

BRIEF UPDATE

FROM THE EMPLOYMENT LAW DIVISION



Age Discrimination

The European Court of Justice issued its Judgment in the long running Heyday case (formerly Age Concern case) on 5 March 2009.

As regular Brief Update readers will be aware, this case was raised by Heyday to challenge the UK Regulations which allow for mandatory retirement at age 65.

The Court's Judgment acknowledges that the UK Employment Equality (Age) Regulations 2006 do not establish a mandatory scheme of automatic retirement but rather set down conditions under which an employer may dismiss a worker because he has reached retirement age.

The Court recognises that Member States of the European Union can apply a retirement age in circumstances where it has a legitimate aim. The European Directive, implemented in the UK by the 2006 Regulations, makes clear that the aims which may be considered legitimate are social policy objectives such as those related to employment policy, the labour market or vocational training.

The Court states that social policy objectives are distinguishable from "purely individual reasons particular to the employers situation, such as cost reduction or improving competitiveness", and considers that

it cannot be ruled out that a national rule may recognise, in the pursuit of legitimate aims, a certain degree of flexibility for employers".

In summary, the Court's position is that it is potentially legitimate for the UK Government to apply Regulations allowing mandatory retirement based on social policy objectives, and highlighted that it is for the High Court in London in this case to ascertain (a) whether the aims contemplated by the 2006 Regulations in allowing mandatory retirement at age 65 are legitimate based on social policy objectives, and (b) whether the means chosen by the UK Government are appropriate and necessary to achieve that aim.

The case will therefore now progress to the High Court to consider whether the actions of the UK Government were justified on social policy reasons.

The message for employers continues to be that, until such time, as the case is concluded, there remains a potential risk in retiring employees at 65.

DISABILITY DISCRIMINATION

Disability Related Discrimination

The recent case Stockton-on-Tees Borough Council –v- Mr. R. Aylott is the latest to consider the matter of disability related discrimination.

Mr. Aylott, a disabled person diagnosed as having bi-polar affective disorder, was employed by Stockton-on-Tees Borough Council. Following a period of absence from the office and some internal conflict after his return, Mr. Aylott raised an action at Tribunal claiming that he had been discriminated against on grounds of his disability and that the dismissal was "disability related". The Tribunal found in favour of Mr. Aylott and awarded him a total of £32,356.54.

The Council appealed the Tribunal's decision to the Employment Appeal Tribunal ("EAT") on a number of grounds. The EAT in London considered the matter in detail and made the following points:-

- I. **Disability Related Discrimination**

The Employment Appeal Tribunal (“EAT”) held that the House of Lords decision in *Malcolm –v- Lewisham Borough Council*, which related to provision of housing, also applied to employment cases. Referring to the decision in the case of *N. –v- Borough of Barking and Dagenham Independent Appeal Panel*, the EAT held that the same meaning should be applied to the section dealing with employment rights as the other sections of the Disability Discrimination Act dealing with other areas of the law including provision of housing.

To use the example of long term sickness absence, this means that an employee with a disability will now be compared by the Courts and Tribunals with another employee, real or hypothetical, who has been off sick for the same length of time but who is not disabled. Previously the comparator would have been an employee who had not been off sick and who was not disabled, making it much easier to establish disability discrimination.

This confirms the position as described in a recent Brief Update, that the focus of disability discrimination will now turn to the duty to provide reasonable adjustments, the nature of adjustments which can be made and the practical and financial consequences of doing so.

2. Allegations of Discriminatory Conduct

The EAT held that claimants cannot rely on a long list of alleged incidences of discriminatory behaviour in circumstances where the alleged acts were not the subject of a specific grievance to the employer and/or which occurred outwith the relevant timescale. This requires a claimant and his or her representative to provide fair notice to the Respondent of each and every allegation. This potentially makes life easier for employers in respect of any future discrimination claim.

3. Generalisations about Disabled Employees

One aspect of the case was that Mr. Aylott’s behaviour had, on occasion, caused concern to his employers. In its decision the Tribunal made a finding of direct discrimination based on the “stereotypical view of his mental illness”.

The EAT stated that this was too vague a statement to support a serious conclusion that disability discrimination had been made out. The EAT stated “what does a stereotypical view of mental illness mean? Did the Tribunal consider that Mr. Aylott would be violent, be offensive, fail to perform his duties, have further long periods of absence? In our judgment this phrase falls far short of a finding as to the reason for conduct of the Council of which the complaint is made and which is necessary for the identification of the characteristics of an appropriate comparator.”

The Code of Practice issued by the Disability Rights Commission in

October 2004 states that “if the less favourable treatment occurs because of the employer’s generalised or stereotypical assumptions about the disability or its effects, it is likely to be direct discrimination.” The rationale for this being that an employer would not normally make such assumptions about a non-disabled employee but would instead consider the individual circumstances.

This serves as a warning to employers to treat each individual employee on his or her own merit and to steer away from a “stereotypical” view of any condition the employee may have.

WANT TO KNOW MORE?

Stuart Robertson is a partner within our employment division and a specialist in discrimination law. To view Stuart Robertson’s web profile, [click here](#).

Stuart is commencing a series of specialist discrimination law seminars, the first of which is *An Introduction to Discrimination Law*. The details are as follow:-

When: 8 June 2009

Where: Paull & Williamsons, Union Plaza

Time: 12.30 -2.30pm

A light lunch and refreshments will also be served.

Please confirm if you wish to attend.

Email: trainingsolutions@paull-williamsons.co.uk