

Wilson v Health and Safety Executive [2009] EWCA Civ 1074

ARTICLE ON THE JUDGMENT

Overview

In this case, the Court of Appeal considers the correct approach under UK law to objective justification in equal pay claims arising from a service-related pay progression scheme which has a disparate impact on women compared with men. In such cases, the Court holds, an employer may be required to justify both the adoption of length of service as a determinant of pay and the particular way in which it is used or applied.

In particular, the Court of Appeal considers the implications of the ECJ's judgment in Cadman v HSE [2006] ICR 1623, in which the ECJ held that, as a general rule, service-related pay progression does not require justification by the employer because longer service generally goes hand in hand with experience which enables the employee to perform his duties better and it is generally legitimate and proportionate for the employer to reward such experience. However, the ECJ also held that, where the worker provides 'evidence capable of giving rise to serious doubts' as to whether that general rule applies in the particular case, then the employer may still be required to prove objective justification.

In Wilson, Arden LJ (with whom the other members of the Court, Rimer and Sedley LJJ, agreed) concludes that the requirement for an employee to provide 'evidence capable of giving rise to serious doubts' does not impose any new burden of proof or other substantive hurdle on the employee. It is no more than a preliminary filter' designed to eliminate frivolous claims. Therefore, it will be satisfied if the employee can show that there is evidence from which, if established at trial, it could properly be found that the general rule does not apply. The legal burden of proof in relation to objective justification, including showing proportionality, remains on the employer.

Further, Arden LJ holds that, even if she is wrong about the effect of Cadman and, as a matter of Community law, there is some additional substantive hurdle or burden of proof on

the employee, then domestic law under the Equal Pay Act 1970 is more favourable to employees and must prevail. This is because Community law sets a minimum level of protection in relation to equal pay but does not preclude domestic rules which are more favourable to employees. As a matter of domestic law, the Equal Pay Act 1970 (read together with the Sex Discrimination Act 1975) places the burden of proving objective justification (including proportionality) on the employer and does not provide for any exception in the case of a length of service criterion. Therefore, under the Equal Pay Act 1970, there is no additional substantive hurdle or burden placed on the employee. However, Arden LJ finds that there is no reason why an employee should not be required to show (in accordance with her interpretation of the effect of Cadman) that the claim has some prospect of success in the sense that there is evidence from which, if established at trial, it could properly be found that the general rule does not apply.

Facts and background

Mrs Wilson was employed by the HSE as a Band 3 Inspector. As long ago as 2002, she brought her claim for equal pay, in which she compared her work and pay with that of three male Band 3 Inspectors. It was conceded by the HSE that they did work rated as equivalent to that of Mrs Wilson for the purposes of section 1(2)(b) of the Equal Pay Act 1970.

The pay of Mrs Wilson and her comparators was governed by a pay scheme which in part fixed increases in pay according to length of service over a 10-year period. This resulted in Mrs Wilson being paid less than her comparators.

The tribunal found that the length of service criterion had a disparate impact on female employees because they would tend to have shorter service than men because of career breaks to have children or, in some cases, because of commencing employment at a later date than would otherwise have been the case because of childcare responsibilities.

Mrs Wilson accepted that the HSE was justified in having *some* recourse to length of service in setting pay, but contended that a 10-year pay progression scale was disproportionate. She contended that 5 years was the appropriate period.

In a decision given in December 2003, the employment tribunal held that it was bound by the decision of the EAT in Cadman v Health & Safety Executive [2004] ICR 378 to find that the HSE was not required to objectively justify a difference in pay attributable to length of service. However, the tribunal also stated its conclusion that, if it had not been bound by the EAT's judgment in Cadman, it would have found that the 10-year period was outside the 'margin of appreciation' to be allowed to the employer and was not justified. The tribunal would have found that 5 years was the appropriate period.

Subsequently, the ECJ gave its judgment in Cadman. As indicated above, the ECJ held that, as a general rule, service-related pay progression does not require justification by the employer because longer service generally goes hand in hand with experience which enables the employee to perform his duties better and it is generally legitimate and proportionate for the employer to reward such experience. However, the ECJ also held that, where the worker provides 'evidence capable of giving rise to serious doubts' as to whether that general rule applies in the particular case, then the employer may still be required to prove objective justification.

Mrs Wilson's case then came on appeal before the EAT to consider the effect of the ECJ's judgment in Cadman. The EAT (Elias P presiding: [2009] IRLR 282) held that, in light of the ECJ's judgment, it was open to Mrs Wilson to challenge the proportionality of the HSE's recourse to length of service in setting pay. However, the EAT held that, in order to mount such a challenge, she had to show 'serious doubts' as to whether the general rule applied and that this imposed a 'high' hurdle on Mrs Wilson, which required her to go 'some way towards' demonstrating an 'overwhelming case' that the general rule did not apply. The EAT therefore remitted the case to the employment tribunal to consider whether Mrs Wilson had satisfied the 'serious doubts' test.

The HSE appealed the EAT's conclusion that that it was open to Mrs Wilson to challenge the proportionality of the HSE's recourse to length of service. The HSE argued that, on proper interpretation of Cadman, it is only open to employees to challenge the use of length of service *per se*, not the extent of recourse to length of service.

Mrs Wilson cross-appealed against the remission of the ‘serious doubts’ issue to the tribunal. She argued that the EAT had set the bar too high and that, since the tribunal had actually found that the extent of the HSE’s recourse to length of service was not proportionate in her case, then she had necessarily shown ‘serious doubts’ as to whether it was proportionate.

Held

1. On a proper reading of the judgment of the ECJ in Cadman, under Community law an employer can be required to provide objective justification not only for his initial adoption of length of service as a criterion in setting pay, but also for the particular *way* in which he uses or applies that criterion. The concept of proportionality is an integral part of objective justification in Community law and, if the ECJ had intended to exclude claims based on a challenge to the proportionality of the employer's recourse to length of service as a determinant in pay, it would have said so. Further, the right to equal pay is a fundamental right under the Treaty of Rome and should be given effective protection. If employees were unable to challenge the particular *use* of a length of service criterion (as opposed to its initial adoption) then there would be no protection at all for women who are disadvantaged by the disproportionate use of such a criterion. That result would not be either logical or fair.

2. As a matter of Community law following Cadman, the requirement on an employee to provide 'evidence capable of giving rise to serious doubts' about the applicability of the general rule does not impose any new substantive hurdle or burden of proof on the employee. It is no more than a preliminary 'filter' designed to eliminate frivolous claims and to ensure that the complaint has some prospect of success. Therefore, it will be satisfied if the employee can show that there is evidence from which, if established at trial, it could properly be found that the general rule does not apply. The formal burden of proof in relation to objective justification, including showing proportionality, remains on the employer.

3. In any event, the correct approach is to analyse the case in terms of domestic law first and not in terms of Community law. Community law provides minimum guarantees in relation to equal pay, but it does not prevent a Member State from having rules on the burden of proof which are more favourable to employees. Therefore, whilst domestic legislation cannot take away rights available under Community law or impose additional hurdles to claims which would be incompatible with Community law, equally Community law cannot take away features of domestic legislation which are more favourable to employees.

4. As a matter of domestic law, the Equal Pay Act 1970 ('EqPA') and the Sex Discrimination Act 1975 ('SDA') form a single code and are to be interpreted harmoniously so as to be internally coherent and consistent. Under section 1(2)(b) of the SDA, the onus of showing objective justification (which entails proportionality) is on the employer and there is no additional hurdle or onus on the employee in a case involving a challenge to a length of service criterion. Therefore, consistently with that approach, the onus of showing justification under section 1(3) of the EqPA is also placed on the employer without any qualification for cases where what is challenged is use of a service-related criterion as a determinant in pay.
5. Consequently, even if (contrary to the Court of Appeal's judgment) Community law following Cadman does impose some new high hurdle or onus of proof on an employee in a case challenging length of service as a determinant of pay, domestic law under the EqPA would prevail.
6. However, there is no reason under the EqPA why an employee should not be required to satisfy the low evidential burden identified by the Court of Appeal as being the correct interpretation of the 'serious doubts' test in Cadman. That burden does not amount to a switch of the burden of proof, but is no more than a 'sensible evidential requirement' on the employee to show that her complaint has some prospect of success. It is similar to the evidential burden on employees in 'automatic' unfair dismissal cases, where the employee is required to produce evidence which puts the reason for dismissal in dispute and shows there is a real issue to be tried, but the legal burden of proof remains on the employer (see Maund v Penwith District Council [1984] ICR 143, CA; Kuzel v Roche Products Ltd [2008] ICR 799, CA).

Comment

As Arden LJ herself notes, the issues in this case are 'of great practical importance to employers and to women in employment' because service-related pay progression schemes are common and such schemes frequently (perhaps ordinarily) have a disparate adverse impact on women compared with men.

The Court of Appeal's judgment makes it clear that the 'general rule' in Cadman does not enable employers to escape the need to provide a full objective justification in circumstances where the employee shows that there is a real issue as to the applicability of that general rule. Length of service as a determinant of pay is not, fundamentally, a special case to which different principles apply: the burden of objectively justifying an indirectly discriminatory pay structure based on length of service remains on the employer and the 'general rule' does not provide a blanket cover beneath which employers can set pay by reference to length of service with impunity and without regard to its discriminatory effects, or to the particular circumstances within their organisation.

Employers will therefore need to be astute to ensure that the 'general rule' does actually apply in their particular circumstances, and that any use of length of service as a determinant in pay is proportionate to the value of the additional experience which their particular employees gain with longer service.

For female employees, the Court of Appeal's judgment means that claims under the EqPA are likely to continue to be the most effective way of challenging unjustified pay progression schemes based on length of service (assuming that they have a disparate impact on women). That is so particularly in light of the relative impotence of the Employment Equality (Age) Regulations 2006 in this area (see regulation 32).

Finally, the Court of Appeal's judgment is significant for its clear reiteration of the principle that Community law cannot be used to restrict the meaning or effect of domestic legislation where the latter offers greater protection to employees than Community law. Community law sets the floor, not the ceiling, for protection in relation to equal pay. Wilson is not the only recent case in which an employer has sought to rely on concepts from Community law to restrict the protection provided by the EqPA (see for example North Cumbria Acute Hospitals NHS Trust v Potter [2009] IRLR 176, EAT, paras 80-87). The Court of Appeal's clear and convincing statement of principle on this issue should bring a halt to such attempts in future.