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Age Discrimination one year on

There have been a couple of decisions on age discrimination, considering the defence of justification as a proportionate means of achieving a legitimate aim, worthy of note.

In the case of *Palacios v Cortefiel Servicios SA* the ECJ handed down its opinion that the EU Equal Treatment Framework Directive does not prohibit member states from introducing mandatory retirement ages. The ECJ held that a general mandatory retirement age did fall within the scope of what the Directive prohibited, but the ECJ considered that a mandatory retirement age was justified as it was a proportionate means of achieving a legitimate social aim of promoting employment opportunities and reducing unemployment.

As you may be aware Heyday is currently challenging the UK's retirement provisions before the ECJ, so this decision will not have been well received there.

Age discrimination was also considered recently by an employment tribunal in the high profile case of *Bloxham v Freshfields Bruckhaus Deringer*. A former partner complained that changes to a law firm's pension scheme amounted to unlawful age discrimination. It was held that although certain aspects of the changes did discriminate on the grounds of age, this discrimination was justified as it was a proportionate means of achieving a legitimate aim of providing a more financially sustainable and fairer pension scheme.

Age discrimination will be considered along with other areas of discrimination at our Annual Employment Law seminar on Thursday 1 November, to book your place click [here](#).

Maternity pay increases delayed until on or after April 2009

The Government plans to increase Statutory Maternity Pay (SMP), Maternity Allowance (MA) and Statutory Adoption Pay (SAP) from 39 to 52 weeks and to introduce Additional Paternity Leave and Pay (APL & P) by the end of this Parliament. APL&P would give employed fathers the right to take up an additional 26 weeks off work with pay to care for their child in the first year, if the mother has returned to work and had not used up all her full entitlement to maternity leave.

The Government indicated last week that although this still remains a goal, the implementation date has not been decided and to give employers some clarity and further time to make preparations, these changes will not be implemented in April 2008 as previously announced. Planning will now take place on the basis that implementation will be for babies due on or after April 2010.

Whether the agency worker is an employee of the end user

(Wood Group Engineering (North Sea) v Robertson EAT)

This decision is the latest in a line of cases considering whether there should be an implied contract of employment between the agency worker and the end user.

Ms Robertson worked as a receptionist for Wood Group Engineering through a number of different agencies. Ms Robertson submitted her timesheets to and was paid by the agency.

In July 2005 the Wood Group advertised for a receptionist at a new office and Ms Robertson was successfully appointed to the post. However in March 2006 the Wood Group terminated her contract and she brought a claim for unfair dismissal.

The Wood Group accepted that she was an employee but contended that she had been employed for less than a year at the time of her dismissal. Ms Robertson contended that she had in fact been an employee of Wood Group before July 2005 under an implied contract of employment.

The Tribunal decided that in light of the degree of control and mutuality of obligation there had been an implied contract of employment.

On appeal by Wood Group, the EAT found that there was no such implied contract. The EAT decided that the Tribunal had wrongly interpreted the Court of Appeal's decision in *Dacas v Brook Street Bureau*, in considering that where there was a high degree of control and mutuality of obligation, there would be an implied contract of employment.

The EAT held that the *Dacas* decision should be interpreted on the basis that it could only be concluded that an implied contract exists or existed where it was necessary to do so and such implication would not be appropriate unless the arrangements under which the person is working are only explicable by there being such a contract. If the arrangements are explicable by reference to the existing written contract, then there would be no room for any such implication unless it could properly be concluded that such contracts were a sham.

In this case the EAT said that there was no reason to believe than the written contracts had not adequately described the degree of control and mutuality of obligation between Ms Roberson and the Wood Group.

Agency users may once more breathe a sigh of relief. However, a word of caution, as permission to appeal to the Court of Appeal has been granted in another agency case, *James v Greenwich* so there may be more on this point soon.

If you have any questions about these or other employment issues please call Heather Cowley on 01582 731161.

The information given in this email update was, at the time of publication, believed to be a correct statement of the law. However, readers should seek specific legal advice on matters arising, and no responsibility can be accepted for action taken solely in reliance upon such information.