

## Default retirement age of 65 remains lawful

The High Court has decided that the Government's default retirement age of 65 is capable of being justified, for now at least. The decision in what was known as the Heyday litigation will come as a relief to many employers across the country, particularly those who are at the receiving end of one of the 800 age discrimination claims which had been put on hold pending the decision. However that relief is likely to be short lived.

The High Court judge was at pains to point out that his decision would have gone the other way were it not for two key factors. The first was that the retirement age of 65 had been set in 2006 when the age discrimination regulations came into force and the economy was in a much better state. Had the retirement age been set now in the midst of a global recession, the position may have been different. Secondly, the Government has announced that the review of the default retirement age earmarked for 2011 will be brought forward to next year. The judge was of the view that a retirement age of 65 is unsustainable long-term as it creates a greater discriminatory effect than necessary on people who are both able and willing to work longer, while a higher age would not have a general detrimental effect on the labour market or block jobs for future generations.

The Equality and Human Rights Commission is petitioning for the Government to abolish the default retirement age altogether, and it may be seen as a possible vote-winner ahead of the forthcoming election. Employers should therefore brace themselves for the fact that it is quite possible that the default retirement age will be raised, or indeed removed altogether, when it is reviewed by the Government.

If it is, employers and pension scheme trustees who have not already addressed this issue will have to consider how their scheme rules should cater, on a non-discriminatory basis, for members who remain in service after 65; in practice this is likely to mean offering the over-65s the same choice between continued accrual and opting-out that younger members have.

A further likely issue for employers and trustees if the default retirement age goes is the increasing cost of insuring death-in-service benefits for older employees. Many insurers seem willing to provide life cover for employees up to age 70 under a group policy without a material increase in the premium. But if significant numbers come to be employed after that age – into their late 70s or older – then presumably the premium for insuring a death benefit of say four times the employee's salary could become a material fraction of salary in itself.

Pending the review, those employers who operate a retirement age of 65 do not need to make any changes to their retirement policy for the time being. If the default retirement age of 65 is raised or even abolished, it may still be possible to operate a compulsory retirement age if it can be shown to be proportionate, necessary and for a legitimate purpose as required by the discrimination regulations. This will not, however, be an easy test to satisfy. Given the changes that are almost certainly afoot, employers involved in succession planning should bear in mind that before too long, they could have employees working significantly beyond 65.

If you have any questions or require specific advice on any matter discussed in this alert, please contact the following partners:

**Christopher Fisher**  
Partner, Employment  
Tel: +44 20 3130 3724

**Jonathan Moody**  
Partner, Pensions  
Tel: +44 20 3130 3042

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