

Discrimination on grounds of age – case law of the CJEU

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Age discrimination prohibited by Dir 2000/78 – four distinct features

1. Non-discrimination on grounds of age is a general principle of EU law – Art 21 of the Charter - domestic legislation conflicting with the principle and falling within the scope of EU law must be disapplied – Case C-555/07 *Kücükdeveci* and Case C-441/14 *Dansk Industri*
2. Direct age discrimination in the laws of Member States can be objectively and reasonably justified by a legitimate aim if proportionate to that aim – Art 6(1)
3. Fixing of ages for entry or entitlement to occupational social security schemes by Member States is not discriminatory (unless sex discrimination) – Art 6(2)
4. Occupational requirements providing for differential treatment based on a characteristic related to age are often relied on by Member States – Art 4(1)

Objective and reasonable justification for direct age discrimination – Dir 2000/78/EC, Art 6(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***

Art 6(1) - 'Differences of treatment' may include:

- (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

Settled case law on the scope of Art 6(1)

- **Member States enjoy a broad discretion** in their choice to pursue a particular aim in the field of social and employment policy, and define measures capable of achieving it – C-530/13 *Schmitzer* para 38
- must not have the effect of frustrating the implementation of the principle of non-discrimination - Case C-388/07 *Age Concern England* para 51
- national measures must respect the Directive – C-143/16 *Bordonaro* para 17
- may take account of budgetary, political, social, demographic considerations - **budgetary considerations cannot in themselves constitute a legitimate aim** – C-159-160/10 *Fuchs & Köhler* para 74

1. Differential treatment under Art 6(1) – scope for justification?

Examples from the case law –

- A. Mandatory retirement ages
- B. Age-related pay grading structures
- C. Age-related exclusion from payment of a severance allowance
- D. Age-related taxation scheme for access to vocation training
- E. Automatic termination of employment contract when an employee reaches age of 25

A. Mandatory retirement ages – case law

(1) C-388/07 *Age Concern England*

- UK's default retirement age of 65 did not establish automatic retirement but was discriminatory
- national court must determine whether it was justified by a legitimate aim – broad discretion of MSs on social policy but not mere generalisations
- stricter test for justifying direct age discrimination – limited to the conditions in Art 6(1) – high standard of proof to show legitimacy of the aim pursued
- UK abolished the default retirement age in 2011

Mandatory retirement ages – case law

(2) C-341/08 *Petersen*

- dentists in Germany could not practice beyond 68
- justified by the following aims
 - health of patients
 - financial balance of health system - see public health derogation in Art 2(5) and
 - **intergenerational fairness in employment and labour market**
- rule could be justified on the basis of the latter and was proportionate to that aim

Mandatory retirement ages – case law

(3) C-45/09 *Rosenblatt*

- cleaners at German military barracks could be compulsorily retired at 65 under a collective agreement

LEGITIMATE AIM: ‘By guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff, the clause on automatic termination of employment contracts is thus the reflection of a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment’, para 68

PROPORTIONATE: social partners have wide discretion in pursuing aims of social policy – national law did not prevent workers over 65 from continuing to work. Rule was lawful

Mandatory retirement ages – case law

(4) C-141/11 *Hörnfeldt*

- compulsory retirement age of 67 in Swedish postal service – was above State retirement age of 65
- created more opportunities for older workers and reflected consensus of social partners and broad aims of employment policy – objectively and reasonably justified, proportionate

Mandatory retirement ages – case law

(5) C-447/09 *Prigge and Others*

- Lufthansa pilots had contracts automatically terminated at 60
- aims: air traffic safety, protecting life of crew and passengers
- too broad to fall within public health derogation in Art 2(5)
- not justified under Art 6(1) because air traffic safety was not related to employment and labour market policy

B. Pay grading structures in the public sector in Germany and Austria

First generation cases

- C-297-298/10 *Hennigs and Mai*
- C-88/08 *Hütter*

Second generation cases

- C-501-506 & 540-541/12 *Specht and Others*
- C-530/13 *Schmitzer*
- C-417/13 *Starjakob*

German cases

(1) *Hennigs and Mai*

- collective agreement had set public sector pay rates for state employees based on age
- new collective agreement abolished age differentials but retained acquired rights – could it be justified?

LEGITIMATE AIM: yes - to reward loyalty and professional experience

PROPORTIONATE: yes - was a transitional progressive step – would ultimately lead to the eradication of discrimination

German cases

(2) *Specht and Others*

- new law anticipated *Hennigs and Mai* – civil service pay scheme now based on ‘experience’ not age
- under transitional arrangements pay grades were determined by reference to the old scheme

LEGITIMATE AIMS: yes - rewarding previous professional experience and protecting acquired rights

PROPORTIONATE: yes - although transitional system perpetuated a discriminatory situation – differential pay solely on account of age continued – taking account of budgetary considerations (cost of retroactively assessing individual claims) and possibility that differentials would eventually fade away, the arrangements were not disproportionate

Austrian cases

(1) *Hütter*

- pay grading system for civil servants imposed less favourable treatment for persons who acquired their professional experience before the age of 18 – found to be direct discrimination

LEGITIMATE AIMS: to encourage students to take further education and reduce cost of apprenticeships – yes, but age-related criterion had no direct relationship with these aims, therefore did not fulfil them.

Conclusion – **not justified**

- distinguished in Case C-529/13 *Felber* – periods of study before the age of 18 was not the same as periods of employment – legitimate to exclude them as they did not give rise to payments of contributions

Austrian cases

(2) *Schmitzer*

- new law after *Hütter* – ended age rule but civil servants had pay increment every 5 years rather than 2 years
- civil servants advantaged under old law did not have to change to the new scheme - discriminatory between the two groups

LEGITIMATE AIMS: yes - procedural economy (taking account of budgetary considerations), acquired rights and legitimate expectations. But not appropriate because it maintained discrimination indefinitely even though the purpose was to establish a non-discriminatory system. Conclusion – **not justified**

- followed in C-417/13 *Starjakob*

C. Exclusion of severance allowance on grounds of age in Denmark

(1) Case C-499/08 *Andersen*

- law permitted employers to refuse to pay a severance allowance if workers had joined State pension scheme before the age of 50 and had reached 60 when right to early retirement could be exercised
- restriction based on premise that workers of pensionable age will generally decide to leave the labour market. Severance allowance pursued legitimate labour market aim – facilitating move to a new job
- rule was disproportionate – made it more difficult for workers with the same length of service to exercise their right to continue to work
- applied in Case C-441/14 *Dansk Industri* – horizontal application of general principle of non-discrimination – law deprived individuals of right to severance allowance

Exclusions of severance allowance on grounds of age in Denmark

(2) Case C-515/13 *Landin*

- same law – Landin dismissed at 67 and refused severance allowance – he started another job and challenged refusal to pay severance allowance
- CJEU distinguished *Andersen*
- risk of incurring a reduction in pension entitlement was less for employees who were already entitled to a State pension when dismissed – no significant loss of income
- national court must satisfy itself that the measure is appropriate and necessary to achieve a legitimate aim relating to employment and labour market policy

D. Age-related taxation scheme for access to vocational training

Case C-548/15 *de Lange*

- Netherlands rule allowed persons under 30 to deduct in full the costs of vocational training from their taxable income – Mr de Lange started his training to be an airline pilot at the age of 32 – did not benefit
- was designed to promote the access of young people to the labour market, fell within Art 6(1)(b) – expansive interpretation
- was a legitimate aim and was, taking account of the broad discretion enjoyed by the Member States and both sides of industry in the field of social policy and employment, proportionate to that aim

E. Automatic termination of employment contract when an employee reaches age of 25 – Case C-143/16 *Bordonaro*

- Italian law permitted employers to hire ‘on-call workers’ under 25 and dismiss them when they reach 25
- justification - making labour market more flexible, increasing employment levels, give young people chance to enter labour market – a **legitimate aim**
- **proportionate** – promotes flexible working to facilitate labour mobility, make workers adaptable, combat social exclusion and eliminate illegal working – not the case if young people only had access to ‘stable’ employment contracts
- ‘in a context of a persistent economic crisis and weak growth, the situation of a worker aged under 25 years who, thanks to a flexible and temporary employment contract, can access the labour market is preferable to the situation of someone who does not have such a possibility and who, as a result, is unemployed’, para 42

2. Indirect discrimination under Art 6(1) Case C-354/16 – *Kleinstreiber*

- length of service rule – ceiling of 35 years could be taken into account under occupational pension scheme – not directly based on age, therefore indirect discrimination – employees starting work before the age of 30 disadvantaged
- justification, for national court to decide – scheme encourages mobility in pensions but still rewards loyalty – legitimate aim – balances interests - proportionate

3. Art 6(2) – age exception for occupational social security schemes

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**

Occupational social security schemes – age exception in Art 6(2) – case law (1) C-546/11 *DJØK*

- officials reassigned at 65 after dismissal were not entitled to ‘availability pay’ under Danish law. Ministry said it was occupational social security within the scope of Art 6(2). Was this correct?
- CJEU – no, it was ‘pay’ within the scope of Art 3(1). It was not excepted by Art 6(2) – an exhaustive list of types of occupational social security schemes, not a general exception, must be strictly interpreted as prohibition of age discrimination is a general principle of law and in Art 21 of the Charter. Art 6(2) only applies to retirement or invalidity benefits – this was neither

Occupational social security schemes – age exception in Art 6(2) – case law (2) C-476/11 *HK Danmark v Experian*

- contributions under Experian's pension scheme linked to age. Ms Kristensen (represented by HKD) resigned at 30 - claimed back pay based on pension contributions of workers in an older age band. Private parties but E's rule was permitted under national law so fell within Directive's scope
- strict interpretation in *DJØK* applied. The scheme did not set any age for admission to retirement benefits so **no 'fixing' of ages, outside the scope of Art 6(2)**.
- but **scheme was justified under Art 6(1)** – ensured retirement savings of a reasonable amount when an employee retires. Gradual increase in pension contributions as employees become older appeared proportionate to that aim – to be determined by the national court

Occupational social security schemes – age exception in Art 6(2) – case law

(3) Case C-159/15 *Lesar*

- pension contributions paid by Mr L when working as an apprentice under the age of 18 not taken into account in the calculation of his Austrian civil service pension
- CJEU: law fell within the exception – fixed ages for admission or entitlement to retirement or invalidity benefits, distinguished *HK Danmark*
- this legislation ‘constitutes an expression of the freedom enjoyed by the Member States’ to fix ages for admission or entitlement to the benefits of occupational pension schemes, para 30

Occupational social security schemes – age exception in Art 6(2) – case law (4) C-443/15 *Parris*

- survivor's pension for spouses and civil partners at Trinity College Dublin payable only if married or entered civil partnership before reaching the age of 60. P entered same sex civil partnership in UK aged 63 in 2009. Civil partnership not possible in Ireland until 2011
- was age discrimination but rule fixed an age for entitlement to an old age benefit (survivor's pension) and was covered by Art 6(2) exception
- CJEU notes the legal impossibility of a member of such a scheme over the age of 60 from being able to have a civil partnership recognised before 2011 – but EU law does not preclude the state of national law

4. Art 4(1) – general occupational requirements (ORs) exception

Member States may provide that a difference of treatment which is based on a characteristic related to [age] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, **such a characteristic constitutes a genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate

ORs – case law

(1) C-229/08 *Wolf*

- age limit of 30 for certain levels of fire-fighters in Frankfurt. Job required exceptionally high physical capacities – was a genuine and determining OR some tasks could only be performed by younger fire-fighters – based on scientific data
- age rule was justified by the legitimate objective of ensuring operational capacity and proper functioning of a professional fire service – found to be proportionate

ORs – case law

(2) C-416/13 *Vital Pérez*

- max. age for applying to be police officer in Oviedo was 30. Held: tasks of police officer were less physically demanding than fire-fighters but the need to possess particular physical characteristics was an OR.

LEGITIMATE AIM: safeguarding the operational capacity and proper functioning of the police.

PROPORTIONALITY: physical capacity requirements not supported by evidence – *Wolf* distinguished – age limit not shown to be necessary to fulfil these aims

ORs – case law

(3) C-258/15 *Salaberria Sorondo*

- max. age for police to be recruited to the autonomous community of the Basque region was 35
- *Vital Pérez* distinguished – duties of autonomous communities in Spain differ from local police – had a wider mission to protect people and property – essentially operational rather than administrative duties, may imply recourse to physical force – separate recruitment for police performing largely administrative roles
- conclusion – physically demanding job function, two years of training, retirement at 55 – recruiting at later age would reduce the number of police who could perform the most physically demanding tasks – not a less restrictive alternative - proportionate

Conclusions