

Pay and Length of Service

The European Court of Justice (ECJ) gave a ruling that provides greater clarity to potential litigants over the lawfulness of the use of the factor of length of service/seniority when calculating pay.

Cadman v HSE

Although the case relates to equal pay it also has relevance in other areas of discrimination law, for example age discrimination. It regards the pay structure at the Health and Safety Executive (HSE) and in particular annual pay increases. These are determined not only by personal performance but also length of service. This worked to Ms Cadman's disadvantage in that certain men in her pay bracket received higher pay than her, and she brought a claim under the Equal Pay Act 1970. The case was referred to the ECJ by the Court of Appeal.

In the earlier case of *Danfoss* (1989) it seemed that the use of length of service criteria by an employer did not need to be justified even where this has a "disparate effect between relevant male and female employees." A dispute arises here as greater length of service does not necessarily mean greater experience or ability. The length of service criteria should have to be justified as the statistics show a disparity between men and women in terms of length of service.

The Decision

The ECJ decided that employers are entitled to use length of service as an appropriate and legitimate way of rewarding experience allowing an employee to do a better job. Employers do not have to justify this by establishing that this criterion is appropriate as regards a particular job. This clears up the confusion as a result of *Danfoss* and the decision comes at a time when employers are adjusting to the new age discrimination legislation.

Exceptions

The ECJ provided for some exceptions by stating that the general rule will prevail "Unless the worker provides evidence capable of raising serious doubts in that regard". *Danfoss* had previously failed to make this understood.

Although the employee carries the burden, circumstances may arise where doubt could be shown. For example is length of service for lawyers necessarily as helpful in assessing skills and contribution as actual post-qualification experience?



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Age Discrimination

Overlaps may occur in relation to age discrimination cases. If an older person of the same circumstances is being paid more they may be deemed to have been treated more favourably and an individual may be able to bring a claim.