

*Conference: The Race and Framework Employment Directives*

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**Age discrimination in employment: issues arising in practice**

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**Introduction**

I have been asked to speak at today's conference about Ireland's experience of age discrimination law, and what lessons can be drawn for other jurisdictions implementing the Framework Directive.<sup>1</sup>

Ireland has had comprehensive legislation against age discrimination in employment, in force since 1999 (the Employment Equality Act 1998<sup>2</sup>). Although this Act predates the Framework Directive, in many ways it was already very close to what the Framework Directive later required. For example:

- Employment was broadly defined,
- The basic concepts of direct discrimination, indirect discrimination, harassment and victimisation were largely very close to those in the Framework Directive,
- Age discrimination was prohibited whether against old or young, and
- A specialised Equality Tribunal was set up to decide equality cases, and to give legally binding decisions. These decisions could award compensation, and could make a broad range of orders for equal treatment in practice.<sup>3</sup>

The Irish legislation was changed with effect from July 2004 to adapt it more completely to the Directive's requirements. (The changes made are outlined later in this paper.)

Age discrimination is a new and relatively difficult area of law: this is seen from the fact that six Member States<sup>4</sup> are taking up the option of extra years before they implement it into national law. The most obvious example of a long-standing age discrimination law, that of the United States, is different in a number of important ways from the model of the Framework Directive, and for this reason does not seem very helpful in trying to apply age discrimination law in a European context.

Because the Irish model is so similar to the Framework Directive, and has already been in operation for five years, it may give a more useful idea of what sort of age discrimination

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<sup>1</sup> Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation [irrespective of religion, disability, age or sexual orientation] ("*the Framework Directive*").

<sup>2</sup> The Employment Equality Act protects against discrimination in employment on any of nine grounds: gender, race including nationality, religion or belief, age, disability, sexual orientation, family status, marital status or membership of the Traveller community.

<sup>3</sup> There is also the Equal Status Act 2000, which prohibits discrimination in the provision of goods or services based on any of nine grounds including age.

<sup>4</sup> Belgium, UK, Germany, Netherlands, Sweden and Denmark (European Commission press-release on implementation of Article 13 Directives, Brussels, 19<sup>th</sup> July 2004.)

issues can be raised, and what the concept of age discrimination in the Framework Directive can mean, in practice.

In this paper I will review what the Framework Directive itself says about age discrimination, and briefly outline the main similarities and differences with the Irish legislation. For most of the paper, I will talk thematically about the sort of cases that have been brought so far in Ireland about age discrimination in employment, and how concepts very similar to those in the Directive have been applied in practice.

I will be speaking mainly about decisions<sup>5</sup> from the two specialised tribunals which deal with employment equality cases in Ireland; so far there are no relevant decisions of the higher Courts<sup>6</sup>. Since Ireland is a common-law jurisdiction, Irish lawyers attach great importance to the decisions of courts and tribunals as a method of supplementing, explaining and expanding the law set out by legislation. The two specialised tribunals are the Equality Tribunal<sup>7</sup>, which decides employment equality cases at first instance and issues legally binding decisions, and the Labour Court<sup>8</sup>, which hears appeals from the Equality Tribunal's decisions. (Appeals on points of equality law to the High and Supreme Courts are possible, but relatively rare.)

## **I. The Framework Directive and age discrimination**

### ***1.1 General provisions and concepts***

The Framework Directive provides, as its nickname suggests, a broad general framework for prohibiting discrimination in employment and occupation on any of four grounds: age, disability, religion or sexual orientation. It provides that "there shall be no direct or indirect discrimination whatsoever" on grounds of age (the term "age" itself is not defined.) The Directive also prohibits age-based harassment, which is deemed to be discrimination, or victimisation connected to complaints of age discrimination. The Directive must be implemented by Member States by 2 December 2003, although under article 18 of the Directive, a Member State may opt to wait a further three years (to 2 December 2006) before implementing the provisions concerning age discrimination, "in order to take account of particular conditions."

The Directive defines employment and occupation, in Article 3, in very broad terms, as including access to employment, recruitment, promotion, all types and levels of vocational training, working conditions, pay, dismissal, and membership of or involvement in employers' bodies, trade unions and other professional organisations. The recitals clarify that the scope of the Directive does not include social security and social protection schemes, but

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<sup>5</sup> Decisions of the Equality Tribunal (all those with a DEC- reference in this paper) are published on its website on [www.equalitytribunal.ie](http://www.equalitytribunal.ie). Decisions of the Labour Court are published on its website at [www.labourcourt.ie](http://www.labourcourt.ie). For an overview of recent decisions see Equality Tribunal, *Legal Review 2003* and Labour Court, *Annual Report 2003*, available on websites.

<sup>6</sup> With the single exception of the Supreme Court's judgment on the constitutionality of the Employment Equality Act, *In the matter of Article 26 of the Constitution and the Employment Equality Bill 1996*, 1997 ELR 132. This decision considered whether Irish constitutional guarantees of equality allowed the Employment Equality Act 1998 to contain some exceptions to statutory protection against age discrimination, and held that they did.

<sup>7</sup> The Equality Tribunal was formerly known as ODEI, or the Office of the Director of Equality Investigations. A hearing before the Tribunal is normally before an Equality Officer sitting alone. Equality Officers are not always qualified lawyers (to ensure accessibility for the general public), but are civil servants with guaranteed independence, specialised in this area.

<sup>8</sup> Despite the name, the Labour Court is not a court of law. Like the Equality Tribunal, it is a specialised quasi-judicial tribunal. Equality cases are heard by a three-person board composed of one workers' representative, one employers' representative and a chairperson. The Court has considerable, long-established standing in industrial relations matters, also deciding issues under a range of other legislation.

does include occupational pensions. Article 7 permits positive action measures on the age ground.

The recitals to the Directive refer to the EU Employment Guidelines' emphasis on supporting older workers in order to increase their participation in the labour force, as well as to fundamental rights and the *acquis* on gender equality. Protection against age discrimination is seen as "*an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce.*"<sup>9</sup>

The Directive defines direct and indirect age discrimination as follows:

Article 2.1.2(a):

*"Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the [ground of age]"*.

Article 2.1.2(b):

*" indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having.... a particular age.....at a particular disadvantage compared with other persons unless:*

(i) *that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.... "*

The Directive also defines age-based harassment as follows:

Article 2.3: *"Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to [the age ground] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States."*

Finally the Directive provides protection against victimisation (where a person is adversely treated from having made an equality complaint at work or otherwise tried to enforce their rights under the Directive (Article 11).

The Directive also clarifies that it is laying down minimum requirements, does not permit any reduction in existing protection for equal treatment (non-regression), and does not invalidate any national provisions which offer a higher level of protection for equality (Article 8).<sup>10</sup>

## ***1.2 The exceptions to the Directive***

There is at present a very wide range of age-based differences of treatment in the employment field across the EU. Some of these, such as protection of younger workers from exploitation, are generally uncontroversial. Others, such as mandatory retirement ages and pensionable ages, raise considerable financial and economic issues.

The Framework Directive provides a number of relevant exclusions, which can be grouped into three types. There are some ***broad general*** exclusions which apply to all four grounds. There are a few exclusions ***specific to the age ground***. Thirdly, there is also an option for Member States to allow ***justification for direct age discrimination***, in some circumstances. (This is unusual, and does not apply to the other grounds protected by the Framework Directive.)

<sup>9</sup> Recitals 8, 25.

<sup>10</sup> See also recital 28.

General exclusions for all four grounds

- *Positive action* (Article 7.1) (Recital 26 notes that this would include organisations of persons from any of the four protected grounds, whose main object was to promote their special needs)
- *Genuine and determining occupational requirements* (stated to arise in very limited circumstances, where the objective is legitimate and the requirement is proportionate) (Article 4.1, Recital 23)
- Measures laid down by law which, in a democratic society, are necessary for *public security, maintenance of public order, crime prevention, health protection or protection of others' rights or freedoms* (Article 2.5)
- *Not competent and available*: The Directive “does not require the recruitment, promotion, maintenance in employment, or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned, or to undergo the relevant training”...(Recital 17)
- In particular, *armed forces, police, prison and emergency services* are not required to recruit, or maintain in employment, persons who do not have the required capacity to carry out their range of functions, having regard to legitimate objectives of preserving operational capacity (Recital 18)

Specific exclusions for the age ground

- The Directive is “without prejudice to national provisions laying down *retirement ages*” (Recital 14)
- Member States may opt not to apply the Directive to all or part of their *armed forces* as concerns the age and disability grounds, to safeguard combat effectiveness (Art. 3.4, Recital 19)
- Member States may optionally allow *occupational security schemes* to fix ages for admission or entitlement to retirement or invalidity benefits (including fixing different ages for employees or groups of employees), or to use age criteria in actuarial calculations in such schemes, provided that this does not result in sex discrimination, (Art. 6.2)

Justification for direct discrimination

Article 6.1, which is also specific to the age ground, provides that:

*“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.*

*Such differences of treatment may include, among others:*

- (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.”*

It is unusual to allow justification for direct, as distinct from indirect, discrimination. This was probably necessary because of the wide range of practices in different EU Member States which differentiate on grounds of age, and which would have been impossible to treat in detail in a Community measure.

Consistent with the framework approach of the Directive, this provision concentrates instead on establishing parameters to ensure that permitted differences are consistent with the broad purpose behind the Directive. It uses similar provisions to the existing Community law regulating indirect discrimination. Recital 25, having stated that “*The prohibition of age discrimination is an essential part of meeting in the aims set out [for Member States’ employment policies] in the Employment Guidelines*”, goes on to add that: “*However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination, which must be prohibited.*”

In practice, the full meaning of this Article will have to be determined by the European Court of Justice. The Court’s caselaw on the legitimacy of Member State policy objectives as justification for indirect gender discrimination in employment provides some indication of its likely approach <sup>11</sup>.

## **II. Irish legislation on age discrimination**

A brief overview, then, of the Irish legislation prohibiting age discrimination, and of the similarities and differences at present with the Directive.

### ***II.1 General provisions and concepts***

The Employment Equality Act 1998 came into force in October 1999. It prohibited discrimination based on any of nine protected grounds (gender, race, religion, age, disability, sexual orientation, membership of the Traveller community, family status or marital status.) The Equality Act 2004 came into effect in July 2004. It made some changes to bring the 1998 Act into line with the requirements of the Framework Directive.

The 1998 Act defined “employment” broadly, as in the Framework Directive. There were two exceptions: occupational pensions, which were specifically excluded <sup>12</sup>, and self-employment, which was added under the 1004 Equality Act.

The 1998 Act originally protected only those aged between 18 and 65 (65 is the most usual retirement age in Ireland.) The 2004 Act changed this: it removed the upper limit altogether, and the lower limit is now 16 (the age up to which everyone is required to attend secondary school)

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<sup>11</sup> See for example *Kutz-Bauer v Freie und Hansestadt Hamburg*, judgment of 20 March 2003, C-187/00, and C-167/97 *Seymour-Smith and Perez*. In both cases it should be noted that while the Court set out criteria for judging whether the government policy complied with Community law, it remitted the issue to the national court for decision. *Kutz-Bauer* is of particular interest as it concerns differences of treatment based on age as well as sex. The complainant challenged a public service collective agreement which offered part-time work for older employees up to pensionable age. Since pensionable age differed as between men and women, the female complainant could only avail of the scheme up to 60, but could have continued until 65 had she been male. The respondent argued that the scheme was justified because it aimed to provide a tapered transition from work to retirement for older workers while freeing up posts for younger workers, and to avoid duplication between pensions and income.

<sup>12</sup> The Pensions Acts were amended in April 2004 by another Act (the Social Welfare (Miscellaneous Provisions) Act 2004) to protect against age discrimination and related matters, within occupational pensions. However, the Acts contain some broad exceptions for certain age-based differences in occupational pensions, reflecting those allowed by the Directive itself. No cases have been decided yet in this area.

The 1998 Act prohibited direct or indirect discrimination in all stages of employment or vocational training, from advertisement of post to dismissal, including pay and working conditions. It also prohibited harassment based on age, and victimisation. Broadly speaking, these concepts were defined on very similar lines to the concepts in the Framework Directive.

The 1998 Act defined *direct discrimination* on the age ground almost identically to the Framework Directive, as occurring where one person is treated less favourably than another is, has been or would be treated, on the ground that they are of different ages. (sections 6(1), 28(1)e and 28(3).)

The original definition of *indirect discrimination* (section 31) was somewhat different to that in the Framework Directive, for example in allowing justification on the lower standard of where “reasonable in the circumstances of the case”. The 2004 Act replaced this with a definition almost identical to that in the Directive. *Harassment* of an employee by reference to their age, whether by an employer, employee or a work contact, was also prohibited under the 1998 Act (s. 32.) The original definition has been rewritten under the 2004 Act to match the exact terms of the Directive, but the concepts seem substantially the same. Irish law features a sophisticated caselaw on harassment as discrimination, going back some thirty years. Where one employee at any level harasses another, the employer is legally liable unless it can show that it took prompt and active measures to prevent the harassment recurring, as soon as it was aware of the conduct.<sup>13</sup>

There is a statutory entitlement to *equal pay* without discrimination based on age (s. 29) excluding occupational pensions. There is also a statutory equality clause entitling employees to equal treatment at work with employees of different ages (s. 30(1)).

## ***II.2 The exceptions under Irish legislation***

The 1998 Act provided numerous detailed exceptions to the overall principle that age discrimination in employment is prohibited. The most important exclusions were:

- differing compulsory retirement ages
- persons aged under 18, or 65 (normal retirement age) and over
- persons no longer fully competent to undertake the duties of the position
- maximum ages for recruitment which relate to expected training requirements, or the need for a minimum effective period before retirement age
- where “clear actuarial or other evidence” is shown that significantly increased costs would otherwise result
- Licenses to drive planes, trains and ships
- Defence, prison and security forces
- Seniority-related pay or working conditions

The 2004 Act changed these to fit more closely with the terms of the Directive. The main exclusions are now:

- Persons aged under compulsory school age (presently 16)
- Compliance with two laws protecting young persons in employment
- Setting a minimum recruitment age (not exceeding 18)
- Setting a maximum recruitment age which takes account of cost or time needed to train the person into the job, or the need for a minimum effective period before retirement age

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<sup>13</sup> See the statutory Code of Practice on harassment, SI no 78 of 2002. The 1998 Act provides that this Code may be taken into account in deciding legal proceedings.

- Differences in remuneration or conditions of employment based on relative seniority or length of service
- Genuine and determining occupational requirements
- Compliance with various laws restricting the age for various public transport licences (air traffic controllers, commercial pilots, train or bus drivers, lorries, etc)
- All employment in Defence Forces: aspects of employment in police, prison or emergency forces
- Access to certain jobs within private households
- Vocational training: preferential offers of places to mature students

Other exemptions relating to mandatory retirement and to age-based remuneration are discussed below.

### III. The Irish experience: thematic issues in age discrimination

#### III.1 *The volume and scope of age discrimination claims*

Age discrimination is often seen as less significant in practice than discrimination based on other grounds such as race or disability. In fact, on our experience to date, age discrimination can be expected to generate a very significant volume of cases. In the period 2000-2003, 17% of employment discrimination claims referred to the Equality Tribunal have been on the age ground, and this proportion has stayed fairly constant. (Over half the complaints were of gender discrimination, but age was in equal place with race and disability as three grounds which accounted for the vast majority of other complaints.)<sup>14</sup>

Age discrimination is usually understood as targeted particularly against older people. The majority of decided cases so far have concerned people aged 40-60. However, there have also been a significant number of claims of discrimination against younger workers. For example, the first Irish decision on age-based harassment concerned a young female manager who was consistently ridiculed before other staff by an older male colleague as a “young, fooling girl”.

The claims covered the full range of employment, from advertising job vacancies to dismissal and severance packages, as well as vocational training and professional bodies. It is clear therefore that age discrimination cases under the Directive might be expected to be quite diverse and to involve all stages and forms of employment. However, in Ireland there has been a cluster of cases around two particular areas: access to employment and selection for promotion.

The number of age discrimination cases is perhaps not surprising, when we consider that European Community law already has a substantial hidden caselaw on age discrimination. The first sex equality case referred to the European Court of Justice under the gender ground, *Defrenne v Belgian State*<sup>15</sup> was also an age discrimination case, as it effectively arose from Sabena’s requirement that female employees could not work as cabin crew after the age of 40. And of course, many subsequent sex discrimination cases have also concerned age restrictions

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<sup>14</sup> ODEI/the equality tribunal, *Annual Reports, 2000-2003*. (The figures quoted are for claims referred on a *single* ground. A significant number of other claims are referred on *multiple* grounds: no breakdown of grounds is available for these, but a substantial number would still involve age.)

<sup>15</sup> *Defrenne v Belgian State, “Defrenne I”*, Case 80/70. The complainant argued unsuccessfully under Article 119 ECT that the retirement pension she received after compulsory retirement did not constitute equal pay with an acting male air crew member, who was not obliged to retire at 40. (The Equal Treatment Directive had not yet been passed at this stage.)

which applied differently between men and women.<sup>16</sup> One can imagine that there are many more age-based restrictions which do not impact differently between men and women, but could still amount to age discrimination.

### **III.2 Advertising and admission**

The first decision under the 1998 Act, *Equality Authority v Ryanair*, challenged an advertisement for a “young and dynamic” executive. The advertisement was found to be clearly discriminatory on the age ground, despite the respondent’s argument that it really meant “young at heart”, and did not mean to refer to chronological age. The Equality Officer observed that both in its dictionary and commonsense meaning, “young” did refer to a chronological age group and would reasonably be understood in practice as excluding applicants who were middle aged or old. He noted that in fact none of the 28 candidates who stated their age was aged over 40. He did not find the company’s interview and selection procedures to be consistent with their stated commitment to equal opportunities policies. In his view the ad “constituted clear discrimination” on the age ground, contrary to sections 6 and 10(1) of the 1998 Act. “*In my view overt and public discrimination, which has occurred in this case by way of discriminatory advertising, must be countered in the strongest possible way.*”

More recently *Clifford v Aosdana* successfully challenged the requirement for an national honorific professional body of distinguished artists, that candidates must be aged over 30 years. This was also held to discriminate directly based on age.

As in discrimination law generally, the main objection made to age-based discrimination is that it tends to be based on generalised assumptions or stereotypes (such as that people over 40 are less dynamic, people over 60 are no longer physically fit, that people over 50 won’t learn new ideas ...). It is argued either that these assumptions may be true for some of the age group but are not fair as concerns an individual member: or, perhaps, that they are not true even of the age group as a whole; or that they are true to an extent, but the differences in treatment are out of proportion. Opponents of age-based differences also argue that age-based assumptions are significantly more damaging to the individual and to society as a whole than has been realised, and that existing cost-benefit analysis ignores the hidden economic costs of age differentiation. (The UK’s Employers’ Forum on Age published a report in 1998 estimating that age discrimination in employment costs the UK STG £26 billion per year in lost income tax revenue, economic productivity and tax revenue from spending<sup>17</sup>, and the most recent research in Ireland also expresses concern about the overall economic effects of disincentives to employment for older workers and of age discrimination in employment<sup>18</sup>.)

Defenders of age-based differences may argue that not all differences of treatment are based on assumptions, that many are imposed in support of other valid policy objectives, that underlying assumptions are generally true, or that they do not give a perfect picture but are the only feasible approach, that individual testing is impractical, or that it is not economically viable to work differently.

*Byrne v FAS* is a good example of a case involving discriminatory assumptions. The case found that a 48-year old woman was refused a vocational training place, and was told at interview that older students were less successful at technical drawing and had more conflict

<sup>16</sup> See for example *Marshall*, Case 152/84, *Worringham & Humphreys v Lloyds Bank*, *Burton v British Railways* *Roberts v Tate and Lyle*, *Beets-Proper*, *Barber*, *Moroni v Collo*, *Beune*, *van den Akker*, *Foster v British Gas PLC*

<sup>17</sup> Employers’ Forum on Age, “*The Cost of Ageism*”, 1998, quoted by Helen Meenan, *Age Discrimination in the UK*, *International Journal of Discrimination and the Law*, p. 240.

<sup>18</sup> National Economic and Social Forum, Ireland, *Labour Market Issues for Older Workers*, February 2003.



with family commitments. The Equality Officer observed that no objective evidence to support these comments had been produced, and the interviewer appeared merely to have applied a series of discriminatory assumptions in refusing her a place.<sup>19</sup>

### **III.3 The burden of proof in age discrimination cases**

Article 10(1) of the Framework Directive requires Member States to take the necessary measures, in accordance with their national judicial systems, to ensure a shift in the burden of proof when “*persons who consider themselves wronged because of the principle of equal treatment has not been applied to them, establish before a court or other competent authority facts from which it may be presumed that there has been direct or indirect discrimination*”<sup>20</sup>. This text is identical to the equivalent provision for gender discrimination cases in Directive 97/80/EC (the “Burden of Proof Directive”), which codified earlier decisions of the Court of Justice on the gender ground.

The Employment Equality Act 1998 was silent on the burden of proof in discrimination cases. However, it had already for many years been the practice of the specialised tribunals in Ireland to shift the burden of proof in discrimination cases concerning gender or marital status. In the absence of any provision to the contrary in the 1998 Act, this approach was therefore extended to the “new” grounds, including age<sup>21</sup>. The Equality Act 2004 clarified this by specifically providing for a shift in the burden of proof for all the protected grounds, using the same wording as the Framework Directive.

It is important to work out what a shift in the burden of proof means in practice. What sort of facts does a complainant need to establish before it “may be presumed that there has been direct or indirect discrimination”? Presumably they must be less onerous than those which would be required in a civil case where the burden of proof is not shifting. The Labour Court has said that the complainant “*must prove, on the balance of probabilities the primary facts on which they rely in seeking to raise the presumption of unlawful discrimination. It is only if those primary facts are regarded by the Court as being of sufficient significance to raise a presumption of discrimination that the onus shifts to the respondent to prove that there was no infringement of the principle of equal treatment.*”<sup>22</sup>

The “primary facts” were defined in an age discrimination case<sup>23</sup> as follows: “*It appears to me that the three key elements which need to be established by a complainant to show that a prima facie case exists are:*

- (i) *that s/he is covered by the relevant discriminatory ground(s)*
- (ii) *that s/he has been subjected to specific treatment and*
- (iii) *that this treatment is less favourable than the way someone who is not covered by the relevant discriminatory ground is, has been or would be treated.”*

In this particular case about vocational training, the complainant showed that she was a mature student with young children, and was significantly older than the others in her class. All students were required to work a placement in a restaurant as part of their course, but she was the only one who was asked to work a trial period in her placement before the restaurant accepted her. This amounted to less favourable treatment than other students. As a result, the Equality Officer held that she had established a prima facie case of discrimination, and that

<sup>19</sup> *Equality Authority v Ryanair*, DEC-E2000-014; *Clifford v Aosdana*, DEC-E2004-046; *Byrne v FAS*, DEC-E2002-045.

<sup>20</sup> Article 10(1) does not apply to criminal cases, and Recital 32 provides that Member States need not apply the rules on burden of proof to any proceedings where it is for the court or other competent body, not the plaintiff, to prove the facts of the case.

<sup>21</sup> For examples, see *Hughes v Aer Lingus*, DEC-E2002-049; *Flexo Computer Stationery v Coulter*, EED 0313.

<sup>22</sup> *Southern Health Board v Theresa Mitchell*, Labour Court, AEE/99/8. This principle has been extensively quoted and applied in age discrimination cases.

<sup>23</sup> *Minaguchi v Wineport Lakeshore Restaurant*, DEC-E2002-020

the burden of proof shifted to the respondent to prove on the balance of probabilities that the reasons for the difference of treatment were not discriminatory.

In several age discrimination cases<sup>24</sup>, Equality Officers have emphasised that the mere fact that the complainant and the successful candidate are of different ages will not be enough to shift the burden of proof to the respondent. However, referring to a similar decision of the High Court in a gender discrimination case<sup>25</sup>, they have held that the burden of proof may shift where the complainant is a different age *and* appears to be objectively better qualified, according to the job criteria fixed by the respondent. In such a situation the respondent may be required to prove that the difference of treatment is not discriminatory.<sup>26</sup>

### **III.4 Selection cases: general issues**

Some cases, like the *Ryanair* or *Clifford* cases mentioned above, essentially turn on whether an alleged statement or rule which expressly refers to age was made, and if so, why it should not be discriminatory. In practice, most discrimination cases are more complex because there is no express reference to age. Selection cases are a good example. Often, the complainant believes that they have been less favourably treated and believes that their age is the reason. The respondent denies this. There may be no clear evidence, for an outside observer, of why the decision was made in a particular way. These cases are much more difficult to decide, and the key question is often whether, under the burden of proof rules, it is correct to draw an inference that age discrimination is the reason unless the respondent can prove otherwise. I consider below what sort of factors have led the Irish tribunals to draw an inference of age discrimination.

Another issue is what may amount to indirect discrimination. It may be clearly discriminatory to advertise for a “young and dynamic” executive, as in *Ryanair*. But what if the ad had instead used just the word “dynamic”? What is the status of an advertisement for a “mature” candidate? Or for one with “five years post-qualification experience”? Or for a “recent graduate”? Is it indirectly discriminatory to turn down an applicant who is “overqualified”?

There is also an issue of whether particular qualities or skills may refer particularly to particular age groups. For example, does seeking qualifications in computer or information technology tend to privilege younger generations at the expense of older generations? Might this risk being indirectly discriminatory if the qualification was not reasonably related to the actual requirements of the job?

### **III.5 Selection and promotion**

The Labour Court has expressly stated that it is now unlawful to ask for candidates’ ages on job application forms. Discussions in the UK are now questioning whether employers should ask for a complete lifetime cv with dates, since this provides evidence of age: this issue hasn’t as yet been considered by the Irish tribunals, though I understand that it is considered age-discriminatory in the US.

Disputed selection cases<sup>27</sup> provide a good overview of the sort of factors which have been considered in Ireland to raise an inference of age discrimination.

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<sup>24</sup> *Margetts v Graham Anthony*, DEC-E2002-050, *Sheehan v DPP*, DEC-E2002-047, *McCormack v Dublin Port* DEC-E2002-046.

<sup>25</sup> *Davis v Dublin Institute of Technology*, High Court, Quirke J. unreported, 23 June 2000.

<sup>26</sup> *Margetts v Graham Anthony*, DEC-E2002-050

<sup>27</sup> See for example *Dept of Health v Gillen*, EDA0412; *Revenue Commissioners v O’Mahony & ors*, EDA033.

The Directive provides at recital 15 that “*The appreciation of facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with the rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means, including on the basis of statistical evidence.*”

A number of tests have been used in the Irish cases so far in considering whether to draw an inference of age discrimination. Generally it is a *combination* of factors which convinces the tribunal that an inference of discrimination is appropriate. The factors which have figured most strongly so far are:

- A marked statistical difference in success rates for different age groups in apparently similar circumstances<sup>28</sup>
- Evidence of a policy to prefer a particular age group<sup>29</sup>
- Lack of transparency, or unexplained procedural unfairnesses, *may* create an inference of discrimination<sup>30</sup>
- Mismatch between formal selection criteria and those apparently applied in practice may also create an inference of discrimination<sup>31</sup>
- A pattern of significant inconsistency with older candidates’ previous assessments<sup>32</sup>
- Discriminatory question asked at interview (see below)
- The presence of a single successful appointee who was in the same age group as the complainants does *not* disprove age discrimination, if that appointee is of exceptional ability compared to other successful appointees<sup>33</sup>

Conversely, the following elements have weighed against an inference or a conclusion of age discrimination:

- The selection criteria appear objective, and seem to have been honestly applied in practice<sup>34</sup>
- Statistics suggest that success rates are broadly similar for different age groups, in apparently similar circumstances<sup>35</sup>
- The employer tried to ensure that the interview board included a mix of ages<sup>36</sup>
- The fact that the respondent’s *overall policy* is not found discriminatory has been given limited weight in several decisions, but does not in itself disprove discrimination<sup>37</sup>.

Equality Officers and the Labour Court have frequently emphasised that their function here is not to substitute their own assessment of the job’s requirements for that of the employer, but to decide whether the selection board could reasonably have reached the decision it did<sup>38</sup>.

<sup>28</sup> *O’Mahony v Revenue Commissioners, Revenue Commissioners v O’Mahony, O’Byrne v Department of Public Enterprise, Madden, McCormack*

<sup>29</sup> *O’Byrne*

<sup>30</sup> *O’Byrne, Madden, An Employee v a Government Department, Sheehan*

<sup>31</sup> *O’Mahony v Revenue Commissioners*

<sup>32</sup> *O’Mahony v Revenue Commissioners*

<sup>33</sup> *O’Mahony v Revenue Commissioners*

<sup>34</sup> *Complainant v Department of Foreign Affairs, Sheehan, McCormack*

<sup>35</sup> *Hughes, Byrne v FAS, McCormack*

<sup>36</sup> *O’Mahony v Revenue Commissioners*

<sup>37</sup> *Hughes v Aer Lingus, Byrne v FAS, McCormack*

<sup>38</sup> *Margetts, Sheehan*, quoting *Dublin Institute of Technology and a Worker*, Labour Court, DEE994, where the Labour Court said “*It is not the responsibility of the Equality Officer or of this court to decide who is the most meritorious candidate for a position. The function of the Court is to determine whether the [protected ground] influenced the decision of the [interview] Board.*” See also *McCormack, An Employee v a Government Department*.

This could be described as a “rational choice” standard of scrutiny. In *Sheehan*, for example, where the complainant was more experienced than the younger appointee, the Equality Officer nevertheless held that the appointment was not discriminatory, because the successful appointee did have significant relevant experience and appeared from the interview board’s evidence to have given more impressive answers at interview.

Age-discriminatory statements or questions during selection are treated as unlawful discrimination. They will ground an award of compensation for breach of rights, even where the selection itself is held not to be discriminatory. *Revenue Commissioners v O’Mahony* went further in treating a comment to one candidate as evidence of bias permeating the entire selection. The case concerned a promotional competition for customs officials. Four candidates aged over 50 claimed that they had been treated less favourably than younger candidates of equivalent merit. The Labour Court found statistical evidence suggesting age discrimination, but also relied on a question put to one candidate as to “why he was seeking promotion at this stage of his career”. The Court accepted that the comment related directly to his age, and held that “*apart from the question being offensive and discriminatory in the case of the person to whom it was put, it also indicates that, probably subconsciously, the age of the candidates had become a matter of some relevance in the selection process ... this is evidence of relevance to the whole case, and not just to the [complainant concerned].*”

### **III.6 Selection and promotion**

Another question which has arisen is how large a difference of age must be, before age discrimination can be inferred from a difference in treatment. In one case, *Perry v Garda Commissioner*<sup>39</sup>, the comparison was between hypothetical candidates, born two days apart. The case concerned a voluntary early retirement scheme: it was alleged that its design incentivised early retirement most strongly for candidates aged under 60, and thus discriminated based on age. The complainant, who was 64, argued that the severance package payable to her was substantially smaller than that payable to her comparator, who was 59. The respondent argued that the differences were not due to age, but were designed to compensate the younger employee for losing more years’ paid employment.

The Equality Officer investigated this claim by considering the hypothetical example of two workers taking early retirement, with identical service records, but aged respectively 60 plus one day, and 60 minus one day. It transpired that the scheme would result in the younger worker gaining almost IR £6,000 more, which clearly was not proportionate to the two-day difference between their loss of future earnings. The Equality Officer concluded that the scheme was discriminatory, (though it was not unlawful at the time, due to transitional provisions allowing age-related pay to continue until three years after the Act came into effect.)

Conversely, in another case, *Freeman v Superquinn*, the Labour Court found that a three-year difference between candidates was not sufficient (combined with unexplained procedural unfairnesses) to suggest age discrimination, while in *Reynolds v Limerick Co Council* the Court held that an eight-year age gap was large enough<sup>40</sup>.

A couple of indirect age discrimination cases have concerned candidates rejected as “overqualified.”<sup>41</sup> On both occasions the older candidate fulfilled all the stated requirements for the post, and was expressly rejected as overqualified for the position. In one of the cases the Equality Officer accepted (based on the interviewers’ notes) that the true reason for rejection was that the candidate was seen as having a very strong personality, which would make it difficult for them to take instructions. (It was also helpful to the respondent’s case that

<sup>39</sup> *Perry v Garda Commissioner*, DEC-E2001-029

<sup>40</sup> *Superquinn v Freeman*, DEE0211; *Limerick Co Council v Reynolds*, EDA048.

<sup>41</sup> *Hughes v Aer Lingus* DEC-E2002-049, *Noonan v Accountancy Connections*, DEC-E2004-042.

on the statistical evidence, candidates of the complainant's age were disproportionately likely to be selected for interview, and as likely to be successful as younger candidates.) In the other case the complainant had been rejected as overqualified without an interview, the respondent explaining that although the advertisement referred to a "senior" post, it really wanted someone with only 2-3 years' post-qualification experience. The complainant (who had twenty years' experience) conceded that an overqualified candidate might lack motivation, but argued that this should be tested at interview rather than assumed. Here, indirect age discrimination was found.

### **III.7 Age-related pay**

Age-related pay became unlawful under the 1998 Employment Equality Act, although it allowed a three-year transition period (to October 2002) within which such practices were to be removed.

Under Irish law, workers who were made redundant became entitled to a lump sum payment calculated at a particular rate per year of service. The rate was more generous for service after the age of 40. This difference was abolished in 2003 and the Redundancy Payments Acts were amended to level up so that all service was now calculated at the higher rate previously reserved for over-40s. However, an exemption remains whereby a person who has attained "normal retirement age" in the post, is not eligible for any redundancy payments.

Following the decision in *Perry* (above), an amendment in the Equality Act 2004 now allows an employer to fix differential rates of severance payment, based on the employee's distance from compulsory retirement age. There are also specific exceptions for differences based on seniority in relation to remuneration or to conditions of employment, though in *McGarr v Dept of Finance*<sup>42</sup> the Equality Officer held that this exception must be strictly interpreted and could not stretch to permitting seniority requirements for *promotion*, particularly ones which were not objectively justified.

Market forces were accepted as sufficiently explaining the decision to pay a younger female solicitor more than an older male counterpart doing like work, in *Glen v Ulster Bank*<sup>43</sup>. It was clear that the respondent had been compelled to recruit, as a matter of urgency, an experienced specialist who was familiar with its own procedures, to cover a particular project; such qualifications were in high demand, and realistically, the respondent had no choice but to pay the complainant the price she specified.

### **III.9 Conditions of employment and harassment**

In *A Named Female Complainant v a Company*<sup>44</sup>, the Equality Officer found that a young female manager newly recruited to a small company had been harassed on the age ground. She held that the complainant had been systematically belittled and humiliated before other staff by an older male manager who could not accept her role there. He was consistently hostile and aggressive to her, refused to co-operate with her and intervened in her designated responsibilities. A typical public comment was that the female manager was "only a young fooling girl". The complainant was so upset by his behaviour, and by the absence of any real support from the employer, that she eventually resigned. The Equality Officer held that such conduct constituted age-based harassment under section 32, as well as gender-based harassment under section 23, and awarded her €6,500 in compensation.

This is an interesting feature of the 1998 Act, as experience in some other jurisdictions suggests that harassment is a common aspect of age discrimination in the workplace. Typical examples include ridiculing older employees to their face or to other staff as incompetent, out

<sup>42</sup> *McGarr v Dept of Finance*, DEC-E2003-036.

<sup>43</sup> *Glen v Ulster Bank*, DEC-E2004-020.

<sup>44</sup> *A Named Female Complainant v a Company*, DEC-E2002-014.

of touch or lacking in dynamism, giving them particularly burdensome work, or dropping heavy hints that they should hand over their jobs to younger candidates. In the US, where harassment is also considered as a form of discrimination, an example is *Clancy v Preston Trucking Company*<sup>45</sup>. Rose Clancy, aged 55, had been employed as a full-time clerical worker for 21 years when she was sacked and replaced by a 28-year old. Her supervisor, she alleged, engaged in a concerted campaign to force her resignation, including moving her to a night shift without her agreement, and telling other employees that he “wanted new blood”, that she was “older than dirt”, “had been here since Christ”, that he would “do everything he could to get rid of her” and that he wanted someone “younger and more vibrant”.

### **III.9 Dismissal and retirement**

A striking direct discrimination case was *A Firm of Solicitors v a Worker*<sup>46</sup>, where the Labour Court held that an experienced legal secretary had been discriminated against on the age ground by her employer. The firm was found to have dismissed her with the stated intention of taking on a “young girl” to do paralegal and secretarial work. There was no suggestion that the complainant’s work was unsatisfactory. Although the complainant had experience of paralegal work, she was not considered for such a post. The Court was satisfied that there was a causal connection between her age and her dismissal: the firm simply wanted an employee significantly younger than the complainant. It awarded €6,000 compensation.

Conversely, in *Flexo Computer Stationery v Coulter*<sup>47</sup>, the complainant claimed age discrimination when he was selected for redundancy in preference to five younger co-workers. The facts were heavily disputed, and the Labour Court concluded that the complainant had not established his claim that the respondent told him he was being selected because he was the oldest. It held that the selection for redundancy was “unfair and contrary to good practice” in being apparently based on a previous incident (details supplied to the Court) which the employer had not considered at the time to warrant any disciplinary action. However, such unfairness did not, in isolation, necessarily imply discrimination, and the Court saw no reason, on the totality of the evidence before it, to draw an inference of age discrimination.

Mandatory retirement is one of the more complicated issues under the Employment Equality Acts. In Ireland, the social security pensionable age does not differentiate between women and men, and the normal pensionable age accordingly is 65 for both sexes. However, there is no law fixing any general mandatory retirement age. For most people, retirement age is either expressly fixed by their contract of employment, or implied from custom and practice in the workplace. Employees who have reached “normal retiring age” for that employment cannot claim unfair dismissal, if obliged to retire.

The Acts are silent on the general issue of mandatory retirement age, although they do state that it is not discriminatory to provide different retirement ages for different groups of employees, or to offer a fixed term contract to a person aged over normal mandatory retirement age.

The recent Public Service Superannuation Bill 2004 provides that with some exceptions, recruits to the public service after April 2004 “shall not be obliged to retire on age grounds”, although it seems from the explanatory memorandum that they could be compulsorily retired if not fit to continue work.

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<sup>45</sup> 967 F. Supp. 806 (D. Del. 1997). Dunaway, 04.1998, p. 9/10. The case was ultimately settled.

<sup>46</sup> *A Firm of Solicitors v a Worker*, EED011

<sup>47</sup> *Flexo Computer Stationery v Coulter*, EED 0313

