differently, they should recognise the potential for that difference in treatment to be either directly or indirectly age discriminatory. If it is, they need to make sure the difference in treatment is for good reasons, and can be shown to be a proportionate means of achieving a legitimate aim. If the principal reason is cost saving it is important to consider the broader picture and identify the other reasons that may help to justify the difference in treatment, such as intergenerational fairness.

Donkor v Royal Bank of Scotland [2015] UKEAT/0162/15, 16 October 2015

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