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UK and European Employment Law: Quarterly Case Update

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At a Glance

This Stay*Current* summarises the latest employment law developments affecting employers with operations in the UK and Europe.

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1. Compulsory Retirement And Age Discrimination

The European Court of Justice ("ECJ") has given its judgment in *The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* Case C-388/07 – known as the "Heyday" case – in which it considered the interpretation of the Equal Treatment Framework Directive 2000/78/EC (the "Directive") with particular reference to the UK's provisions relating to retirement under the Employment Equality (Age) Regulations 2006. UK employees can be retired by employers at 65 years old.

The ECJ followed the Advocate General's opinion on all of the questions referred to it and held that:

(i) national rules on retirement fall within the scope of the Directive as they relate to "*employment and working conditions, including dismissals and pay*" within the meaning of Article 3(1) of the Directive;

(ii) member states are not required to specify treatment that may amount to justification of age discrimination in legislation implementing the Directive.

Article 6 of the Directive lists examples of treatment that may amount to justification. Age Concern argued that member states were, therefore, required to set out similar examples in implementing domestic legislation. However, the ECJ confirmed that, although member states are obliged to ensure that a directive is fully effective

when they transpose it, they retain a broad discretion in how to implement it. Taking this principle into account, Article 6(1) cannot be interpreted as requiring member states, when transposing a directive, to draw up a specific list of differences in treatment that may be justified by reference to a legitimate aim; and

(iii) the test for justification is the same in relation to direct and indirect discrimination.

In the Directive, the test for justification in relation to indirect discrimination states that treatment must be "*objectively justified*", whilst the test in relation to direct discrimination specifies that treatment must be "*objectively and reasonably justified*". The ECJ agreed that the wording for the justification test is not identical, but this is not significant. The tests are in effect the same.

Comment: *The ECJ's judgment has a limited impact given that it is only a preliminary ruling. The real interest lies in the next stage when the UK High Court has the task of determining whether retirement of workers at the age of 65 is justified by a legitimate aim and whether the means of achieving that aim are appropriate and necessary. Regardless of what happens in this case, the Government is committed to reviewing the UK retirement age of 65 in 2011.*

2. The Right To Annual Leave During Long-Term Sickness Absence

The ECJ, in *Stringer and others v HM Revenue and Customs* Case C-520/06, held that a worker on sick leave accrues annual leave under the EC Working Time Directive 1993/104/EC (the "WTD") even if the individual is not actually working. It is a matter of national law as to whether a worker can take this annual leave during the sick leave period. However, a worker on sick leave must be permitted to carry forward their annual leave if they have not been able to take it during the holiday year. On termination of employment a worker has the right to be paid in lieu of notice for any accrued holiday not taken even if the worker has been on sick leave for the whole or part of the year.

The UK House of Lords ("HL") will now have to interpret the UK implementing legislation (the Working Time Regulations 1998 ("WTR")) in light of the ECJ's decision. The decision is only applicable to the minimum four weeks of holiday entitlement under the WTD and not the additional eight days' annual holiday entitlement under the WTR or any greater entitlement under a worker's contract.

Comment: *The ECJ ruling will have no immediate effect on workers in the private sector but will apply directly to those in the public sector. If the HL subsequently expands the decision so that it affects the private sector, the judgment will have significant cost implications for employers and is likely to provoke dismay from business, especially in view of the prevailing state of the UK economy. Employers may be forced to consider recouping or offsetting some of any additional costs by, for example, reducing company sick pay entitlements.*

3. Use Of The Word "Discretionary" In Bonus Schemes

In *Small v (1) The Boots Co PLC and (2) Boots UK Limited* UK EAT/0248/08, the Employment Appeal Tribunal ("EAT") confirmed that, even though a UK bonus scheme had been labelled "*discretionary*" in employment documentation, it might still have contractual status.

Central to the case were various documents issued to employees, including a statement of employment particulars and a staff handbook. These included various references to "*bonus*", accompanied by the word "*discretionary*".

The EAT considered that the use of the word "*discretionary*" could be, and was in this case, ambiguous. It could mean that the employer had discretion as to whether to pay a bonus at all, its calculation, its amount, or any number of other factors.

In order to decide whether a scheme is truly discretionary, all relevant circumstances,

including a practice of making payments over a number of years, will be relevant to deciding how discretionary wording in documentation is to be construed and whether a bonus actually has contractual effect. As bonuses had been paid by Boots over a period of 40 years, the EAT held that this should have been considered when deciding whether the bonuses were contractual.

The EAT also reiterated principles from earlier cases – that any exercise of discretion in relation to provision of a bonus must be rational and in good faith.

Comment: *This case highlights the need for careful drafting of employment contracts or bonus documentation by employers and warns that the liberal use of the word "discretionary" in such documents provides no guarantee of avoiding legal challenge over payment.*

4. The Correct Comparator In Disability-Related Discrimination Claims

In *Child Support Agency (Dudley) v Truman* UKEAT/0293/08, the EAT held that the comparator for a disability-related discrimination claim under the Disability Discrimination Act 1995 ("DDA") in the employment sphere is a non-disabled person, who, apart from the disability, shares the same circumstances as the claimant.

In the previous leading case on disability-related discrimination *(Clark v TDG Ltd t/a Novacold* [1999] EWCA Civ 1091), it was held that the appropriate comparator for such a claim is not simply a non-disabled person, but a non-disabled person to whom the underlying reason for the claimant's treatment does not apply. In the subsequent case of *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43, the HL took a different view and held that the correct comparator for disability-related discrimination is a non-disabled person to whom the underlying reason for the treatment applied equally. However, as *Malcolm* concerned the housing, rather than employment, provisions of the DDA, it was suggested that it did not apply to employment cases. In *Truman*, the EAT was asked to decide this point.

The EAT held that the *Malcolm* comparator does apply to disability-related discrimination claims in the employment sphere and the wider comparator in *Novacold* should not be used unless and until the DDA is amended by the UK Parliament.

Comment*: Following this case disability-related discrimination has effectively become another form of direct disability discrimination. Therefore, for now the focus of most disability claims is likely to be on the employer's duty under the DDA to make reasonable adjustments. However, in the long term, the Government proposes to use the forthcoming Equality Bill to remove disability-related discrimination entirely from the DDA and introduce indirect disability discrimination in its place. We await the outcome of the Government's consultation.*

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