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Discrimination Based on Age Recent Case-Law of the CJEU

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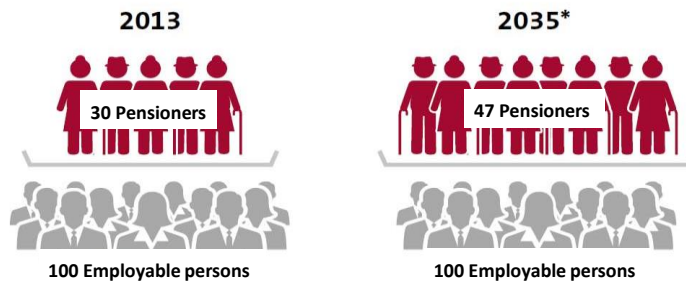
1



I. Factual basis Demographic change

2035: One in three people of retirement age

The ratio of employable people to pension claimants will continue to shift. The statutory pension will reach its limits as early as 2035.



*) The prediction is based on net immigration of 230,000 people per year on average.

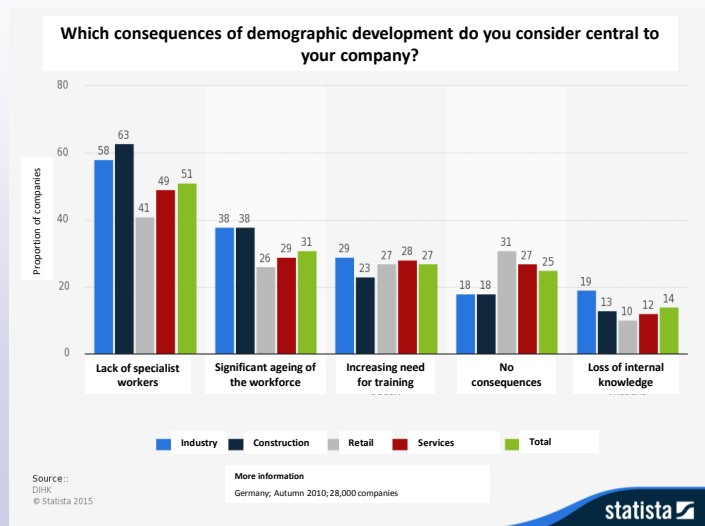
Source: German Federal Statistical Office
Image: www.gdv.de | German Insurance Association (GDV)



2



Effects of demographic change on companies



3



I. Overview of the case-law of the CJEU

Case C-190/16 „Fries“ (age limits for pilots)

Case C-143/16 „Abercrombie & Fitch“ (on-call employment for persons under 25 years of age)

Case C-441/14 “Rasmussen” (redundancy pay/private law issues)

Case C-432/14 “Bio Philippe” (redundancy at the end of fixed-term contracts)

Case C-501/12 “Landin” (redundancy pay with a pensioner’s right to benefit)

4



I. Overview of the case-law of the CJEU

Case C-286/12 “Com v Hungary” (judges)

Case C-152/11 “Odar” (flexible redundancy compensation paid to disabled workers under social plan)

Case C-132/11 “Tyrolean Airways” (cabin crew)

Case C-141/11 “Hörnfeldt” (postal services employee)

Case C-297/10 “Hennings + Mai” (pay groups under collective agreement)

Case C-159 & 160/10 “Fuchs + Köhler” (public prosecutors)

5



I. Overview of the case-law of the CJEU

Case C-447/09 “Prigge” (pilot)

Case C-268/09 “Georgiev” (professor)

Case C-341/08 “Petersen” (panel dentist)

Case C-229/08 “Wolf” (fire service)

Case C-555/07 “Kücükdeveci” (notice periods)

Case C-411/05 “Palacios” (manager)

Case C-144/04 “Mangold” (lawyer)

6



II. Legal bases

EU primary law:

Article 21 CFR - Principle of non-discrimination
(cf. C-190/16 „Fries“)

Article 6(3) TEU - General principles of EU law
(cf. C-144/04 “Mangold”)

Article 19 TEU - Legislative competence for
non-discrimination

EU secondary law:

Article 2 Dir. 2000/78/EC - Ground of “age”,

7



Primary law effects: Legal test for secondary law (cf. Case C-190/16 „Fries“)

Primacy of EU law: within the framework of its applicability

Direct effect of directives –

vis-à-vis Member States and their institutions

No direct effect –

among individuals; only need to interpret all national
rules of law in keeping with the provisions laid down
in EU law

However: national law must **not be applied** also between
private persons if national law is incompatible with primary law
(“Mangold” C-555/07, „Kücükdeveci“; C-441/14 „Rasmussen“)


8



Third-party effect of the ban on age discrimination

- The ban on age discrimination is a fundamental principle of EU law
- Directive 2000/78/EC serves solely to reaffirm this principle
- The principle is therefore applicable in Directive form
- Courts fulfil their implementation obligation from the state; primarily by interpreting national law. If an interpretation confirming to the Directive violates the ban on interpretation “contra legem”, the standard that is contrary to primary law remains inapplicable.

9



Caution: consistent case-law on how national law should be applied, does not elicit the “contra legem” ban; the case-law must be changed.

Open question: does this case-law only apply for “general principles” of EU law or for the broad discrimination ban under primary law in Article 21 CFR?

10



III. Application

Prohibition of age discrimination

(1) Direct/indirect discrimination

- Differentiation based directly on age
- Differentiation which is not based on age, but which leads to disproportionate adverse effects on a specific age group

11



III. Application

2. Justification of disadvantage:

Article 2(2)(b) Directive 2000/78/EC – Justification of indirect discrimination, i.e. legitimate aim/appropriate means

Article 2(5) Directive 2000/78/EC – Public security and public order/health protection/protection of rights of others

Article 4(1) Directive 2000/78/EC – Genuine occupational requirements

Article 6 Directive 2000/78/EC – Objectively justified objectives such as employment policy, vocational training etc. if means are appropriate and necessary

- Different requirements in terms of admissible margin of appreciation (State/collective bargaining parties/employers)
- Different requirements with regard to the proportionality test

12



IV. Discrimination test

1. Disadvantage:

- Is the cl. treated more unfavourably (in reality or hypothetically) than a comparator?
- Is the comparator in a comparable situation (with regards to all circumstances unrelated to age)?

Example: No precariousness premium on leaving temporary employment for “holiday working” students, case C-432/14 “Bio Philippe”.

13



IV. Discrimination test

2. Applicability of exemptions/ justifications

- Article 2(5) Directive 2000/78/EC:
Legal basis, distinction aimed at public security...etc.
- Article 4(1) Directive 2000/78/EC: differentiation based on age is a significant occupational requirement: legal aim of differentiation objective and proportionate means to achieve this aim (opinions case C-25/15, maximum recruitment age for the police force)

14



IV. Discrimination test

3. Justification of the disadvantage,

Article 6(1)/ Article 2(2)(b) Directive 2000/78/EC:

- Specific, clearly defined aim of differentiation, legitimate (= labour market policy, occupational training)
- Means for achieving the aim are appropriate, necessary and do not encroach more than needed

15



Result of discrimination test

→ Depends on type of measure which leads to difference in treatment:

- 1) Very wide discretion for all players with regard to standard retirement age. Proportionality of measures has been regularly confirmed.
- 2) In all other cases, margin of discretion has been strictly limited, proportionality has often been criticised, in particular due to:
 - lack of consistency
 - lack of necessity
- 3) Wider margin of discretion for labour market policy of the member states (Case C-143/16, „Abercrombie & Fitch“)

16



Result of discrimination test

Example: Discrimination on termination of employment

Payment of severance allowance to workers entitled to old age pension
Case C-499/08 "Andersen"

Termination of employment contract on reaching retirement age
Case C-45/09 "Rosenblatt"

--- older employees need severance allowance for bridging of a longer job-seeking period

17



Result of discrimination test

Result: on strict scrutiny, the difference in treatment cannot be justified: using the pension entitlement as a basis, instead of the pension actually drawn, is disproportionate because the claimant's interest in remaining employed is worthy of protection

Case C-515/13 "Landin":
Pension claimants should be excluded if they have reached the statutory pension age on termination

Result: the difference in treatment is justified without having considered the objective of the measure, regardless of the actual economic resources available to an individual: social welfare is sufficient, irrespective of the claimant's interest in remaining employed

18



Findings

Inconsistency in age discrimination cases, depending on whether, or not, general employment policy is affected; this is due to

- fears that this might have (significant) consequences for social welfare systems
- difficulties for all Member States to adapt
- fact that early retirement is seen as a hard-won accomplishment
- lack of acceptance of “Mangold” jurisprudence
- that, since Lisbon, the EU’s strategy has been to increase the employment rate among persons up to 64 years of age and to reduce early retirement

19



Legal consequences of established age discrimination

1. The discriminating difference in treatment is unlawful, and hence ineffective.
2. What will replace the ineffective measure?
→ A violation of equality rights can always be remedied in a variety of ways:
 - upward harmonisation
 - downward harmonisation
 - re-adjustment(The principle of equal treatment as such does not specify the alternative to be applied)

20



Legal consequences of established age discrimination

3. According to the CJEU's case-law, the alternative will be determined by the Member States' obligation to work towards improving living and working conditions.

Consequently:

Alignment of conditions for discriminated persons with conditions for the privileged group

until

a non-discriminatory rule is applied. This means –

with regard to the past: upward alignment

with regard to the future: at libitum, within the framework of what is legally possible

21



Reasons given for the justification effect

- (1) Article 2(5) Directive 2000/78/EC: strict standard
Rationale: Exceptions to a general principle need to be strictly interpreted
- (2) Article 4(1) Directive 2000/78/EC: strict standard
“genuine and determining requirement” for adopting the measure concerned

In both cases: Required consistency calls for stricter scrutiny

22



Result of discrimination test

- (3) Article 6(1) Directive 2000/78/EC: non-exhaustive list of objectives that can provide justification

Must be applied in an appropriate manner

→ flexible Standard, wide discretion for players

Consequence: standard retirement age (laid down in laws/collective agreements/employment contracts) is always accepted because of

- “better distribution of work between the generations”
- “sound structure of age pyramid in companies”
- “generally accepted practice”, approved by social partners
- no statutory exclusion from participation in labour market

23



Example:

Amendment of (previously discriminatory) pay groups

- Principle: pay increases based solely on age cannot be justified; they can be justified based on experience (joined cases C-297/10 and C-298/10 “Hennigs” and “Mai”)
- Collective agreements are subject to the ban on discrimination too, when measuring the prerogative for assessment the autonomy of collective bargaining can be taken into account (case C-501/12 “Specht”).
- The desire for public savings does not constitute valid grounds to justify the creation of disadvantaged groups

24



Example:

Amendment of (previously discriminatory) pay groups

- When switching to a grouping system without disadvantage, acquired rights and legitimate expectations should be taken into consideration, even if, in doing so, the previously discriminatory regulation continues (temporarily).
Case C-530/13 “Schmitzer”; C-20/13 “Unland”;
if the discriminatory effect is continually perpetuated in some cases, this cannot be justified
Case C-417/13 “Starjakob”.