

“ Plain speaking legal advice ”

Age Discrimination Developments
HR Forum 27th November 2007

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When the Regulations came in to force in October 2006, it was thought there would be a flood of applications to the Employment Tribunals, not least because it was estimated that one third of the working population was over 45 and all the demographics expect that to rise over the next 10 years.

In fact there have only been about 2000 claims, none of which have yet gone to Appeal.

What has happened is an application for Judicial Review by Heyday (an arm of Age Concern) asserting that the Government's default compulsory retirement age of 65 is itself discriminatory and in breach of the European Directive. That will be heard by the European Court of Justice albeit no decision is expected until at least 2009. It is doubtful that the claim will succeed, given that a Spanish challenge on similar grounds has already failed. Initially the Tribunals were told not to stay claims pending the outcome of the Judicial Review, but it does seem that some Tribunals are playing safe and doing so.

The other case to hit the media related to the Partners of Freshfields Solicitors and their decision to amend their pension arrangements as between the Partners. They fixed a cut off date that meant when Peter Bloxham retired at 54 his pension benefits were subject to a discount that did not apply to the pensions of Partners who were aged 55 or more.

The Tribunal agreed it was age discriminatory, but held it was justified discrimination as overall Freshfields had to do something to make the Partners pension scheme sustainable. Although a very interesting case, it has little relevance to the employed sector as the only people affected were the Partners, there was a high level of consultation and the majority of the Partners were in favour of the new arrangement.

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There is an objective justification defence to age discrimination, whether direct or indirect. You have to show not just that you have a legitimate aim but also that it is “a proportionate means of achieving a legitimate aim”. When the Regulations came in the DTI had already made it clear that Employers would be unlikely to succeed in such a defence if cost was the only argument. Indeed it made it clear that if cost was the only argument an Employer would have to demonstrate that the cost was so high that if the Employer was obliged to pay it, it would go out of business.

Insured benefits and Enhanced Redundancy schemes are the primary areas causing both the Government and Employers headaches. The Government seems to have decided to ignore the issue and hope the Tribunals and Courts sort out the mess.

Life and medical insurance are specifically linked with age and become more expensive to provide the older the employee gets. Providing benefits beyond the age of 65 without incurring substantial additional cost is very difficult. Do you grade the cost to the employee so they have to contribute more? That means the older employees have to pay more than the younger employees – discrimination. If you spread the cost across all employees, the younger employees are paying for the extra cost of providing for older employees – discrimination.

The Government insists that Employers who stick to the limits the insurers place on cover will be fine, but what happens when an Employer simply cannot afford to keep paying the increased premiums demanded by the Insurers?

Enhanced Redundancy Schemes are invariably linked to age and/or length of service. If the scheme mirrors the statutory redundancy scheme (discriminatory but exempt because the Government could not figure out a way to change the scheme without falling out with employers and Trade Unions alike) it will probably be safe from challenge. If it does not mirror the statutory scheme, it is ripe for challenge. If it is then found to be discriminatory, the employees will be entitled to be levelled up and get the maximum benefit.

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Most Employers are understandably wary about approaching this particular “hot potato” as Trade Unions and Employee Representatives will fight hard to keep the benefit as high as possible.

More encouragingly for Employers, the ECJ in a recent equal pay case *Cadman –v- Health & Safety Executive* [2006] has said that length of service based awards are not automatically indirect discrimination.

It acknowledged that there might be situations where using length of service could be justified by an employer, in which case it would be for the employee to provide evidence “capable of raising serious doubts as to the appropriateness of awarding pay increases based on length of service to reward experience, having regard to the particular job in question.”

In short - length of service was linked to experience and that it could be legitimate to reward experience.

In the *Cadman* case, Mrs Cadman discovered she was earning £5,000 - £9,000 less per year than male employees on the same grade doing a comparable job. The case went to the ECJ on a particular point, namely did the H&S Executive have to provide objective justification.

The ECJ confirmed that where the pay system has a disproportionate impact on women the employer is required to provide objective justification for differences in pay. Now that point has been determined, Mrs Cadman’s claim goes back to the Tribunal to consider what evidence the H&S Executive can produce and whether she has been discriminated against.

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If you wish to discuss the issues above further in relation to your particular circumstances please contact Frankie Tierney on 01276 686222 or email

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