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DEFAULT RETIREMENT AGE OF 65 - HERE TODAY, GONE TOMORROW?

1 INTRODUCTION

The eagerly awaited High Court decision in the *Heyday*[1] case was published on 25 September 2009.

The case centred on a challenge to the legality of provisions in the Employment Equality (Age) Regulations 2006 (the Regulations) which allow employers to dismiss employees aged 65 or over by reason of retirement. It also means that an employer has ready justification for not recruiting someone of that age. The European Court of Justice (ECJ) found that the UK's default retirement age (DRA) could be objectively justified as a matter of national law. It was then up to the High Court to determine whether the Government's basis for introducing a DRA of 65 was supported by a legitimate aim.

2 KEY POINTS

- The Court found that it was both legitimate and proportionate to adopt a DRA (see section 4).
- It was also reasonable, against the backdrop of the prevailing economic and social circumstances, that age 65 was selected to be the DRA (section 5).
- But given the current economic climate and increasing longevity, the judge gave a clear steer that maintaining a DRA of 65 is unlikely to continue to be proportionate. This will be the subject of a Government review in 2010 (section 6).

[1] R (on the application of Age UK) v Secretary of State for Business, Innovation and Skills

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3 BACKGROUND

Among other things, the European Framework Directive[2] required Member States to introduce national law prohibiting discrimination on grounds of age in relation to recruitment and employment. The Directive specifically envisages that Member States may have "national provisions" setting retirement ages.

The UK sought to implement the anti-age discrimination provisions of the Directive via the Regulations, which generally came into force on 1 October 2006 (although not until 1 December 2006 in respect of pensions). Owing to concerns that the Government had not implemented the Directive properly (by allowing what was described as "forced retirement" at age 65), the National Council on Ageing[3] commenced judicial review proceedings. These culminated in a number of questions being referred by the High Court to the ECJ.[4]

Back in March 2009, the ECJ confirmed that it was lawful for national legislation 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…, if the means of achieving that aim are appropriate and necessary". Member States would, however, need to meet a "high standard" of proof to establish the legitimacy of the aim relied on to justify the measure.

It therefore fell to the High Court to decide whether these tests were met.

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

[3] Now operating as Age UK, following the merger of Age Concern with Help the Aged

[4] Please see our Alerts: "Default Retirement Age - Here to Stay?" (dated 26 September 2008) and "Heyday: The ECJ decides" (dated 6 March 2009)

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4 ADOPTION OF A DEFAULT RETIREMENT AGE

In the High Court, Mr Justice Blake concluded that adopting a DRA was both a legitimate aim and not "a disproportionate way of giving effect to the social aim of labour market confidence".

Looking at the evidence considered by the Government during the process of implementing the Directive, he considered that having a DRA is designed "to give certainty and corresponding focus for planning purposes for employers and employees alike". As such, the DRA "was based upon a social policy aim that may generally be described as maintaining confidence in the labour market". The fact that this was a broad aim did not mean that it was not a legitimate one.

The Government had undergone an "elaborate" consultation process and had "proved to the requisite high standard that it did have social policy concerns in protecting the integrity of the labour market".

In reaching these conclusions, the judge drew a distinction between having a DRA and imposing a mandatory retirement age. He also recognised (as the ECJ had before him) that age discrimination is very different from other types of discrimination, as people will grow older and face decisions about retirement.

5 APPROPRIATENESS OF CHOOSING AGE 65

Separately, the judge looked at whether it was reasonable for the Government to have selected 65 as the DRA.

Based on the circumstances at the time the provision was agreed, it was not "beyond the competence of the Government in applying the directive" to select this age. Bearing in mind affordability of retirement, it could not have been lower than the state pension age of 65, and the proposal of a higher DRA of 70 had proved unpopular during consultation.

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6 WILL THE DRA OF 65 SURVIVE?

Originally scheduled for 2011, the Government has already announced that it is bringing forward its review of the DRA based on the "very different economic circumstances today - for businesses, and for individuals coming up to retirement - in comparison to 2006 when the age regulations came into force".[5] Its promised review will now take place in 2010.

The DRA of 65 therefore remains in place - for the time being. But given factors such as the planned rise in the state pension age to 68, increased longevity and the Government's review, the judge was in no doubt that "the case for advancing the DRA beyond [the] minimum age of 65 at least would seem to be compelling".

[5] In its consultation report "Building a society for all ages" published by the Department for Work and Pensions on 13 July 2009

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