



Bulletin 155

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**AGE DISCRIMINATION  
– EMPLOYEE AGREEMENT DOES NOT MEAN DISCRIMINATION CAN BE JUSTIFIED.**

In *Pulham and others v London Borough of Barking & Dagenham* the Employment Appeal Tribunal has found that a tribunal had erred in placing too much emphasis on trade union agreement and an employer's financial situation when deciding whether discriminatory provisions could be objectively justified.

London Borough of Barking and Dagenham had an incentive scheme to reward loyalty and long service. The scheme 'kicked in' when an employee reached the age of 55 **and** had 25 years service. In anticipation of the Employment (Equality) Age Regulations 2006 ("the Age Regulations") coming into force, the Borough reviewed the scheme and found it to be potentially discriminatory on the grounds of age and that it was unlikely to be objectively justified.

Despite this finding, during negotiations with the trade unions with regards to ongoing equal pay claims, it was agreed with the unions that the scheme would close on the 1<sup>st</sup> April 2007 to new entrants and existing employees would be frozen on their current rate.

Mrs Pulham brought a claim against the Borough for direct and indirect age discrimination. The grounds of her claim were that whilst she had the requisite 25 years service, she would not reach the age of 55 until 2011 and therefore, as of the 1<sup>st</sup> October 2006 she had been discriminated against on the grounds of age by not being allowed into the scheme and after the scheme had closed she had been discriminated against by not having ongoing increments.

A tribunal found that Mrs Pulham had been discriminated against on the ground of age **but** that the Borough's treatment of her was **objectively justified** on the grounds that agreement as to the transition position of the scheme had been reached with the unions and the Borough had exhausted its pot of money set aside to deal with equal pay litigation.

Mrs Pulham appealed. The EAT held that whilst employee agreement to a discriminatory act may be a relevant factor to consider when assessing whether the discrimination could be objectively justified, tribunals must still carry out the proper assessment of proportionality.

➤ **Practical Tips**

Employers should be careful not to place too much reliance on union or workforce agreement when deciding whether age or length of service based criteria can be objectively justified. It is important to ensure that the test in the Age Regulations of a '**proportionate means of achieving a legitimate aim**' is satisfied.

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact: Paul Chamberlain in Manchester on 0161 836 8864, Andrew Cross in Liverpool on 0151 600 3062 or Kevin James in Preston on 01772 229847.

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