

Age Discrimination

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Introduction

- 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*
- 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)
- Fixing of ages for entry or entitlement to occupational social security schemes by Member States is not discriminatory (unless sex discrimination) – Art 6(2)
- Occupational requirements providing for differential treatment based on a characteristic related to age are often relied on by Member States – Art 4(1)

Rasmussen C441/14.

- if it is established that a domestic law conflicts with the general principle, national courts are not entitled to balance the general principle against legal certainty and protection of legitimate expectations and then conclude these take precedent over the general principle.
- The principle applies as between individuals (horizontal direct effect).

Comparability in age

- The assessment of comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the subject matter of the case C 432/14 O v Bio Philippe Auguste SARL Bio Philippe Auguste SARL
- Tyrolean Airways Tiroler Luftfahrt Gesellschaft: C-132/11, see [29].
- In an indirect discrimination case must the difference be caused by age?
 - collective agreement about group companies in the air industry. Took into account experience acquired as crew from the date of recruitment by company 1 for pay grading. Was this indirect age discrimination because the agreement did not take account of the skills and knowledge of older workers acquired with company 2?
 - No: no evidence of a link between starting age of employees at the company 1 and the criteria. They identified a material difference in circumstances between the comparative groups that made the difference and did not relate to age. What made the difference was not the length of experience, but the length of service with the company 1. A "length of service-with-a particular airline" rule!

Article 2(5)

- Petersen C-341/08, aim - protection of health - but maximum age for public work not mirrored by maximum age for private dental work, so not proportionate.
- Achbita AG Opinion: art 2(5) requires action by Member State.

Genuine and Determining Occupations Requirements

- Article 4 permits states to legislate to permit age based differential treatment, where,
- because of the nature of the occupational activity or
- its context
- a characteristic related to age constitutes
- a genuine and determining occupational requirement, if
- the objective is legitimate and the requirement is proportionate.

Article 4

- Wolf v Stadt Frankfurt am Main. Case C-229/08 There was medical evidence of relation of characteristic to age.
- Perez v Ayuntamiento de Oviedo. C-416/13 Article 4 applies in ‘very limited’ circumstances. Evidence must show that the characteristic is inevitably related to a particular age and is not found in persons (over or under) that age. The CJEU noted Wolf was based on a finding “on the basis of scientific data submitted to it, that some of the tasks of persons in the intermediate career of the fire service, such as fighting fires, required ‘exceptionally high’ physical capacities and that very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities”. The national court had found in Perez that the physical capacities required were not of that high capacity. Therefore, the local law was disproportionate under Article 4. (It also failed under A6)

C-258/15 *Salaberria* *Sorondo*

- Last age for recruitment to police in autonomous community of the Basque region = 35
- *Vital Pérez* different. Duties of Spanish autonomous communities differ from local police – a wider mission to protect people & property –operational rather than administrative, may need recourse to physical force – separate recruitment for police performing largely administrative roles.
- Proportionate because – 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 – no less restrictive alternative available.

Article 6(2)

- Member States may provide that the fixing, for occupational social security schemes (“OSSS”), of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age.
- Lesar v Telecom Austria AG. C-159/15. fixed ages for admission or entitlement to retirement or invalidity benefits, distinguished *HK Danmark*
- Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet C 546/11.
- HK Danmark v Experian A/S C476/11

Article 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***

Article 6(1) Justification

- identify a difference of treatment which is based on age,
- is it possible to justify the treatment by reference to certain types of aims:
 - "employment policy, the labour market or vocational training", - not "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness".

Consistency with employment policy aims is insufficient.

There are fewer aims which can justify direct discrimination than those justifying indirect discrimination.

Summary of case law

- **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
- A higher standard of proof of legitimate aim is required: *Age Concern England*
- 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*

public interest employment policy

- Prigge C- 447/09
- aims had to do with the safety and security of air travel.
 - not related to employment policy etc. So not Art 6(1); so consider either Art 2(5), or (in relation to the physical capabilities required for flying a plane) Art 4(1).
- Neither international nor national legislation considered that an absolute ban at the age of 60 was necessary to achieve these aims, so the rule could not be justified under these derogations either.

What is the aim?

- Analyse the real aim? Is the stated aim in reality a means to a further aim?
- inter-generational fairness e.g.:
 - a. facilitating youth access to employment;
 - b. enabling older people to remain in the workforce;
 - c. fairly sharing limited opportunities to work in a profession between the generations;
 - d. promoting diversity and the interchange of ideas between younger and older workers.
- Dignity e.g. avoiding the need to dismiss older workers on the grounds of incapacity or underperformance (preserving their dignity and avoiding humiliation); or as avoiding the need for costly and divisive disputes about capacity or underperformance.

Cases on aims

- Age Concern England C388/07: no need for list, public interest element of aims
- Küçükdeveci C555/07: flexibility aimed at was not flexibility as an end in itself, but as a means to encourage recruitment of young people.
- Fuchs and another v Land Hessen C159/10: intergenerational balance, efficient planning of the departure and recruitment of staff, encouraging the recruitment or promotion of young people, avoiding disputes about older employees' ability to perform their duties ; and also promoting interchange between the experience of older colleagues and the recently acquired knowledge of younger ones. All of these could constitute legitimate aims. (See also Case C-548/15 *de Lange*)

Cases on aims

- Commission v Hungary C286/12 standardisation of retirement ages (ensuring the elimination of age inequalities), the creation of age balance in a sector.
- Ingeniørforeningen i Danmark v Region Syddanmark C499/08: facilitating transition to new employment for those finding it difficult to obtain new employment because of the length of time they had been with their old employer.
- Georgiev v Tehnicheski Universitet Sofia C250/09 delivery of quality teaching and the best possible allocation of posts for professors between the generations. (One aim or two?)

Cases on aims

- Case C-143/16 *Bordonaro*: Italy permits employers to hire 'on-call workers' under 25 and dismiss them when they reach 25
- Legitimate aim: making labour market more flexible, increasing employment levels, give young people chance to enter labour market
- **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

Collective bargaining

- AG in Prigge suggested supporting this was an aim in itself. (Not developed in judgment)
- Küçükdeveci v Swedex
- Rosenbladt C45/09 sectoral collective agreement; automatic termination upon entitlement to a retirement pension or, at latest, the end of the month in which 65 was reached. Legislation supported such agreements, which were listed as justifiable when appropriate and necessary.
- The legislation's aims included sharing employment between the generations; making it easier for younger workers to find work, particularly in a time of chronic unemployment; protecting the rights of older workers whose pensions serve as replacement income; and not requiring employers to dismiss older workers on grounds of incapacity, which may be humiliating.

Proportionality

- MS broad discretion in the choice both of the aims and means to pursue them.
- Hutter C88/08 self contradictory aims - not appropriate means.
- Petersen: C-341/08, risk avoidance aim - means chosen were appropriate for 6(1)
- Küçükdeveci the law was not "appropriate" because it applied to all employees who joined before the age of 25 irrespective of their age at dismissal.

Appropriate

- Rosenbladt: collective agreement was an important justification factor:
- "That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question (Palacios de la Villa, [74])."

Necessary

- Rosenbladt considered the significant financial hardship caused to workers in the commercial cleaning sector, where poorly paid part time employment is typical. It considered whether there were less onerous measures. After retirement age people could continue to work, and whilst finding work were protected against age discrimination. They were not forced to withdraw from the labour market. So the Directive permitted the measure.
- Syddanmark : not inappropriate to exclude persons from claiming a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment because they had qualified for a pension and actually intended to retire. However, it was not necessary to exclude those who wished to waive their pension claims in order to try to continue working. So the measure was precluded. Distinguished in 515/13 Landin facts of necessity to be determined by the national court.

Necessary

- HK Danmark v Experian A/S C-476/11 The aim of the scheme was to enable older workers, who entered the service of the employer at a later stage in their working life, to build up reasonable retirement savings over a relatively short contribution period. Young workers in the same scheme could at an early stage have at their disposal a larger proportion of their wages. The scheme took account of the lower rate of employee contribution that was applied to them. It therefore gave a means for all employees to amass reasonable retirement savings, to use when they retired.

Necessary

- Dansk Jurist: the law deprived those wanting to remain in the labour market of the entitlement to availability pay simply because they could because of their age, draw a pension. This might force them to accept a pension lower than that to which they would be entitled if they remained in employment for more years. This would particularly happen if they had not made contributions for a sufficient number of years to be entitled to draw a full pension. The aims could be achieved by less restrictive, but equally appropriate, measures and as civil servants who were eligible to draw a retirement pension were automatically excluded from receiving availability pay, the legislation went beyond what was necessary to ensure the objectives.
- Fuchs: referred to the non-frustration of the aims of the Directive emphasising that this must be read in the light of the fundamental right to engage in work. Particular attention must be paid to the participation of older workers in the labour force. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life. This interest must be taken into account in respecting the other, potentially divergent, interests.

Necessary

- The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (...Palacios de la Villa ... [69], [71] ...Rosenbladt... [44])."
- Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim within Article 6(1). The retirement age scheme might be appropriate to the aim of facilitating access to employment by younger people, in a profession where the number of posts is limited. Nor did it go beyond what was necessary to achieve its aims, given that the prosecutors could retire at 65 on generous pensions, continue working until 68, and practise as lawyers after leaving.
- Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai : the CJEU held that determining pay grades by reference to age at first appointment could not be justified. Rewarding experience was a legitimate aim (see Hütter), but while length of service was appropriate to achieve that aim, age did not always correlate with experience.

Case C-354/16 –

Kleinsteuber

- 35 years service is taken into account under occupational pension scheme
- not directly based on age, so indirect – if services started age of 30 - disadvantage
- national court to decide justification: it has a legitimate aim: encourages mobility in pensions and rewards loyalty must decide if it sufficiently balances interests i.e. proportionate

Pay and Grading

Pay problems

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

Cases on transitional arrangements

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

Transitional schemes, budgets and acquired rights

- Schmitzer v Bundesministerin für Inneres
- Specht
- Unland
- Commission v Hungary

Budgets

- Specht justification cannot be based on increased financial burdens or potential administrative difficulties. However, a transitional scheme (which is means of to the aim of achieving equality) must remain technically and economically viable. In that case the complexities were relevant:
 - (a) high numbers of employees with diverse periods and backgrounds for consideration;
 - (b) difficulties that could arise concerning the determination of earlier periods of activity the employees could validly claim,
 - (c) individual examination of cases (excessively complex and entailing a high risk of error).
- Starjakob Establishing a non-discriminatory pay advancement scheme and requiring the employee to apply for a review of the reference date served objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations.

Budgets

- EU law does not stop States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.
- The means were not appropriate. While a transitory legitimate aim, protection of acquired rights cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference. The measure was not appropriate for the purpose of establishing a non-discriminatory system for employees who were disadvantaged by that previous system