

## Age Discrimination – Issues for Money Purchase And Final Salary Schemes



**The Employment Equality (Age) Regulations 2006 (the “Regulations”)** was introduced on 1 October 2006 and prohibited age discrimination in relation to pensions from 1 December of the same year. It places an overriding non-discriminatory rule on both money purchase and final salary pension schemes, for all trustees to refrain from doing any act which is directly or indirectly discriminatory (the “Non-Discrimination Rule”).

### **Why is this still a current issue?**

Although the Regulations are now coming up for two years old, it is still a very topical issue for two main reasons.

First, an action has been taken against the UK Government claiming that it has improperly implemented the Framework Directive. Heyday, a not-for-profit organisation forming part of Age Concern, was set up in 2006 to help people in or approaching retirement to be better prepared, better connected and better off in their future. They have taken a case to the European Court of Justice (the “ECJ”) alleging that many of the exemptions permitted under the Regulations are not permitted under the Framework Directive. If successful, employers

could find themselves facing thousands of backdated claims for age discrimination.

Secondly, despite coming into effect on 1 December 2006, it appears that a surprising number of pensions schemes have not yet reviewed their scheme rules. This may be because of the complexity of the Regulations, which will become apparent throughout this article. Whatever the reason, many pension schemes are open to a claim in an employment tribunal by one of their members.

### **Heyday**

Heyday challenges two particular aspects of the Regulations. They argue that allowing employers to require employees to retire upon reaching the age 65, as provided for in the Regulations, is prohibited under the EU Directive.

The second aspect of the Regulations to be challenged by Heyday is its approach to direct discrimination. Under the Regulations, direct discrimination is permitted if it can be objectively justified. A provision may be objectively justified if it is proved to be a proportionate means of achieving a legitimate aim. Heyday argues that rather than provide a test which can be applied to all provisions, the Regulations should set out a list with specific instances whereby direct discrimination may be justifiable, in line with the Framework Directive.

The case was heard before the ECJ on 2<sup>nd</sup> July 2008 and it is expected that the Advocate General, will publish his opinion on 23<sup>rd</sup> September 2008, with the Court hopefully publishing its judgement thereafter.

If the ECJ agrees with Heyday, people who have been forced to retire since the Regulations took effect on 1 December 2006 will have claims against their employers for both discrimination and unfair dismissal. How much this will cost is anyone’s guess but there are already at least 260 Employment Appeal Tribunals on hold pending the outcome.

### **Regulation in its current form**

Despite it being possible that the Regulations will be amended to reflect any judgement given by the ECJ, it is essential to ensure that you are compliant with the law as it currently stands.

There is no guarantee that the ECJ will issue its judgement by the end of the year. It may not give a clear cut answer. Any amendments to the Regulations may not take place for some time and may only affect the aspects of the Regulations considered above.

Of greater significance, trustees and employers should be reviewing scheme rules and employment contracts to ensure current compliance. The cost of having a claim raised against them for non-compliance can be substantial and have wide implications.

### **The effect of non-compliance**

If the trustees fail to recognise the Non-Discrimination Rule they could face claims for both breach of trust and breach of the Regulations. It is essential to avoid such action being taken.

### **Employers beware**

Although the Non-Discrimination Rule does not extend to employers, the Regulations automatically treat an employer as being joined to a complaint that is brought against the trustees.

If the claim is successful, the benefits would be levelled up to those provided on the more favourable basis from 1 December 2006. The trustees will have to find the funds to provide the increased benefits and may look to the employer for a cash injection. It is thought there is a high chance that the trustees will not be protected by the exoneration and indemnity provisions in the scheme's trust deed and rules. The trustees may therefore find themselves personally liable.

To prevent this from occurring, the trustees have the option of amending the scheme rules to level down the benefit by equalising the benefits of the advantaged group down to the level of the disadvantaged group. Such amendments will not be retrospective and benefits given in the period from 1 December 2006 until the date of amendment will still require to be levelled up.

Trustees and employers should be taking action sooner rather than later and seeking legal advice from a pensions lawyer.

### **Action**

The process is relatively straight forward in theory: identify all potentially discriminatory provisions and practices, consider if they are covered by an exemption and if not consider if the practice can be retained on the basis that it can be objectively justified. It soon becomes apparent that this is not so straight forward in practice.

First, employers and trustees must review not only the scheme rules, but all employment contracts, staff handbooks, member booklets and discretionary practices.

Secondly, there are several possible exemptions across many aspects of the scheme. For example, there are exemptions relating to waiting periods, admission and early retirement. There are also exemptions

which can be applied to contributions, however some apply only to certain types of schemes, whether it be defined contribution or defined benefit. Extra care must therefore be taken to ensure the exemptions are correctly applied. If in doubt, ask a lawyer.

To further add to the confusion, there are many common practices for which no exemption applies and regarding which it is still unclear if they fall foul of the Regulations. For example, capping accruals for service beyond the normal pension age may be discriminatory.

Finally, proving that a provision is objectively justified can be rather burdensome. For a discriminatory practice to be objectively justified it must pursue a legitimate aim, and be a proportionate means of achieving that aim. The difficulty is that this must be judged on a case by case basis. There is no definition of legitimate aim although it is thought to include reducing staff turnover, business needs and efficiency. It is for trustees and employers to decide whether there is a balance between the discriminatory effect of the measure and the importance of the aim being pursued.

Even once the decision has been taken that a discriminatory practice is objectively justified, this may not be the end of it as it will be open for members and employees to challenge this decision at a tribunal.

There is a good example of this currently at the Employment Appeal Tribunal. Leslie Seldon was forced to retire as senior partner from his Kent law firm at 65. The Regulations excludes partners in firms from the rules relating to the default retirement age. Mr Seldon has raised an action against his firm, claiming he is the victim of age discrimination.

The firm argues forcing partners to retire is a proportionate means of achieving business aims, such as providing partnership opportunities for junior lawyers and a reasonable expectation of vacancies. Mr Seldon was unsuccessful at the initial tribunal but has now raised an appeal. Many other claims have been put on hold pending the ruling. This highlights the importance of recording sufficient evidence to justify the decision. Evidence should include details of any agreements and consultations

In addition, certain challenges, if successful, could once again bring us back to the requirement to level up the benefits with effect from 1 December 2006.

### **Conclusion**

We will keep you updated with the outcome of the Heyday case, however the priority at this point in time is to revisit all relevant pension and employment documents, ideally with the help of your legal advisers, with a view to ensuring compliance with Regulations in its current form. You should consider carrying out a "health check" of your scheme.

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