

Discrimination on the grounds of age: CJEU case law

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Age as a protected characteristics: underpinning principles

- Age is relatively recent addition to equality law
- It is a legally protected characteristic that we all share, it changes as we also share advantages and disadvantages associated with different ages
- Double bind: need to balance between “an individual and right-based approach of age discrimination law and a collective and interest-based approach” (Hendrickx, 2012)
- Reconciling economic and structural dimension (e.g. and social dimension (Vickers 2018)

Age as a protected characteristics: underpinning principles

Structural economic dimension

- Structural mechanism to allocate rights, benefits and obligations
- Demographic trends
- Intergenerational fairness
- Pensions sustainability

Social Dimension

- Dignity
- Stigma
- Disadvantage
- Inclusion
- Intersection of age with other protected characteristics (e.g. age and gender)

The EU Legal Framework: Equal Treatment Framework Directive 2000/78/EC

This Directive includes provisions to protect against age discrimination, but it allows for direct age discrimination to be justified in certain circumstances. Article 6 provides:

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

- 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;
- the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- 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.

Mandatory retirement provisions: can they be justified?

Do mandatory retirement provisions pursue a legitimate aim of employment policy?	Is the measure appropriate and necessary?
Intergenerational solidarity (<i>Palacios de la Villa; Peterson; Rosenblatt</i>)	Interest of older works taken into account by ensuring that they are entitled to a pension and able to seek employment elsewhere (<i>Palacios; Rosenblatt; Hornfeldt</i>)
A legitimate aim within the scope of Article 6(1) relating to employment policy needs to be of 'public interest' and not 'purely individual reasons specific to the employer's situation, such as cost reduction or improving competitiveness' (<i>Age Concern</i>)	Question as to whether the means chosen were appropriate and necessary left to the national courts to determine (<i>Age Concern</i>)
Aim in principle could be justified but it is up to the national courts to determine whether it corresponds to actual facts (<i>Georgiev</i>)	In order to establish whether a measure is appropriate and necessary 'it must be supported by evidence' (<i>Fuchs</i>)
	Capability argument rejected as deemed based on stereotypical assumptions (<i>Peterson</i>)

Mandatory retirement provisions not upheld by the CJEU

Cases	Legitimate aim of employment policy
<i>Prigge</i> Lufthansa collective agreement that set pilot retirement at the age of 60	Not justified as retirement age for pilots working for other international airlines is 65
<i>Commission v Hungary</i> Lowering of retirement age for judges from the age of 70 to 62 to achieve a 'fair balance between different generations of lawyers'	Not justified: it was deemed that it would not achieve the aim of 'fair distribution of job opportunities between different generations of lawyers in the medium and long term'

Emerging patterns from the cases on retirement:

- Support for the principle of intergenerational solidarity and the need to redistribute job opportunities across the generations
- Rejection of age stereotypical assumptions
- Need for evidence to substantiate claims to justify differential treatment
- Reluctance of the CJEU to interfere with Member States employment and social policy
- Question as to whether measures adopted are appropriate and necessary often left to the national courts to determine
- No engagement with intersectional issues
- Looking at these decisions through the lens of the 'double bind' considerations driven by collective interests tend to prevail over an individual right-based approach

Differential pay and conditions

Differential pay linked to age cannot be justified **but** it can be justified if:

- It is intended to reward loyalty and experience (*Tyrolean; Hennigs*)
- It is linked to a "criterion, which renders the application of the new rules dependant exclusively on the date of recruitment as an objective and neutral factor, is manifestly unconnected to any taking into account of the age of the persons recruited" (*Horgan and Keegan*)
- It aims to promote young people access to the labour market (*Hutter, Bordonaro*)
- It aims to protect younger workers and help their integration in the labour market (*Odar*)

Differential treatment of young workers not justified if:

Based on a stereotypical assumption that it is easier for younger people to be mobile (*Kucukdeveci*)

Maximum recruitment age

- *Wolf v Stadt Frankfurt am Main*: maximum recruitment age of 35 for fire fighters. Justified as linked to the legitimate aim of ensuring operational capacity and age limit did not go behind what necessary to achieve the aim
- *Mario Vital Perez*: police officers' recruitment limited to those under the age of 30. Possibly met a legitimate aim in relation to training requirements but found discriminatory because of lack of evidence
- *Gorka*: maximum age of 35 justified as the police academy produced evidence that operational capacity can reduce after the

Key points:

Recruitment age limits may be justifiable if linked to operational needs (legitimate aim) but the proportionality of these measures needs to be supported by evidence

Final considerations about future challenges for age equality law

- Covid-19 impact on employment: high level of youth unemployment, reduced jobs, need to re-distribute job opportunities among generations (intergenerational solidarity); more pay differential schemes to incentivise the labour market?
- Reasonable accommodation in the workplace on the grounds of age?
- Dignified approach (P.Alon-Shenker 2012)
- Work-ability model (Ilmarinen, 2001) matching an individual's capabilities with work demands.
- BMW 'Today for Tomorrow' to manage and support an ageing workforce
- Oxford City Council: providing alternative career trajectories and alternative roles as workers get older

List of cases

Felix Palacios de la Villa v Cortefiel Servicios SA CJEU 16 October 2007

Age Concern England [2009] C-388/07

Peterson v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe CJEU Judgment 12 January C-341/08

Kucukdeveci v Swedex GmbH & Co KG [2010] C-555/07

Rosenblatt v Oellerking Gebäudereinigungsgesellschaft CJEU Judgement 12 October 2010 C-45/09

Reinhard Prigge and Others v Deutsche Lufthansa CJEU Judgement 13 September 2011

Gerard Fuchs en Peter Kohler v Land Hessen CJEU Judgement 21 July 2011 C-159/10

Hennings v Eisenbahn-Bundesamt and Land Berlin v Mai [2011] C-298

Commission v Hungary CJEU C-286/12

Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH [2012] C-132/11

Odar v Baxter Deutschland GmbH [2012] C-152/11

Hutter v Technische Universität Graz C-88/08

Abercrombie & Fitch Italia Srl v Antonio Bordonaro CJEU Judgement 23 March 2017 C-143/16

Wolf v Stadt Frankfurt am Main C-299/08

Mario Vital Perez v Ayuntamiento de Oviedo C-416/13

Gorka Slaberría Sorondo v Academia Vasca de Policía y Emergencias C-258/15

Tomás Horgan and Claire Keegan v Minister for Education & Skills and Others [2019] C-154/18

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