

HR Bulletin E-Update 22 - August 2011

Young people take precedent in age dispute

Just when you thought there was clarity in respect of managing older workers, it all becomes a bit grey again with the ECJ ruling in Fuchs and anor v Land Hessen where it was held that setting a retirement age of 65 for permanent civil servants was not in breach of the EU Equal Treatment Framework Directive because its objective was to encourage the recruitment and promotion of young people, improve personnel management and avoid performance disputes with older workers!

The Equal Treatment Framework Directive and the UK law

As a brief recap, the equal treatment framework is designed to ensure equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation. Its focus is around access to employment or occupation and membership of certain organisations. Exceptions are permitted in the areas of Genuine Occupational Qualifications and in respect of age, differences in treatment on the grounds of age are permissible when they are objectively and reasonably justified by a legitimate labour market aim and are appropriate and necessary to the achievement of that aim (e.g. protection of young people and older workers, requirements as to the extent of job experience etc)

In fear of stating the widely known, in the UK the law changed in respect of age discrimination in April 2011 which meant that unless an employer had an Employer Justified Retirement Age (EJRA), it would be liable for potentially successful unfair dismissal and age discrimination claims beyond this date (with the exception of those that fell within a transitional period) if it dismissed an employee by way of compulsory retirement.

If an employer views compulsory retirement necessary for reasons such as health and safety, the Government advised that organisations can “retain a retirement age if this can be objectively justified.” However even if an employer has a legitimate reason, justifying the age at which to compulsorily retire employees can be a minefield.

The below case is a German case but may have implications for what could be argued as an EJRA in the UK.

Background

The two claimants, Fuchs and Köhler both worked as State Prosecutors for the Ministry of Justice in Germany. German federal law stated at the time that civil servants must retire upon reaching a specific retirement age, however it was at the discretion of the various regions to determine what that retirement age should be. Land Hessen (a region in West-Central Germany) set the retirement age for its civil servants at 65. Civil servants could make applications to postpone their retirement for up to a period of one year, provided that the overall retirement age did not exceed 68 and all extended retirements had to be mutually agreeable subject to the interests of the service.

Fuchs and Köhler, were both born in 1944, and therefore reached the age of 65 in 2009, and would normally have been required to retire. Their cases came before the German courts and they applied to take advantage of a rule that allowed them to continue working for one extra year if it was “in the interests of the service”. Their applications were turned down and they sought ways to continue working. They were successful in the lower courts, however the national court in Frankfurt referred questions to the ECJ on whether or not the compulsory retirement age for civil servants complied with the Equal Treatment Framework Directive. The national court had a suspicion that the retirement policy was driven by financial savings which did not seem to be conducive to the aims of the directive.

The ECJ

Land Hessen believed that they could objectively justify the discrimination as it felt that the aims of their retirement policy were legitimate. They stated that its objective was to create a balanced age structure, to assist with workforce planning, encourage the recruitment and promotion of young people and (startlingly) avoid performance disputes with older workers. The evidence they put forward consisted of information supporting their argument that the number of prosecutors' posts were limited; that the claimants could retire on 72 per cent of their salary and had the possibility of working until 68 if it was in the interests of the service for them to do so. In addition opportunities were open to them to continue to work in a role which had no age limit, such as a legal advisor.

Given the importance attached to employment and the labour market policy in the directive when considering what potentially constitutes a legitimate aim and the realisation that multiple aims could be put forward, the ECJ felt they could not rule out the argument laid before them by Land Hessen. They also felt that Member States were entitled to take financial considerations into account when setting social policy objectives if they were alongside political, social or demographic considerations, on the proviso they observed the general principle of prohibiting age discrimination. However costs on their own could not in themselves constitute a legitimate aim in accordance with the Directive.

The ECJ felt that the decision as to whether a 65 age limit was appropriate and necessary was a matter for the national courts to evaluate through the course of their analysis. It would not be appropriate for a reason to be put forward as a generalisation for example, the evidence would have to show there was a balance between the interests of various age groups and could only go as far as what was ‘legitimate and necessary’. Whilst the experts are not absolutely sure what this means it seems to suggest that the establishment of an age structure in the workplace which ensures a balance between the generations could be a legitimate aim.

In respect of the evidence put forward by Land Hessen, it was the Court's view, that the compulsory retirement age did not go beyond what was necessary to achieve the stated aims.

Finally the ECJ held that allowing some employees to work until 68 and others only to 65 did not lack coherence nor did it undermine the arguments put forward by Land Hessen about promoting young workers. It felt the policy allowed for certain civil servants to remain in post beyond 65 and allowed for the gradual raising of the retirement age which fitted the aims of the directive as their policy allowed for a temporary extension of the working age. It did not even matter that other national legislation provided for certain civil servants to remain in post beyond 65. In this regard they took into consideration that those that retired at 65 did so on a full pension equivalent to 72% of their final salary or could alternatively work as a legal adviser in another department with a higher retirement age. Overall the case appeared to lean more towards the test of reasonableness rather than a proportionality.

What could this mean for our EJRA and other cases?

It is not quite clear what constitutes a strong enough EJRA as it is early days but this ruling appears to fit in with rulings in two other German cases so we appear to be getting a pattern.

One case (which you may recall we discussed in a previous bulletin) concerned a firefighter (*Wolf v Stadt Frankfurt am Main*, ECJ). Wolf was not considered for a role in the fire service due to a local requirement to be under the age of 30 and the ECJ ruled this was a genuine occupational requirement even though he was only months into his thirtieth year. Another case was in respect of dentists in the German National Health service where it was justified that the local labour market required opportunities for younger workers and older dentists could work outside of the NHS so their retirement was permitted (*Petersen v Berufungsausschuss für Zahnärzte für Bezirk Westfalen-Lippe*, ECJ).

Closer to home and again reported previously in one of our bulletins, the Court of Appeal case of *Seldon v Clarkson, Wright & Jakes* (the “Seldon case”) gave its landmark decision which in brief stated that it was held by the CA that the compulsory retirement age was justifiable by reference to the partnership’s workplace planning arrangements.

So can we justify retirement? If this case allows a retirement to be justified to encourage the promotion of a younger workforce, this appears to make a mockery of the purpose of protecting older workers from age discrimination in the first place. Furthermore, we are sure that the EHRC will have something to say about the suggestion that older workers to can be retired to prevent possible disputes with fitness beyond a certain age. The ruling however does seem to suggest that employers that want to use workforce planning as a justification need to be able to show specifically why its workforce still needs a retirement age against showing an appropriate age balance in the workforce....but we would not want you to be one of the first to try it.

An audience with Daniel Barnett!

‘Devastating in court , he knew our case inside out and tore the other side to pieces in cross examination.’

Martin Anastasi, Tomax Technology, LLP

‘Expert advice, great style, successful outcome: we could not have been in safer hands’

Michelle Cooper, Ealing Primary Care Trust

‘Excels in the cut and thrust of the courtroom’

Paul Housego, Beers Solicitors

We are very fortunate indeed to confirm that Daniel Barnett will be speaking to our region the morning of 22nd September 2011. It is very fitting to add this event to this week’s bulletin as Daniel Barnett’s update inspired the main case featured.

Daniel is an employment law barrister who has appeared on TV and radio and advises/represents businesses in a variety of discrimination cases, TUPE, team moves, removal of confidential business information and unfair dismissals. He will be giving us tips for the Employment Tribunal as well as a general legal update to answer some of the burning questions you have been putting to your Employers Services team. The event has already attracted over 95 expressions of interest in the first week of its promotion and who can blame you with our very attractive rate of £75 + VAT per person or 3 for 2 for Local Authorities/other organisations who subscribe to our service. We also are offering this rate to West Midlands PPMA members who are sponsoring the event.

A special thanks goes to Birmingham City Council as hosts for providing the facilities of their council chamber

Not expressed an interest yet? Email [Carrie Rowberry](mailto:Carrie.Rowberry@c.wmccouncils.gov.uk) c.rowberry@wmcouncils.gov.uk

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HR Webhelp

Don't forget to use our HR Webhelp to:

- Share knowledge
- Upload your policies to our library
- See if our FAQ's can assist you

For more information contact Carrie Rowberry on 0121 678 1057 or email c.rowberry@wmcouncils.gov.uk

Are you strapped for time? Need some assistance? Do you need

- Someone to conduct an investigation?
- Interim HR Professional?
- Bespoke Training Programme?
- JE Support?

Employer Services Team is here to help

For advice and information on employment issues (including on any of the contents of this Bulletin) and consultancy support contact:

Colin Williams , Director of Employer Services on 07785 727306 (c.williams@wmcouncils.gov.uk)

Michelle Cartwright, Regional Adviser/Consultant-Employer Services on 0121 678 1019 or 07771 373202 (m.cartwright@wmcouncils.gov.uk)

Shane O'Callaghan, Regional Adviser/Consultant-Employer Services on 0121 678 1038 or 07771 373201 (s.ocallaghan@wmcouncils.gov.uk)

For general queries, please use our central inbox hr@wmcouncils.gov.uk

West Midlands Coaching Conference 2011

The West Midlands Coaching Pool are pleased to announce that it will be hosting the fourth annual West Midlands Coaching Conference in Central Birmingham.

Date: Monday 7th November 2011

Venue: ETC Maple House, Birmingham

Focus of the Conference: Making Coaching Count - for individuals, teams and organisations.

Please click to view this year's [Workshop Options](#)

Please click to view our [Conference brochure and booking form](#)

Booking Prices:

- Coaching Pool Coaches - £45+VAT
- Non Coaching Pool Coaches - £170+VAT
- Early Bird Price - Non Coaching Pool Coaches £120+VAT (Valid until 12th September 2011)

Who Should Attend:

Executive coaches from beginner to professional level.

The Conference offers an excellent opportunity to network with fellow coaches, experts, trainers and those with a keen interest in coaching from across the UK.

Website:

<http://www.wmcouncils.gov.uk/wmcoachingconference2011>

Last year's delegates said...

"The Pool's conference is definitely up there on the national coaching conference map, for quality of speakers/presenters, excellent value for money and for coach CPD and networking"

For further information about the West Midlands Coaching Conference please visit

<http://www.wmcouncils.gov.uk/wmcoachingconference2011>