# The Employment Equality (Age) Regulations 2006 are now two years old, and have been taking their first, faltering steps

*Case C-388/07 R (Incorporated Trustees of the National Council on Ageing) v Secretary of State for Business, Enterprise and Regulatory Reform (23 September 2008, not yet reported).*
*Chief Constable of West Yorkshire v Homer UKEAT/0191/08/RN (27 October 2008, not yet reported).*

By Tom Richards

Two recent developments are of note. First, Advocate General Mazák has delivered his opinion in the High Court's reference to the ECJ in the Age Concern proceedings. Age Concern are challenging the validity of various aspects of the Regulations, but as AG Mazák emphasised, the questions referred to the European Court are narrow: in summary, (1) whether in principle national rules allowing mandatory retirement fall within the scope of Directive 2000/78/EC, (2) whether in principle Member States are allowed to create a general justification defence for direct age discrimination, as the UK has done, and (3) whether there is any significant difference in the Directive between the tests of justification for indirect and direct age discrimination.

Question (1) had already been determined by the ECJ in Case C 411/05 *Palacios de la Villa* [2007] ECR I 8531, where the ECJ held that national provisions for mandatory retirement ages do fall within the scope of the Directive. In relation to question (2), AG Mazák broadly accepted the UK government's submissions. Member States are free to create a general defence of justification of direct discrimination, without listing exclusively the forms of permissible conduct. Indeed, it might be impossible to establish such a list in advance without unduly restricting the scope of a justification defence.
As for the third question, the key difference between Article 6 (justification of direct age discrimination) and Article 2 (justification of indirect discrimination of all kinds) is that Article 6 is focussed on national measures, rather than employers' individual decisions.

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Where a Member State has created a rule allowing employers forcibly to retire employees aged 65, as the UK has, the question is not whether any particular forced retirement is justified, but whether the Member State can justify the rule. There is no difference, on the other hand, in the level of scrutiny required, and AG Mazák rejected Age Concern's suggestion that justification of direct discrimination under Article 6 of the Directive involves a more exacting standard than justification of indirect discrimination.

If the ECJ agrees with the Advocate General, some of Age Concern's arguments of principle will have failed. But it will remain for the English Administrative Court to decide whether Regulation 30 of the domestic Regulations, permitting forced retirement of employees from age 65, is justified under Article 6 of the Directive, and whether the UK's creation of a general justification defence for direct age discrimination is so justified.

The second case is Homer. Mr Homer's employer had introduced a new grading structure, with a new requirement that for employees to achieve the top grade, and enjoy the greatest salary increments, they had to have a law degree. Mr Homer did not have a law degree. He complained that since he was 61, he could not realistically achieve the top grade, since by the time he had acquired his degree he would be due or very nearly due to retire. The Tribunal found that he had made out a claim of indirect age discrimination.

However, the EAT disagreed. The only disadvantage suffered by those in Mr Homer's age group was that younger employees had longer than them to enjoy the benefits that came with a law degree. That, said the EAT, is true of any benefit conferred by employers on employees. The fact that as employees age their remaining working lifespan decreases and the future value of benefits conferred by the employer decreases accordingly *'is the human condition, and not even Parliament can change it*'. Insofar as the employer's criterion had put Mr Homer and his age group at a comparative



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disadvantage, that *'is the inevitable consequence of age; it is not a consequence of age discrimination'*.

The EAT's reasoning is not entirely clear. It appears that the true cause of Mr Homer's disadvantage was not anything done by the employer, but age itself; that the criterion, in terms of the test under the Regulations, did not put Mr Homer at a disadvantage.
The difficulty with this is that the requirement for a law degree plainly did put Mr Homer at some disadvantage. The EAT's approach would seem to introduce a further test of the real cause of the disadvantage – a test that does not appear in the Regulations. Arguments about what Homer stands for, and whether it stands up, can be expected.

*Dinah Rose QC appeared for the UK Government in the Age Concern proceedings.*



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