

Redundancy Selection: Length of Service Criteria is Valid

Age Discrimination Concerns

LIFO, or Last In First Out, was once a common way of selecting employees for redundancy. However, it has become less popular in recent years on the basis that it can be challenged as being discriminatory on the grounds of sex. When the Age Discrimination Regulations (“the Age Regulations”) came into force in 2006 many argued that it was the final nail in the coffin of LIFO as a criterion for selecting employees for redundancy on the basis that LIFO is arguably also discriminatory on the grounds of age because those who are older will usually have longer service.

The above concern has now received some judicial comment in the case of *Rolls Royce Plc -v- Unite*.

Rolls Royce Plc -v- Unite the Union

Rolls Royce and Unite had entered into a collective agreement relating to redundancy. This collective agreement dealt, amongst other things, with how employees would be selected for redundancy. The selection criteria involved various categories such as expertise and versatility. The employee would also receive a score of one point per year of continuous service. Each category was scored between four and 24 points. The parties could not agree whether this would be lawful under the Age Regulations.

Legitimate Aim

After hearing the submissions of both parties, the High Court held that the redundancy selection criteria based on length of service was potentially discriminatory on the grounds of age. However the Court found that this could be objectively justified. The collective agreement made between the employer and union was designed to enable the employer to carry out redundancies in a way that was perceived to be fair. The High Court concluded that it was a legitimate aim of the collective agreement to carry out the redundancies in a ‘peaceable’ manner.

The High Court recognised that length of service would be a strong indicator as to loyalty and experience. They also concluded it would be a legitimate aim to protect the older workforce from being made redundant at a time when finding other employment would be increasingly difficult.

The High Court was therefore satisfied that use of length of service as one of the selection criteria could be justified, and was therefore lawful, in this case. However whilst not precluding the use of length of service as the sole criterion, the High Court did suggest that the use of “LIFO alone....might be objectionable”.

Exempt from Regulations

In any event, the High Court felt that the collective agreement would fall within the exclusion under the Age Regulations relating to benefits. As you will know, the Age Regulations contain specific rules relating to the use of length of service in awarding benefits to employees, for example giving enhanced holiday or sick pay to employees after a specified length of service.

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The High Court viewed the benefit of being given more points in a redundancy selection process as a benefit, and hence falling within the specific rules relating to employee benefits. Under these special rules where the length of service which is required is less than 5 years then the use of length of service will be automatically permitted. Where the length of service which is required is more than 5 years then the employer will have to justify the use of length of service, but the test of justification is easier and the use of length of service will be justified where it reasonably appears to the employee as 'fulfilling a business need' for example rewarding loyalty and experience. In this case, the High Court decided that it was probable that the use of length of service would be regarded as reasonably fulfilling a business need.

Conclusion

The High Court gave employers comfort that they can continue to use length of service as a criterion to select employees for redundancy, provided that it is used as one of a number of different criteria. However whilst not ruling it out, the High Court weren't as happy with the use of length of service as the sole criteria and employers should therefore probably proceed with caution, and no longer use LIFO as the sole criterion.

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