

The prohibition of discrimination based on age in light of ECJ case-law

A journey into light?

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- **In the EU between 2010 - 2030:**
65-79 year olds will grow by 37.4%,
(Green Paper Confronting Demographic Change ... (COM) 2005 94 final)
- By 2040 old age will start at 82 (Genevieve Reday-Mulvey, 2005)
- **AGE (2009)** - growing number of old people will live just above poverty level in EU, older workers among most affected by financial crisis, life cycle and age neutral employment policies needed.
- **AGE (5/10/2009)** – Multiple and intersectional discrimination are contextual.

Contd...

Before *Mangold*, Article 6.1 described as, Waddington “an open-ended possibility to justify age discrimination” (2003) and seeks to “legalise age discrimination” (2003).

After,

H. Meenan “the most vague and permissive provision in all three Article 13 Directives” (2007).

Things we did not know before cases:

- Does Article 6.1 work? *Mangold*
- What does Recital 14 mean? How precisely must 'aim' be stated? *Palacios d.l.V.*
- To satisfy Art. 6.1, how specific must national justification be? And, what kind of 'aim' and standard of proof is intended? *Age Concern*
- Can M. States exclude apprenticeship before 18 years of age in pay grade? *David Hutter*
- Max. age limit for dentists (& doctors), aims of 'public health' and 'generational renewal', role of Art. 2(5) & 6(1) *Petersen*

Continued...

- 1) Are shorter notice periods for younger workers allowed, 2) is flexibility of employers a legitimate aim, ((3) is intra-group discrimination engaged by the Directive)? *Kucukdeveci*

- Max. age limit (30 years) for recruitment as fire officer, does this engage Art. 4(1) or Art. 6(1)?

Colin Wolf

Enduring unanswered question: is a ‘chronological age’ meaning / approach the correct one in all circumstances?

Mangold v Helm, Case C-144/04

Setting the Scene I

- 2003 Mr Mangold aged 56 enters fixed term contract with Mr Helm
- duration of contract based on statutory provision, para. 14(3) TzBfG which,
- stated no objective justification for Fixed Term Contract needed if worker is 58,
- but FTC not allowed if close connection (less than 6 months) with previous indefinite contract with same employer

Setting the Scene II

- Para. 14(2) TzBfG - in absence of objective grounds, maximum period for FTCs is 2 years
- 2002 Para. 14(3) amended to reduce age from 58 to 52 until 31/12/2006

Setting the Scene III

Questions for ECJ

- Q.1(a) Does Cl. 8(3) (non-regression) FWA, prohibit reduction of protection, following reduction of age limit from 60 to 58? **No, reduction in age unconnected with implementation of FWA**
- Q. 2 Does Article 6(1) Dir. 2000/78 preclude a national law authorising the conclusion of FTCs, without any objective reason, with workers 52 and over?

ECJ

Q. 2 - Three steps of Article 6.1

Step I Para. 14(3) introduces a difference in treatment on grounds directly of age

Step II the vocational integration of unemployed older workers - is a legitimate objective which 'objectively and reasonably' justifies difference in treatment

Step III are the means used appropriate and necessary (proportionate)?

Effects of the national law...

- All workers of 52, without distinction, whether or not they were unemployed before FTC may lawfully be offered FTCs indefinitely until retirement age
- This significant body of workers, *determined solely on basis of age* is in danger of being excluded from the benefit of stable employment for a significant part of working life (para. 64)

Fails step III....disproportionate!

- Use of age as only criterion for FTC and failure to demonstrate this age was objectively necessary to achieve the vocational integration of unemployed older workers and,
- absence of any other consideration linked to structure of labour market or the personal situation of the person concerned, went beyond what was “appropriate and necessary” (para. 65)

ECJ overcame a number of issues, in doing so it relied...

- *inter alia* on the principle of non-discrimination on grounds of age which must be regarded as a general principle of Community law (para. 75) and,
- the source of the principle underlying the prohibition of the forms of discrimination in 2000/78 is found in various international instruments and in the constitutional traditions common to the Member States not Directive 2000/78 (para.74)

Finally ...

- **ECJ does not cite contextual aspects e.g. impact of demographic ageing**
- **Or multiple / intersectional discrimination, particular position of e.g. older women**

Palacios de la Villa v Cortefiel Servicios S.A.

Case C-411/05

- 1980-2001 Under Spanish law compulsory retirement used to absorb unemployment.
- 2005 – law permits compulsory retirement (c.r.) in coll.agreements (C.A.s) where worker has reached the normal retirement age (n.r.a.) and 1) c.r. linked to employment policy and 2) worker must have qualified for retirement pension.
- Pre-existing C.A.s only, need to satisfy condition 2)

Case

- Mr P dIV was terminated from job at 65 and had completed contributions to pension
- Claimed this was “dismissal” which breached right not to be discriminated against on grounds of age
- Spanish court believes single requirement (qualifying for state pension only) breaches Community law

Key Question for ECJ

Does the principle of equal treatment in Art.13 EC T and Art. 2.1, Dir. 2000/78 preclude a national law, where comp. retires. clauses are lawful where sole requirements are that workers have reached n.r.a. and fulfilled conditions for a retirement pension?

No.

How did ECJ reach this decision?

- Does Dir. 2000/78 apply here?

Clarifies meaning of Recital 14,

“that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing conditions for termination of employment contracts where the retirement age thus established, has been reached”. (para. 44)

Contd...

- The law prevents “his future participation in the labour force” and “must be regarded as establishing rules relating to ‘employment and working conditions, including dismissals and pay’ within the meaning of Article 3(1)(c) of Directive 2000/78”. (Para. 45-46)

- The national law imposes a difference in treatment directly based on age (Art. 2(1) and (2) (a), Dir. 2000/78)
- Does the natl. law pursue a legitimate aim?
The law did not expressly state one but, ECJ – lack of precision does not preclude justification if consider other elements from the general context of the measure which enable aim to be identified (paras. 56-57)

In context of legislative history, ECJ found the measure “was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment”.
(para.60-62)

And,

Collective agreement referred to the “interests of promoting employment”. (para. 63). Thus objectively and reasonably justified within the context of national law (para. 66)

- But were the means used appropriate and necessary?

Yes

- Referring to *Mangold*, M. States have ‘broad discretion’ in choice of aim of social and employment policy and,
- In definition of measures to achieve it.

ECJ also referred to ‘specific provisions which may vary in accordance with the situation in Member States’ in Recital 25....

Contd...

“...such is the case as regards the choice which the national authorities may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people’s working life, or conversely, to provide for early retirement”. (para. 69)

AND also refers to adapting the means used to changing circumstances in employment in Member States (para. 70)

However,

ECJ concluded that the means used to achieve that aim of public interest “do not appear to be inappropriate and unnecessary for the purpose”. [emphasis added]

Curious terminology in the English language version or, more?

Note A.G. Mazak

- “it should be borne in mind that ... age as a criterion is a point on a scale and that, therefore age discrimination may be graduated”. More difficult to determine existence of age discrimination than sex discrimination where comparators clearer. (Para. 61)

He echoes A.G. Jacobs in *Lindorfer*, (similar remarks made by A.G.s Sharpston also in *Lindorfer*, Mazak in *Age Concern* (para. 71-75.))

Age Concern England, Case C388/07

- Do UK rules which permit dismissal at 65 or normal retirement age for reasons of retirement, fall within scope of Dir. 2000/78.

Yes, this issue already decided by *Palacios de V.* These rules lay down conditions for derogating from age discrimination and affect participation in professional life.

Does Art. 6.1 preclude a provision where a difference in treatment is not age discrimination if there is shown to be ‘a proportionate means of achieving a legitimate aim’?

OR

Does Art. 6.1 require Member States to define the kinds of differences in treatment that may be justified by a list or other measure which is similar to Art. 6.1?

Q. 4. ECJ Replies ...paras. 43, 45 & 46

- Art. 6.1 - a specific list is not required, the legitimate aims and differences in treatment given are “purely illustrative”.
- In absence of precision the aim may be found in general context of measure (PdIV).
- Legitimate aims are “social policy objectives”. Distinguish from individual reasons of employers e.g. cost reduction / improving competitiveness, but rule may recognise some flexibility for employers.

Contd...

- Member States enjoy broad discretion in choosing the “means” of achieving social policy objectives, which must not frustrate implementation of principle of non-discrimination on grounds of age.
- “Mere generalisations concerning the capacity to contribute to employment policy, labour market or vocational training objectives are not enough” and do not constitute evidence that means chosen are suitable for achieving that aim. (para. 51)

Q.5 Does test under art. 6.1 differ from test under Art. 2.2(b)? (Paras. 58-66)

- Scope “not identical”.
- Art. 2.2(b) concerns only indirect discrimination. Not relevant here.
- Art. 6.1 – derogation for age discrimination only, “recognised specificity of age” among the grounds (contrast A.G. Mazak, paras. 70-74, and other A.G.s above)
- Art. 6.1 Imposes on M. States ...the burden of establishing to a high standard of proof the legitimacy of the aim pursued. No need to rule whether higher than in Art. 2.2(b).

But...

- If a provision is justified under Art. 2.2(b) there is no need to have recourse to Art. 6.1 (para. 66)
- No particular significance should be given to the use of the word 'reasonably' in Art.6.1 and not in Art. 2.2.(b)

Age Concern, High Court 25/9/09

- Mr Justice Blake identified the legitimate social policy aim as “protecting the integrity of the labour market” and found means proportionate. (paras. 90,103 & 114)
- Accepts that use of age for social policy decisions is different to use of race, sex, religion or sexual orientation, now suspect grounds. (Refers to A-Gs’ *Jacobs, Sharpston & Mazak*) (para. 111) (ECJ silent!)

BUT

- UK Regulation 30 (setting DRA) originally due to be reviewed in 2011 now 2010 and possibility of no DRA in the future.
- He refers to “changed economic circumstances” and longer living.
- If Regn. 30 had been adopted in 2009 or there was no review planned he would have found age of 65 disproportionate! (126-128)
- “I cannot see how 65 could remain as DRA after the review”. (para. 130)

David Hutter v TUG, Case C-88/08

- Austrian rule excluded periods of apprenticeship before age of 18, to be accredited in pay for public service jobs
- Mr Hutter had identical training of 3.5 years as his slightly older female colleague but she was recruited at a higher incremental step
- Aim of rule to avoid placing students in secondary education at a disadvantage...to avoid making apprenticeship costly for public sector, to promote integration of young apprentices into labour market

Did Dir. 2000/78 preclude this rule? ECJ ...

- Rule affects pay therefore within scope
- It established a difference in treatment between persons with same studies and experience based on their respective ages
- Aims were legitimate but contradictory
- The rule aims to reward prior experience but also, creates a difference in treatment (based on age) even where experience is equal – no direct relationship with aim!
- Rule not appropriate to aim of integration, as excludes employment before 18.

Domnica Petersen, Case C-341/08 (12/1/10)

- German rule set a max. Age limit of 68 to practice as a panel dentist
- Referring court says aim is protection of health of patients but not referred to by legislature
- National court asks ECJ, if Art. 6(1) Dir. precludes a max. age of 68 to practise as a dentist to protect health of patients, insured under statutory scheme?
- If yes, does it matter that legislature did not refer to this aim?

ECJ

- What is the aim pursued? Three identified.
 - 1) The protection of health of patients and,
 - 3) the financial balance of German health system.

ECJ – examined these under Art. 2(5) Dir. (Dir. without prejudice to national measures for *inter alia* protection of health)

Was the measure / age limit necessary to pursue these aims?

Dir. applied (access to employment etc) but Four exceptions to the age limit!

- 1) Allowed to work after 68 if do not have 20 years' practice on panel scheme (pension reasons)
- 2) There is a shortage of panel dentists in the region
- 3) To cover illness, leave or training events
- 4) Dentists (and doctors) can work outside the panel system after 68!

ECJ said 4) is so broad and inconsistent – not essential for protection of public health, Art. 2(5) precludes it.

What about aim (2) to share opportunities between generations of dentists ('generational renewal' (A.G.)?)

ECJ-not precluded by Art. 6(1) if age limit is 'appropriate and necessary' e.g. too many panel dentists. Implications for other professions!

Seda Kucudevci, Case C-555/07 (19/1/10)

- Ms K employed at 18 years old by Swedex in 1996
- Dismissed in 2006 but her notice based on 3 years' service not 10 years' service
- German law from 1926, provided-
 - a) notice period increases with longer service but,
 - b) periods of employment before age 25 not included.

Qs for ECJ

- 1) Does this national provision infringe Community law prohibition on age discrimination, ... or Directive 2000/78?
- 2) Can less notice for younger workers be justified by, a) employers' operational interest in flexible staffing and b) that younger employees do not have same protection because of "their age and/or lesser social, family and private obligations, they are assumed to have greater occupational and personal flexibility and mobility?"

ECJ

Rule results in less favourable treatment for workers who were less than 25 when joined the firm, even where length of service is the same.

Note the aims of rule:

- 1) to increase protection in line with length of service, 2) to reflect belief that “younger workers generally react more easily and more rapidly to the loss of their jobs and greater flexibility can be demanded of them” (to give employers greater flexibility). And,
- 3) A shorter notice period for younger workers also facilitates their recruitment ... !

ECJ

- The rule is not appropriate to achieve former aim since it applies to all employees who joined firm before 25, whatever their age at time of dismissal.
- Rule also affects young employees unequally, it does not affect those who start work later (paras. 40-42). (Note, A. G. Bot's clear analysis at paras. 41-53, Opinion)
- The principle of non-discrimination on grounds of age as given expression by Dir. 2000/78, precludes this rule which does not take service before 25 into account.... (para. 43)

Colin Wolf, Case C-229/08, (12/1/10)

Mr Wolf was rejected for an intermediate career post in Frankfurt fire service as he was older than 30.

German court referred 10 questions to ECJ, essentially as per ECJ, Qs 1-9 amount to:

Were aims e.g. to set up a balanced age structure or to ensure a minimum period of service before retirement legitimate under Art. 6(1) and, was max. Recruitment age of 30 an appropriate and necessary means to achieve them?

ECJ

- The aim of age limit was to ensure the operational capacity and proper functioning of the fire service
- ECJ considered case under Art. 4(1) instead of 6(1). Under Art. 4(1) the difference in treatment is based not on a ground but on a characteristic related to the ground (of age) if it is to be a genuine and determining occupational requirement (GDOQ).
- Is physical fitness a characteristic related to age?
- Is it a GDOQ, subject to a legitimate aim and proportionate requirement?
- The objective is legitimate under Art. 4(1) (ECJ referred to Recital 18) (paras. 37-39)

- As for GDOQ, the activities of an intermediate career fire fighter “are characterised by their physical nature” possession of high physical capacities may be a GDOQ.
- Is the need to possess high physical capacities related to age of intermediate career fire officer?
- German Government produced scientific data to show that respiratory capacity, musculature and endurance reduce with age thus, very few people over 45 can fight fires and very few over 50 can rescue people.
- ECJ Yes. Older officials perform other duties.

Is max. age limit of 30 for recruitment proportionate?

Yes, fire fighting and rescue duties can only be performed by younger officials. Older officials carry out less physical work and therefore must be replaced by younger ones.

Finally, as difference in treatment is justified under Art. 4(1), no need to examine it under Art. 6(1).

Other cases...

(Touching on age but not Dir. 2000/78

- *Lindorfer Case C-227/04*
- *Bartsch v Bosch und Siemens ... Case C427/06)*

Forthcoming

Andersen v Syddanmark, case C-499/08 (DK law) dismissal allowance for employee of 12, 15 or 18 years' service is not payable where employee is entitled to old age pension.

Rosenblatt, Case C-45/09 (German rule) automatic termination of an employment contract at a fixed age (65) regardless of economic, social and demographic context and labour market situation.