Age is the Issue: Interpreting Age Discrimination Case Law in the UK

BY CHRIS BRACEBRIDGE, ANNA SANFORD AND CHRISTOPHER WALTER

At a Glance
Case law in 2007/8 sheds light on UK courts’ interpretations of the age discrimination regime which came into force on 1 October 2006. This Stay Current summarises key decisions.

CONTENTS
1. Employment Equality (Age) Regulations 2006 ................................................... 1
2. Dismissal Discriminatory on the Grounds Of Youth................................. 1
3. Retirement and Objective Justification................. 2
4. Provision of Flexible Benefits Not Age Discriminatory ..................................... 3
5. Default Retirement Age – Palacios / Heyday Challenge................................. 4

1. Employment Equality (Age) Regulations 2006

The Equal Treatment Framework Directive (2000/78/EC) (the "Directive") was introduced in 2000 in order to harmonise European Union Member State legislation regarding discrimination in employment and occupation. The UK implemented the age strand of the Directive through the Employment Equality (Age) Regulations 2006 (the "Regulations"). The Regulations prohibit direct and indirect age discrimination (subject to a defence of objective justification), harassment and victimisation on the grounds of age. They introduce a default retirement age of 65, although employees can request to work beyond this age, and employers must consider any such request. The Regulations also contain various limited exceptions in respect of the provision of benefits and pensions to employees.

This Stay Current looks at how UK courts have approached some major issues under the Regulations.

2. Dismissal Discriminatory on the Grounds Of Youth

In Wilkinson v Springwell Engineering Limited (ET/2507420/07), the Employment Tribunal ("ET") held that the dismissal of an 18-year-old employee was not on grounds of capability, as Springwell claimed, but on grounds of age.

Miss Wilkinson was employed by Springwell as an office administrator, a role her (older) aunt had previously undertaken. After one month of
Miss Wilkinson’s three-month probationary period, Springwell asked her to improve her work as she was only completing 90 per cent. of the role. Springwell also asked an administrator from another office (who was older than Miss Wilkinson) to cover some of the work. Miss Wilkinson alleged that she was then summarily dismissed with no process or right of appeal, being told by her line manager that her dismissal was because she was too young to do her job.

Miss Wilkinson issued age discrimination proceedings.

The ET concluded that Springwell was satisfied with Miss Wilkinson’s aunt’s performance and expected a similar level of performance from Miss Wilkinson. This, together with Springwell’s request that another, older, administrator do some of Miss Wilkinson’s work, lead the ET to conclude that Springwell had made a stereotypical assumption based on age to the detriment of Miss Wilkinson. Springwell had assumed a relationship between experience and age and capability which had not been supported by evidence of Miss Wilkinson’s work.

Miss Wilkinson had established primary facts from which the ET could conclude that the dismissal was by reason of age. Springwell failed to establish that age was not the reason for the dismissal or advance any arguments that the less favorable treatment was objectively justified.

Comment: This is the first widely reported UK decision where an employee has successfully alleged age discrimination on the grounds of youth, as opposed to old age. It is a salutary warning that, unlike in the USA, where age discrimination generally only applies to those aged 40 or over, UK age discrimination laws apply to all employees.

3. Retirement and Objective Justification

Under the Regulations, employers can retire employees when they reach 65 years old (or (in certain cases) the employer’s normal retirement age, if different). Provided that some simple procedural requirements are met, the dismissal will be neither discriminatory nor unfair. However, the automatic retirement provisions do not apply to non-employees such as partners or office-holders. In those cases, forced retirement is likely to be discriminatory on the grounds of age, unless objectively justified.

The defence of objective justification requires the employer to show that the treatment, or provision, criterion or practice, was “a proportionate means of achieving a legitimate aim”. Although only first-instance decisions, and therefore not binding on future ETs, three recent cases illustrate the ET’s initial approach to this test (in the context of retirement).

In Bloxham v Freshfields Bruckhaus Deringer (ET/2205086/2006), the ET held that changes to Freshfields’ pension arrangements were directly discriminatory but could be objectively justified and were therefore lawful.

Freshfields, an international law firm, made changes to its UK partners’ pension scheme in order to make it fairer to younger partners and more financially sustainable. As part of the changes, Freshfields introduced transitional arrangements for partners over the age of 55. Mr Bloxham, an older partner, argued that, as a result of the transitional arrangements (which subjected him to a 20 per cent. discount for early retirement), he had been discriminated against on the grounds of age.

The ET confirmed that Mr Bloxham had suffered direct discrimination as he had been treated less favourably on the grounds of age by virtue of the transitional arrangements. However, the ET also held that the treatment was objectively justified, as:

- reform of the pension scheme was legitimate and necessary to alleviate the unfairness of the existing arrangements to younger partners;
- months of analysis were undertaken prior to devising the proposals for reform;
Consultation regarding the changes was extensive; and there were no alternative less discriminatory means of achieving the same aim.

Justification arguments were also successful in the compulsory retirement at 65 of a partner in a different law firm, in Seldon v Clarkson Wright and Jakes (ET/1100275/2007). Having carried out a “balancing exercise” between the needs of the partnership and the impact of compulsory retirement on Mr Seldon, the ET held that Mr Seldon's compulsory retirement at 65 had been discriminatory on the grounds of age. However, on balance it found that the dismissal was a proportionate means of achieving the following legitimate aims:

- achieving a supportive partnership culture by avoiding having to confront or expel underperforming partners at or about retirement time (a performance dismissal being the alternative to mandatory retirement); and
- encouraging associates and other professional staff to remain, with a view to advancement, as it enabled them to ascertain when future partnership vacancies would likely occur.

However, in a case relating to certain judicial office-holders called “Recorders” (Hampton v The Lord Chancellor And The Ministry Of Justice (ET/2300835/2007)), the UK Government Ministry of Justice failed to persuade the ET that compulsory retirement of Recorders at 65 was objectively justified.

The ET did find that there was a legitimate aim of maintaining “a reasonable flow of new appointments and a reasonable flow of candidates for posts in the full time judiciary”. However, the Ministry could not show evidence that retirement at 65 was proportionate i.e. reasonably necessary in order to achieve the legitimate aim. The dismissal was therefore not justified and was discriminatory.

**Comment:** These cases show that employers must have cogent and extensive evidence in order objectively to justify otherwise discriminatory practices. It will not be sufficient to show that a legitimate aim exists if there is no evidence showing that the means of achieving it are proportionate and that the aim has been or is likely to be achieved by the otherwise discriminatory measure. Such evidence should be obtained before implementing a potentially age discriminatory practice. Running an objective justification defence is likely to be expensive, as the case will necessarily be complex and evidence-heavy, and may require some degree of expert evidence.

### 4. Provision of Flexible Benefits Not Age Discriminatory

In Swann v GHL Insurance Services UK Limited (ET/2306281/07), the ET held that the provision of a fund for the purchase of items from a flexible benefits package was not capable of amounting to less favourable treatment on the grounds of age (and therefore was not age discriminatory), notwithstanding the fact that the premiums payable for private health insurance – one of the optional elements of the benefits package – were calculated according to age and gender.

Even if the offer of the benefits package had been tainted by age discrimination, the ET was satisfied that the employer would have been able objectively to justify the practice, as:

- the employer offered the benefits package for the purpose of enhancing the recruitment and retention of staff (the legitimate aim);
- it had sought professional advice in order to identify a package of benefits that fulfilled that aim, had surveyed its employees about the benefits they would find most useful, and had considered their responses.

Therefore the employer had made all reasonable efforts to offer its employees the most advantageous flexible benefits package. On the balance of probabilities, the package would have the desired beneficial effect on the recruitment and retention of staff.
**Comment:** It is helpful for employers that the ET considered the reliance on professional advice to be an important factor – this could be an achievable central plank in any employer’s objective justification defence. The use of a staff survey is another cheap and effective factor to consider. It is also useful that the employer’s genuine intentions appeared to be important to the ET in its decision-making.

5. Default Retirement Age – Palacios / Heyday Challenge

In our December 2007 Stay Current we reported that the European Court of Justice (“ECJ”) has given its judgment in Palacios de la Villa v Cortefiel Servicios SA (C-411/05), the Spanish case addressing the legality of mandatory retirement ages in collective agreements. The ECJ determined (contrary to the Advocate General’s opinion) that the Directive does apply to national laws on retirement, notwithstanding recital 14 of the Directive, which seemed to indicate otherwise.

The UK’s default retirement age of 65 has been challenged in the case of R (on the application of the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform (24 July 2007). This is an application (backed by an age charity operating as the Heyday group) for judicial review of the Regulations on the grounds that they fail properly to give effect to the Directive, particularly in allowing UK employers the ability to retire employees mandatorily at 65. On 24 July 2007, the High Court referred various questions to the ECJ for determination, in order to decide the application.

The decision in Palacios has clear relevance for the Heyday case. Importantly, the ECJ decided that termination of employment on retirement falls within the scope of the Directive; that view is contrary to the UK Government’s position that the UK law governing dismissals at retirement age is outside the scope of the Directive and so cannot be challenged under EU law.

The UK Government will therefore have to objectively justify the UK default retirement age as an appropriate and necessary means of achieving a legitimate aim. The justification defence was made out in the Spanish case, but there are important differences between the two cases: in the UK, retirement ages are set by individual employers (not by collective agreements), and UK employees do not have the opportunity to challenge retirement dismissals in an ET, unlike their Spanish counterparts.

It is expected that the Heyday reference to the ECJ will be decided in 2009. However, the HC will then almost certainly have to determine whether certain parts of the Regulations are objectively justified, and, whatever the outcome, there are likely to be appeals. Final resolution of the issue is therefore likely to be in 2010 or later. The Employment Appeals Tribunal has issued a practice direction staying until then all ET claims relying upon the Heyday point.

**Comment:** The Heyday challenge raises the possibility that mandatory UK retirements at 65 will be unlawful unless objectively justified, particularly in the public sector, where employees can rely on directly effective rights under the Directive if the Regulations are found to be incompatible with it. Any such retirement claims currently stayed at the ET might be found to be unlawful in retrospect. Pending resolution of the Heyday issue, employees may be more likely to put in such a speculative claim as a negotiating tactic on exit. For the time being, employers have little choice other than to continue to comply with the Regulations. To manage the risk of retirement claims, a compromise agreement can be entered into with a retiring employee – however, this will require an additional payment to the employee and their taking independent legal advice.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

Chris Bracebridge  
44-20-3023-5138  
chrisbracebridge@paulhastings.com

Anna Sanford  
44-20-3023-5146  
annasanford@paulhastings.com

Christopher Walter  
44-20-3023-5129  
christopherwalter@paulhastings.com