



## briefing

Employment, Pensions & Benefits - September 2009

### UK's retirement age here to stay? Probably not

**The High Court has now given its decision in the proceedings brought by Age Concern relating to the UK's default retirement age of 65. It held that the government's introduction of a default retirement age in 2006 was 'legitimate and proportionate'. As a result, organisations can still require that their staff retire at the age of 65.**

#### Background

The [Employment Equality \(Age\) Regulations 2006](#) came into force on [1 October 2006](#) and prohibit discrimination in employment and training on the grounds of age and also introduced a new procedure for retiring employees. The Regulations provide that it is not unlawful to dismiss an employee at or after the age of 65 where the reason for dismissal is retirement and the procedural requirements for retiring employees are followed. Specifically, the organisation must notify the employee of the intended date of retirement and the employee has the right to request to continue working beyond that date.

Age Concern argued that the UK default retirement age of 65 was discriminatory and incompatible with the Equal Treatment Framework Directive (from which the Regulations are derived). In what became known as the '[Heyday challenge](#)' it made an application for judicial review and the High Court referred the matter to the European Court of Justice (ECJ) in summer 2007.

One of the issues considered by the ECJ was whether or not the Directive permitted member states to introduce legislation such as retirement ages whereby, difference of treatment on grounds of age did not constitute discrimination if it was a proportionate means of achieving a legitimate aim.

The ECJ also gave some guidance as to what aims could be considered '[legitimate](#)'. The matter was then referred back to the High Court. (For further details of the ECJ decision - see e bulletin no 15).

#### High Court decision

The High Court held that although the default retirement age of 65 was, on the face of it, discriminatory, it had been introduced to pursue legitimate social policy objectives and was a proportionate measure. It was therefore lawful.

The Court appears to have been influenced in particular by the fact that the Regulations were the product of extensive consultation. In fact, there were four consultation exercises relevant to the development of the Regulations and these contained a number of specific questions relating to whether or not there should be a mandatory retirement age and if so, what that age should be. One of the government's stated social policy objectives when implementing the Regulations and the default retirement age of 65 was '[workforce planning](#)' and this had three specific aspects:

- a retirement age provides a target age against which employers and employees can plan work and retirement
- prevention of job blocking
- encouraging employees to save for retirement

Other benefits identified were the protection of workers' dignity at the end of their working lives, improving the participation of workers in the 50 - 64 age group and encouraging culture change.

However, although the Court considered that the default retirement age of 65 had been appropriate and proportionate in 2006, there was now a 'compelling' case for change. Crucial to the Court's decision was that at the time of implementing the Regulations, the government had already made it clear that it would be reviewing the issue of the default retirement age of 65 in 2011 but in July 2009 it announced it was bringing forward this review to 2010. It is unlikely that the retirement age of 65 will remain in place. As the High Court Judge stated he "[cannot presently see how 65 could remain as a default retirement age after the review](#)". Had the review of the default retirement age not been announced then the Court's decision well may have been different.

### The implications the decision

For the time being there is now certainty that the retirement age of 65 is lawful. However, this certainty is likely to be short-lived. Taking into account the Judge's comments it is expected that the government will dispense with 65 as the retirement age following its review in 2010.

When will any changes be effective? Many organisations have already removed their normal retirement age and the Employers Forum on Age has been pursuing a long-term campaign to persuade the government to remove the default retirement age completely rather than just reviewing it. According to the Office of National Statistics there are currently 1.4 million people working past pension age and it is likely that many more would welcome the opportunity to do so bearing in mind the current economic climate and shortfalls in pension funds.

The recent High Court decision is certainly not the end to the contentious issue of a mandatory retirement age. What is certain though is that employers should continue to comply with the requirements of the statutory retirement procedure and to actively manage any performance concerns rather than simply letting someone coast to retirement.

Finally, in relation to the 260 Employment Tribunal claims where the retirement age was an issue and which were put on hold (stayed) pending the High Court decision, many of these are likely to be dismissed or withdrawn. However, those claims which relate to procedural failings in the statutory retirement procedure (as opposed to the retirement age itself) may still be pursued.

### More information

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If you would like further information, or would like to discuss the potential impact of these decisions on your organisation, please call Debra Gers, or your regular Morgan Cole contact.



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