LITTLETON

JUSTIFYING AUSTERITY - NOT SOLELY A QUESTION OF COST

by Antony Sendall

On 11 November 2020, the Court of Appeal dismissed the appeal in ***Heskett -v- Secretary of State for Justice*** [2020] EWCA Civ 1487, holding that the 'pay freeze' imposed on probation officers as the result of the Government's austerity measures, which might otherwise have been regarded as indirectly age discriminatory, was capable of being justified as a proportionate means of achieving a legitimate aim.

The Claimant, Mr Craig Heskett, has been employed since 2006 as a probation officer in Kent. At the time material to his claim, the probation service in England and Wales was operated by the National Offender Management Service ("NOMS"), which was an executive agency under the "sponsorship" of the Ministry of Justice. It had no separate legal personality. Although his employment was effectively managed by NOMS, Mr Heskett has at all times been a civil servant and an employee of the Crown. NOMS was replaced in April 2017, following the start of the proceedings, by Her Majesty's Prison and Probation Service.

In 2016, when he was aged 38, Mr Heskett brought proceedings against the Respondent in the Employment Tribunal complaining of indirect age discrimination. The essence of his claim was that the rate of pay progression for his job had drastically reduced as a result of the policy of austerity in public sector pay which had been in force since 2010, and that this disadvantaged younger employees such as himself, since they were inherently less likely than older colleagues to have reached the top of the applicable pay range when the policy came into force.

The principal facts were not in dispute at any stage and can be summarised as follows:

1. The annual budget of NOMS was set by the Ministry of Justice. Within the parameters of that budget, it was the responsibility of NOMS to determine pay for its employees, subject to any constraints imposed by the Cabinet Office Department or the Treasury and "in alignment with" the Ministry's pay strategy.
2. Prior to the policy of "austerity" in 2010, NOMS operated a pay progression system in which particular jobs were placed in a "pay band", which comprised a scale of "spinal points" corresponding to particular salary figures. This was a system that was in common use at the time in the public sector.
3. An employee could expect to progress up the scale by three spinal points each year until they reached the top.
4. In addition, there was an expectation that the salary figures which each spinal point represented would be adjusted annually, so as (broadly) to keep pace with increases in the cost of living, so that progress up the scale would constitute increases in salary in real as well as nominal terms.
5. The Claimant was promoted to band 4 in 2008 and started at the bottom of the band.
6. There were 25 spinal points in the band.
7. If the rate of annual progression had remained the same he could have expected to reach the top in eight or nine years.
8. In June 2010, in response to the financial crisis, the Coalition Government announced what was described as a "pay freeze" in the public sector under which pay increases would be limited to 1% of overall pay costs.
9. Negotiations between NOMS and the recognised trade unions in the National Negotiating Council for the Probation Service ("the NNC") resulted in an agreement in February 2012 (with retrospective effect to the start of the 2011 pay year).
10. The NNC agreement provided (amongst other things) that:
    a. the rate of annual progression in bands 3-6 was reduced from three spinal points to one (save in the first year, when it was reduced to two); and
    b. there was to be no cost-of-living increase in the salary figures attached to the bands.
11. The agreement as regards the rate of progression remained in effect up to the date that the Claimant brought his claim in 2016. If it remained in place indefinitely, he would not be able to reach the top of the band until he had been in it for a further sixteen years (23 years in total).
12. It was common ground that the slowing of the rate of progression as a result of the NNC agreement had a disproportionate effect on younger employees because a higher proportion of older employees would, in the nature of things,

either have reached the top of the pay band or in any event have progressed further up it than younger employees.

The Claimant's complaint was dismissed by Employment Tribunal in October 2017 and his appeal was dismissed by the Employment Appeal Tribunal (Barklem HHJ) in June 2019. He then appealed to the Court of Appeal, which has now dismissed his appeal.

The main point of interest in the decision is the question as to whether the justification argument advanced by the Crown was in reality one that was based solely upon cost which has long been regarded as an impermissible basis for justifying discrimination. In particular, there was an issue as to whether a lack of means brought about by imposed budgetary constraints could be distinguished from a decision based purely upon cost and whether the Employment Tribunal had failed to draw that distinction.

The essence of the Crown's justification argument was based upon "the need to balance the ability to continue to award probation officers with an annual incremental annual pay rise in recognition of the difficult and valid role they undertake, and thereby to retain these vital employees in employment, versus the significant reduction in public money available to run this vital service and remunerate its employees in light of the significant downturn in the economic climate from 2010 onwards." The Claimant sought to argue that this was effectively a decision based solely upon cost considerations.

The material provisions are Sections 19 and 39 of the Equality Act 2010. Section 39 (2) (d) of the Equality Act 2010 provides that an employer must not discriminate against an employee by subjecting him or her to any detriment. Indirect discrimination is defined in section 19 and subsections (1) and (2) of that section provide as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if–

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not

share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The relevant protected characteristics are listed in subsection (3) and include "age".

In order to succeed in a justification defence the Crown needed to show two things:

a. that the purpose of the provision criterion or practice ("PCP") was to achieve a legitimate aim; and
b. that it represented a proportionate means of achieving that aim.

The distinction between the two is in principle important since the aim, so long as "legitimate", must be a matter for the choice of the employer whereas the proportionality of the means chosen must be assessed by the tribunal – see ***Harrod v Chief Constable of West Midlands Police*** [2017] EWCA Civ 191.

In the Court of Appeal the leading judgment was given by Underhill LJ (McCombe and Macur concurring) and contains a detailed review of the relevant EU and domestic case law. In particular, he reviewed the authorities underlying what is often described by employment lawyers as the "costs plus" principle. The costs plus principle is that cost alone cannot justify discrimination and that there has to be an extra or "plus" factor in order to succeed in the defence.

In paragraph 81 of his Judgment Underhill LJ adopts the formulation given by Rimer LJ in ***Woodcock -v- Cumbria PCT*** [2012] EWCA Civ 330 where he refers to the language used in the CJEU cases in respect of the costs plus issue and states that the language "cannot mean more than that the saving or avoidance of costs will not, *without more* [my emphasis], amount to the achieving of a 'legitimate aim'". In other words, to take the paradigm case of discriminatory pay, an employer "cannot justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same". Underhill LJ then goes on to say at para 83 of the judgment:

"It follows that the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle (to adopt the Supreme Court's language in [O'Brien -v- Ministry of Justice [2013] UKSC 6, [2013] ICR 499]) but it is real."

His conclusion at paragraph 89 of his judgment is that the "cost plus" label is not incorrect and might be a convenient shorthand, but he points out that this expression is not used in the key authorities and he would prefer to avoid its use. His view is that "it can lead parties, and sometimes tribunals, to adopt an inappropriately mechanistic approach" and that a better approach is to consider how the employer's aim can most fairly be

characterised, looking at the total picture. It is only if the fair characterisation is indeed that the aim was solely to avoid increased costs that it has to be treated as illegitimate.

In dismissing the appeal Underhill LJ concluded also that an employer's aim to 'live within its means' or in the case of a public body to operate within budgetary restraints imposed upon it can be legitimate. In paragraph 99 of his judgment he stated that he could see "no principled basis for ignoring the constraints under which an employer is in fact having to operate…almost any decision taken by an employer will inevitably have regard to costs to a greater or lesser extent; and it is unreal to leave that factor out of account. That is particularly so where the action complained of is taken in response to real financial pressures, as was very clearly the case … on the Tribunal's findings, in the present case." He also stated that it is necessary to bear in mind that because age (unlike other protected factors) is not binary, it is difficult for an employer to make decisions affecting employees that will have a precisely equal impact on every age group, however defined. "This makes it particularly important for them to be able to justify such disparate impacts as may occur by reference to the real world financial pressures which they face".

The other main ground of appeal was based upon the Employment Tribunal's finding that the reduction in the rate of pay progression had been imposed as a temporary measure and that active consideration was being given to changing the system so as to reduce the age-discriminatory effect of the scheme as it stood was a key aspect of the justification defence. It was argued for Mr Heskett that the fact that NOMS was intending to change the system was as a matter of principle irrelevant to the issue of whether it could be justified in the period to which the complaint related. The Court of Appeal rejected that argument on the basis that an employer may sometimes feel obliged to take urgent measures which have an indirectly discriminatory effect on a group of its employees whether the disparate impact is (or should be) appreciated from the start or whether it is something which only becomes apparent after a time. It held that there was no reason in principle why it should not be open to the employer to seek to justify those measures on the basis that they represented a proportionate short-term means of responding to the problem in question, albeit that they could not be justified in the longer term.

The effect of the Court of Appeal's judgment in ***Heskett*** is to maintain the position that it is not possible to justify discrimination solely on the basis of cost, but it recognises that cost is a key and relevant consideration. So, a PCP which is applied because of an aim for the employer to "live within its means" or to "balance its books" is capable of being a legitimate aim and if it is a proportionate means to achieve that aim, the discrimination can be justified. It has also clarified that there may be circumstances where a discriminatory PCP can be justified where it is applied only as a short term measure to address a particular issue and its application is proportionate.

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