

## ECJ decision on Heyday challenge

Although no final decision has yet been reached regarding whether employers can lawfully force people to retire at the age of 65, yesterday's European Court of Justice ("ECJ") decision can be seen as good news for employers.

The ECJ delivered its long-awaited ruling on the legality of the UK's default retirement age yesterday and essentially followed the Advocate General's opinion which was published last September. The ECJ held that a compulsory retirement age of 65 is, in theory, capable of being justified. Attempts by Age Concern England to make it more difficult for the retirement age to be upheld were unsuccessful. However, it is for the UK Courts to decide whether or not the compulsory retirement age is objectively and reasonably justified by a legitimate aim, and whether the means used to achieve that aim are appropriate and necessary.

The ECJ did comment on the need for the particular aim to be a social policy objective. There is a broad discretion given to Member States as to how they achieve their social policy objectives, provided this does not frustrate the principle of non-discrimination. However in order for the retirement age to be justified the Government would have to produce more than mere generalisations about the way the retirement age is intended to implement the relevant social policy.

So, as we anticipated, it remains a case of "wait and see" whilst the case is referred to the High Court for a decision on whether the retirement age is justified. There are already an estimated 800 age discrimination tribunal claims awaiting the final Heyday decision and, if the High Court comes to the conclusion that a compulsory retirement age is not justified, this could have a substantial financial impact on employers.

Turning to UK occupational pension schemes, the decision has no immediate implications. If compulsory retirement at 65 did eventually go, schemes would end up with more members over 65 in employment - and perhaps accruing pensions - and employers and trustees would need to consider the financial implications of this. But in most cases there would be few other legal implications. Most schemes, particularly those with a normal retirement date ("NRD") below 65, have already decided how to treat members who stay in employment after NRD; letting them stay on after 65 would raise no new issues. However some schemes with an NRD of 65 may not have addressed this issue so far, and they might find they would have some new age discrimination issues to consider.

We do not expect the Heyday decision to lead to any material change in the list of pensions exemptions set out in the Age legislation, as the DWP seem to have taken great care in thinking through how to justify them at the outset.

If you would like to discuss this case or any issues arising from it, please speak to your usual contact in the Employment or Pensions Group.

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