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## DEFAULT RETIREMENT AGE – HERE TO STAY?

### 1 INTRODUCTION

The Advocate General (AG) of the European Court of Justice (ECJ) has delivered his opinion - the first stage towards a judgment in the highly anticipated Heyday case.

The case challenges provisions under the Age Regulations<sup>1</sup> which allow employers to dismiss workers aged 65 or over, provided the reason for dismissal is retirement and is not otherwise discriminatory. The arguments centre on whether the UK has properly implemented the age discrimination requirements of the European Framework Directive<sup>2</sup> (Directive), and whether the so-called default retirement age of 65 is, of itself, discriminatory.

### 2 KEY POINTS

- The AG found that the UK's default retirement age may "in principle" be objectively justified under the Directive (see section 4).
- In order to be justified, the UK Government will have to demonstrate a legitimate aim for having a default retirement age of 65.
- Under the Directive, the means for achieving that aim must also be "appropriate and necessary".
- The ECJ has also handed down its decision in *Birgit Bartsch*, a case concerning "age gap clauses" (section 6).

<sup>1</sup> The Employment Equality (Age) Regulations 2006

<sup>2</sup> 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 its provisions operate “without prejudice” to them).

The Age Regulations generally came into force on 1 October 2006, although the provisions relating to pensions came along a little later (with effect from 1 December 2006). In contrast to other areas of discrimination<sup>3</sup>, 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

The AG indicated that the UK’s default retirement age could “in principle” be objectively justified as a matter of national law. However, in line with the Directive, this will need to be supported “by a legitimate aim relating to employment policy and the labour market”, and the means used for achieving that aim must not be “inappropriate and unnecessary for the purpose”.

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

If the ECJ agrees generally with the AG’s opinion, the onus will be on the UK Government to demonstrate that the default retirement age of 65 is justifiable. In this regard, the AG recognises that the scope for justifying age discrimination may be broader than for other types of discrimination.

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<sup>3</sup> Such as sex discrimination, where only indirect discrimination may be justified

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In *Palacios*, the Spanish government was able to convince the ECJ that its default retirement age was justifiable as it was aimed at regulating the Spanish labour market (unemployment levels having been historically high). Also influential was the fact that levels of state pension in Spain are not “unreasonable”.

### **5 WHAT HAPPENS NEXT?**

Although the ECJ is not bound to follow the AG’s opinion, it often does. According to Heyday’s website we can expect the decision “later this year”. The question of whether the default retirement age can be objectively justified may then be referred back to the UK courts.

In the meantime, the provisions under the Age Regulations remain very much in place.

### **6 AND FINALLY...**

The ECJ’s judgment in *Birgit Bartsch*<sup>4</sup> has also been published. This case considered whether an “age gap clause” in a pension scheme which excluded entitlement to a survivor’s pension where the survivor was more than 15 years younger than the deceased member was discriminatory.

As the alleged right under the scheme arose before the deadline for implementing the Directive had elapsed, on the facts, the ECJ concluded that there was no discrimination. However, in her opinion (published in May 2008), the AG in this case commented that such an age gap clause could not have been objectively justified.

UK pension schemes often provide for the actuarial reduction of a widow or widower’s pension over a certain threshold (for example, where he/she is more than 10 years younger than the member). But it is arguable that such clauses are more easily objectively justified (and, indeed, the Age Regulations contain an exception to this effect) than those which exclude a benefit altogether. We await developments.

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<sup>4</sup> *Birgit Bartsch v Bosch und Siemens Hausgerate (BSH) Altersvorsorge GmbH*