

AGE DISCRIMINATION

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THE EUROPEAN CONTEXT

- A 'greying' European population
- Greater expectation that individual self-realisation will not decline or stop with old age
- Enhanced emphasis on individual pension provision, the shrinking of state 'cradle to grave' support, and the inevitable pressures of globalisation

COUNCIL DIRECTIVE 2000/78/EC

Recitals

- (13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.
- (14) **This Directive shall be without prejudice to national provisions laying down retirement ages.**
- (25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

COUNCIL DIRECTIVE 2000/78/EC

Article 6(1) - Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary. Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

COUNCIL DIRECTIVE 2000/78/EC

Article 6(2) - Justification of differences of treatment on grounds of age

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

COUNCIL DIRECTIVE 2000/78/EC

Summary

- Direct and indirect discrimination on the grounds of age is prohibited, as is harassment and victimisation – but not association? Watch for C 303/06, *Coleman v Attridge Law*, ECJ.
- A 'genuine occupational requirement' defence exists, shared with the other equality grounds.
- Article 6 makes provision for a general objective justification defence – different from the other equality grounds.
- The other provisions of the Directive, including Art. 7 on positive action and Art. 10 on burden of proof apply.

‘Less Favourable Treatment’

- When will someone be subject to ‘less favourable treatment’ on the grounds of age?
- ‘*Age-linked*’ characteristics: seniority, experience etc. – direct or indirect discrimination? Does it matter?
- Differential standard of justification for ‘age-based’ as distinct from ‘age-linked’ characteristics?

JUSTIFICATION

- Genuine occupational requirement
- General objective justification defence
 - i) legitimate aims
 - ii) proportionate means
- Will age discrimination be treated in the same manner as the other equality grounds?
- Case C-144/04, *Mangold*, [63]-[65]: ‘Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy...Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued

EXCEPTIONS?

- Article 6(2) – occupational pension schemes.
- Recital 14 – ‘national retirement ages’?
- C-411/05, *Palacios v Cortefiel Servicios SA* - the ECJ appeared to reject the suggestion made by AG Mazák that Recital 14 should be interpreted as exempting provisions in national collective agreements providing for compulsory termination of employment at a certain age from the objective justification requirements of the Directive.
- Positive action – see Article 7 of the Directive.
- When will member states be able to introduce general exemptions? See the forthcoming *Heyday* case from the UK.

RETIREMENT AGES

- The *Palacios* case established that a compulsory retirement age imposed by collective agreement could be justified on the basis of a legitimate employment policy.
- In this case, compulsory retirement was only possible after an employer had accumulated her full pension entitlement, and the contents of the collective agreement had been agreed following extensive negotiation.
- Will arguments that compulsory retirement ages are useful for business planning be sufficient objective justification? See the forthcoming *Heyday* case.
- Note that compulsory retirement is not generally permitted in the USA.

SENIORITY/PENSIONS

- Seniority exceptions – when will they be objectively justified?
- Experience – when will this serve as an objective justification?
- Redundancy payments – can they be age-related?
- Occupational pensions – note exception contained in Article 6(2) – will this be interpreted narrowly?

COMPARATIVE EXPERIENCE

- From the experience of North America, age cases will be relatively frequent and will often be complex;
- Damage awards may often be reasonably substantial;
- Be slow to presume that age will be treated by courts and tribunals as a 'watered-down' form of discrimination;
- Interesting case-law has already emerged from Ireland and the UK.

FINAL COMMENTS

- Medical/social/political trends very much now favour age-neutral approaches.
- However, is age discrimination 'less morally problematic' than other forms of discrimination?
- Will age discrimination legislation be extended?
- Will/should age discrimination in access to goods and services be prohibited in a future Directive?