Corporate Property Landlord & Tenant Employment
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Hey Day Appeal

Introduction

The EU Equal Treatment Directive ("the ETD") prohibits discrimination on a number of grounds including a person's age. It applies to all employees and governs working conditions including pay and dismissals.

The UK introduced the Employment Equality (Age) Regulations ("the Regulations") in October 2006 to bring UK law in line with the ETD. The Regulations currently provide that employers can compel employees to retire at the default retirement age ("DRA") of 65 under Regulation 30, provided they comply with the statutory retirement procedure that involves giving employees notice of their right to request to work beyond their intended date of retirement, considering any such request and providing them with a right of appeal should their request be rejected.

The provision of a compulsory retirement age has however, been heavily criticised by charities such as Help the Aged and Age Concern who believe it is inconsistent with the ETD. In this regard, a high profile judicial review challenging the DRA of 65 was launched back in 2007 by Hey Day, a membership organisation supported by both Help the Aged and Age Concern. The High Court handed down its decision in the case on Friday 25th September 2009.

Facts of the case

Hey Day brought its judicial review on the basis it considered the Regulations were over-broad in terms of the way they detracted from the principle of non-discrimination and as such failed to adequately implement the ETD. In the circumstances, the High Court referred a number of questions to the European Court of Justice ("the ECJ") to assist it in determining whether the Regulations were compatible with the ETD.

The ECJ handed down its judgment on 5th March 2009 and held that a DRA of 65 is theoretically capable of objective justification but that it is for the UK courts to determine whether it is justified by legitimate social policy objectives such as those related to employment policy, the labour market or vocational training. In addition to this, the ECJ determined that the Regulations do not breach the ETD by failing to set out a precise list of legitimate aims.

In the circumstances the case was referred back to the High Court to determine whether a DRA of 65 can be objectively justified.

Decision of the High Court

The High Court was satisfied that the Government's decision to introduce a DRA was based upon legitimate social policy aims, such as maintaining confidence in the labour market and its short-term competitiveness, and that it was a proportionate means of giving effect to these aims. In the circumstances, the Court then went on to consider whether the choice of 65 as the DRA was itself proportionate in all the circumstances.

The Court indicated that there were powerful reasons why a DRA of over 65 should have been adopted, including creating a change in culture in respect of retirement and age discrimination and ensuring the DRA keeps pace with changes in the pensionable age. Furthermore, had Regulation 30 been adopted in 2009 it would not have been found to be proportionate on the basis it creates greater discriminatory effect than is necessary and a higher age would not have any general detrimental labour market consequences.

Notwithstanding the above however, the Court determined that Regulation 30 as adopted in 2006 was not beyond the competence of the government in applying the ETD and as such was lawful. The Court did make the point however, that the position might have been different had the government not announced its decision to bring forward the review of Regulation 30 to early 2010 and noted that it "cannot presently see how 65 could remain as a DRA after the review".

Glaisyers Solicitors LLP
One St James's Square, Manchester M2 6DN
Email: manchester@glaisyers.com **Telephone:** 0161 832 4666 **Fax:** 0161 832 1981
www.glaisyers.com

GLAISYERS SOLICITORS LLP
www.glaisyers.com

Conclusion

Whilst the High Court has upheld the DRA of 65 in the Hey Day case, it seems clear from the judges' comments that it is only a matter of time before the DRA is either increased or removed. In the meantime, the raft of cases that were stayed pending the outcome of the High Court's decision are now likely to be dismissed.

Sickness whilst on annual leave

The European Court of Justice ("the ECJ") has recently handed down its decision in Francisco Pereda v Madrid Movilidad.

Mr Pereda was employed by Madrid Movilidad SA as a specialist driver. He booked a period of annual leave in 2007 but two weeks before its commencement he was involved in an accident. As a result of this, he was on sick leave for all but 2 of his 30 days holiday. In the circumstances, upon his return to work, he asked if he could take an additional period of annual leave. His employer refused and Mr Pereda took legal action which resulted in the Spanish court referring the matter to the ECJ.

The ECJ determined that Mr Pereda's period of sick leave should not have counted towards his annual leave entitlement. In the circumstances, he should have been allowed to take his annual leave at a different time once he had recovered from the accident.

Conclusion

The decision of the ECJ reinforces the principle that there can be no dilution of a worker's right to paid annual leave. The right to annual leave is intended to allow a break and rest from work whereas entitlement to sick leave is intended to allow an employee to recover from a period of sickness. Accordingly, where a worker is ill during a period of annual leave he or she must be granted the ability to take a further period of leave at a later date so as not to deprive them of their right to have a break and rest from work. This principle will be likely to apply whether a worker falls ill before or during the period of leave.

If you would like to receive more information regarding the contents of this newsletter or information on any other employment law related matters then please contact **Russell Brown** at Glaisyers Solicitors LLP, One St James's Square, Manchester M2 6DN. Tel: 0161 832 4666; Fax: 0161 832 1981; Email: rwb@glaisyers.com

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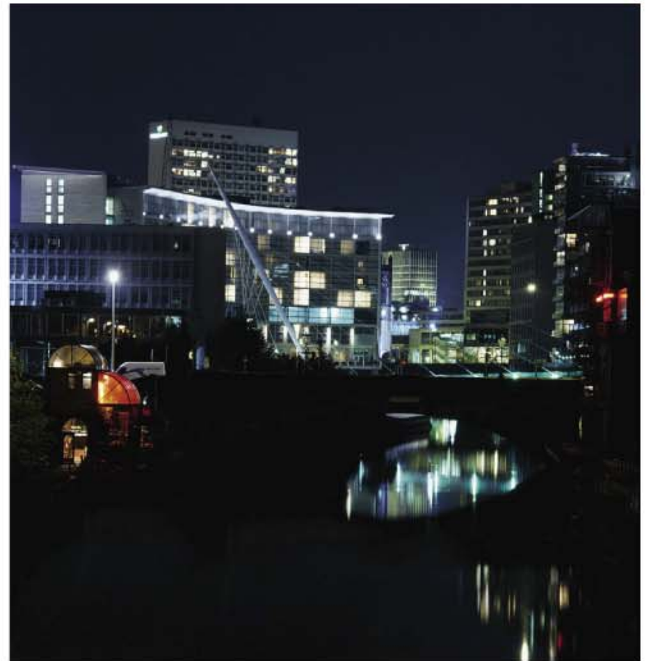

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