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HEYDAY: THE ECJ DECIDES

1 INTRODUCTION

On 5 March 2009, the European Court of Justice (ECJ) published its highly anticipated judgment in the Heyday case.

The case challenged provisions under the Age Regulations¹ which allow employers to dismiss workers aged 65 or over, provided the reason for dismissal is retirement (and is not otherwise discriminatory). The arguments centred on whether the UK has properly implemented the age discrimination requirements of the European Framework Directive² (Directive), and whether the so-called default retirement age of 65 is, of itself, discriminatory.

2 KEY POINTS

- The ECJ confirmed that national legislation may provide that certain differences in treatment on grounds of age do not constitute discrimination.
- However, any such difference in treatment must be justified by a legitimate aim, such as employment policy.
- The means of achieving that aim must also be “appropriate and necessary” and “a high standard of proof” will be required.
- It will now be up to the High Court to decide whether the tests are met in relation to the UK’s default retirement age.

¹ The Employment Equality (Age) Regulations 2006

² The European Framework Directive on Equal Treatment in Employment and Occupation (2000/78/EC)

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3 BACKGROUND

To implement the Directive, Member States were required to introduce national law prohibiting discrimination on grounds of age (amongst other things) in relation to recruitment and employment. The Directive specifically envisages that Member States may have “national provisions” setting retirement ages (and that it operates “without prejudice” to them).

The Age Regulations generally came into force on 1 October 2006, although the pensions requirements came along a little later (with effect from 1 December 2006). In contrast to other areas of discrimination³, both direct and indirect discrimination can be objectively justified under the Age Regulations if the practice in question is a proportionate means of achieving a legitimate aim.

4 THE DECISION

Essentially, the ECJ has reached a similar conclusion to the Advocate General⁴ (whose opinion was delivered on 23 September 2008) in finding that the UK’s default retirement age could be objectively justified as a matter of national law. It ruled that the Directive “*gives Member States the option to provide...for certain kinds of differences in treatment on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, or [the] labour market..., and if the means of achieving that aim are appropriate and necessary*”.

On the face of it, this is consistent with the ECJ’s 2007 decision in *Palacios de la Villa v Cortefiel Servicios SA*, in which it concluded that Spanish national legislation which allowed collective agreements to require workers to retire at age 65 was permissible.

In this instance, however, the judgment went further, commenting that the Directive imposes on Member States a burden of establishing “*to a high standard of proof*” the legitimacy of the aim relied on as a justification.

³ Such as sex discrimination, where only indirect discrimination may be justified

⁴ See our Alert, “Default Retirement Age – Here to Stay?” dated 26 September 2008

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5 WHAT HAPPENS NEXT?

It now falls to the UK's High Court to determine whether the default retirement age can be objectively justified. But both Age Concern and Help the Aged have called on the UK Government to act immediately "to scrap" the default retirement age, which would (if the Government took this course) by-pass the need for a further decision.

In its recent consultation on flexible retirement and pension provision⁵, the Government restated its aim to encourage people to remain in the workforce. Given that it is also due to review the default retirement age, in any case, in 2011, it is not inconceivable that it will take the opportunity to make a change now.

For employers and trustees, therefore, it is a case of wait and see. If the default retirement age is removed from the legislation, its continued use by an employer will need to be objectively justified.

⁵ See our Alert, "Flexible Retirement: What the Dickens" dated 22 December 2008