

ARTICLE: ECJ rules that compulsory retirement can be justified by “social” aims

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Introduction

The European Court of Justice has this month given a judgment on the Heyday appeal, where Age Concern challenged the Employment Equality (Age) Regulations 2006 (“the Age Regulations”) as failing to correctly implement EC law. The ECJ has ruled that while it is permissible for the UK to have a legislative provision allowing compulsory retirement at the age of 65, nevertheless this provision must be justified by legitimate aims and implemented by appropriate and necessary means. However, such aims must have a social policy context.

This topic is currently a hotbed of debate and a recent split within the Cabinet was reported in the Observer after the judgment was published.

The concerns of Heyday

The Age Regulations allow retirement of workers when they reach the age of 65. Further, any discrimination by an employer in relation to an employee’s age can be justified if they can show such treatment was “a proportionate means of achieving a legitimate aim”.

Age Concern, under the name of Heyday, sought judicial review of the Age Regulations claiming that they did not implement the EC Framework Directive properly because they allowed compulsory retirement at the age of 65, and that the ability for an employer to justify direct discrimination was too wide.

Faced with these challenges, the High Court stayed the proceedings to refer three questions to the ECJ for clarification. On 5 March 2009, the ECJ gave its judgment on the three questions.

1. Does the scope of the Directive include the compulsory retirement provisions of the Age Regulations?

The ECJ noted that the Age Regulations set down conditions under which an employer may derogate from the prohibition on age discrimination by insisting that an employee over the age of 65 should retire. The ECJ held that, as such, the Age Regulations were rules relating to “employment and working conditions, including dismissals” and so fell within the scope of the Directive.

2. Should the Age Regulations include a list of treatments which can be justified?

Treatment which might otherwise be discriminatory can be justified if it is “a proportionate means of achieving a legitimate aim”. This particular question arose because Article 6(1) of the Directive gives a list of examples of treatment which may be justified, but this list is not reproduced in the Age Regulations. The ECJ held that Member States have a wide discretion on how to implement a Directive, and that the list in Article 6(1) was “purely illustrative”. There was no obligation on the UK to have a similar list.

However, the ECJ went on to distinguish which types of aim might be considered legitimate. The ECJ made it clear that legitimate aims would include those of a “public interest nature”, such as those relating to employment policy, the labour market or vocational training. Examples of non-legitimate aims were cost reduction or improving competitiveness. The ECJ added that it was for the national court to decide whether the aims specified in the Age Regulations are legitimate.

3. Are there two different tests for justifying discrimination under the Directive?

When attempting to justify indirect discrimination under the Directive, the differences in treatment must be “objectively justified”; when justifying direct discrimination, the differences must be “objectively and reasonably justified”.

Whilst the ECJ admitted that the wording was not identical, they held that it made no difference and the tests were the same.

What the ECJ judgment means for the UK

The case must now go back to the High Court which will decide whether the provisions relating to compulsory retirement of workers aged 65 and above is a justified by a legitimate aim, and whether the means of achieving that aim are appropriate and necessary.

Although the ECJ held that the UK legislation does not need to have a list showing which types of treatment can be justified, nevertheless the Government would be wise to give thought to producing such a list and/or some guidance as to what types of direct age discrimination are permissible on the basis that they meet social objectives that satisfy a legitimate aim. With the ECJ having denounced business-related reasons in favour of wider social policy reasons as legitimate aims, employers may currently be hard-pressed to identify which reasons for compulsorily retiring an employee would be justified in the wider social context.

Furthermore, EC law is considered to have direct effect on the public sector without the need for implementing legislation. As such, should the Government need to change the Age Regulations, public sector employers may be put at risk of having breached the law when they were in fact following the Age Regulations at the time.

Cabinet split over compulsory retirement

Just three days after the ECJ published their judgment, the Observer newspaper reported that the issue of whether to allow employees to work past the age of 65 had caused a “parliamentary revolt”. The MPs’ concerns were that older workers would be at a higher risk of redundancy as employers would see them as “having only a few years left anyway”.

In addition, there were fears that workers over 50 would suffer as well, since their pensions will have been hit as a result of the economic downturn, and they might now need to work for longer to rebuild the value of their savings.

We will be doing a further article on this issue when the case has been back to the High Court. In the meantime, if you would like any further information on this case or how the judgment might impact on your business, please contact David Hill at dhill@davidsonlarge.com or Lucy Bond at lbond@davidsonlarge.com.