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Employment
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Rolls Royce v Unite the Union

Introduction

The Employment Equality (Age) Regulations 2006 ("the Regulations") were introduced in October 2006 and make it unlawful to discriminate, whether directly or indirectly, against a person on the ground of his or her age. Under the Regulations, indirect discrimination arises where an employer applies a "provision, criterion or practice" which places workers of a particular age group at a disadvantage. A common example is the use of "last in first out" in redundancy selection which may indirectly discriminate against younger members of the workforce who are likely to have accrued less service than their older colleagues.

Unlike with other strands of discrimination, there is a justification defence available under Regulation 3 to employers facing indirect age discrimination claims. In order to benefit from the defence, employers must show that the provision, criterion or practice was "a proportionate means of achieving a legitimate aim".

In addition to this, the Regulations also contain provisions exempting service-related benefits. Regulation 32 however, permits employers to treat workers differently in relation to the award of benefits where the reason for doing so is length of service provided they can demonstrate that the way in which they reward long service (that is over five years service) fulfils a business need.

In Rolls Royce v Unite the Union, the Court of Appeal had to determine whether the use of length of service as a criterion in a redundancy selection policy amounted to unlawful indirect age discrimination and whether it also fell within the service-related benefits exemption in Regulation 32.

Facts of the case

Rolls Royce ("RR") and Unite the Union ("Unite") negotiated two collective redundancy agreements for two groups of employees at RR's Derby factories. These agreements contained a clause providing: "where two or more employees in a surplus occupation group have the same total assessment score (i.e. a tie break), length of service with the company will be the deciding factor and the longest serving employee will be retained".

In November 2007, RR announced that it would be consulting with Unite on the loss of 140 jobs in the aerospace division at its Derby plant. RR were concerned however that the use of the length of service criterion might amount to indirect age discrimination under the Regulations. In view of this it applied to the High Court for a declaration as to whether the use of the criterion was a proportionate means of achieving a legitimate aim in accordance with Regulation 3 and whether it constituted a "benefit" and if so whether it could reasonably appear to fulfil a business need within Regulation 32.

Decision of the High Court

The High Court held that whilst the criterion did indirectly discriminate against younger workers, its inclusion was justified by the legitimate aim of bringing about redundancies peaceably. Furthermore, the court determined that the award of points for long service did constitute a "benefit" within Regulation 32 and that it did fulfil a business need as it rewarded loyalty and experience. RR appealed against the decision to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal held that the criterion was a proportionate means of achieving a legitimate aim and as such

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was lawful. The Court decided that the legitimate aim was the reward of loyalty and the overall desirability of achieving a stable workforce and the proportionate means was demonstrated by the fact that the length of service criterion was only one of a number of criteria and it was not determinative.

As regards Regulation 32, the Court considered that a length of service criterion which counted a point for every year of service did reasonably fulfil a business need of the company, that of having a stable and loyal workforce.

Conclusion

It is clear from the Court of Appeal's judgment that employers may now be able to objectively justify the use of a length of service criterion in a redundancy selection process provided it is one of a number of criteria and is not determinative of the outcome. That being said, employees will still be able to challenge the use of such a criterion and therefore employers will need to be able to justify its use in the circumstances of each particular case.

Forthcoming employment law changes

We have set out below details of some of the important changes to be introduced on 1st October 2009:

- The national minimum wage will increase as follows:
  - workers aged 22 and over – £5.80
  - workers aged 18-21 – £4.83
  - workers aged 16-17 – £3.57

- The maximum limit of a week's pay for the purposes of calculating a statutory redundancy payment will increase from £350 to £380. As a result the maximum potential redundancy payment will increase to £11,400 (currently £10,500).

If you would like to receive more information regarding the contents of this newsletter or information on any other employment law related matters then please contact **Russell Brown** at Glaisyers Solicitors LLP, One St James's Square, Manchester M2 6DN. Tel: 0161 832 4666; Fax: 0161 832 1981; Email: rwb@glaisyers.com

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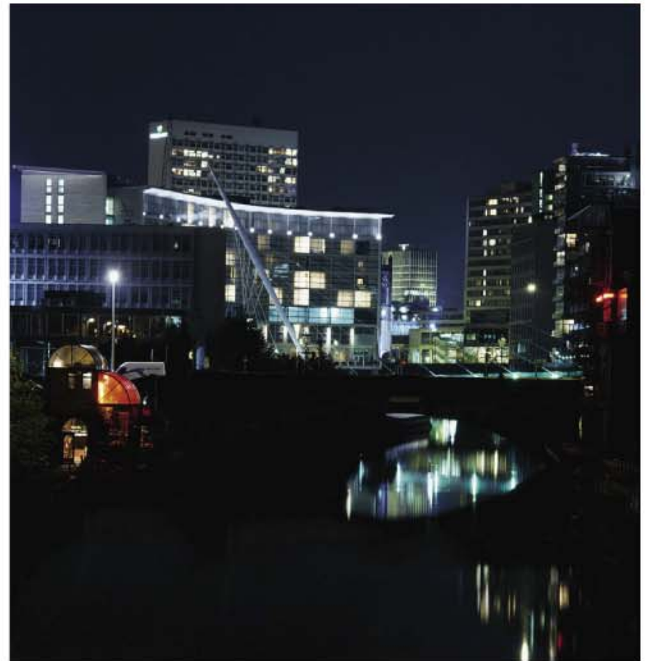

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