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Claims for forced retirement at 65 stayed pending ECJ decision in Heyday case

Last year, Heyday (an offshoot of Age Concern) brought a claim against the UK Government that the UK's national default retirement age of 65 under the Employment Equality (Age) Regulations 2006 is incompatible with European law. The case has been referred to the European Court of Justice (ECJ) and a decision is not expected until 2009.

Now the Employment Appeal Tribunal (EAT), in the case of **Johns v Solent SD Ltd**, has ordered an age discrimination claim against a private sector employer to be stayed pending the ECJ's decision in the Heyday case. Mrs Johns, who was forced to retire at 65, brought claims for age discrimination and unfair dismissal in the Employment Tribunal. The Tribunal struck out Mrs Johns' claim earlier this year on the basis that it had little prospect of success. The EAT has now overturned this decision. The full transcript of the judgment is not yet available but in the light of this judgment, the President of the EAT has now ordered that all claims brought by former employees for age discrimination or unfair dismissal because of their having been forced to retire at 65 will now be stayed pending the ECJ decision in the Heyday case.

What does this mean for employers?

The **Johns** case will ring alarm bells for private sector employers, as up to now it has been believed generally that only public sector employers are at risk of direct claims against them under European law. The legal issues are complex but our view is that claims against private sector employers are unlikely to succeed. Nevertheless, the fact is that the EAT has directed that all claims, including ones against private sector employers, be stayed pending the Heyday decision in the ECJ. There is therefore an appreciable risk, given the publicity surrounding these cases, that private sector employees will be tempted to 'have a go' and bring similar claims. Any such claims will be stayed pending the outcome of the Heyday case and there will be little employers can do in the meantime (other than perhaps settle). Naturally it is not satisfactory for employers to have such claims hanging over them for the next few years.

It is unfortunate that employers are now placed in a position whereby they are unable to comply with UK legislation without still incurring some risk. The decision in **Johns** is being appealed. The Court of Appeal hearing is expected some time in 2008 but there remains a possibility that it will be appealed further to the House of Lords. Until the outcome of the appeal process is known, employers will be in a state of uncertainty over how to handle retirements. In the meantime, employers in the private sector should consider the following:

- Continue to require employees to retire at 65 (or the employee's normal retirement age if lower, and that lower age can be objectively justified), and to follow the statutory retirement procedure under the Age Regulations. The risk of **Johns**-type claims will be low where no request to continue working beyond retirement is made.
- Where an employee's request to continue working beyond retirement is denied, consider if a compromise agreement is required. If a claim is brought, it will, as mentioned above, be stayed pending the outcome of the Heyday case. Even if Heyday succeeds, claims against private sector employers may still fail if the UK courts are unwilling to interpret the Age Regulations in line with EU law.
- Reassess the above if retired employees begin to bring claims (claims must generally be brought within 3 months of termination of employment).
- Claims for failing to follow the statutory retirement procedure under the Age Regulations will be unaffected by the outcome of the **Johns** and Heyday case.
- Alternatively, proceed along the cautious route and follow the advice given to public sector employers by abandoning any normal retirement age and continuing to employ staff until they wish to leave. Dismissals should then be managed in the same way as an employee of any other age using ill health, performance, redundancy, or another relevant reason (being sure to follow the statutory dismissal procedures and ensuring that the reason for dismissal and the procedure followed is fair).
- However, as regards the last point, note that if the Heyday case fails, returning to a policy of having a normal retirement age may present problems as it may then be difficult to justify why the employer needs to retire the employee at that normal retirement age. It is worth noting that in 2011 the Government is due to review the national retirement age of 65 in any event.

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