

**Age Discrimination : The Framework Employment Directive
(Council Directive 2000/78/EC);
Irish Legislation and Irish Case law**

This paper deals with age discrimination under the Framework Directive in terms of both prohibited conduct and justification of differences of treatment on grounds of age. It will then discuss the relevant provisions of the Irish Employment Equality Act, 1998 which also contains a prohibition on age discrimination. Finally the paper will present a review of some decided cases from the Irish Equality Tribunal and Labour Court under the Employment Equality Act, 1998.

1. The Framework Directive

Scope: Age is one of the four protected grounds included in the terms of the Framework Employment Directive. The scope of the Directive as set out in Article 3 specifies its application to all persons as regards both public and private sector, including public bodies. It covers conditions for access to employment, to self-employment or occupation, including selection criteria and recruitment conditions as well as promotion. It applies to employment and working conditions, including dismissals and pay. It also applies in relation to access to all types and levels of vocational guidance and vocational training including practical work experience; it extends to include also membership of and involvement in organisations of workers or employers. The Directive explicitly excludes “payments of any kind made by state schemes or similar, including state social security or social protection schemes.” It also excludes difference of treatment based on nationality.

Within this very broad remit, the Directive prohibits direct discrimination, indirect discrimination, harassment and victimisation. The definitions of discrimination are contained in Article 2 of the Directive.

Age discrimination: The objectives of the Directive in terms of age are set out in the recitals and are stated to include “the need to take appropriate action for the social and economic integration of elderly and disabled people”. (Recital 6). It also, by reference to the Employment Guidelines of the European Council, refers to “the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.” However, despite the expansiveness of the scope of the Directive in general and the laudable aspirations contained in the recitals, the provisions on age discrimination are considerably diluted by a number of permitted derogations and “justifications of differences of treatment on grounds of age”.

Differences of treatment:

Article 6 of the Directive provides for a range of “differences of treatment” which Member States may provide for in their legislation provided they are, within the context of national law, “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.” This in itself allows for significant interpretation by individual countries of the requirements of and derogations from the Directive for transposition into domestic law. The Directive is stated to contain minimum requirements and to prohibit any “reduction in the level of protection against discrimination already afforded by Member States”, however it is hardly likely to bring about a situation where any countries will have provisions more favourable than those required under the Directive. As Ireland is one of the very few countries with provisions relating to age discrimination already in place, the non-regression provision will have little effect.

Article 6 contains a number of examples of permitted differences of treatment on the age ground but does not make this a conclusive list. Justified differences of treatment may include

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

The legitimacy of the aim, the employment policy, labour market and vocational training objectives and the appropriateness of the means of achieving the aim remain to be considered and adjudicated upon by the European Court of Justice.

Article 6(2) of the Directive provides further that member states may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on grounds of age, provided that this does not result in discrimination on the grounds of sex.

Apart from the justification permitted by Article 6, the Directive provides for other specified exceptions and exemptions from the prohibition against discrimination on grounds of age. In particular, Article 3.4 permits member states to exclude its armed forces from the application of the Directive in relation to age (and disability). Although the recital which reflects this provision refers to “*all or*

part of their armed forces” (Recital 19); the effective clause of Article 4 is broader in its reference to “the armed forces”.

Genuine Occupational Requirements:

The Directive also provides in Article 4 for difference of treatment based on a characteristic related to any of the grounds where such difference is based on the nature of the particular occupational activities concerned or of the context in which they are carried out and the relevant characteristic “*constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate*”. This Article covers all four grounds and is likely to be of very limited scope and be applicable to, for example, dramatic and artistic presentations and to a lesser degree, personal services. Caselaw in the United Kingdom on this area under the race and sex grounds has produced a restrictive interpretation of comparable provisions in their domestic legislation. The defence of “genuine occupational requirement” has been accepted by the courts there in sex cases more often than race cases; a reflection of general social policy. It has also been subjected to scrutiny by judges where it may have been used as a first, rather than a last resort. For example, it has not succeeded in situations where job reorganisation is possible to avoid total exclusion of an employee. (See for example *Etam plc v Rowan* 1989 IRLR 150 EAT, a case based on an application by a man for a job in a ladies’ clothing shop). In relation to age, it is difficult to see many circumstances where such a blunt instrument as age as a ‘genuine occupational requirement’ would be justifiable. The proviso at the end of Article 4 of the Directive together with the general principle of proportionality contained in the recitals would support this view. In practice, it is rare that a person’s chronological age in itself should be a determining factor in differentiating between persons in relation to employment; the use of age as a proxy or convenient shortcut in selection procedures therefore should be carefully restricted in the interests of equality.

2. Irish Equality Legislation Employment Equality Act, 1998

Irish equality legislation dates back to the 1970’s when the Equal Pay and Equal Treatment Acts prohibited discrimination in employment on grounds of sex, and in the case of equal treatment, marital status. The next substantial body of equality legislation came in the form of the Employment Equality Act, 1998 (EEA) and the Equal Status Act, 2000. Both of these Acts prohibit discrimination on any of nine grounds which are gender, marital status, family status, religion, disability, sexual orientation, age, race and membership of the Traveller Community. The Equal Status Act applies to the provision of services including education and accommodation and also contains provisions in relation to discriminating clubs. The provisions of both acts are quite far-reaching, particularly in relation to grounds such as age, disability, sexual orientation and religion which have not yet become mandatory grounds of protection under European legislation.

The age discrimination provisions in the Employment Equality Act are similar in many respects to those contained in the Employment Framework Directive. Both the Irish legislation and the Directive take a similar approach to age discrimination

to that contained in existing legislation in the United States (the Age Discrimination in Employment Act 1967 as amended), Canada and Australia. Although age discrimination in all of these jurisdictions is based on the same model as sex and race discrimination legislation, it is less precise in that it permits more exceptions and justifications than what might be called the core discrimination grounds

There are some differences between the Irish Employment Equality Act and the Framework Directive in terms of the provisions relating to age discrimination. The scope of the Irish legislation is more limited in that it does not include self-employment or occupational pensions. The indirect discrimination provisions in the Irish legislation across the board are somewhat narrower than that contained in the Framework Directive; similarly the harassment provisions in the Irish Act have a narrower definition of harassment than that contained in the Directive. On the other hand, the Irish legislation is broader in its scope in that it does not exclude difference of treatment based on nationality and in fact nationality is explicitly included in the definition of race in the Employment Equality Act. The exemption permitted by the Framework Directive in relation to the armed forces (Article 3.4) is not as broad as that contained in the Irish legislation which, in Section 37(6) of the EEA, provides that age discrimination provisions shall not apply to employment in the defence forces, Garda Síochána (police) or prison services. These exemptions are broader than provided for explicitly in Article 3 of the Directive and are probably broader than those envisaged in Recital 18. The defence of occupational requirement under the Framework Directive is unlikely to extend to all jobs in the police force or the prison service. Section 16 of the Employment Equality Act mirrors to some extent the situation outlined in Recital 17 of the Directive in relation to competence and capability, although the substantive contents of this recital do not find their way to expression in the legal provisions of the Directive.

Both Article 6 of the Directive and Section 6 of the Employment Equality Act suggest the need for a comparator. However, the wording of the main provisions of both the Directive and the Irish Act would appear to allow for a hypothetical comparator in their reference to how a person “would be” treated. (This applies in all cases under the Irish Act except for equal pay cases the provisions in relation to which are framed differently in the Act). The need for a comparator can become problematic in relation to segregated employment; this has historically been a difficulty in gender discrimination cases and could continue to cause a problem in relation to discrimination on the age ground.

It is likely that a claimant would find it easier to establish indirect discrimination under the Framework Directive than the Employment Equality Act; in the former case, it is necessary only to establish that there is an “*apparently neutral provision, criterion or practice (which) would put persons having a particular age at a particular disadvantage compared with other persons...*” Under Irish law it is necessary to establish that there is a provision relating to employment or membership of a regulatory body which operates to the disadvantage of the claimant or in practice can be complied with by a substantially smaller proportion of the group to which the claimant belongs as compared with employees outside

that group and that the provision cannot be justified as reasonable in all the circumstances.

3. Irish Case Law

Age discrimination cases in Ireland are heard at first instance by Equality Officers at the Equality Tribunal (Office of the Director of Equality Investigations) or, in the case of discriminatory dismissals by the Labour Court. Decisions of the Equality Tribunal in employment cases may be appealed to the Labour Court and decisions of the Labour Court may be appealed to the Circuit Court and on a point of law, to the High Court. All decisions of both the Equality Tribunal and the Labour Court are issued in writing and are published on their respective websites: www.odei.ie and www.labourcourt.ie.

The Equality Authority is an independent body established under the Employment Equality Act, 1998 which has specified functions under that Act including working towards the elimination of discrimination in relation to employment; promoting equality of opportunity in relation to the matters to which the Employment Equality Act applies and providing information to the public on and keeping under review the working of that Act. The Authority also has statutory power to provide assistance to complainants which may take the form of legal advice and / or legal representation. In effect, the Authority represents a significant number of complainants taking cases before the Equality Tribunal, the Labour Court and the Circuit Court.

(It is interesting to note that while council Directive 2000/43/EC –the ‘Race Directive’- requires the designation of ‘*a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin*’, the Framework Directive contains no such requirement.)

The first case taken by the Equality Authority under the 1998 Act on the age ground was in relation to discriminatory advertising.

Equality Authority v Ryanair (DEC- E/2000/14)

This case was taken by the Authority under Section 10 of the EEA which provides that

- “A person shall not publish or display or cause to be published or displayed, an advertisement which relates to employment and which –
- (a) indicates an intention to discriminate, or
 - (b) might reasonably be understood as indicating such an intention.

In that case the respondent had advertised a vacancy for the position of “Director of Regulatory Affairs” and indicated in its advertisement that it required “a young and dynamic professional”. A complaint was lodged by the Equality Authority within the remit of its discretionary enforcement powers contained in Section 85 of the Employment Equality Act. The respondent maintained in its defence that its use of the word “young” did not in fact refer to chronological age, particularly as it did not specify any particular age group. However, the Equality Officer found that the use of the word ‘young’ clearly indicated, or might reasonably be

understood as indicating, an intention to exclude applicants who were ‘not young’ ie. Applicants who were ‘middle-aged’ or ‘old’. He also found that the respondent could not avail of the defence in Section 10(2) of the Act which states that “an advertisement using a word or phrase connoting a particular characteristic (in this case, age) shall be taken to indicate an intention to discriminate *unless the advertisement indicates a contrary intention.*” The company in this case was ordered to pay compensation of IR£8,000 to the complainant and to review its procedures and publish an appropriate statement in the relevant daily newspaper.

The first dismissal case under the EEA on grounds of age was taken by the Equality Authority in a case titled **A Worker v A Firm of Solicitors (EED 011)**. In that case the claimant was dismissed from her position as a legal secretary with the respondent, allegedly on the ground of her age. The respondent conceded at the hearing that its senior partner told the claimant that it was intended “to take on a young girl”. Although there was a conflict of evidence in relation to the connection between the taking on of the young girl and the dismissal of the claimant, the Court found that there was in fact such a causal connection between the dismissal of the claimant and her age and therefore found in favour of the claimant and awarded IR£6,000 compensation.

Other cases determined by the Equality Tribunal and the Labour Court have included those dealing with access to employment, training and promotion; harassment on grounds of age; victimisation and working conditions. Access to employment cases can present difficulties in relation to the evidential burden to be discharged. The Equality Tribunal has tended to focus firstly on the more objective and quantifiable criteria to establish that discrimination has taken place. These criteria would include statistical evidence and discriminatory questions at application and / or interview stage of recruitment.

In the case of **Hughes v Aer Lingus (DEC-E-2002-049)** the claimant alleged discrimination in failing to appoint her to a cabin crew position with the respondent airline. The claimant was a 50-year old woman with considerable experience as a cabin crew attendant who was applying for an entry level position with Aer Lingus. She claimed that discriminatory questioning at her second interview, including questions about how she would deal with taking instruction from younger people and how she would feel about starting at the bottom of the ladder were unlawful. She claimed that these questions had unsettled her during interview and had caused her to perform at less than optimum level for the rest of the interview. She was unsuccessful in her application and sought an explanation from the managing director of the company. He wrote to her stating that he would have been happy to consider her for a more senior position with the airline. In his decision in this case, the Equality Officer found that the questioning at interview was in fact discriminatory and unlawful and he awarded compensation of €5,000 in respect of this discrimination. However, in considering whether or not the failure to appoint the applicant to the position was discriminatory, he considered statistical evidence from the respondent. He found that the statistical evidence available did not show a pattern of discrimination on grounds of age. A further point was made by the complainant in relation to the concept of ‘overqualification’. The Equality Officer did consider remarks made in writing by the chief executive in relation to the applicant’s experience and qualifications

where he stated *‘The interviewers in your particular case were impressed by your experience and qualifications, but felt that they were not appropriate for a basic cabin crew position. If we were recruiting at a higher level we would certainly consider your application.’* The Equality Officer he did not however address the argument put forward by the claimant that the suggestion that she was over-qualified for the entry-level position was merely a pretext for discrimination on grounds of being too old. This is an issue which has been the subject of much litigation and discourse in the United States where age discrimination law is considerably more advanced and courts have looked behind such pretexts. (see for example *Taggart –v- Time Inc.* 924 F2d 43 1991).

The Equality Officer in the Hughes case found that the claimant had not established a prima facie case of discrimination in relation to the failure of the airline to appoint her to the position.

Burden of Proof

Although the Burden of Proof Directive does not apply to age discrimination and the provisions of the Framework Directive in that regard are not yet enforceable, the Irish courts and tribunals dealing with discrimination law have for some time adopted the practice of shifting the evidential burden when a prima facie case has been established. In the case of **The Revenue Commissioners v O’Mahony & Others (EED-033)**, the Labour Court found that a selection process which “fell short in the standards of objectivity, fairness and good practice...”, in conjunction with statistical evidence, indicated a link between the age of the candidates and their success or failure in the competition. This satisfied the Court that there was a prima facie connection between the selection process, the anomalous result in the case of the complainants and the age of the complainants. In this and other cases, the Labour Court has followed the line of authority first established in gender discrimination cases and then applied in other discrimination cases in relation to the shifting of the burden of proof. This principle will be given statutory expression following the transposition of the Framework Directive into domestic legislation.

One of the few cases in Irish law which addressed any exemptions on the basis of age is the case of **Perry v The Garda Commissioner (DEC-E2001-021)**. The provision in question is Section 34(3) of the EEA which makes permissible *“discrimination on the age ground or the disability ground in circumstances where it is shown that there is clear actuarial or other evidence that significantly increased costs would result if the discrimination were not permitted in those circumstances.”* The case concerned a voluntary early retirement scheme which involved the payment of a severance gratuity as well as a pension. The Equality Officer stated that the severance gratuity or non-pension elements of the voluntary early retirement scheme constitute remuneration for the purposes of the EEA and therefore must not be calculated on discriminatory grounds (including age). The scheme purported to distinguish between payments made to those under sixty and those over sixty years of age and found that the consequent disparity in severance gratuity was based exclusively on the ages of the employees and further that there was *no clear actuarial or other evidence* which would make such discrimination permissible in the context of the Act. (Note: in this case the three-year transitional

period provided for in the EEA protected an otherwise discriminatory scheme from being found to be unlawful).

A further exemption contained in Section 34(7) of the Act was also considered in this decision:

(7) it shall not constitute discrimination on the age ground for an employer to provide for different persons:

- (a) different rates of remuneration or*
- (b) different terms and conditions of employment if the difference is based on their relative seniority (or length of service) in a particular post or employment.*

In this case, the lump sum element of the payment was found to be based on length of service rather than age and therefore was not unlawful.

These cases are a sample of the rapidly developing body of caselaw in Ireland relating to age discrimination; there have also been some very interesting decisions under the Equal Status Act relating to discrimination in provision of services. In the absence of precedent from European countries, Irish claimants are looking to North American and Australian legal developments as well as parallel provisions in Europe in the other areas of discrimination. Statutory modifications in the US have included the removal of an upper age-limit for protection –The ADEA now covers everyone over age 40, whereas the Irish EEA applies to ages 18-65.

Amending legislation is about to be introduced in Ireland to comply fully with the requirements of both the Race directive and the Framework; however, as age discrimination has proved to be an evolving subject in other continents, it is likely that judicial interpretation and social re-evaluation will bring about ongoing change in Europe also.

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