Forced Retirement, Age Discrimination, and the *Heyday* Case

Case C-388/07 *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* Judgment 5 March 2009

1. INTRODUCTION

This case, popularly known as *Heyday*, was referred to the ECJ by the High Court, which is hearing a claim by Age Concern that exemptions in the Employment Equality (Age) Regulations 2006 SI 2006/1031 do not comply with the parent Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The central challenge is to the default retirement age, provided by reg 30, which permits employers to dismiss workers aged 65 or over simply on the ground of 'retirement'. A further challenge is to the objective justification defence for *direct* discrimination provided by reg 3, which could be used to justify retirements falling outside of the default retirement age.

The judgment is a major disappointment for all but those familiar with the reference, because it did *not* decide the central question of the lawfulness of the default retirement age. Rather than place this question in the hands of the ECJ, the High Court referred three rather technical issues (couched as five questions). First, whether the Directive applied to the default retirement and objective justification provisions. Second, whether the general justification defence for direct discrimination (in reg 3) was compatible with the Directive. Third, whether there was a practical difference between the tests of objective justification provided in the Directive by Article 2(2)(b)(i) (the orthodox formula for indirect discrimination) and Article 6(1) (allowing for defences against age discrimination). The ECJ held: (1) the Directive did apply to the provisions; (2) the Directive permitted the general justification defence to direct discrimination in reg 3 if the defence itself could be objectively justified in pursuit of a legitimate *social policy* aim under Article 6(1); (3) the tests were different in scope, but Article 6(1) still demanded a measure to be objectively justified 'to a high standard of proof'.

The significant answers are that the Directive permits a *general* defence to direct age discrimination (such as that in reg 3), and that justification under Article 6(1) must be in pursuit of a social policy objective. This last aspect is particularly relevant to the defence to direct discrimination in reg 3 because its general nature (permitting defences to unspecified and unforeseen scenarios) makes it hard to square with a *social policy* objective. The Court offered some general guidance on the application of Article 6 to the defence in reg 3. The judgment was less helpful on the default retirement age. As a specific defence, there was no question that it fell within Article 6 (once the first issue was resolved). But no guidance was provided on the application of Article 6(1) to the default retirement age. On the meaning of Article 6(1), the judgment was general, and at times ambiguous, which leaves it vulnerable to selective interpretation. As such, when the case returns to the High Court to decide the lawfulness of the default retirement age, the court may find more guidance from previous ECJ case law, than from this judgment.

2. THE LEGISLATION

Article 2(2) of the Directive defines direct and indirect discrimination in the orthodox manner, providing (in paragraph 2(b)(i)) an objective justification defence for indirect discrimination only. However, Article 6(1) provides a more specific defence for direct and indirect age discrimination:

> Justification of differences of treatment on grounds of age
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> Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Article 6 then offers a non-exhaustive list of three examples of different treatment that could be justified under this formula, none of which are relevant to this case.

Recital 25 in the preamble appears to explain Article 6(1). It provides:

> ... differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

Recital 14 states rather cryptically: 'This Directive shall be without prejudice to national provisions laying down retirement ages.'

Regulation 3 of the Age Regulations 2006 defines direct and indirect discrimination in the orthodox way, but unlike the 'parallel' Article 2 of the Directive, it offers the objective justification defence to *both* indirect and direct discrimination.

Regulation 30 provides the more specific exception for retirement:

> (2) Nothing .... shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

This is the controversial default retirement age, a blanket exemption from the age discrimination principle available to all employers and permitting dismissal simply on the ground of 'retirement'. Employers need not provide any other justification. However, by reg 30(1), this only applies to:

> an employee within the meaning of section 230(1) of the [Employment Rights] 1996, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

This is of narrower application than the Regulations generally. It does not include, for instance, partnerships. Regulation 7(4) provides a supplementary exception permitting employers not to recruit anyone approaching (i.e. within 6 months of) the employer's normal retirement age, or if it does not have one, 65.

The defence of objective justification for direct discrimination in reg 3 comes into play where a retirement falls outside of the default retirement age, for example, retirement of workers under 65 (early retirement), or retirement from a partnership. In these cases - unlike the default retirement age - each retirement must be objectively justified.

3. THE FIRST ISSUE - DOES THE DIRECTIVE APPLY?

The first issue for the Court was whether the Directive applied to exemptions from the age discrimination principle. The Court held (at paras 21-30) that it did, despite Recital 14 of the Preamble, which was confined to 'the competence of the Member States to determine retirement age.' (Citing Case C-411/05 Palacios de la Villa [2007] ECR I-8531, [44]). This is settled law and relatively uncontroversial, and requires no further comment.

4. THE SECOND ISSUE - RETIREMENT OUTSIDE OF THE DEFAULT RETIREMENT AGE

The next issue was whether the Directive permitted the general objective justification defence for direct discrimination in reg 3. The significance of reg 3 in this context is that it provides a defence for retirement outside of the default retirement age, such as early retirement or retirement from a partnership. The problem is that reg 3 goes beyond the 'parallel' (and orthodox) definition of discrimination in the Directive (Article 2), which limits the defence to indirect discrimination. Thus, Article 6 provided the only possibility of legitimising the broader defence in reg 3.

The Court observed that early retirement could fall under the justification defence in reg 3 (para 34). Age Concern and the EC Commission – relying on Recital 25 (above) - argued that Article 6 permitted only express specific exemptions to discrimination. The UK (and Italy) argued that Article 6 permitted a general exemption such as the defence in reg 3. The Court rejected Age Concern's position, but only went some way to agreeing with the UK. Although Article 6 did not require Member States to draw up a specific list of exemptions (para 43), and that Member States retained 'a broad discretion as to the choice of methods' of implementation of a Directive (para 41), this was provided that the legal position is 'sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights ...'. Perhaps with reg 3 in mind, the Court added 'A directive may also be implemented by way of a general measure provided that it satisfies the same conditions' (para 42).

However, Article 6 makes clear that such exceptions have to be 'objectively and reasonably' justified. Of course, this requires that the defence has a legitimate aim, and is appropriate and necessary to achieve that aim. Further, the Court held, Article 6 restricts these aims to social policy objectives and so 'By their public interest nature, [they] are distinguishable

from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness ... although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers' (para 46). Such aims may be identified from the 'general context' of reg 3 (citing Palacios de la Villa, [57]) (para 45).

The Court offered some guidance on the matter of whether the general justification defence for direct discrimination in reg 3 was proportionate, or 'appropriate and necessary'. This included taking account of other (presumably less discriminatory) means to achieve the aim (para 50). The Court noted that the broad discretion 'cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age.' And that 'Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough ... and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim' (para 51), citing Case C-167/97 Seymour-Smith [1999] ECR I-623, [75] & [76].

Comment

In practice, this means that before an employer can use the defence in reg 3 to a direct discrimination claim, the defence itself must be justified by social policy aims in the national interest, not merely the employer's interest, although of course, on occasion the two could coincide. The restriction to social policy aims places a question mark over the recent judgment in Seldon v Clarkson, Wright & Jakes [2008] UKEAT/0063/08, (a partnership case falling outside of reg 30) where it was suggested that forced retirement could be justified under reg 3 by the partnership's aims of promoting a congenial culture in the workplace (by avoiding the indignity of evaluating the performance of older partners), and facilitating the expectations of junior associates to achieve partnership.

Back in the High Court, justifying reg 3 could prove problematic for two reasons. The ECJ indicated that in the absence of an expressed social aim, one could be inferred from the 'context' of reg 3. In its first consultation, the Government stated it would include a general defence to direct discrimination because inter alia it did not 'want to ban employment practices that can be reasonably and objectively justified. Businesses must be able to operate productively' (Equality and Diversity: Age Matters Age Consultation 2003 URN 03/920 para 3.13). In the second consultation, it stated: 'A wide variety of aims may be considered as legitimate. ... Economic factors such as business needs and considerations of efficiency may also be legitimate aims'. ('Equality and diversity: coming of age. Consultation on the draft Employment Equality (Age) Regulations 2006' (July 2005) DTI, URN 05/1171, at para 4.1.16)

Thus, the first problem is that the Government considered a range of aims, at least some of which are 'purely individual reasons particular to the employer's situation', which are not legitimate. From this context it can be seen that the Government did not consider that the defence must be related to a social policy aim (see e.g. ibid para 4.1.1). The reason it chose this general defence was that in consultation 40% of employers considered a prescriptive list of aims too restrictive, hence its general nature, allowing 'a number of other potentially legitimate aims' (ibid para 4.1.3-4.1.4). The context also reveals that the driving force behind the defence was not a social policy, but rather the views of some employers, contributing to the individual and private nature of its aim.

Second, if one assumed that at least one of Government's aims could be considered a social policy objective, it is difficult to see how such a general defence could be appropriate and necessary. As it stands, employers could use it for a wide range of 'purely individual reasons'. There exists, as the Court demanded, less discriminatory alternatives, such as more specific

defences, more closely related to whatever social aim(s) the Government wishes to pursue; indeed such defences were enacted for other aims, such as the national minimum wage (reg 29) and positive discrimination (reg 31).

5. THE THIRD ISSUE - THE MEANING OF ARTICLE 6

The third issue for the Court was whether Article 6(1) presented a different defence from the standard defence of objective justification for indirect discrimination afforded by Article 2(2)(b)(i). The Court held there was a difference 'in scope'. This was because, it seems, unlike Article 6, the defence in Article 2 was limited to indirect discrimination (paras 58-60). The Court confirmed that the default retirement age could amount to direct discrimination (para 63), and so only the meaning of Article 6 needed consideration. It held that Article 6:

> ...allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which fall in particular within the category of direct discrimination as defined in Article 2(2)(a).

But this was 'strictly limited by the conditions laid down in Article 6(1) itself' (para 62).

Age Concern argued that the phrase 'objectively and reasonably' adopted the language of the European Court of Human Rights, which required 'very weighty reasons' to justify discrimination under the European Convention on Human Rights, Article 14. (See e.g. ***Gaygusuz v Austria*** **[1996]** (1997) 23 EHRR 364 **[42] (nationality discrimination);** *Van Raalte v Netherlands* **(1997) 24 EHRR 503** [40] (sex discrimination)). Accordingly, Article 6 imposed 'a very high standard of scrutiny' in line with the ECtHR jurisprudence. The Court rejected this view, reasoning:

> it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable.

Accordingly, 'no particular significance should be attached' to the addition of the word 'reasonably' (para 65). However, Article 6 imposed on Member States 'notwithstanding their broad discretion in matters of social policy' a 'high standard of proof' regarding the legitimacy of the aim relied upon (para 65). Whether this is 'higher' than the orthodox test, the Court did not say, save that where a measure (indirectly discriminating) could be justified under the orthodox test in Article 2(2)(b)(i), there was no need to have recourse Article 6 (para 66). This suggests that Article 6 imposes no higher burden than the standard formula in Article 2. Finally, the Court reiterated the standard formula that the measure must be in pursuit of a legitimate aim - 'such as employment policy, or labour market or vocational training objectives' - and be appropriate and necessary to achieve the aim (para 67). Although the Court did not express it in terms, it is implicit from this and its opinion on the second issue (para 46), that under Article 6(1), the legitimate aim is restricted to a *social policy* objective. Of course, this is another difference from Article 2(2)(b)(i), which permits employers to cite purely individual reasons to justify indirect discrimination.

Comment

This ruling was helpful so far as it confirmed that the default retirement age amounted - prime facie - to direct discrimination, and could be justified only by social policy objectives under Article 6. It was less helpful on the meaning of this justification. It repeated the standard formula for justifying a discriminatory social policy. The Member State had a 'broad discretion', but this was qualified with phrases such as 'a high standard of proof' and that exceptions under Article 6 were 'strictly limited', and the suggestion that Article 6 imposed no higher standard of proof than Article 2. The resulting ambiguity permits selective quoting, and no doubt this will be a feature when the case returns to the UK for a decision on whether the default retirement age is indeed objectively justified.

An example of selective quoting was apparent in an earlier reference, *Seymour Smith* (above), where the challenge was to a reduction in unfair dismissal rights that adversely affected women. In its conclusion, the ECJ stated that a measure had to be 'suitable' to achieve the legitimate aim (para 77), although it had earlier stated it had to be 'suitable and necessary' (para 69). In between, with a clear allusion to the Government's defence in that particular case the ECJ observed that 'mere generalisations concerning the capacity of a ... measure to encourage recruitment are not enough ... to provide evidence' to justify the measure (para 76). Nonetheless, back in the UK, the House of Lords ignored the last two passages, quoting only the first to support a finding that the test was no longer as stringent as previously thought, and as such the measure was justified despite a total absence of evidence from the Government ([2000] 1 CMLR 770 [62] Lord Nicholls). Unlike in *Seymour-Smith*, the ECJ in *Heyday* ventured no opinion on the lawfulness of the measure, and so its judgment is even more vulnerable to selective interpretation.

6. BACK TO THE HIGH COURT - THE DEFAULT RETIREMENT AGE

The headline question in this case is whether the UK's default retirement age is lawful. The ECJ 'deliberately' was not asked to decide that matter, and indeed had no evidence upon which to offer an opinion (see A-G Mazák's Opinion, para 21). However, the judgment confirmed (the first issue) that retirement exemptions fall within the scope of the Directive, and so the default retirement age must be justified under Article 6(1). On the meaning of Article 6, the Court confirmed that the legitimate aim must be a social policy objective, but beyond that it merely repeated - more or less - the standard formula for objective justification. And so this reference has provided only limited assistance to the High Court on the lawfulness of the default retirement age.

Previous ECJ case law may provide a little more assistance. The Court has ruled on the lawfulness of a state exemption from the age discrimination principle on two occasions. In Case C-144/04 *Mangold v Helm* [2006] 1 CMLR 43, German law exempted from regulation fixed-term employment contracts for any worker over 52. This relaxation of protective legislation was designed to encourage employers to recruit older workers. Its aim was to help older persons find jobs more easily. Of course, the more direct result of this measure was to remove safeguards for older workers, who could now be employed on temporary contracts for the rest of their working lives. The ECJ observed: 'This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment' (para 64) and held that the policy could not be objectively justified because it went beyond what was appropriate and necessary to help *unemployed* older workers.

In *Palacios de la Villa* (above), a worker challenged a Spanish measure permitting compulsory retirement ages to be negotiated in collective agreements. The Court found that the aim of 'checking unemployment' was a legitimate one (para 62). This was generous because this measure could only *redistribute* unemployment from the young to the old. On proportionality, the Court stated (para 72):

> It does not appear unreasonable for ... a Member State to take the view that a measure ... may be appropriate and necessary in order to achieve ... the promotion of full employment by facilitating access to the labour market.

Further, the measure did not 'unduly prejudice' workers of retirement age because compulsory retirement was subject to a worker being entitled to a 'not unreasonable' retirement pension. 'Moreover', it enabled trade unions and employers' organisations to agree 'with considerable flexibility' a compulsory retirement mechanism that took account of the labour market concerned, and the specific features of the jobs in question (paras 73-74). Thus, the measure was justified. The generous view of the social aim, and the deferral to what the *Member State* considered reasonable, indicates that, in contrast to *Mangold*, this was a liberal approach.

These cases appear to represent two approaches to justifying age discrimination: one strict and one liberal. The *Heyday* judgment does little to indicate which approach should prevail. Its references to a 'high standard of proof' and 'strictly limited' could be cited in favour of the strict approach. However, future courts could just as easily point to the 'broad margin of discretion' repeated in *Heyday*, and afforded in *Palacios de la Villa*.

However, *Mangold* and *Palacios de la Villa* are reconcilable on one issue at least. Unlike in *Mangold*, the measure in *Palacios de la Villa* was passed with the instigation and/or cooperation of trade unions and employers' groups, and this clearly influenced the Court (paras 53, 60, & 74). Similarly, in the United States the federal Age Discrimination in Employment Act 1967 (ADEA) permits workers to 'waive' their rights, but only, especially for retirement, according to conditions that must be strictly observed: see e.g. *Oubre v Entergy Operations* 522 US 422 (Sup Ct 1998). Article 6 similarly signals that the law is more tolerant of age discrimination. Precise expressions of this tolerance are provided by the ADEA's waiver provision and the *Palicios de la Villa* judgment. By contrast, the law would be highly *intolerant* of an agreement to dismiss a worker on racial grounds, for instance, an employer paying off a hairdresser because his customers 'prefer white girls'. Although it appears a universal principle that age discrimination is less pernicious, the law's tolerance - so far - is limited to cases with an element of *consent* (see also, for Canada, *McKinney v University of Guelph* [1990] 3 SCR 229). The default retirement age is a significant step outside of the tolerance to age discrimination shown in *Palicios de la Villa* and the long-established ADEA 1967.

Of course, the Government will invoke *Palacios de la Villa* on the ground that it is a 'retirement' case and so appears factually closer to *Heyday* than *Mangold.* However, *Palacios de la Villa* is distinguishable. Consent is conspicuously absent in *Heyday*. Further, the Spanish exemption was subject to the worker's pension qualification. By contrast, the UK exemption allows *all* employers to compel its workers to retire, without consideration of the worker's pension qualifications; and without any level of worker-agreement whatsoever. It facilitates even 'age-hostile' dismissals, so long as they are labelled 'retirement'.

In its second consultation, the Government stated that the default retirement age was made with two social policy aims: employers' workforce planning and the stability of occupational pension schemes and other work-related benefits. ('Equality and diversity: coming of age. Consultation on the draft Employment Equality (Age) Regulations 2006' (July 2005) DTI, URN 05/1171, para 6.1.15.) It is questionable whether these aims qualify as a social policy, because they are to help individual employers and their benefit schemes. However, it is arguable that a compulsory retirement age has a broader societal impact, such as a motivation for workers to save pre-retirement, and a reduction in 'job-blocking' ('Notes on the Regulations' (http://www.berr.gov.uk/files/file27136.pdf), para 100.) Given the ECJ's deference to member states' autonomy in social matters, it may well be that these relatively minor factors qualify the policy as a legitimate aim.

On the issue of proportionality, the UK Government maintained that a 'significant' number of employers use a set retirement age as a necessary part of their workforce planning. But the exemption covers *all* employers, not just this 'significant' number. Second, the Government claimed that its consultation showed that without a default retirement age there was risk to the stability of pensions. No supporting evidence or extended reasons were given (see e.g. the Government's Regulatory Impact Assessments: http://www.berr.gov.uk/files/file35877.pdf). On the face of it, pension schemes should not suffer if workers carry on working and either draw their pensions, or defer entitlement and continue to contribute to the scheme. This is especially so with the increasingly common 'defined contribution' schemes, where the payout is governed by the size of the fund, rather than external factors, such as the final salary used for 'defined benefit' schemes. Further, at a time of a 'pensions crisis', caused by the ever-growing proportion of retired persons, forced retirement does not appear an appropriate way to achieve general pension stability. Of course, situations may arise where forced retirement becomes a necessary consequence of preserving the pension scheme, say where a restructuring may compel workers to retire to qualify for the more generous old scheme (see e.g. *Bloxham v Freshfields Bruckhaus Deringer* [2007] Pens LR 375 (ET)). But these are isolated cases, requiring specific justification. As with the 'workforce planning' argument, the exemption goes far beyond what is necessary to address these situations. Further, it appears to be no more than a 'mere generalisation' considered inadequate by the ECJ in *Seymour-Smith* and *Heyday*.

5. CONCLUSION

For those approaching an unwanted retirement, and those with cases pending the outcome of the *Heyday* litigation, the judgment may appear to be of marginal importance. However, one significant pronouncement was the restriction of any legitimate aim to social policy objectives. In the context of reg 3, the Government, and the EAT in *Seldon v Clarkson*, seemed unaware of this restriction. Otherwise, the judgment is of limited importance. This was not the fault of the ECJ, which was confined to the limited questions supplied by the High Court.

The judgment confirms that the Directive applies to the 'retirement' exemptions (regs 30 and 7(4)) and the objective justification defence (reg 3), a point already established in *Palacios de la Villa*. It stated that these regulations are permissible if they can be objectively justified according - more or less – to the orthodox criteria usually afforded to social policy measures. But there were ambiguities in the guidance to both issues. For instance, for the objective justification defence to direct discrimination, the defence had to be 'sufficiently precise and clear' for persons to 'ascertain the full extent of their rights' and yet a general defence may 'satisfy' these conditions. Justification of the default retirement age under Article 6 does not involve a 'very high standard of scrutiny', but it will have to be to a 'high standard of proof', yet apparently no higher than the orthodox test; at the same time we were reminded of a State's 'broad margin of discretion' in such matters. This guidance is so vulnerable to selective quoting, that the outcome, as shown by the *Seymour-Smith* saga, remains unpredictable.

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