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Prohibition of Discrimination on Grounds of Age

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Introduction

Discrimination on grounds of age differs from other forms of discrimination, such as those based on race or sex. Race and sex constitute an individual’s inherent and (generally) unchangeable characteristics, and discrimination on those grounds harms an entire defined group of people. The presence of these criteria immediately gives rise to suspicion. Our age, however, varies as we make our way through life, and any one individual may be subject to discrimination based on age at certain times in their life, but not at others. Moreover, each age is relative. An individual aged 40 is young compared with someone aged 80, but older in comparison with a child of ten. So it is not always easy to identify discrimination based on age, and it is possible for different groups to suffer such discrimination by the application of various criteria. In addition, the group affected is not always a clearly defined one.

This can be illustrated with a few examples of criteria that might show up the existence of a possible discrimination on grounds of age. One such criterion might be a reference to a certain age (for instance “65 and over”) or a certain age range (such as “between 35 and 45”); a second might be a reference to a particular group (“the young”, “grown-ups” or “the elderly”); a third might be a biological characteristic (“women going through the menopause”); and a fourth might be the use of terms suggesting membership of a particular group (“dynamic” or “with extensive experience”). These examples also serve to show that discrimination based on age can be in either a direct or indirect form.

Community and international law

Discrimination on grounds of age has been forbidden under community law since the entry into force on 2 December 2003 of the Framework Directive on equal treatment in employment and occupation (2000/78/EC). However, member states have an additional period of three years available to them for transposing those provisions that concern discrimination based on age (and disability). The preamble to Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states also contains a reference to the prohibition of discrimination on account of age (along with other grounds). In addition, the Charter of Fundamental Rights of the European Union (which has been only soft law up until now) also contains passages on the prohibition of discrimination on grounds of age and the recognition of the rights of the elderly (in particular in its Articles 21 and 25).

Turning to international law, it is worth mentioning the International Covenant of Civil and Political Rights, and especially its Art. 26, which, although it does not explicitly ban discrimination based on age, does contain an exemplary list of prohibited forms of discrimination. This article has been invoked several times before the Dutch courts in actions challenging discrimination on grounds of age going back to the 1960s. Art. 1 of the Netherlands' Constitution has also been invoked in the same way.

The Framework Directive on equal treatment

The Framework Directive, 2000/78/EC, places an obligation on the member states to adopt the necessary provisions to ensure that national law complies with it.¹ Some of the things the Directive does are to define the concept of discrimination, its own scope, those exceptions that justify a difference of treatment based on the grounds targeted by the Directive, burden of proof, protection against victimisation and sanctions. Most of the general provisions are the same for all the various forms of discrimination outlawed by the Directive (discrimination based on religion or belief, disability, age or sexual orientation).

The Directive's main areas of concern are access to employment, vocational training, employment and working conditions (including the conditions governing dismissals and remuneration) and membership of organisations of workers or employers (Art. 3). The explicit exclusions from the Directive's scope include social-security and social-protection schemes as well as national provisions on retirement age (Preamble and Art. 6). Member states retain the option of not applying those provisions of the Directive that deal with age (and disabilities) to their armed forces (preamble and Art. 3). In addition, the Directive does not affect measures laid down by national law which have to do with public security, defence and public order (Art. 2).

A difference of treatment based on age (or other grounds) is not prohibited if it is justified by reason of the nature of a particular occupational activity (Art. 4). It is thus possible for member states to maintain or adopt measures intended to prevent or compensate for any disadvantages linked to age (or other grounds) – in other words to pursue a policy of positive action (Art. 7).

The definition of the principle of equal treatment makes a distinction between direct discrimination, indirect discrimination, harassment and instructions to discriminate (Art. 2). These definitions also apply to discrimination based on age. However, the distinction between direct discrimination and indirect discrimination on grounds of age has no impact on the possible arguments that may be put forward to justify a difference of treatment, given that the possibilities for justifying a difference of treatment based on age constitute an "open" system". By way of contrast to the prohibition of discrimination based, for example, on race (dealt with especially in Directive 2000/43/EC) or sex (which is the subject, *inter alia*, of Directives

¹ Sources of further information include: C. O'Conneide, *Age discrimination*, Luxembourg, European Commission, April 2005; European Commission, *Equality and non-discrimination, Annual report 2005*, Luxembourg, European Commission, April 2005; European Commission, *Critical review of academic literature relating to the EU directives to combat discrimination*, Luxembourg, European Commission, July 2004; as well as the bibliographies contained in each of these reports.

76/207/EEC et 2002/73/EC), a difference of treatment based directly on age is not prohibited if it is possible for it to be objectively and reasonably justified. This justification must be in the form of a legitimate aim, including legitimate objectives concerned with employment, the labour market and vocational training, and the means for achieving that aim must be appropriate and necessary (Art. 6). The test reflects the one developed by the European Court of Justice in the context of the concept of indirect discrimination based on sex.²

The Directive goes on to mention a few possible specific exceptions justifying differences based on age for certain groups in the context of access to employment or vocational training, minimum age conditions, professional experience or seniority or certain advantages linked to employment. It also makes it possible to fix age limits for recruitment and for admission or entitlement to retirement or invalidity benefits (Art. 6).

The Framework Directive only contains minimum requirements and forbids member states from reducing their existing level of protection against discrimination (Art. 8). The Directive's general provisions regarding the defence of rights (Art. 9), burden of proof (Art. 10), protection and victimisation (Art. 11), dissemination of information (Art. 12), social dialogue and dialogue with non-governmental organisations (Articles 13 et 14) must also be put into effect. The same holds true for the measures that the member states are required to take and for sanctions (Articles 16, 17 and 18).

Transposition of the Framework Directive in the Netherlands as regards the prohibition of discrimination on grounds of age

It is only recently that the majority of member states have adopted specific legislation banning discrimination on grounds of age.³ The Netherlands is a typical case. A law dealing with equal treatment from the age point of view came into force on 1 May 2004.⁴ The purpose of this law is to transpose those provisions of Directive 2000/78/EC that relate to prohibiting age discrimination.

This law's scope (like that of the Directive) is limited to employment, occupation and vocational training. The Dutch government did not consider it opportune to broaden the scope to take in goods and services, education and housing, as the second house of the national parliament would have liked. The main reasons put forward for this were the complexity of the subject and the desire to establish a clearer picture of the law's practical effects in the field of employment.

Differences of treatment as a function of age are far from being a rarity in Dutch laws and regulations and also in collective agreements, the rules governing retirement, pensions, and so on. It is often the case that the purpose of this sort of difference is to

² cf. (especially) the *Bilka* judgement, case C-170/84.

³ cf. (for example) www.age-platform.org and http://europa.eu.int/comm/employment_social/fundamental_rights.

⁴ *Wet gelijke behandeling op grond van leeftijd*, (law on the equality of treatment on grounds of age), Stb. 2004, 30. Its provisions dealing with dismissals before the age of 65 and the special case of the armed forces are to come into force on 2 December 2006 and 1 January 2008 (or possibly later) respectively.

protect certain age groups or to offer them a better chance of joining or staying on the employment market.

For a long, long time, differences of treatment as a function of age were considered matter-of-course and were widely accepted. In recent years, such differences of treatment have become subject to more debate, and the stereotype perceptions of certain groups have now been called into question. One of these, for example, is that it is no longer taken for granted that there are particular functions that cannot be performed beyond a given age, and such matters have also been the subject of litigation.⁵

The Dutch law is to be considered as a relatively faithful transposition of the provisions of the Directive, although there are certain differences that are worth mentioning. One of these is that the Dutch law prohibits “differences” based on age, avoiding use of the word “discrimination”. A difference based on age can be either direct or indirect. A clear-cut example of an indirect difference is the seniority criterion for granting salary-earners certain rights; this is a criterion that is often applied in the Netherlands and generally tends to favour older salary-earners. It is a frequent practice for employees’ remuneration to be increased periodically in relation to their number of years of experience.

The law not only prohibits both direct and indirect discrimination based on age, but also instructions to discriminate and harassment – and in that respect it adheres closely to the Directive. One practical example of this is that employers would be considered to have practised discrimination if they had instructed temporary-employment agencies only to select persons aged less than 30 for a particular function, without that criterion being objectively justified. If such an agency were to refuse to abide by such a request and to suffer damage as a result, the employer would be civilly liable. Harassment based on age is defined in the same way as in the Directive, and there are no available justifications for it.

The Dutch law does leave open the possibility of justifying a difference based on age for certain groups in the field of employment policies in order to facilitate their participation in the labour market, provided any such measure is based on a legal provision. One example of this is that Dutch law allows for specific measures for young employees aged less than 23.

The Dutch law prohibiting discrimination based on age accepts the dismissal of an employee who has reached retirement age (65) as being justified.⁶ It further makes it possible to justify a difference of treatment based on age in relation to retirement and disability benefits. Like the Directive, the Dutch law also provides for a possible justification for a difference of treatment based on age where this is objectively and

⁵ cf. (for example) judgements by the Amsterdam court of 28 February 2002, *LJN AD9696* (concerning an unjustified age limit of 70 for a referee), by the *Hoge Raad* (supreme court) of 1 November 2002, *LJN AE7356* (concerning a justified age limit of 65 for a consultant) and by the *Hoge Raad* of 8 October 2004, *LJN AP0424* (concerning a justified age limit of 56 for airline pilots). These judgements are published (in Dutch) on the internet at: www.rechtspraak.nl, but date from before the entry into force of the law on equal treatment on grounds of age.

⁶ This sort of exception is not explicitly provided for in the operative part of the directive, but it is mentioned in the recitals (number 14).

reasonably justified in accordance with the criteria laid down in the Directive (Art. 6). It does not, however, contain any provisions relating to positive action.

The Dutch government has drawn up a list of the differences based on age contained in laws and regulations and has thereby complied with a duty imposed by Art. 16 of the Directive. The government holds the view that these differences based on age are objectively justified. The point must, nonetheless, be made that the government has axiomatically assumed that the objectives pursued are legitimate and has not thoroughly examined the question as to whether the means for attaining them are appropriate and necessary (the principle of proportionality), as required by the Directive (Art. 6). So it still remains to be seen at sometime in future whether all those differences based on age that persist in Dutch laws and regulations will be considered as being in conformity or not with the provisions of Directive 2000/78/EC dealing with discrimination based on age.

Case law

Since the law came into force on 1 May 2004, the Dutch Equal Treatment Commission or “CGB” (a body charged, inter alia, with making sure the principle of equal treatment really does work in practice and whose remit includes issuing opinions on this principle) has published 84 opinions concerning differences based on age.⁷ In the course of the 2004 calendar year, it published a total of 179 opinions dealing with the prohibition of discrimination on various grounds (race and nationality, sex, religion or beliefs, sexual orientation, part-time work, nature of contracts, disabilities and age). Of these, 18 dealt with differences of treatment on grounds of age. Taking the situation from the start of 2005 until the beginning of October, more than a third of the 180 opinions published have dealt with a difference of treatment on grounds of age. It is thus quite clear that the number of employees seeking an opinion on the application of the law prohibiting differences based on age has increased spectacularly. It happens frequently that the Equal Treatment Commission concludes that a form of discrimination banned by the law has indeed occurred. Some of its opinions have attracted the attention of the national media and have been at the centre of controversy. One example of these is its view that granting an increased number of paid days’ leave to employees above a given age (typically 45 or 50) is contrary to the law.⁸ The refusal to allow a 59-year-old unemployed man to attend a teaching course was also found to constitute discrimination based on age as prohibited by the law.⁹

Several of the Dutch judgements handed down by the Supreme Court deal with cases of difference of treatment on grounds of age that occurred before the law transposing the Directive came into force.¹⁰ The Supreme Court often concludes that differences of treatment based on age are objectively justified. The test it applies is less strict than the one described in Art. 6 of the Framework Directive.

⁷ cf. www.cgb.nl and www.age-platform.org.

⁸ Opinions 2004-118, 2004-150.

⁹ Opinions 2005-172 and 173.

¹⁰ cf. (for example) *Hoge Raad* of 11 November 2002, *LJN* AE7356 and *Hoge Raad* of 8 October 2004, *LJN* AP0424.

Since 1 May 2004, several Dutch courts have been called on to apply the law on equal treatment on grounds of age. In these cases, the application of the test has been stricter.

Up until now the European Court of Justice has not yet published any judgement concerning discrimination based on age. However the Munich labour court (*Arbeitsgericht*) has submitted a number of questions to it for preliminary rulings regarding the conformity with community law (and especially Directives 99/79/EC and 2000/78/EC) of Germany's federal legislation, which permits without any limitation the conclusion of fixed-term employment contracts with workers aged over 52.¹¹ Advocate General Tizzano arrives at the conclusion that the general principle of non-discrimination and Art. 6 of the Directive 2000/78/EC would stand in the way of such provisions, since the means used are disproportionate, even if the objective pursued is legitimate.

A few conclusions

There are many forms of difference of treatment based on age, and these are becoming more and more evident and are increasingly a matter for debate. It is not only an issue of direct differences of treatment when an actual age or an age range is specifically mentioned, but also indirect differences, such as the criterion of seniority. Community law places a duty on the member states, the social partners, the employers and all those who have a say in determining the conditions of work and employment to perform a review of differences based on age. This involves combating stereotypes relating to various age groups.

The test that ought to be applied according to Art. 6 of Directive 2000/78/EC is a strict one. It is therefore important that the reasons leading to differentiations on grounds of age be clear and explicit.

In the literature, attention has been drawn to the problem of multiple discriminations. One example of this is that an age limit of 30 for entering a particular job might constitute direct discrimination on grounds of age, but it might also represent indirect discrimination based on sex, if such a measure were, for instance, to work to the detriment of young women who had left the labour market temporarily on account of family responsibilities. That sort of criterion might also militate against people with disabilities, insofar as their training might take longer, which would mean that they would not enter the labour market until older. Up until the present, there is no clear sign that such problems have emerged in the opinions issued by the Dutch Equal Treatment Commission or in the judgements handed down by Dutch courts.

It is going to be necessary to wait and see how case law on discrimination on grounds of age develops. It is still much too early to draw conclusions, even just at a national level. It is also going to be necessary to wait for national courts to submit questions for preliminary rulings to the European Court of Justice and to digest its case law to have greater clarity as regards the interpretation of the community provisions.

¹¹ Case C-144/04.

There are, however, several questions that have already cropped up: how is inequality of treatment to be established when the disadvantaged group has not been clearly defined? Which group is to be taken as the reference? What objectives might be considered as legitimate on top of those mentioned in the Directive? How is the test to be applied in practice, especially the principle of proportionality? What treatment is to be applied if a provision or a practice is found to be contrary to community law? How are the non-regression clauses to be interpreted?

It seems more that likely that there is still going to be a plethora of questions regarding discrimination on grounds of age.