

# Age Discrimination

Ass.Prof. PD Dr. Christa Tobler, LL.M.  
(Universities of Basel and Leiden)

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# OVERVIEW

- The historic background in EC law and in Dutch law before the existence of specific provisions
- The current legal framework (NL, EC)
- Some basic concepts
- (If there is enough time:) A short case study
- Conclusion

# THE HISTORIC BACKGROUND (1)

## EC Law

Case law based on then existing *sex discrimination law*, e.g.

- The Defrenne cases (1971, 1976, 1978)
- The Marshall cases (1986, 1993)
- Beets Proper = *a Dutch case* (1986)
- Barber (1990)

# THE HISTORIC BACKGROUND (2)

## **E.g. the Netherlands**

- Academic argument since the 1960s.
- Case law based on:
  - Art. 1 of the Dutch Constitution (Basic Law): right to equal treatment
  - Art. 26 of the United Nation's International Covenant on Civil and Political Rights: prohibition of discrimination

Age discrimination *not explicitly mentioned!*

Both provisions *worded in an open manner.*

# THE CURRENT LEGAL FRAMEWORK (1)

- EC law, in particular - but not only! - the EC Framework Employment Directive.
- National implementation of this Directive.

# THE CURRENT LEGAL FRAMEWORK (2)

## **In the EC**

- The so-called Employment Framework Directive (Directive 2000/78/EC).
- The new Directive on EU citizens' movement and residence rights (Directive 2004/38/EC).
- Possibly in the future: The Charter of Fundamental Rights as integrated into the Constitutional Treaty (at present only soft law).

# THE CURRENT LEGAL FRAMEWORK (3)

## **The Employment Framework Directive**

- Based on Art. 13 EC.
- Discrimination grounds covered:  
Religion, race, handicap, age, sexual orientation.
- Adopted in the year 2000.
- Implementation period:  
In principle until 2 December 2003. But: special rules for handicap and age if the Member States so desire (2 December 2006).

# THE CURRENT LEGAL FRAMEWORK (4)

## **National implementation: the example of the Netherlands**

- *Wet gelijke behandeling op grond van leeftijd (WGBL)* = Age Discrimination Act.
- Exception for the time being: functional dismissal.
- 21 provisions; some like EC law, some different.
- In force since 1 May 2004.



# SOME BASIC CONCEPTS (1)

## Overview

- Scope of the legislation
- “Age”
- Discrimination
- Justification
- Positive action
- Multiple discrimination

# SOME BASIC CONCEPTS (2)

## **Scope of the legislation**

- Access to work and to professional training
- Working conditions
- Membership with unions

## *Not covered:*

- Statutory social security
- Employment in the army in relation to age and handicap, if a given Member States so chooses.

# SOME BASIC CONCEPTS (3)

## “Age”

- No definition in the Directive!
- Examples from literature and Dutch case law:
  - Numeric indications of age (“65 years and older”).
  - Qualitative indications (“young”, “old”, “middle-aged”).
  - Biological-medical indications (“women in the menopause”, “people in puberty”).
  - Terms (possibly) related to age (“dynamic”, “very experienced”, “recently graduated”).

# SOME BASIC CONCEPTS (4)

## **Discrimination (1)**

- In the Dutch law: “differentiation” (*onderscheid*) as the basic concept.
- In EC law however: “discrimination”, here essentially meaning different treatment of comparable situations.  
(Careful: concept in fact more complex!)

# SOME BASIC CONCEPTS (4)

## **Discrimination (2)**

- Direct discrimination
- Indirect discrimination
- Harassment
- Instruction to discriminate

# SOME BASIC CONCEPTS (5)

## **Justification (1)**

Under EC law

- Public security, public order, public health, protection of rights and freedoms of others (Art. 2(5) of the Directive).
- Occupational requirements (Art. 4).
- Age: objective justification (Art. 6).

(Positive action: see later.)

# SOME BASIC CONCEPTS (5)

## Justification (2)

Under Dutch law (not for harassment!)

- Two statutory exceptions:
  - Employment policy helping people of certain ages.
  - Dismissal when reaching the statutory pension age (note: not a mentioned in EC law *as a justification ground*; though see preamble).
- Objective justification.

# SOME BASIC CONCEPTS (5)

## Justification (3)

- Objective justification: the problem of a closed versus an open justification system.
- Traditional approach:
  - Direct discrimination: only grounds explicitly mentioned in the law.
  - Indirect discrimination: in addition, the open category of objective justification.



# SOME BASIC CONCEPTS (5)

## **Justification (4)**

- EC law regarding age discrimination:  
Open category also in relation to direct discrimination!!
- Dutch law:  
So-called half-open system.

# SOME BASIC CONCEPTS (5)

## **Justification (5)**

Objective justification in the Netherlands:

- Test relevant already under the old case law.  
Reason: general approach of national and international law.
- Originally: quite easy test.
- Later: more detailed and careful.
- Today, under the new law: essentially same test as for indirect discrimination on grounds of sex.

# SOME BASIC CONCEPTS (6)

## Positive action

- EC law: Art. 7
- Nothing in the Dutch law!!!
- But: different approach in the information material of some NGOs (e.g. The European Older People's Platform AGE, [www.age-platform.org](http://www.age-platform.org)).

# SOME BASIC CONCEPTS (7)

## Multiple discrimination

EC law:

- Mentioned in the Directive's preamble, in relation to sex discrimination.
- Problem regarding justification!  
(Competition of open and closed systems.)
- Issue of remedies!

# A SHORT CASE STUDY (1)

## Introduction

Dutch cases since 1 May 2004:

- Equal Treatment Commission (article by M.J.J. Dankbaar): 18 cases in 2004.
- Ordinary courts (information by the national expert centre on age discrimination):  
e.g. Hoge Raad (Supreme Court judgment of 8 October 2004).

# A SHORT CASE STUDY (2)

## The case (1)

Judgments 2004-178 and 2004-179 (same case)

- Application for a job with a bank, through a selection agency, by a man who is 50 years old.
- Selection agency and bank discuss the applicant's age in view of his functioning within a young team.
- Applicant not employed, allegedly because of lack of qualification.
- Applicant's complaint: "Age discrimination!!!"

# A SHORT CASE STUDY (3)

## The case (2)

Action against the bank:

- Discrimination: who bears the burden of proof?
- If the bank after complaints invites the applicant for an interview but does still not employ him, does that take away the suspicion of discrimination?

# A SHORT CASE STUDY (4)

## **The case (3)**

Action against the selection agency:

- Explicit provision in the Dutch law.
- Discrimination on grounds of age?

Regarding both bank and agency: instruction to discriminate?



# A SHORT CASE STUDY (5)

## **The case (4)**

Objective justification on grounds of the composition of the workforce?

- Bank: no justification brought forward.
- Selection agency: lack of knowledge about the legal prohibition as objective justification?

# CONCLUSION (1)

## **Is age discrimination special?**

- Age as a flexible phenomenon (peoples' ages change constantly).
- The argument of a lesser form of discrimination.

# CONCLUSION (2)

## What to learn from this session

- Different treatment on grounds of age can be prohibited under EC law.
- Thus: age limits need to be very carefully reconsidered.
- Whoever applies age limits, should clearly state the reasons for this decision.
- The views on objective justification may change over time.
- There is the problem of levelling down.