

THE END OF LENGTH OF SERVICE?

In The Beginning

1. Having spent over 20 years as an employment lawyer I have seen many changes in the law. When I first started LIFO or FIFO was widely accepted as a fair and objective approach. It was either used exclusively as a selection criteria or it was used as the tie breaker when deciding who should stay and who should go.
2. Things were changing at the end of the 80s and the more enlightened employers were starting to approach retrenchment with an eye to what skills and experience needed to be retained to enable the business to not only survive the worst but also grow again in the good times.
3. By the 90s LIFO was on its way out as the sole criteria. As always the main driver was not the impact LIFO was having on young or female workers but to do with the basics of running an efficient business.
4. Service related benefits remained as it had always been appreciated that rewarding loyalty and experience made good business sense. What was not really questioned at the time was whether this reward structure was discriminatory?

Overview

5. This lecture looks at the application of length of service criteria in two separate employment law areas: age and sex discrimination.
6. These two areas differ in that age discrimination allows for a 5 year length of service opt out that requires no justification. This aside the jurisprudence in relation to length of service benefits should be universally applicable to both sex and age discrimination cases.

Sex Discrimination

7. In 1989 the ECJ ruled in the case of *Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] IRLR 532 (*Danfoss*). It is always interesting to note that at the time commentators were concerned more with the effect on the burden of proof and the need for employers to produce more cogent evidence on the issue of justification. What slipped by without much comment was the ECJ's assessment of the use of length of service/seniority to set pay levels for employees. The Court simply stated at para 24:

"Third, as regards the criterion of seniority, it cannot be ruled out either that, like that of vocational training, it may result in less favourable treatment of female workers than for male workers,

insofar as women have entered the labour market more recently than men or are subject to more frequent interruptions of their careers. However, since seniority goes hand in hand with experience which generally places a worker in a better position to carry out his duties, it is permissible for the employer to reward it without the need to establish the importance which it takes on for the performance of the specific duties to be entrusted to the worker."

8. Thus even though the Court accepted that the application of a length of service criteria disadvantaged women the employer did not need to give any specific justification for using the criterion of seniority (see *para 25 of Danfoss*).
9. The accepted wisdom of seniority as a yard stick was now enshrined in European as well as UK law.
10. It was not long however until the wisdom of *Danfoss* was challenged. In *Nimz v Freie und Hansestadt Hamburg [1991] IRLR 222 (Nimz)* it appeared that the seniority loophole might have been closed. This is an unusual case as it involved the application of a length of service qualification that discriminated against a part time mainly female workforce.
11. Workers were paid according to the number of days/hours worked. The more time you worked the quicker you qualified for a pay

increment. Part time workers were paid less than the full time workers because it was reasoned they had less experience as they were working less hours. This reasoning was rejected by the ECJ who at *para 14* observed:

"In fact, although seniority goes hand in hand with experience which, in principle, should allow the employee to carry out his tasks all the better, the objectivity of such a criterion depends on all the circumstances in each case and notably on the relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been worked. Nevertheless, it is for the national court, which is the sole judge of the facts, to determine in the light of all the circumstances whether and to what extent a provision of a collective agreement such as that in question is justified by objective factors unrelated to any discrimination on grounds of sex."

12. After *Nimz* there were further decisions relating to part-timers that followed the reasoning in *Nimz* (see *Gerster v Freistaat Bayern* [1997] IRLR 699 & *Hill v Revenue Commissioners* [1998] 466) None of the cases dealt directly with sex discrimination/equal pay and so lawyers in the UK continued to apply the *Danfoss* reasoning to cases where seniority/length of service benefits resulted in sex inequality.

13. Some 10 years after *Nimz* the issue of service related pay was back in front of the UK courts in *Cadman v The Health & Safety Executive* [2006] IRLR 969. Mrs Cadman challenged the HSE's continued adherence to pay differentials based on seniority. She succeeded in the Tribunal but the matter was appealed. The EAT held that *Danfoss* was still good law and the Court of Appeal referred the matter on to Europe.

14. The ECJ now had the chance to deal with a seniority related pay case based on sex inequality and explain any inconsistencies between *Danfoss* and *Nimz*. This did not happen and a further twist occurred with the ECJ supporting the original *Danfoss* decision but adding the 'serious doubts' test. I have set out para 40 of the judgment below:

"It follows from all of the foregoing considerations, that the answer to the first and second questions referred must be that Article 141 EC is to be interpreted as meaning that, where recourse to the criterion of length of service as a determinant of pay leads to disparities in pay, in respect of equal work or work of equal value, between the men and women to be included in the comparison:

– since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties

better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard;"

15. So in October 2006 *Danfoss* was confirmed as the correct statement of the law unless there was a 'serious doubt'! As Elias P observed in *Wilson v The Health & Safety Executive* UKEAT/0050/08 at para 33, "The ECJ in *Cadman* has not provided the clarity one would have desired in its judgment".

16. It was perhaps not that surprising that another case on length of service at the HSE appeared. Mrs Wilson was complaining about the same thing as Mrs Cadman. Her case had in fact been stayed after the tribunal hearing whilst Mrs Cadman's case had made its way on and up to the ECJ.

17. The Tribunal in Mrs Wilson's case found that had they not been bound by *Danfoss* then they would have held that the length of service criterion was discriminatory and was not justified. It is worth noting that the main reason for this was that the HSE did not call supporting evidence for the seniority criteria and the Tribunal accepted the evidence of the trade union rep who suggested less seniority was in fact appropriate in the circumstances.

18. The EAT had the advantage of the ECJ decision in *Cadman* and came up with an analysis that sought to apply the *Cadman* principle in UK courts. To this end the EAT ran with the idea that *Cadman* produces a rebuttable presumption in favour of a length of service requirement being justified. This is summed up at *para 43 – 45*:

“ In our judgment, the ECJ is plainly seeking to establish a position where there is a presumption that length of service is to be equated with experience which in turn is likely to result in improved job performance. It is not enough that the tribunal will have some doubts as to whether that is truly the position; they must have serious doubts. This suggests to us that the hurdle is a high one.

If after hearing the evidence of the claimant the tribunal is of the view that there is a genuine issue as to whether justification could be established, that would not be enough. We think that the tribunal would have to be satisfied that in the light of the evidence adduced by the claimant there is real reason to suspect that the employer has stepped beyond the margins which can properly be afforded to employers when considering whether added experience typically improves job performance. No doubt in many, if not virtually all, such cases the employer will have real difficulty in justifying the application of the criterion but the ECJ has held that the employer must have that opportunity.

In short, although the language does not quite replicate the position adopted by the UK Government before the court when it said that the employee must adduce an 'overwhelming case' that the length of service criterion cannot be justified, nonetheless it seems to us that the court has gone some way towards accommodating that position."

19. Not surprisingly Mrs Wilson took her case off to the Court of Appeal to try to find someone with a bit of common sense (*Wilson v The Health & Safety Executive [2009] EWCA Civ 1074*). Applying the basic equality principles the decision was surely wrong. Why should seniority be a special exception to pay inequality and discrimination?

20. Arden LJ gave the judgment in the case with Rimmer LJ and Sedley LJ agreeing. The judgment is worth reading in its entirety as it gives a very good overview of the Equal Pay legislation and Article 141.

21. Some principles need restating on a regular basis to avoid judges and lawyers being lead down the wrong path in the legal maze that is European equality legislation.

22. Whilst accepting that there has been much helpful as well as unhelpful judicial thought both in the UK and Europe on the subject

of equal pay the relevant principles in relation to equal pay are simple:

- Men or woman who do the same work ought to be paid the same.
- If they are not paid the same then that reason must be unrelated to sex.

23. This is why Arden LJ spent the first part of her judgment setting out the principles in respect of equal pay. It is also why she then goes on to review in some detail the judicial decisions in *Danfoss* and *Cadman* that appeared to most of us to alter these basic principles in relation to length of service/seniority.

24. It is interesting to note that the HSE's Counsel sought in this case to try to draw a further distinction between the application of a length of service requirement and the adoption of such a requirement. The Court was unwilling to do so as it would clearly fly in the face of the fundamental principle of pay equality.

25. What Arden LJ then goes on to deal with is the crux of the case namely the concept of 'serious doubt'? It is the argument of Robin Allen QC who was instructed by the Equality & Human Rights Commission (intervener) that found favour here (see para 47 & 48).

26. He argued that the addition of a 'serious doubts' test in respect of this type of case would be inconsistent with the Burden of Proof Directive.
27. Arden LJ then spends a whole page of the judgment trying to square this with what was said in *Cadman*. I don't believe she does this satisfactorily. The main reason being that there is this 'serious doubts' comment in *Cadman* which does not fit in with the Equal Treatment directives.
28. It is quite clear that she sees the logical inconsistency of making length of service a special case and so does her utmost to get around this. In the end Arden LJ finds her own get out by allowing a new argument to be raised on appeal. It is in my view the most important part of the judgment as it lays down what the test is under in the UK.
29. The argument is again very simple: There is no length of service opt out under the Equal Pay Act 1970 and so length of service should be treated in the same way as any other pay inequality (contrast this with age discrimination). There is after all nothing in the Directive that prevents a better level of protection being given to employees in the UK.

30. Her conclusion is that there is no hurdle of serious doubt imposed by the Equal Pay Act 1970. What this means is that no matter what the ECJ do about *Danfoss*, *Cadman* or any other case on length of service the domestic courts will not be applying a 'serious doubts' test.

31. Length of service will from now be treated in the same way as any other pay inequality.

Age Discrimination

32. *Rolls Royce PLC v UNITE the UNION [2009] EWCA Civ 397*. Here you had somewhat unusually a company challenging its own collective agreement. The problem was the use of length of service as one of the criteria for redundancy selection. In this case the company wished to depart from the pre-agreed terms on the basis that times had moved on. The company's current business objective was to retain employees who had versatility and skills rather than length of service.

33. What the Court of Appeal ended up doing (after having spent a good deal of time deciding whether to actually hear the appeal) was fully reviewing the use of length of service under the age discrimination provisions contained within the Council Directive

2000/78/EC of 27 November 2000 (the Directive) and The Employment Equality (Age) Regulations 2006 (EEA).

34. Wall LJ gave the leading judgment. The provision he was looking at was a criteria whereby for each year of service up to 10 years the employee got a point for each completed year of service. The effect of such a criteria was to disadvantage younger employees. It was he decided indirect discrimination (see Reg 3(1)(b) & 7 EEA).

35. Wall LJ accepted that this was an award of 'any benefit' and so fell squarely within Reg 32 EEA (see para 103). Note that any benefit that was for 5 years or less would have been excluded from consideration (Reg 32(2) EEA).

36. He then went on to consider whether the use of the length of service criteria was a proportionate means of achieving a legitimate aim. At paragraph 95 he concluded as follows:

"I am, however, quite satisfied that, viewed objectively, the inclusion of the length of service criterion is a proportionate means of achieving a legitimate aim. The legitimate aim is the reward of loyalty, and the overall desirability of achieving a stable workforce in the context of a fair process of redundancy selection. The proportionate means is in my judgment amply demonstrated by the fact that the length of service criterion is only one of a substantial

number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative. Equally, it seems to me, the length of service criterion is entirely consistent with the overarching concept of fairness – or, to put the matter at its lowest – there is no evidence to contradict the statements made on the union's behalf that the company's younger employees accept it.”

37. It should be noted that throughout his analysis he stresses that this was one of a number of criteria that form an overall agreed approach to redundancy selection. In fact it was Sir Thomas Morison’s view expressed in the Court below in an obiter comment that had he been looking solely at LIFO then that might be objectionable. This was not dealt with directly by Wall LJ but he does point out at para 92 that:

“The first and most important [in this case] is that the length of service criterion is but one of a number of criteria in the context of an overall selection for redundancy. Moreover, it is by no means determinative or definitive of selection.”

38. It is also worth noting that Arden LJ who gave the leading judgment in *Wilson* accepts the *Cadman* principles without question (see para 156) a position she will not follow less than a year later.

Conclusions

39. I have set out below what I believe are the important principles to take away from these two authorities:

40. LIFO without more is over.

41. LIFO as part of an approach is justifiable but the employer must be clear what the aims are.

42. All length of service benefits are open to challenge under the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

43. The normal rules in relation to proving discrimination apply there is no extra hurdle simply because the benefit is linked to length of service.

44. Just because the provision/benefit is open to challenge does not mean that an employee will succeed. An employer will still be able to justify the disparity on the grounds of loyalty and experience as a proportionate means of achieving a legitimate aim. This has been accepted as good justification for many years by the Courts in the UK and in Europe (I think this is what the ECJ were trying to get at in *Danfoss & Cadman*).

45. Lastly I think it is worth bearing in mind what Arden LJ says in *Wilson* that the jurisprudence on the relationship between length of service and the inequality that it sometimes produces is at an early stage of development.

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The law is as at 3rd December 2009. Fact sensitivity in this area of the law is important so the information in these notes should be seen as guidance rather than a definitive statement of the law to be applied to every situation.

RESOURCES

I have found the following of great assistance when putting these notes together:

The IDS subscription website <http://www.idsbrief.com/>

The Industrial Relations Law Reports (IRLR)

Equal Opportunities Review: <http://eordirect.co.uk>