

“ Plain speaking legal advice ”

## Has Retirement Had It's *Heyday*?

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The introduction of the Age Discrimination legislation in October 2006 also saw the arrival of the default retirement age of 65. Employers have been able to insist on employees retiring at 65 providing they follow a statutory procedure. Employees could ask to work longer but had no right to insist. The legality of a default retirement age has recently been challenged – so where does this leave employers?

There has been an application for Judicial Review by Heyday (an arm of Age Concern) claiming that the Government's default compulsory retirement age of 65 is itself discriminatory and in breach of the European Directive. The application is due to be heard by the European Court of Justice, but no decision is expected until at least 2009.

Initially, the Heyday application was not thought to have much chance of succeeding and Employment Tribunals were told not to accept applications from employees objecting to being forcibly retired and hoping to capitalise on Heyday.

However another ECJ decision - Palacios - at the end of 2007 has meant that the Heyday application may be more of a problem than first thought. Palacios also raised the question as to whether it was legal for a national default retirement age to be fixed.

Rather than simply confirming that EC countries had the absolute right to impose a national default age, the ECJ said that they must still meet the requirement of objective justification.

As a consequence although the Heyday argument still looks weak, it is no longer a foregone conclusion that the UK Government will succeed in opposing it. This means that employees compulsorily retired on reaching 65 can lodge a Tribunal Claim on grounds of age discrimination but that claim will then sit in limbo pending the decision on the Heyday case in 2009.

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For employers that means uncertainty -

(a) You can continue to retire people at 65 and run the risk of Heyday succeeding and any possible claims lodged at the time of the retirement coming back to haunt you much later. Remember the upper limit on awards will not apply in discrimination cases

OR

(b) You can stop making employees retire at 65 and only terminate because people want to retire or you can show proper capability and conduct grounds following a full disciplinary process.

Our advice continues to be that employers operate the default process and if you want employees to retire at 65 you don't leave them in post simply because of concerns about the challenge. There is no guarantee that Heyday will be decided in 2009 and certainly no guarantee that it will be successful in making the current default retirement age unlawful. Watch this space for further developments.

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If you would like to discuss this matter with one of our advisers then please contact Frankie Tierney at [ftt@herrington-carmichael.com](mailto:ftt@herrington-carmichael.com) or call 01276 686222

Watchmoor Park  
Camberley  
Surrey  
GU15 3YL

tel: 01276 686222

4 Station Road  
Aldershot  
Hampshire  
GU11 1HU

tel: 01252 322451

51 Guildford Road  
Bagshot  
Surrey  
GU19 5NG

tel: 01276 451451

3&4 Market Place  
Wokingham  
Berks  
RG40 1AL

tel: 01189 774045

[www.herrington-carmichael.com](http://www.herrington-carmichael.com)

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