

Spanish Retirement Legislation Lawful under EU Law

October 2007 was an important month for decisions on age discrimination both in England and Wales and on a European level. In Case C-411/05 **Palacios de la Villa v Cortefiel Servicios SA** (judgment 16 October 2007) the European Court of Justice ('the ECJ') held that the Equal Treatment Framework Directive 2000/78 ('the Directive'), which is implemented in the United Kingdom in the Employment Equality (Age) Regulations 2006, does not preclude national legislation stipulating a retirement age, provided that (i) it was objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and (ii) the means put in place to achieve that aim of public interest do not appear to be inappropriate and unnecessary for the purpose.

Article 2(1) of the Directive prohibits direct or indirect discrimination on, among other grounds, age. Pursuant to Article 6 of the Directive, Member States may provide that differences of treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

Mr Palacios de la Villa claimed that his dismissal from Cortefiel on the ground that he had reached the compulsory retirement age of 65, which was laid down in a collective agreement, was unlawful. Spanish law allowed for a compulsory retirement age in collective agreements. The Textile Trade Collective Agreement for the Community of Madrid, which governed the relationship between Mr Palacios de la Villa and Cortefiel, provided for a compulsory retirement age of 65 unless the worker concerned had not completed the qualifying period required for drawing a retirement pension. The Agreement stated that the compulsory retirement age served the interests of promoting employment. Mr Palacios de la Villa argued that the termination of his employment breached his fundamental rights, he had been discriminated against because he had reached the age of 65 and sought an annulment of that decision. It was common ground between the parties that Mr Palacios de la Villa had completed the periods of employment necessary to draw a retirement pension.

In a reference for a preliminary ruling under Article

234 EC from the Juzgado de lo Social No 33 de Madrid on the compatibility of national legislation governing retirement age with the Directive, the ECJ held that the automatic termination of an employment contract under national legislation had to be regarded as directly imposing less favourable treatment for workers who had reached retirement age as compared with all other persons in the labour force. The national legislation, therefore, established a difference in treatment directly based on age. However, as the ECJ noted, the Spanish law was aimed at regulating the national labour market, specifically for the purpose of checking unemployment. It did not matter that the national measure did not expressly refer to a policy of that kind. Lack of precision in a national measure in respect of the aim pursued did not automatically preclude the possibility that it may be justified under Article 6(1) of the Directive. Thus, the national law had to be regarded as objectively and reasonably justifying a difference in treatment on the grounds of age. Further, the ECJ held that the measure adopted to achieve that aim of public interest was appropriate and necessary. The Court considered that it was not unreasonable for a Member State to take the view that a compulsory retirement age in a collective agreement may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, such as the promotion of full employment by facilitating access to the labour market. The Court also observed that the national legislation was not based solely on a specific age, but also took account of the fact that the individuals concerned were entitled to financial compensation by way of a retirement pension. The Spanish legislation, therefore, was compatible with the requirements of the Directive.

In coming to his conclusion the ECJ broadly followed the opinion of Advocate General Mazák. However, it did not follow the AG in his suggestion that Recital 14, which states that the Directive is to be without prejudice to national provisions laying down retirement ages, meant that rules determining retirement ages were outside the scope of the Directive. The ECJ indicated that the recital merely indicated that the Directive did not

affect the competence of Member States to determine retirement, but did not preclude the applicability of the Directive to national rules establishing compulsory retirement ages.

Nor did the ECJ engage with the AG's suggestion that age discrimination, unlike other forms of discrimination, may be graduated and that it was much more difficult to determine the existence of age discrimination than, for instance, sex discrimination where the comparators were more clearly defined. In this the AG echoed the views expressed in case C-227/04 P *Lindorfer v Council* by AGs Jacobs and Advocate General Sharpston, both of whom indicate that age discrimination is different from other types of discrimination and not susceptible to rigorous categorisation.

In Case C-144/04 *Mangold v Helm* [2005] ECR I-9981, a case that concerned the compatibility of German legislation providing for the conclusion of fixed term contracts of employments for workers who had reached the age of 52, the ECJ held that the principle of age discrimination on grounds of age, had to be regarded as a general principle of Community law, thus giving age discrimination the same status as other forms of discrimination on the grounds of, say, sex or race. AG Mazák expressed the view that it was a 'bold proposition and a significant move to infer, solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on the grounds of age.' The Advocate General argued that a general prohibition of discrimination left open the question of which grounds for discrimination are acceptable and pointed out that the Directive did not necessarily reflect an already existing prohibition of all the forms of discrimination to which it refers.

Judicial interpretation of age discrimination laws is still an early stage and, as with earlier discrimination provisions, it remains to be seen how courts will interpret the statutory provisions. It will be particularly interesting to see how receptive courts will be to the argument that age discrimination may have to be assessed differently and placed in a different category from other forms of discrimination.

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Age Discrimination - **Bloxham v Freshfields & Others**

The Employment Tribunal's decision in **Bloxham v Freshfields Bruckhaus Deringer** (9 October 2007) has been eagerly awaited by employment lawyers - or at least by those who need to get out more. For the rest of us it is a timely reminder that the provisions of the Employment Equality (Age) Regulations 2006 ('the Regulations'), which largely came into force on the 1 October 2006, cannot be ignored, although anecdotal evidence suggests that some employers have had a somewhat ostrich like response to their introduction.

It should also be noted that the provisions are not restricted to employees but effect workers, partners and even barristers and their clerks. They impinge on every aspect of the employer/employee relationship from recruitment to retirement.

Very briefly, the Regulations provide that a person ('A') discriminates against another person ('B') if, on grounds of B's age, A treats B less favourably than he treats or would treat other persons (Regulation 3(1)(a)) or if A applies a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and (ii) which puts B at a disadvantage (Regulation 3(1)(b)).

Importantly, however, A will only discriminate against B if he cannot show that the treatment, provision, criterion or practice was a proportionate means of achieving a legitimate aim ('*objective justification*'). This provision sets the Age Discrimination Regulations apart from Sex and Race Discrimination Rules.

The facts of *Bloxham -v- Freshfields* (believed to be the first decision to consider the Regulations) were somewhat complicated. In a nutshell, however, they concerned a change to the Respondent firm's pension scheme which meant that some members aged less than 55 years on the 30 April 2006 were disadvantaged by comparison to colleagues who, on the relevant date, were 55 or older.

The Tribunal found that Mr Bloxham was treated less favourably on the grounds of age and, in their judgment, they acknowledged that their understanding of the

Regulations meant that employers would need to consider the effect on employees of different age groups whenever a change to a pension scheme or an employee policy is concerned. In fact, the need for a thorough consideration is unlikely to be restricted to these areas and may be relevant to other aspects of the employee/employer relationship.

More significant, however, was the Tribunal's treatment of objective justification and the need for the Respondent to prove, on the balance of probabilities, that any discriminatory act it implements is a proportionate means of achieving a legitimate aim. The tribunal found in favour of the firm on both these issues (ie the change it had introduced was a proportionate response to a legitimate aim). Finding, first, that the purpose of the change was 'to provide a more financially sustainable pension scheme which reduced the intergenerational unfairness on younger partners', the Tribunal formed the view that this was a legitimate aim and that the change was a proportionate one. In reaching this decision, they pointed out that any change for employees of one age group would impact on the interests of another. It is also noteworthy that, in *Bloxham*, the Tribunal concluded that the employer had 'comfortably passed' the required test of legitimacy. The case also highlights the need for employees to support any assertion of objective justification. Interestingly, the Tribunal also suggested that maintaining the status quo might not absolve an employer from considering other steps if he is not to fall foul of the Regulations.

Of course, this decision is at first instance only and, at the time of writing, the legal press have reported that the Applicant and his representatives are considering an appeal. Whatever happens in this case, however, the decision demonstrates the far reaching and, potentially, difficult consequence for employers. At the same time, the favourable outcome on the question of justification will be some comfort to employers provided that, in any given a situation, they have fairly and thoroughly considered the options available to them.

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