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Client Alert

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Age Discrimination: Case Law Update

There have been a number of recent cases in various jurisdictions in relation to age discrimination legislation. These all contain important points to note for employers, and partnerships, worldwide.

UK: *Bloxham v A Large UK-based Law Firm*

Legislation

The Employment Equality (Age) Regulations 2006 (the **Regulations**), in force from 1 October 2006, make it unlawful to discriminate either directly or indirectly on the grounds of age. Age discrimination is unlawful in the UK unless it can be objectively justified. To be able to justify discriminating treatment objectively, an employer (or a partnership) must show that the treatment was a proportionate means of achieving a legitimate aim.

Facts

Prior to 1 May 2006, a large UK-based law firm operated a 'lockstep system' for profit sharing. Points were awarded to active and retired partners on the basis of length of service. The exact details of the points awarded to an individual were governed by the Memorandum of Terms of Partnership. Active partners could have a maximum of 50 'active' points. 'Pension' points, the only points applicable to retired partners, were offered on a similar basis but a maximum of only 10 could be accrued. Partners could retire, with consent, at any time from age 50 but if the partner was younger than 55, a percentage reduction was applied to his accrued points.

The system worked on the premise that one generation of active partners pays for the pensions of the retired partners, and they subsequently rely on the following generation to pay their pension. Concern over this system arose from younger partners. As the number of retired partners increased, a larger proportion of the profits of active partners was required to pay retired partners. In addition, it was predicted that by 2018 the retired partners' cumulative share of profits, which was capped at 10 percent, would have been reached so that the value of pension points after that date would decline. As a result, a review of the pension arrangement was launched and, in 2003, a Working Group was set up.

The Working Group had a number of meetings and various proposals were made. They opted for a modified pension arrangement which was to come into effect on 1 May 2006 with a transitional period for those partners older than 50, to last until 31 October 2006. This was to allow those who were aggrieved by the changes to retire and retain the rights they would have had under the old arrangement. Certain partners who decided to retire under the old pension agreement were also to be offered consultancy posts at the firm.

"In holding that the provision in the collective agreements was directly discriminatory on the grounds of age, the European Court of Justice went on to consider whether the measures were **justified**. They held that the aim of the legislation, to regulate the labour markets, could not 'reasonably be called into question'".

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The claimant in question, Peter Bloxham, who was 54 at the time, disagreed with the proposed reforms. He requested consent to retire and later sent an election to retire on 31 October 2006. This was accepted by the firm. As he was 54, a 20 percent reduction was applied to his accrued points. He raised a claim that this reduction meant he was less favourably treated than a partner who was 55 or older and this constituted discrimination on the grounds of age. The Tribunal agreed that this was a case of less favourable treatment and, unless justified as being a proportionate means of achieving a legitimate aim, would result in discrimination.

The Tribunal unanimously considered that the circumstances 'comfortably passed' the test for being a proportionate means of achieving a legitimate aim. They listed several factors of importance, one being that younger age groups were becoming increasingly disadvantaged in the firm as a result of the existing pension arrangement and so change was clearly needed. The fact that a 20 percent discount applied to Mr Bloxham's pension under the transitional provisions was not disproportionate to that aim and was, under the circumstances, justified under the Regulations. It was evident that the firm had embarked on a lengthy consultation process with all of the partners concerned and no less discriminatory alternative had been identified.

This was one of the first major claims to be brought under the new Regulations. Although heard at first instance, and as such non-binding on subsequent tribunals, it does give an indication as to what the Tribunal will consider to be objective justification. What is clear is that employers and partnerships should be very careful to document the reasons behind all decisions and to show where various alternatives have been considered.

EU: *Heyday v Secretary of State for Trade and Industry*

In the Regulations, the UK Government introduced a national default retirement age of 65, after which employers can retire their employees without being required to give reasons (although the employer must consider a request that the employee makes to work beyond this age). Retirement was added as a fair reason for dismissal under the UK unfair dismissal regime. Heyday, a group which promotes the interests of older people, challenged this default retirement age as being in breach of the principles of Council Directive 2000/78/EC of 27 November 2000, which established a general framework for equal treatment in employment and occupation. On 24 July 2007, the High Court made an order referring a number of questions to the ECJ, including the following:

National Retirement Ages and the Scope of the Directive

- Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or older by reason of retirement?
- Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or older by reason of retirement where they were introduced after the Directive was made?

The Definition of Direct Age Discrimination: Justification Defence

Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim? Or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measures which is similar in form and content to Article 6(1)?

The questions put to the ECJ on the *Heyday* case are not expected to be answered until 2009. However, in the interim, a Spanish case has recently been heard that draws close parallels to *Heyday*.

Palacios de la Villa v Cortefiel Servicios SA

Spanish law rendered lawful clauses in collective agreements that provide for the termination of employment contracts where workers had reached the age of 65, subject to the proviso that certain pension conditions were satisfied. The Claimant alleged that this contravened the Directive. The Spanish Government's first contention was that the legislation was exempt as a result of recital 14 in the Directive's preamble, which provides that:

"This Directive shall be without prejudice to national provisions laying down retirement ages".

The ECJ drew a distinction between Member States being allowed to set retirement ages, which was clearly permitted by the Directive, and setting conditions which resulted in the termination of employment, as in the Spanish case.

In holding that the provision in the collective agreements was directly discriminatory on the grounds of age, the ECJ went on to consider whether the measures were **justified**. They held that the aim of the legislation, to regulate the labour markets, could not 'reasonably be called into question'. They also stated that the legislation was appropriate and necessary to achieve this aim. In doing so, emphasis was placed on the margin of discretion granted to Member States. The relevant provisions were therefore not in breach of the Directive.

Heyday Questions in Light of *Palacios de la Villa*

The case indicates that the UK Government will have to justify the compulsory retirement age, as the practical effect of having a compulsory retirement age is that the termination of employment can take place relatively easily after that age. The Government will take comfort from the emphasis the Court placed on margin of discretion of Member States. However, the Spanish legislation relates to provisions in collective agreements, which in theory have been negotiated between the employer and their employees, and provides that the provision can only be applied if conditions in relation to pensions for the workers are met. These aspects were referred to favourably by ECJ, but the UK's default age is an overriding provision applicable in all circumstances. Hence, justification may be harder for the UK government to show.

The recent EAT case of *Johns v Solent SD Limited* (at the time of writing still unreported) addressed the issue of whether age discrimination claims should be allowed a stay in proceedings, pending the result of *Heyday* case. The EAT, overturning the Tribunal, ruled that a stay should be granted. Following this decision, the President of the Employment Tribunals has ordered for all claims brought by employees forced to retire at 65 to be 'stayed' until *Heyday* has been heard. It is understood that the EAT has allowed Solvent SD Limited the right to appeal to the Court of Appeal.

If you have any questions about this *Client Alert*, please contact one of the authors listed below:

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