

# Discrimination on grounds of age: CJEU case law

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## LEGAL BACKGROUND

## Directive 2000/78

- Lays down a general framework for combating [inter alia] discrimination on the grounds of age
- Broad scope
  - **employment relationship**: recruitment, working conditions, remuneration (e.g. salary, bonus), career (e.g. access to a type of job, classification, advancement), dismissal (cause / conditions)
  - **Private/public sector**
- Prohibits
  - **Direct discrimination**: persons are treated less favourably than other persons in comparable situations on the sole ground of their age
    - Example: automatic termination of the employment contract when the worker reaches 25 years of age (= at a given age)
  - **Indirect discrimination**: where an apparently neutral provision puts persons having a particular age at a particular disadvantage compared with other persons
    - Example: no recruitment of persons who are retired (when retirement age goes from 60 to 75) = state of retirement is related to age

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## Directive 2000/78

- Differences of treatment are not prohibited if:
  - Direct discrimination
    - 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): specific to age!!)
    - 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 (Art.4(1))
    - necessary for **public security**, for the maintenance of public order and the prevention of criminal offences, for the **protection of health** and for the protection of the rights and freedoms of others (Art.2(5))
  - Indirect discrimination
    - objectively justified by a **legitimate aim** and the means of achieving that aim are appropriate and necessary (Art.2(2))

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## CASE-LAW

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## Cases typology

- **Automatic termination of contract** = *Palacios* (C-411/05), *Age Concern England* (C-388/07), *Petersen* (C-341/08 - dentists), *Rosenbladt* (C-45/09), *Georgiev* (C-250/09, age 68 for university professors), *Commission v. Hungary* (C-286/12 - judges) *Fuchs* (C-159/10 - judges), *Prigge* (C-447/09), *Hörnfeldt* (C-141/11)
- **Minimum / maximum age for recruitment** = *Wolf* (C-229/08 - firemen), *Perez* (C-416/13 – local police), *Sorondo* (C258-15), *CO* (C-670/18)
- **Recourse to atypical contracts** = *Mangold* (C-144/04: fixed-term contract), *John* (C-46-17: fixed term contract) O. (C-432/14), A & F (C-143/16: on-call contract)
- **Pay** = *Hennigs* (C-297/10), *Horgan & Keegan* (C-154/18)
- **Career advancement and classification** = *Unland* (C-20/13), *Specht* (C-201/12), *Bowman* (C-539/15), *Hütter* (C-88/08), *Stollwitzer* (C-482/16), *Tyrolean Airways* (C-132/11)
- **Access to vocational training** = *de Lange* (C-548/15)
- **Length of period of notice** = *Küçükdevici* (C-555/07)
- **Severance allowance** = *Andersen* (C-499/08), *Tekniq* (C-515/13)
- **Social plan package** = *Odar* (C-152/11)
- **Occupational pension** = *Kleinsteuber* (C-354/16), *Parris* (C-443/15)

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## Cases typology

- **All countries** involved: Germany, Italy, Bulgaria, Hungary, France, Ireland, Denmark, Spain, UK...
- **All types of regulations** challenged
  - Law and other statutory rules
  - Collective agreement
  - Company's regulation
- **All categories of ages:**
  - Young employees
  - Senior employees / older persons

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## Court methodology (art. 6(1))

- i. Does case fall within **material scope** of Directive 2000/78?
- ii. If so, does national provision establish a **difference in treatment** based on age?
- iii. If so, is the age-related measure justified by a **legitimate aim**?
- iv. If so, is the age-related measure **appropriate and necessary** to achieve that aim? (“proportionality/coherence test”)

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## Difference of treatment (ii)

### Situations must be comparable

- It is required not that the situations be identical, but only that they be comparable
  - assessment of that comparability must be carried out not in a global and abstract manner, but in a **specific and concrete manner in the light of the benefit** concerned [A & F, C-143/16]
- Italian law on **on-call contract** “established two different regimes as regards (...) the dismissal of on-call workers on the basis of the age category to which those workers belong” = “**for the application of provisions such as those at issue, the situation of a worker who is dismissed for the simple fact that he has reached the age of 25 years is objectively comparable to that of workers in other age categories**” [A & F, C-143/16]

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## Legitimate aim (iii): categories

“The Member States enjoy broad discretion in their choice [...] to pursue a particular aim in the field of social and employment policy” [eg. A & F, C-143/16]

- **Economic background characterised by high unemployment:** to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment.
- **Encouragement of recruitment (e.g. of young people)**
- **Mix of different generations** / establishing an **age structure** that balances young and older employees
- **Rewarding experience** that enables a worker to perform his duties better
- For a **social plan**, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a **fair distribution of limited financial resources**

**Caveat: Budgetary considerations** cannot in themselves constitute a legitimate aim

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## Legitimate aim: categories

- aims must have a **public interest nature** distinguishable from purely individual reasons particular to the employer's situation
- Aims cover only **social policy objectives** (related to employment policy, the labour market or vocational training)
- Specification of the aim pursued is not necessary:
  - elements taken from the **general context** of the measure concerned, enable the underlying aim of that law to be identified,
  - a **change in the context** of a law leading to an alteration of the aim of that law does not, by itself, preclude that law from pursuing a legitimate aim

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## Legitimate aim: national courts' task

- **Identification of the aim** is a task which it is for the national court to carry out
  - Article 6(1) is addressed to the Member States and imposes on them, **notwithstanding their broad discretion in matters of social policy**, the burden of establishing to a **high standard of proof** the legitimacy of the aim pursued
- **Mere generalisations** indicating that a measure is likely to contribute to employment policy are not enough to show that the aim is legitimate

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## (iv) Proportionality test

### Is the age-related measure adapted and coherent with regard to the legitimate aim?

- Member States enjoy **broad discretion** in their choice in the **definition of measures capable of achieving the aim**
- **For the national court to ascertain**, in the light of all the relevant evidence and taking account of the **possibility of achieving aim by other means**, whether national measures is appropriate and necessary
- To find the **right balance between the different interests** involved
  - Collective interests *versus* individual interest:
    - A regulation which allows an employer to terminate an employee's employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, is compatible with Art. (6)(1)
    - balance between the desire to promote the access of young workers to employment and respect for the right of older persons to engage in work [C-670/18, §45]

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## Proportionality test passed

- “as regards the objective pursued consisting, in general terms, of ensuring the rejuvenation of the employed labour force, **it may be argued that such an aim does not go beyond what is necessary**, where a refusal to employ or recruit retired persons, whose professional life has ended and who are in receipt of a retirement pension, may be reasonably envisaged with a view to promoting the full employment of the active labour force or the access of younger people to the labour market” [CO, C-670/18, §46]
- A measure which authorises employers to conclude less rigid employment contracts **may, having regard to the broad discretion enjoyed by the Member States in that area, be considered as being appropriate** to achieve a degree of flexibility on the labour market.
  - “it must be observed (...) that, 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” [A & F, C-143/16, §42]
  - “Moreover, the Italian Government explained at the hearing that those forms of flexible work are necessary to facilitate workers’ mobility, increase the adaptability of employees to the labour market and give access to that market to persons in danger of social exclusion, while eliminating forms of illegal work” [A & F, C-143/16, §43]

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## Proportionality test failed

- Severance allowance not paid to employees of age 55+ who are eligible to an (early) retirement pension
  - **Legitimate aim:** preventing that allowance from being claimed by persons who are not seeking new employment but will receive a replacement income
  - Age measure **not appropriate:** it deprives workers who have been made redundant **and who wish to remain in the labour market** of entitlement to the severance allowance merely because they could, because of their age, draw such a pension [*Andersen, C-499/08*]

NB: However, Directive 2000/78 do not preclude a national legislation from providing that an employer must, upon termination of the employment relationship of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, pay an amount equivalent to one, two or three months' salary respectively, unless the salaried employee is entitled to receive a State retirement pension upon termination of employment. Indeed, "to the extent that the severance allowance is a lump sum payment corresponding to one, two or three months' salary, provision does not appear capable of causing a significant loss of income to the departing employee in the long term" [*Tekniq, C-515/13: State pension*].

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## Proportionality test failed

- According to the collective agreement, the employee's basic pay is determined on his appointment by reference to the age category to which he belongs
    - An employee recruited at the age of 21 will be classified in age category 21, whereas a 27-year-old new employee recruited the same day will be classified in age category 27
    - **Aim:** to take account of employees' **professional experience**
    - Age measure is **not appropriate:** An employee with no professional experience, appointed at the age of 27 will, as from his appointment, receive basic pay equivalent to that received by an employee of the same age, in the same job, but appointed at the age of 21 and with 6 years' length of service and professional experience in his job
- = System of pay is contradictory to the aim! [*Hennigs, C-297/10*]

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## OCCUPATIONAL REQUIREMENTS (ART.4(1))

“Member States may provide that a difference of treatment which is based on a characteristic related to [the 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**”.

= The nature of the professional activity requires certain skills or abilities for various possible reasons (biological, physical, psychological, intellectual, etc.) which are connected to age and justify the (young or old) age-related criterion

Caveat: Article 4(1) must be interpreted strictly

Example: a bank decides to recruit senior customer advisers for the reason that clients in the banking sector see senior employees as reliable

Can the willingness of the employer to take account of the particular wishes of the customer be an occupational requirement under Art. 4(1)? No! Subjective considerations are not worth occupation requirements (see ECJ Bougnaoui)

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## Age limit for a job application

Application for a fireman job disregarded

because the applicant was older than the age limit of 30

- It is not the age but a characteristic related to that age which can constitute occupational requirement = **physical fitness**
- ECJ verifies that:
  - There is a **legitimate aim**: to ensure the operational capacity and proper functioning of the professional fire service
  - the possession of especially high physical capacities are a **genuine and determining occupational requirement**
  - The need to possess high physical capacities is **related to age**
  - The 30 year **age limit is appropriate to reach the aim and does not go beyond what is necessary** to achieve it = the fire-fighting duties are part of the intermediate career in the fire service that can only be performed by younger officials [*Wolf*, C-229/08]

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## Age limit for a job application

Applicants for local police officer posts  
not to be older than 30 years of age

- **Legitimate aim:** the operational capacity and proper functioning of the police service
- **Occupational requirement:** the possession of **particular physical capacities** is one characteristic relating to age + **tasks** relating to the protection of persons and property, the arrest and custody of offenders and the conduct of crime prevention patrols **may require the use of physical force.**
- **Test of proportionality:** not all duties require high physical capacities + disparity in the local regulations (age limit set at 30, 36, 40...) = age limit goes beyond what is necessary to attain the legitimate aim [*Perez, C-416/13*]
  - NB: Recruitment of police officers of the Autonomous Community of the Basque Country restricted to candidates under 35 years of age = “*the duties performed by the police forces of Autonomous Communities differ from those carried out by the local police*” = proportionality test passed [*Sorrondo, C-258/15*]

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## PUBLIC HEALTH & SECURITY (ART. 2(5))

“This Directive shall be without prejudice to Measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of **public order** and the prevention of criminal offences, for the **protection of health** and for the protection of the rights and freedoms of others”

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## Age limit for an airline pilot

- Broad concept of “public security”
  - Measures that **aim to avoid aeronautical accidents** by monitoring pilots’ aptitude and physical capabilities with the aim of ensuring that human failure does not cause accidents are undeniably measures of a nature to ensure public security
- Subject to the proportionality test
  - Since national and international legislation considered that it was not necessary to prohibit pilots from acting as pilots after age 60 but merely to restrain those activities, the prohibition on piloting after that age was not necessary for the achievement of the pursued objective.

Article 2(5) is interpreted strictly

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## Age limit for dentists to practise

- Maximum age for practising as a “panel dentist” (= 68 years)
- Aim: to protect the health of patients against the decline in performance of those dentists after that age,
- Inconsistent with Art. 2(5) since the age limit does not apply to non-panel dentists [*Petersen*, C-341/08]

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## FINAL REMARKS

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## Collective agreements

- Are measures set by agreement subject to a specific analysis?
  - social partners at national level may, on the same basis as the MS, provide for measures which contain differences of treatment on grounds of age
  - Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of EU law, it must, within the scope of that law, be exercised in compliance with that law
  - Consequently, when they adopt measures falling within the scope of Directive 2000/78, the social partners must comply with that directive
  - “The social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it”

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## Direct application of Directive 2000/78

- The existence of a principle of non-discrimination on grounds of age must be regarded as a **general principle of European Union law** and is protected by **Article 21 of the Charter**
- Useful for direct application of the directive (in case of absence/incorrect transposition of the directive)
  - for the national court to provide the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, **disapplying if need be any provision of national legislation contrary to that principle**