

Discrimination on Grounds of Age: CJEU Case Law

Applying EU Anti-Discrimination Law
ERA Webinar

Dr. Petra Weingerl, Mjur, DPhil (Oxford)
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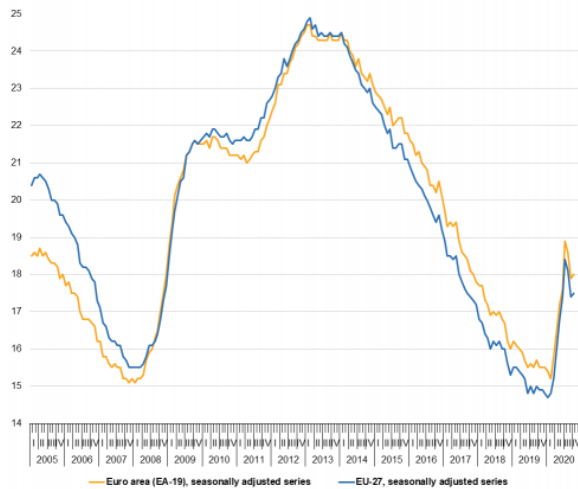
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Ageism in the workplace



Youth unemployment

Youth unemployment rates, EU-27 and EA-19, seasonally adjusted, January 2005 - October 2020

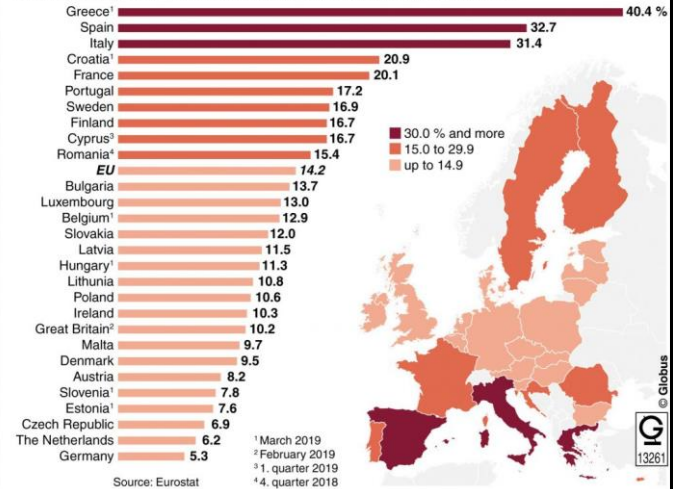


Source: Eurostat (online data code: une_ft_m)

eurostat

Youth unemployment in the EU

Unemployment rate among 15 to 24 years old youths in April 2019 (figures in percent)



Source: Eurostat

Age Discrimination and EU Law

- Primary legislation

- TEU (Articles 2 & 3)
- TFEU (Articles 10 & 19)
- EU Charter of Fundamental Rights (Article 21)

- Secondary legislation

- The Employment Equality Directive 2000/78



The Employment Equality Directive 2000/78

Article 1

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.



Directive 2000/78

Scope Article 3

It applies to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- conditions for access to employment, to self-employment or to occupation,
 - including selection criteria and recruitment conditions,
 - whatever the branch of activity, at all levels of the professional hierarchy, including promotion;
- employment and working conditions, including dismissals and pay;



Directive 2000/78

Article 6

Justification of differences of treatment on grounds of age

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.



The CJEU Test for Exceptions

1. Applicability of Directive 2000/78?
2. Contains a difference of treatment within the meaning of Article 6 of the Directive?
3. Is the difference in treatment justified?



The CJEU Case Law

- Compulsory Retirement Age
- Maximum Age Requirements
- Other fields

❖ Recital 14 of the Directive 2000/78:

This Directive shall be without prejudice to national provisions laying down retirement ages.



Applicability of Directive 2000/78

C-411/05, Félix Palacios de la Villa

45 The legislation at issue in the main proceedings, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force.

46 Consequently, legislation of that kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c) of Directive 2000/78.



C-144/04, Mangold

- The principle of non-discrimination on grounds of age is **a general principle of EU law** (the implementation period for the directive did not pass yet)
- A difference of treatment on grounds directly of age as a rule constitutes discrimination prohibited by EU law



Is the difference in treatment justified?



C-144/04, Mangold

63 *In this respect the Member States unarguably enjoy **broad discretion** in their choice of the measures capable of attaining their objectives in the field of social and employment policy.*

- Legitimate aims for exceptions, e.g.:
 - **legitimate employment policy,**
 - **labour market objectives,**
 - **vocational training**



C-411/05, Félix Palacios de la Villa

- Collective agreement providing for automatic termination of employment relationship where a worker has reached 65 years of age and is entitled to a retirement pension;
- Part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations;
- The relevant provision does not expressly refer to an objective of that kind;
- However – that is not decisive!

56 *It cannot be inferred from Article 6(1) of Directive 2000/78 that **the lack of precision in the national legislation** at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision.*

57 *In the absence of such precision, it is important, however, that **other elements, taken from the general context of the measure concerned, enable the underlying aim of that law to be identified** for the purposes of judicial review of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary.*



Broad discretion....

...but not everything is permissible!



C-388/07, Age Concern England

- The UK's transposition legislation specifically permits employers to dismiss their employees at the age of 65 years without such treatment being regarded as discriminatory;
- The National Council on Ageing, a UK charity promoting the well-being of older people, challenged the legality of the UK legislation as being contrary to Directive 2000/78, arguing that **the country's legislation had failed to specify the kinds of differences in treatment that would be justified**;
- CJEU:
 - Compulsory retirement at 65 is not discrimination
 - Legitimate aim: public interest nature, employment or social policy, and a certain degree of flexibility for employers



C-388/07, Age Concern England

- CJEU: there was no requirement to specify these differences in the national law

Provided that

- a **legitimate aim**, as highlighted in Article 6, and
 - that the means chosen were **appropriate and necessary** to achieve that aim
-
- Legitimate aims mentioned by CJEU: „social policy objectives, such as those related to **employment policy, the labour market or vocational training**”
 - *„By their public interest nature, those legitimate aims are **distinguishable from purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness**, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a **certain degree of flexibility for employers.**” (para. 46)*



C-555/07, Seda Küçükdeveci

- In Mangold, the worker was too old...
-Seda Küçükdeveci was **too young**
- National legislation on dismissal not taking into account the period of employment completed before the employee reaches the age of 25 in calculating the notice period

“It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, is complied with, **disapplying if need be any contrary provision of national legislation**, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.”



C-555/07, Seda Küçükdeveci

38 The Member States enjoy a **broad discretion** in the choice of the measures capable of achieving their objectives in the field of social and employment policy (see *Mangold*, paragraph 63, and *Palacios de la Villa*, paragraph 68).

39 The referring court indicates that the aim of the national legislation at issue in the main proceedings is **to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers**, from whom it is reasonable to expect a greater degree of personal or occupational mobility.

40 However, the legislation is **not appropriate** for achieving that aim, since **it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal**.

42 It should be added that, as the referring court points out, the national legislation at issue in the main proceedings **affects young employees unequally**, in that **it affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training**.



268/09, Georgiev

- Compulsory retirement of University professors at 68
- May continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice (employment conditions after a certain age)

Compatible with EU law if:

- legislation pursues a **legitimate aim** linked to, in particular, employment and labour market policy, e.g.:
 - the delivery of quality teaching,
 - the best possible allocation of posts for professors between the generations;
- and makes it possible to achieve that aim by **appropriate and necessary means**
- Encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim.



C-45/09, Rosenblatt

44 It must be observed that the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is **based on the balance to be struck** between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement....

47 The authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age cannot, generally, be regarded as unduly prejudicing the legitimate interests of the workers concerned.



C-159/10 and C-160/10, Fuchs

- compulsory retirement of civil servant at 65, may work until 68;
- CJEU: „clauses on automatic termination of the employment contracts of employees who reach retirement age could, in the interests of sharing work among the generations, promote the entry of young workers into the labour force“ (para. 64)
- „encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy, in particular when the promotion of access of young people to a profession is involved“
- CJEU: measure must not appear unreasonable in the light of the aim and **must be supported by evidence**



286/12, *Commission v. Hungary*

- Compulsory, sudden retirement of judges at 62 instead of 70
- Justification: standardisation of retirement rules and entry of young lawyers
- Not appropriate: cannot result in a balanced age structure
- Not necessary: those provisions must be viewed against their legislative background and account must be taken both of the hardship they may cause to the persons concerned and of the benefits derived from them by society in general and the individuals who make up society
- a well-founded expectation that they would be able to remain in office until 70
- the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned



C-515/13, *Tekniq*

27 Restricting severance allowance to only those workers who, on termination of the employment relationship, are not entitled to a State retirement pension does not appear unreasonable in the light of the **objective pursued by the legislature of providing increased protection for workers for whom it is difficult to find new employment as a result of their length of service in an undertaking.** Paragraph 2a(2) of the Law on salaried employees also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment....



Failure to take into account periods completed before the age of 18

C-529/13, Georg Felber

- 31 ...The national legislation at issue in the main proceedings aims to harmonise the starting date for contributions to the pension scheme and, therefore, the maintenance of the pensionable age. In that context, **the exclusion of the crediting of periods of education completed before the age of 18 is said to be justified by the fact that the person concerned is not engaged, in principle, during those periods, in any gainful activity giving rise to the payment of contributions to the pension scheme.**
- This aim can constitute a legitimate employment policy objective

C-159/15, Lesar



C-143/16, Abercrombie & Fitch Italia Srl

- On-call employment contract which may be concluded with persons under 25 years of age
- Automatic termination of the employment contract when the worker reaches 25 years of age
- intended to facilitate the entry of young people to the labour market
- IT government: **the main and specific aim** of the provision at issue in the main proceedings is **not to give young people stable access to the labour market, but merely to give them an initial opportunity of entering it**
- CJEU: legitimate aim & appropriate and necessary means



C-670/18, Comune di Gesturi

- Public call for expressions of interest
- Exclusion of retired public-sector and private-sector employees
- No direct reference to a particular age

- CJEU: by referring to retirement, the national legislation at issue in the main proceedings is based indirectly on a criterion linked to age, since the receipt of a retirement pension is subject to the attainment of a particular number of years of work and to the condition that the person has reached a certain age

- a dual objective:
 1. to implement an effective revision of public expenditure by reducing the operating costs of the public administrative authority, without adversely affecting the essence of the services provided to citizens,
 2. to facilitate the rejuvenation of the personnel of public administrative authorities, by promoting the access of younger people to the civil service



C-670/18, Comune di Gesturi

34 ... although **budgetary considerations** may underlie a Member State's choice of social policy and influence the nature or scope of the employment protection measures which it wishes to adopt, they cannot in themselves constitute an aim pursued by that policy

35 It follows that **the aim of achieving an effective reduction of public expenditure**, in so far as Article 5 of Decree-Law No 95/2012 forms part — in a general economic context — of the measures necessary to reduce the excessive deficits of the Italian public administrative authorities and seeks, more specifically, to prevent the cumulation of salaries and retirement pensions from public funds, may influence the nature or scope of the employment protection measures, but **cannot in itself constitute a legitimate aim**.



C-670/18, Comune di Gesturi

37 According to the case-law of the Court, **encouragement of recruitment** unquestionably constitutes a legitimate aim of Member States' social or employment policy, in particular when the improvement of opportunities to enter the labour market for certain categories of workers is involved, inter alia the promotion of the access of young people to a profession....

44 **The prohibition of discrimination on grounds of age must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights.** It follows that particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Retaining older workers in the labour force promotes diversity in the workforce. However, the interest represented by the continued employment of those persons must be taken into account in respecting other, potentially divergent, interests...



C-670/18, Comune di Gesturi

47 By contrast... it is uncertain whether the measure at issue in the main proceedings, namely the prohibition of retired persons from participating in calls for expressions of interest for the award of analysis and consultancy roles, does in fact allow the opportunities to enter the workforce to be improved for younger people. Since performance of the analysis and consultancy roles may prove delicate and complex, an older person is likely to be better placed, given the experience that he or she has acquired, to carry out the role entrusted to him or her. Accordingly, that person's recruitment is beneficial both to the public administrative authority behind the call for expressions of interest and in the light of the general interest...

48 In addition, it would be necessary to determine whether the prohibition at issue in the main proceedings does not go beyond what is necessary to achieve the aim pursued by unduly prejudicing the legitimate claims of retired persons, since it is based solely on the criterion of the age at which a retirement pension may be received and does not take into account whether or not the level of the retirement pension received by the persons concerned at the end of their professional career is reasonable.



No difference of treatment on grounds of age...



C-154/18, Horgan and Keegan

- Newly recruited teachers
- Salary scale and classification on that scale upon recruitment less advantageous than that applicable to teachers already employed as such

CJEU: the new remuneration conditions introduced by Ireland are not based on a criterion which is inextricably or indirectly linked to the age of the teachers, so that it cannot be considered that the new rules establish a difference of treatment on grounds of age



The principle of non-discrimination in respect of employment and occupation...

... must be safeguarded by all organs of the State!



C-378/17, Minister for Justice and Equality

- Maximum Age Requirements
- Recruitment of police officers by *An Garda Síochána*
- National body established by law in order to ensure enforcement of EU law in a particular area
- Power to disapply national legislation that conflicts with EU law (primacy of EU law)

*"duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by **all organs of the State** — including **administrative authorities** — called upon, within the exercise of their respective powers, to apply EU law" (para. 38)*



petra.weingerl@um.si