

AGE DISCRIMINATION IN LIGHT OF THE CJEU CASE LAW

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Where are we now?

- 15 years since adoption of Directives 2000/78 and 2000/43
- 50 decided cases from CJEU!
- 29 concern 'age' = 58% of decisions under these Directives



European Equality Network

Two thematic reports on age-

- Colm O’Cinneide, *Age Discrimination and European Law*, (European Communities, 2005)
- Declan O’Dempsey & Anna Beale, *Age and Employment*, (European Union, 2011) and,
- Anti-discrimination law reviews + Comparative analyses (both concern all anti-discrimination grounds)
- <http://www.equalitylaw.eu/>

Political context: from Dir. 2000/78 to Europe 2020

- ‘The Employment Guidelines for 2000 ...also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force’. Recital 8, Dir. 2000/78

Europe 2020

- EU’s 10 year jobs and growth strategy 5 goals
- 1st goal: ensuring 75% employment of 20-64 year olds

How many older people are working in EU?

‘...employment rates for older workers remain very low in many Member States. Only 3 out of 10 of those in pre-retirement’ age cohort (60-64) in EU 27 are in employment’.

Eurofound (May 2012)

Demographic context

- We are living longer + more of us but we're having fewer children = demographic ageing
- Effect: 20 years added to lifespan since 1950 (UN, 2002)
- By 2050 old and young: equal share of population (UN Population Division)
- We may need to work longer than expected...

Is 'age' different from other grounds in Dir. 2000/78 and 2000/43?

- Unique? changeable and a process (but not all other grounds are completely static)
- At least three meanings:
Chronological age, social age, physical age (functional ability)
- What about perceived age?
- Unique role in employment: organisational tool!
- Take care age has potential to intersect with other grounds and beware of stereotypes!

Age and Dir. 2000/78

- Recitals: 8, 14, 17, 18 (armed forces, police, prison or emergency services + capacity), 19, 25
- Article 2(5) Dir. without prejudice to national measures necessary for public security...public order, prevention of criminal offences, protection of public health and protection of rights and freedoms of others
- Art. 3(4) permitted exclusion armed forces on grounds of age and disability
- Article 4: genuine occupational requirements
- Art. 6(1): Justification of direct age discrimination only!
- Art. 6(2): M. States may provide that ages for admission or entitlement to occupational social security schemes or entitlement to retirement or invalidity benefits...and use of ages in actuarial calculations does not = age discrimination as long as it does not amount to sex discrimination
- Note generally: Art. 3(1) "...this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies..."

Today's cases concern Transitional systems, Maximum recruitment ages for police, no severance pay for workers eligible for State pension and include-

- Direct disc. on grounds of age and Art. 6(1)
- Civil servant's pay dependant on age
- Inclusion of school/study/service before 18 years old for calculating pay and advancement
- Inclusion of training/service only after 18 years old for calculating pension
- Compliance with principle of equal treatment - Art. 16, Dir. 2000/78

Are there examples of intra group discrimination?

Reflections on Article 6(1) & Dir. 2000/78

- L. Waddington, (2003), “an open-ended possibility to justify age discrimination” and “seeks to legalise age discrimination”.
- O’Dempsey & Beale, (2011), “Article 6 has been interpreted as allowing a very wide range of behaviour which differentiates on the ground of age”, p. 13
- Numhauser-Henning, ERA (2014) “An ambiguous directive – the balance to be struck at application level”

Transitional Arrangements Case C-501/12 *Thomas Specht and Ors v Land Berlin*

- Civil servants (CS) old system initial pay based solely on age, new system pay based on experience BUT Transitional system (TS) based on previous pay!
- (Does CS pay fall within scope of Dir.2000/78?)
- ECJ: Amount of pay does not BUT pay conditions do)
- Aim of old system: to reward professional experience, is a L. aim (citing *Hennigs and Mai*) BUT age-based pay exceeded what was necessary
- New law liable to perpetuate discrimination some, CS receive lower pay in comparable situations due to age at recruitment

Specht...

- Could TS be justified by protecting **acquired rights** and legitimate expectations?
- Yes, acquired rights in public interest and,
- direct transfer to new system would= loss for CS thus, TS preserved acquired rights

Context & Proportionality

- ECJ noted old law repealed before decision in *Hennigs and Mai*
- Important to avoid individual re-classification
- Financial burden and administrative difficulty on their own cannot justify breach of art. 2, Dir. but management of scheme must be viable (*Toftgaard*)
- TS proportionate *inter alia* due to high number of CS (65,000!)
- Art. 17 (sanctions) MS not required to pay past difference to CS & narrow time limit not precluded if national court satisfied...

C-530/13 Schmitzer v Federal Ministry for the Interior

- New law: to eliminate discrimination periods of training + service before age 18 now included for reference date and pay BUT 3 year extension added for CS who request a review (now 5 years instead of 2)
- (In effect, Equal Treatment was conditional!)
- ECJ- Q 1. & 3 Do Arts. 2(1), (2)(a) and 6(1) preclude 3 year extension in new rule
- Must examine questions in light of Dir. 2000/78 alone,
- New law = difference in treatment
- The first para. Of Art. 6(1) of Dir. 2000/78 states that Member States may provide that a difference in treatment on grounds of age is not to constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment-policy, labour market...

Schmitzer...

and vocational-training objectives, and if the means of achieving that aim are appropriate and necessary. Para. 37.

- Four aims: procedural economy, budgetary equilibrium & respect of acquired rights, protection of legitimate expectations
- First two cannot be legitimate aims on their own
- Last two, cannot justify law that “maintains definitively, if only for certain persons”, the age-based disc. while protecting acquired rights and legitimate expectations of others, not appropriate
- Q. 2. Art. 9 and 16 Dir. 2000/78 mean a CS who has suffered age disc. (resulting from method of fixing reference date) must be able to rely on Art. 2 to challenge discriminatory effects even though, reference date was revised at his request.

Starjakob, Case C417/13

- Employee federal railway
- Old law reference date for advancement took account of period of apprenticeship after 18 only
- New law allowed pre-18 periods but conditions!
- Relying on *Hutter*, Mr S claimed payment of difference BUT Austrian measures only allowed him to request new reference date if he accepted consequences of new date 1) extension of periods for advancement and 2) evidence of periods of service (obligation of cooperation) He did not supply evidence
- Compare (favoured) employees who had no service before 18, and had no need to request new ref. date

Starjakob...

- New system continues to treat employees differently, neutralises advantage of including service prior to 18 and only places at a disadvantage those disadvantaged by old system
- Aims: (re-conditions) serve fiscal neutrality, procedural economy, respect for acquired rights and protection of legitimate expectations
- M. States may take account of budgetary considerations at same time as political, social or demographic...provided they observe principle of prohibition of age discrimination, they cannot be a legitimate aim on their own (*Fuchs and Kohler*, C 159/10, C- 160/10. This also applies to administrative aims (*Schmitzer* Case C-530/13)

Starjakob...

- Respect for acquired rights and protection of legitimate expectations of favoured employees can be legitimate aims which justify for a transitional period system that discriminates on basis of age BUT they cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the measure is designed to eliminate even if it can protect acquired rights ... of favoured employees, not appropriate. Para. 37-39
- Art. 16 Dir. does not mean that an employee must be allowed to receive financial compensation BUT where transposing law is not in conformity with Dir. 2000/78, re-establishing equal treatment means granting employees whose experience was acquired, even in part, before 18 the same benefits as those who obtained the same experience after 18 in recognition of service **and** advancement on pay scale.
- **Principle of effectiveness** does not preclude a national limitation period for claims founded in EU law from starting to run before the date of judgement of the Court which has clarified the legal position.

Case C-20/13, Daniel Unland v Land Berlin (9/9/2015)

- Mr U appointed a judge at age 29 under old law which calculated salary by age step
- Judges appointed after 35 years of age, basic pay is based on age appointed + half years between 35 and age at appointment
- New law of 2011 pay calculated in steps by experience
- Citing *Specht*, ECJ states Art. 2 and 6(1) Dir. 2000/78 preclude law which determines judges' pay on appointment solely by age.
- But: reclassification? existing judges allocated to pay step based on age in old system which continues different treatment of judges based on age (some receive lower pay based on age at appointment)
- Aim: protection of acquired rights in public interest + ECJ already held such a law not excessive (*Specht*)

Daniel Unland...

- Old law applied to all Land Berlin judges therefore potentially affected all such judges.
- No disadvantaged category of 'young judges' or no favoured category of 'older judges' under this law.
- Reclassification rules not precluded despite fact that old system founded on discrimination based on judge's age provided the different treatment may be justified by aim of protecting acquired rights.

Georg Felber, Case C 529/13
CS only school education after 18 for pension rights

- Mr F, in CS only training and education since age 18 credited for pension (entitlement/calculation)
- What is concept of pay under Art. 157(2) TFEU?
- but 'pay' = any consideration in cash or kind, whether immediate or future provided the worker receives it ...in respect of his employment from his employer...retirement pension = future cash payment ...as a direct consequence of employment relationship. That pension is, under national law, regarded as pay [and] = pay within the meaning of Art. 157(2) TFEU. (ECJ Paras. 20-23)

Felber...

- That criterion may even lead to a difference in treatment between two persons who have pursued the same studies, exclusively on the basis of their respective ages. Para. 27
- Legitimate aims: not to disadvantage those who achieved a higher level of education compared with those who could start work at 18,
- to harmonise the starting date for contributions to the pension scheme and ...the pension age... the exclusion of the crediting of periods of education completed before the age of 18' ...justified by the fact that the person concerned is not engaged, in principle, during those periods, in any gainful activity giving rise to the payment of contributions to the pension scheme.
- That aim = a legitimate employment policy objective insofar as it ensures observance of principle of equal treatment for all persons in a specific sector and relates to an essential element of their employment relationship, such as the time of their retirement.. (by analogy *Commission v Hungary*, C-286/12)

Felber...

- Proportionality: min. age for employment in CS is 18, therefore a CS can only participate in and contribute to a CS' pension scheme after that age.
- National law appears coherent in excluding periods when a CS does not make contributions to pension
- Periods of study do not give rise to contributions
- Periods of study before 18 not equivalent to years of service, only taken into account for special contributions for missing contributions (compensation function)
- ECJ: measure is appropriate

Max. recruitment age of police* ***Mario Vital Perez, Case C-416/13**

- In some Spanish police forces max age for recruitment was 30, 35 or 36 and others had no age limit
- Mr VP rejected by the autonomous community which had age limit of 30 for police
- Spanish court: law not proportionate and level of fitness differs from fire fighters (exceptionally high physical capacities)
- ECJ examined law under Art. 4(1) and 6(1)
- Possession of certain physical capacities is characteristic related to age and may be a GOQ under Art. 4(1) for police officer (*Wolf, Prigge...*)

Mario Vital Perez...

- Age limit of 30 aims to ensure operational capacity and proper functioning of police and can be legitimate objective in Art. 4(1)
- Proportionality
- ECJ: noted age disparities and abolition of national max recruitment age of 30 for police officers and also as in *Wolf*, age limit may be appropriate to ensure operational capacity and proper functioning of service
- Art. 4(1) precludes this law, no evidence in support of age limit of 30 for operational capacity, proper functioning of police force etc also,

Mario Vital Perez...

- competition would require physical tests
- ...guaranteeing police officers have “the particular level of physical fitness required for the performance of their physical duties in a less binding manner than the fixing of a maximum age limit” para. 55
- No evidence to support aims of operational capacity + proper functioning: age limit disproportionate (Art. 4(1))
- Art. 6(1) no clear aim of age limit and no evidence it is aimed at encouraging new recruitment. Spanish court claimed age limit based on training requirements and need for reasonable period of employment before retirement...see Art. 6(1)c
- ECJ not appropriate and necessary for either training or, employment before retirement. No evidence for former and age of retirement for police officers is 65.

Dismissal without severance pay if entitled to State pension

I. i Danmark on behalf of P. Landin, C-515/13

- Mr L engineer, at 65 applied to postpone state retirement pension
- At age 67, Tecniq dismissed him with notice
- did not pay him severance as he was entitled to state pension and he was still in employment.
- Mr L found another job but claimed severance.
- D. law if employed continuously for 12, 15 or 18 years, employer shall pay a sum = to one, two or three months' salary BUT does not apply if entitled to State pension.

Landin...

- Aim: of severance pay to facilitate move to new employment of older workers who have many years of service with same employer
- = legitimate employment policy and labour market objective
- Proportionality:
- (Note: no severance pay for younger workers)
- measure not manifestly inappropriate, does not go beyond what is necessary for workers who on termination of employment receive State pension
- BUT this provision treats those who receive State pension in same way as those who are eligible for State pension

Landin...

- Effect: see *Ole Anderson* Case C-499/08 makes it more difficult to look for work but, distinguished from facts of *Landin*. In *Ole Anderson*, pension paid from age 60 + risk of reduction in pension due to early retirement unlikely to occur here due to pension age 65 rising to 67
- Also distinguished from facts of *Toftgaard* as here size of severance allowance not capable of significant loss to employee in long-term
- Dir. does not preclude law unless employee is entitled to receive State pension on termination and law must be objectively and reasonably justified by a legitimate aim and constitutes an appropriate and necessary means of achieving that aim

