



Discrimination on Grounds of Age in European Court of Justice Case Law

EU ANTI-DISCRIMINATION LAW
SEMINAR FOR MEMBERS OF THE JUDICIARY
Trier, 13 November 2019





Rentenalter Erhöhung.: wir sind auf dem Weg zur Arbeit, wissen aber nicht mehr genau wo wir arbeiten



Contents:

- A. Introduction: Discrimination on grounds of age in times of demographic change**
- B. Prohibition of age discrimination in the EU: Basic principles**
 - 1. Age as a proscribed characteristic in international law
 - 2. Anchoring in EU primary law
 - 3. Anchoring in secondary law: Framework Directive 2000/78/EC
 - 4. Material scope of the Directive and exceptions
- C. Substantiations by the ECJ**
 - 1. Concept of discrimination according to the Directive
 - 2. Addressees of the discrimination prohibition
 - 3. Delimitation of the material scope
 - 4. General restrictions/exceptions pursuant to the Directive
 - 5. Justification of differences of treatment on grounds of age
 - 6. Difference of treatment of younger talents
 - 7. Difference of treatment of older talents
- D. Conclusion and outlook**



A. Introduction: Discrimination on grounds of age in times of demographic change

- **Important sociological distinctive feature, younger concept in international human rights protection**
- What does discrimination on grounds of age mean?
- Simplified portrayal of an age group, attribution of certain characteristics without individual verification
- Special position by comparison with other discrimination characteristics: less critical?



A. Introduction: Discrimination on grounds of age in times of demographic change

- **Consequences**
- **Who is affected**
- Different approaches:

human rights dimension – Right not to be discriminated against; rights of older persons

employment policy dimension – collective interest in the distribution of employment chances in society



A. Introduction: Discrimination on grounds of age in times of demographic change

Demographic change

Reactions: Encouragement of employment in higher working ages; active ageing, lifelong learning, etc.

Important instrument: Prohibition of age discrimination

Problem: Stereotyping of qualities connoted with age
– **widespread even among judges!**

Findings from gerontology and occupational medicine?

Ageing process differs highly from individual to individual



B. Prohibition of age discrimination in the EU: Basic principles

1. Age as a proscribed characteristic in international law:

Implicit recognition of the human rights dimension of discrimination on grounds of age:

- **UN and Council of Europe instruments** (ECHR 1950; Protocol No. 12 (2000) – *Age as other status*; European Social Charter (1961); rev. ESC (1996) – Derivation from the right to work; protected other status in protection against unfair dismissals; rights of older persons (Article 23 ESC)



B. Prohibition of age discrimination in the EU: Basic principles

- **ILO Convention no. 111 (1958): no express mention, but for the ILO committee of experts age also falls under the characteristics (such as disability, long-term unemployment, HIV/Aids, genetic predisposition) which must not lead to discrimination. On the whole, strong signs that “age” falls under prohibited discrimination characteristics in human rights protection under international law.**



B. Prohibition of age discrimination in the EU: Basic principles

2. Anchoring in EU primary law

- 1997 Amsterdam Treaty, Article 13 EC Treaty (Article 19 TEFU)
- Lisbon Treaty, in force on 1.12.2009 :
- EU Charter of Fundamental Rights (2000), Part of EU primary law, prohibition of age discrimination, Article 21: Prohibition of age discrimination to be seen as a **general principle** of EU law



B. Prohibition of age discrimination in the EU: Basic principles

3. Anchoring in secondary law: Framework Directive 2000/78/EC of 27.11.2000 for equal treatment in employment and occupation

The Directive substantiates the prohibition of discrimination under primary law

Age as one of the 5 protected personal characteristics;

Extended implementation period for age and disability (2006)

Implementation in Member State partly abridged / incomplete

- **No expansion of the prohibition of access to goods and services to date (Commission draft directive of 2008)**



B. Prohibition of age discrimination in the EU: Basic principles

4. Material scope: for all persons in the public and private sector / including civil servants (public authorities), in relation to

- a) Conditions of access to paid employment and self-employed activity
- b) Access to vocational guidance, vocational training, further training and retraining
- c) Employment and working conditions (including conditions regarding dismissal and remuneration)
- d) ...

Pertains to **legal, collective bargaining, operational measures/rules**



B. Prohibition of age discrimination in the EU: Basic principles

Exceptions from the scope of the Directive:

- State social security schemes Article 3 (3)
- Optional exception: discrimination on grounds of age for the armed forces Article 3 (4)
- Optional exceptions in occupational social security schemes, Article 6 (2), limited to retirement and invalidity benefits

Permitted: Age limits for membership or receipt of benefits (including different age limits for certain categories of employees) and use of insurance mathematical calculations specific to age (provided there is no gender discrimination)



C. Substantiations by the ECJ

1. Concept of discrimination pursuant to Directive RL 2000/78/EC:

- The Directive requires the Member States to provide comprehensive protection from direct and indirect discrimination on grounds of age

EJC rulings for the most part on age-related unequal treatment

- Direct discrimination on grounds of age shall be taken to occur where one person is treated less favourable than another is, has been or would be treated in a **comparable situation** - Article 2, 2 (a)



C. Substantiations by the ECJ

1. Concept of discrimination according to Directive 2000/78/EC

ECJ on the assessment of comparability: there is no comparable situation if unequal groups of persons are treated unequally – problem of establishing comparative groups and the comparability of the situations

- Non-comparability upheld in:
- Case C-432/14, O, 1.10.2015
- Case C- 49/18, Escribano Vindel, 7.2.2019
- Case C-154/18, Horgan and Keegan, 14.2.2019 (cut-off date)



C. Substantiations by the ECJ

2. Addressees of the prohibition: not only public bodies, but third-party effect, i.e. binding for private employers and the social partners (on the general principle or Article 21 of EU Charter of Fundamental Rights)

- ECJ: **Landmark decision 19.4.2016, Case 441/14, DI – Dispute about severance pay between individuals;**
- Confirms the general principle of the prohibition of age discrimination – now anchored in Article 21 of the Charter of fundamental rights – which is substantiated by the Directive
- The general legal principle of non-discrimination on grounds of age establishes a) a subjective right, which applies also between individuals, and b) requires national judges **to refrain from applying conflicting national law (if no interpretation of national law is compliant with European law, no contra legem interpretation)**
- Principle of non-discrimination: takes precedence over the principle of legal certainty and the protection of legitimate expectation in relation to established national case law
- **Exclusive competence of national courts to assess the possibility of compliant interpretation -**



C. Substantiations by the ECJ

3. Delimitation of the material scope

- **Applicability to tax regulations?**
- **Case 122/15, C, Judgment 2.6.2016:** higher taxation of pension income in Finland – purely tax-law regulation outside the material scope
- **Case C-548/15, de Lange, Judgment 10.11.2016:** Age limits of 30 years for (full) consideration of training costs in income tax law in NL – broad interpretation of scope (access to vocational training!)



C. Substantiations by the ECJ

4. General restrictions/exceptions according to the Directive

Exceptions which are not regarded as “discrimination:”

-- **public order clause, Article 2 (5)**, i.e. measures to ensure the maintenance of public order and security, the prevention of criminal offences, and the protection of health and of the rights and freedoms of others

-- **Essential and decisive occupational requirements (Article 4) –**

Precondition: legitimate purpose and proportionate requirement. **Relevant applications:** Maximum age limits for particularly sensitive occupations in terms of legal security and technical safety such as pilots, police forces, professional fire fighters, especially for recruitment and accreditation in the selection procedure;

-- **Positive action to prevent or compensate discrimination (Article 7)**



C. Substantiations by the ECJ

EJC judgments on essential occupational requirements:

(1) Age limit of 30 years for active service in **Professional fire brigade in the State of Hessen**

Age as representative characteristic for physical capacity and operational capability – based on abundant evidence: legitimate aim and proportionality of unequal treatment upheld (gr. Kammer, **C-229/08- Wolf**)

(2) Age limit of 30 years for local police in Oviedo; legitimate aim (“functional capability of the police,” etc.), **proportionality denied**, because of lack of evidence of necessity (**C-416/13 Vital Pérez**)

- Unlike in the case of disability, no specifications for reasonable



C. Substantiations by the ECJ

(3) C-258/15 Salaberria Sorondo, 15.11.2016

Police service in the autonomous community of the Basque region

Maximum age for application procedure: 35 years / legitimate aim to ensure operational readiness; extensive evidence of the special requirements of physical effort (exercise of physically strenuous task) without administrative tasks;

Proportionate requirement according to Article 4 (1)? Different analysis and assessment (Commission against; governments of Ireland, Italy and France for); Result: under the necessary measures to reach the aim: NO discrimination (**Special feature:** securing the operational readiness of the armed forces, the police, detention facilities or emergency services (Directive – Recital 18))



C. Substantiations by the ECJ

5. Justification of differences of treatment on grounds of age (Article 6 of the Directive)

- Article 6 (1): (particularly) **legitimate aims** in employment policy, labour market and vocational training

According to case law: extremely broad discretionary powers of the Member State concerning legitimate social policy aims

- Most important review standard: **appropriateness and necessity** of the means and resources used to achieve the aims; necessity denied in incoherent pursuit of goals
- **Problem:** Extensive possibilities of justification jeopardize effective protection against age discrimination



C. Substantiations by the ECJ

Examples of admissible differences of treatment - Article 6 (1)

- a) Special conditions for access to employment as well as special employment and working conditions, including conditions for dismissal and remuneration in order to promote the occupational integration of young people, older workers and persons with caring responsibilities
- b) Determination of minimum age requirements
- c) Fixing of a maximum age for employment on the basis of special training requirements; reasonable period of employment before entitlement to a retirement pension



C. Substantiations by the ECJ

6. Difference of treatment of younger talents

- **Case C-88/08, Hütter, Judgment 5.3.2009:** Exclusion of **periods of prior employment pertinent for remuneration purposes** before the age of 18; aims legitimate, implementation incoherent (difference of treatment between younger man with the same period of prior employment, additional age criterion): not admissible!
- **Case C-555/07, Küçükdeveci, Judgment 19.1.2010, Grand Chamber:** Calculation of the period of notice in case of employment before the age of 25, irrespective of the time of notice. Difference of treatment between younger persons aged over 25 and those aged between 18-24: not justified!



C. Substantiations by the ECJ

6. Difference of treatment of younger talents (continued)

- **Non-recognition of periods of employment** before the age of 18 for determining pay: many decisions, in which admissible discrimination on grounds of age was upheld;
- Most recently: Case C-417/13, . Starjakob, 28.1.2015; Case C-482/16, Stollwitzer, 18.2. 2018
- C-24/17 and C-396/17, of 8.5.2019 – Austrian trade union and Leitner: continued effect of earlier age discrimination in new remuneration system = inadmissible discrimination, claim to compensation from employer



C. Substantiations by the ECJ

6. Difference of treatment of younger talents (continued)

- **Case C-432/2015, O**, judgment 1.10.2015: No age discrimination (different circumstances, no comparable need of protection for student jobs after the end of the employment relationship)
- **Case C-548/15, de Lange**, judgment 10.11.2016: Maximum age limits of 30 years for the (full) consideration of training costs in income tax law in NL – Difference in treatment intended to promote training opportunities for younger persons (under 30) on the assumption that older persons (over 30) could have availed themselves of such training opportunities earlier: admissible



C. Substantiations by the ECJ

6. Difference of treatment of younger talents (continued)

Case C-143/16, Abercrombie, Judgment 19.7.2017:

On-call employment contract, maximum age limit (25) – legitimate aim upheld (Flexibilization of the labour market, promotion of employment for younger people, particularly for first work experience)

- Proportionality assessment: Appropriateness and necessity of the means for achieving the aim doubtful (Measure not purposeful because dependent not on lack of prior employment but solely on age).

The ECJ upheld the proportionality and confirmed the broad discretion of the Member States, including as regards the choice of means; **legitimate aim:** opportunity of first work experience, including through reduced protection standard!

Necessity: context of a continuing economic crisis and a decline in the level of employment among the age group concerned



C. Substantiations by the ECJ

Difference from judgment in the Mangold Case? Why an age criterion at all? Aim achievable otherwise also?

- In the Mangold Case (2005), a founded fixed term regulation was declared inadmissible, because it pertained **only to the age of the employee**; full exclusion of older workers from the fixed-term protection is not necessary for an effective integration of older long-term unemployed workers in the labour market.
- Different from the Abercrombie decision! Risks of precarization through age intensified ---



C. Substantiations by the ECJ

7. Difference of treatment of older talents

(1) Exclusion of employees close to retirement from severance pay in case of possible entitlement to a company old-age pension / entitlement to state old-age pension:

- **Case C-499/08, Andersen**, Judgment 12.10.2010 + **Case C-441/14, Dansk Industri**, Judgment 19.4.2016:
- Legitimate aim in principle
- **Disproportionate**: includes also workers who did not want to apply for any company pension or who had not acquired any living pension. Exclusion could compel employees to apply for a lower early retirement pension!



C. Substantiations by the ECJ

7. Difference of treatment of older talents (continued)

Case C-515/13, P. Landin; Judgment 26.2.2015

- Exclusion from severance pay admissible in case of entitlement to **state old-age pension** (Swedish social pension),
- Necessary and appropriate, because claim to normal old-age pension, to preclude any risk of a substantial loss of income through the early claim of this pension
- Different with **special age limits for severally disabled persons: Case C-152/11, Odar, Judgment 6.12.2012**: early pension start date in case of severe disability should not exclude severance pay on account of the special needs of older **severely disabled persons**.

Result: different review standard before and after reaching normal old-age limit with entitlement to a pension



C. Substantiations by the ECJ

7. Unequal treatment of older talents (continued)

(2) Occupational age limits/automatic termination of employment relationship

Flight crew:

- **Case C-447/09, Prigge, judgment 13.9.2011:** statutory age limit 60; review pursuant to Article 4 of the Directive – not justified, because of legal regulations and international standards with higher age limit (65)
- **Case C-190/16, Fries, judgment 5.7.2017** – legal age limit of 65 for (automatic) termination of activity by pilots in commercial aviation admissible
- **Case C-396/18, Cafaro, GA 26.6.2019:** Age limit (60) for pilots in activities for the protection of national security/secret service



C. Substantiations by the ECJ

7. Difference of treatment of older talents (continued)

(3) General age limits for automatic termination of employment relationship: only limited review of the proportionality of collectively agreed clauses or comparable regulations:

- **Case Palacios (collective agreement); Case Rosenbladt (collective agreement); Fuchs and Köhler case** (legal regulation in civil service law/public prosecutors; amended for teachers)
- **Case C-141/11, Hörnfeldt:** Elimination of protection against dismissal upon reaching the normal age limit for state social pension (67)
- Legitimate social and employment policy aims: social consensus, idea of division of labour between generations; integration of younger talents in the labour market



C. Substantiations by the ECJ

7. Difference of treatment of older talents (continued)

Questionable assumptions: Rights of older employees insufficiently protected by pension as income replacement upon withdrawal from working life?

Protection from demeaning reviews of existing performance and employability?

Problematic insinuations/attributions

Contradicts the principle of promoting employment of employees in older working age; contradicts pension reforms

Abstract reason without real connection to the dynamics of the labour market; freedom to continue working beyond pensionable age?



C. Substantiations by the ECJ

7. Difference of treatment of older talents (continued)

Assumptions about the distribution of employment opportunities between the generations

Promotion of employment for younger employees through the dismissal of older talents? Recognized in the Directive and ECJ case law, but suitability of the means doubtful from the economic point of view (cf. **lump of labour fallacy)**

(4) Need to protect older employees also in the case of age-related time limits:

Before old age limit: strict proportionality review (Mangold Case); left open in Case C-109/09, Deutsche Lufthansa

As of old-age limit: Case C-250/09; 268/09, Georgiev, Case C-46/17, Case 46/17, John



D. Conclusion and outlook

Old age discrimination is still not taken really seriously:

- **Prohibition of old age discrimination in European law controversial in its interpretation and the extensive justification possibilities**
- **Effectiveness problems through very broad margin of discrimination in implementing the prohibition of age discrimination**
- **Stereotyping continues to play an important role in the assessment of old age discrimination**
- **Human rights dimensions neglected in the face of social policy aims employment promotion / labour market policy: individual disadvantages in proportionality review given too little weight**



D. Conclusion and outlook (continued)

- **ECJ has increasingly attenuated the review of proportionality of age-related differences in treatment, particularly in age limits in recent years**
- **Dilemma: Economic crisis and high youth unemployment complicate approaches to active aging, free decision to terminate the employment phase**
- **Generational solidarity: interests between the distribution of employment opportunities between generations tend to be outweighed for the benefit of the younger generation**
 - **Solution: restriction of exceptions? No differentiation in protection standard between individual grounds of discrimination in primary law**
 - **Overcoming existing loopholes? Lacking framework directive for access to goods and services; appropriate arrangements at the work place for older employees?**



Thank you for your attention!

Contact:

Dr Eva Maria Hohnerlein

Max Planck Institute of Social Law and Social Policy

Department of Foreign and International Social Law

33 Amalienstr., 80799 Munich

E-mail: hohnerlein@mpisoc.mpg.de