Age discrimination in EU law (and beyond): contextualizing the relevant case-law of the CJEU

APPLYING EU ANTIDISCRIMINATION LAW, SEMINAR FOR LEGAL PRACTITIONERS
Trier, 11 February 2020

Fundamental values of the EU (Treaties)
Non-discrimination in respect of age as a general principle of EU law (Mangold)
Charter of Fundamental Rights:
  Article 20 (equality before the law)
  Article 21 (non-discrimination)
  Article 25 (rights of the elderly)
EU legal framework for equal treatment

<table>
<thead>
<tr>
<th>Fields/Grounds</th>
<th>Race</th>
<th>Gender</th>
<th>Sex. orientation</th>
<th>Age</th>
<th>Disability</th>
<th>Religion</th>
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Acceptance of age-based distinctions in social polity and labour market

New ground of discrimination - relatively less comparable and relevant national case-law

50% of age discrimination references – Germany; Austrian and Danish Courts also high numbers

Large body of case-law guidance on age discrimination: 1) the scope of the Directive 2000/78 and its relationship to the general principle of equal treatment;

2) 2 exceptions laid out in Art. 6:
   - Art 6(1) general “objective justification” – direct discrimination is permissible;
   - Art 6(2) – age limits for admission to occupational social security schemes and the entitlement to the benefits (pension and invalidity) that they provide
The age discrimination case-law of the CJEU and the scope of the Directive 2000/78

- The Mangold doctrine - the general principle of non-discrimination and now the right to non-discrimination protected by Article 21 of the EU Charter enjoys direct horizontal effect in national law
- Ole Andersen case (C-499/08) – rejection of severance allowance because of entitlement to old-age pension, vertical direct effect of the Directive
- Ajos A/S (similar to Andersen but private entity) – not applied by the Danish Supreme

This sounds good, or... a limited protection for age?

- Age as a point on a scale, graduated, not clear-cut
- Public security exception, genuine occupational requirements
- In addition: broad justification possibilities: legitimate aim (e.g. employment policy, labour market or vocational training objectives), appropriate and necessary means
- Such objective and reasonable justification is not available for other grounds in EU law!
What is prohibited in EU law?

- Direct discrimination
- Indirect discrimination
- Harassment
- Instruction to discriminate
- Victimisation
- But... positive action measures are possible

Wide discretion to states and courts

- A lot depends on the circumstances and the justification...
- Under 30 can deduct the full costs of vocational training from their taxable income, for 30+ this is limited
- Age limit of 30 for recruitment of a local police officer
- Age limit of 35 for recruitment of a regional police officer
- Lowering the compulsory retirement age of judges, prosecutors and notaries from 70 to 62 years within the period of one year
Equality on the ground of age in the CoE

- ECHR Article 14: prohibition of discrimination in the enjoyment of the rights and freedoms in the ECHR – age not named, but accepted as ‘other status’
- ECHR Protocol 12: general prohibition of discrimination
- European Social Charter: Article E

Equality on the ground of age in the UN

- Non-discrimination clause in all UN Treaties, with open list of grounds (hence age can be included)
- 2010: UNGA setting up an Open-Ended Working Group on Ageing
- Independent Expert on the enjoyment of all human rights by older persons
Fighting discrimination on the ground of age – equality bodies

- An Equinet Discussion Paper, based on cases and analyses by 22 equality bodies
- Published in March 2019: http://www.equineteurope.org/How-are-Equality-Bodies-Fighting-Discrimination-on-the-Ground-of-Age
- Legal framework and key issues
- Employment, goods and services, housing, and health and family issues

Key issues

- Lack of comprehensive legal protection
- Age discrimination is seen and portrayed as ‘less severe’
- Ageism present in courts – ready to accept generalisations instead of requiring an individualised approach
- Ageism often stipulated in legislation or public policies
- Prevalence of multiple discrimination can result in or exacerbate the experience of discrimination
- New technologies – opportunities and threats
The case work of equality bodies – employment

- Government agency recruiting: candidates must be under 40
- Justification: administrative error, but no applicant was rejected and a number of applicants were above 40
- Equality body: the vacancy notice could dissuade potential applicants above 40
- Discrimination established, publication of the equality body’s decision

The case work of equality bodies – goods & services

- Typical issue: refusal to grant a loan to people above a certain age
- Discriminatory as non-discriminatory alternatives exist
- Importance of individual assessment
The case work of equality bodies – housing

- New apartment building in a student neighbourhood
- Age limit for residents: 31 years
- Justification:
  - prevent complaints about the noise
  - give opportunity to young graduates to continue living in the city
- The equality body achieved the withdrawal of the discriminatory age limit

The case work of equality bodies – healthcare

- Free preventive annual breast cancer screening only available to women aged 40-69
- The equality body recommended the extension of the eligible age group in particular due to the risk of breast cancer being highest among women aged 75-79
THANKS FOR YOUR ATTENTION!

ANY QUESTIONS?

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