

# Cost plus: still alive and kicking?

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In *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487 the Court of Appeal looked at the justification defence for age discrimination claims.

As a result of the policy of austerity in the public sector the Claimant's employer had slowed the rate of pay progression. This disproportionately affected younger employees, as they would have to work longer than their older counterparts had had to work to move up the scale: for the Claimant, he would have to work 23 years to get to the top of the pay band, instead of 8-9 years. The employer's defence was that it was required to balance the books due to budget cuts.

## Relevant principles

The Court of Appeal first confirmed the principle in *Woodcock*: that the CJEU case law means "the saving or avoidance of costs will not, without more, amount to the achieving of a legitimate aim". Therefore *"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"*

The Court also pointed out that the distinction between "costs without more" and what the lawyers call "costs plus" can be subtle.

## Are budgetary constraints "costs without more" or "costs plus"?

On the facts of this case, the Court of Appeal held that an employer's legitimate need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purposes of a justification defence. In other words: it is not "costs without more".

The Court accepted that it could sometimes be difficult to determine whether an employer simply wishes to reduce costs and cases where it is, in effect, required to save costs (only the latter will be a legitimate aim). However, this is the sort of judgment that tribunals are routinely required to make.

### **Effect of the decision**

Employers ought to find it easier to prove that they have a legitimate aim. The focus is likely to shift to the second part of the justification defence: the means by which that aim is pursued.

The Court of Appeal emphasised that an employer with a legitimate aim will still need to show that the measures complained of are a proportionate means of achieving that aim, having regard to their disparate impact on the group in question.

I anticipate that the focus of arguments in tribunal will shift to what alternative means the employer could have pursued, which would have had a less discriminatory impact.

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