

Reflecting on Age Discrimination in 2007 - the Search for Clarity and Food for Thought....

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Introduction

Today we are reflecting on age discrimination in Article 13 EC and the Employment Directive. This process requires that we look back, assess where we are now and attempt to look forward. Looking back we can see that the inclusion of age in Article 13 EC and the Employment Equality Directive was almost a 'coup', a certain seizing of an opportunity – age could more easily have been left out than any other ground at that time.¹ The other grounds had a higher profile in EU law and policy; some even enjoyed early efforts at mainstreaming, such as Disability.² However, there may have been some cost of inclusion in the Directive. A number of the exemptions in relation to age were insisted upon by a small number of Member States and sometimes apparently one Member State.³ This is partly the product of unanimity required by Article 13.1 EC and the different priorities of different Member States in relation to age. In any event, I believe that, "with an even greater passage of time, the inclusion of age in Article 13 and the Employment Directive may come to be regarded as prescient, rational and absolutely of the right time."⁴

As part of the process of assessing where we are now it is necessary to consider wider, salient contexts for age under the Employment Directive. These wider contexts may have some bearing on our appraisal of the early ECJ Judgments concerning age discrimination and indeed on our ability to comprehend, Article 6 of the Employment Directive in particular.

Wider contexts relevant to age (and other Article 13 grounds)

- Something special is visible since 2000 when the Article 13 Directives were adopted. Anti-discrimination and equality have very arguably become mainstream human rights issues. Gerard Quinn argues (discussing disability) that three goals are identifiable in the Employment Directive: economic, social and (fundamental)

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¹ H. Meenan 'Age Discrimination in Europe: late bloomer or wall-flower?' Vol. 25(2) *Nordic Journal of Human Rights*, (2007) pp. 97-118 at p. 98-99.

² Commission Communication on Equality of Opportunity for People with Disabilities – a New European Community Disability Strategy, Brussels, COM(96) 406, final, 30.07.1996 which proposed that the Commission mainstream disability in its policy and law-making processes.

³ A parallel can be drawn with the insertion of Article 119 (now Article 141) into the original EEC Treaty, 1957 largely to assuage the competition concerns of one Member State, France. In relation to age under the Employment Directive an example would be the influence of the United Kingdom in the inclusion of recital 14 in the preamble to this Directive.

⁴ H. Meenan 'Age Discrimination in the EU and the Framework Directive', in Malcolm Sargeant Ed., *The Law on Age Discrimination in the EU*, (Kluwer, The Netherlands, (forthcoming)) pp. 9-27 at p. 10.

human rights and that the human rights goal is the dominant one.⁵ It is now also natural to speak of a rights-based approach to equality in the EU.

- We are edging away from speaking of the Article 13 grounds primarily in terms of a (divisive) hierarchy of equality⁶ and edging towards an understanding of the interdependence and mutual respect of these grounds informed *inter alia*⁷ by multiple discrimination and inter-sectionality.
- The world wide phenomenon of demographic ageing is affecting the EU with a dramatic increase in the number of people over 60 accompanied by a decrease in the number of people aged between 15 and 24 by 2030.⁸ Yet, population ageing is not mentioned in the preamble to the Employment Directive. Arguably this is because Article 6.1 is in tension with calls from the United Nations and the EU itself to increase the labour market participation of older people – in response to population ageing!
- The United Nations has reported that twenty years have been added to the average life span since 1950 and predicts the addition of a further ten years by 2050.⁹ The United Kingdom originally set the state pension age at 65 for men and 60 for women in 1925.¹⁰ Today, the British default retirement age is also set at 65 under the Employment Equality (Age) Regulations 2006. These now comparatively young retirement ages seem at odds with the new threshold of old age which is predicted to be 82 by 2040.¹¹ These issues are very important in trying to come to terms with ‘age’ under the Employment Directive and Article 6.1, in particular.
- Marrying the contexts of human rights and demographic ageing help lead us to calls for an international convention on the rights of older people which could some day promote a more rounded protection of the rights of older people.¹²

The heterogeneity of all people of a particular age or age group

‘Age’ has suffered in its quest for recognition as an equality issue.¹³ This is due to a number of factors, such as,

⁵ G. Quinn, 'Disability Discrimination Law in the EU', in H. Meenan (Ed.), *Equality Law in an Enlarged European Union understanding the Article 13 Directives*, (Cambridge University Press, 2007) PP. 231-277 at p. 248.

⁶ Notwithstanding that the hierarchy arguably endures to this day.

⁷ Human rights are also helping to inform this shift.

⁸ DG Employment and Social Affairs, European Commission, Report of the High Level Group on the Future of Social Policy in an Enlarged European Union, (2004) at p. 19.

⁹ Report of the Second World assembly on Ageing, Madrid, 8-12 April 2002, UN Doc. A/CONF.197/9 (2002), at p. 5.

¹⁰ See Widows', Orphans' and Old-Age Contributory Pensions Act 1925. Note, these ages are in the process of being equalised over the coming decades in the UK.

¹¹ G. Reday-Mulvey, *Working Beyond 60 Key Policies and Practices in Europe*, (Palgrave MacMillan, 2005) at p. 31.

¹² Such as Kwong-Leung Tang and Jik-Joen Lee, 'Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People', 36(7) *British Journal of Social Work* (2006) pp. 1135-1150.

¹³ Note the comments of Colm O’Cinneide, ‘Comparative European Perspectives on Age Discrimination Legislation’, in S. Fredman and S. Spencer (eds.) *Age as an Equality Issue*, (Hart Publishing, Oxford, 2003) at pp. 195-217 at p. 196 and 200.

- 1) Age limits and cut-offs have traditionally been used (and accepted) as a rational organisational tool in employment and labour spheres. Oliver Brettle opines “More than any other form of discrimination, treating people differently because of their age is ingrained in our working culture and the issues raised by the situations in which such treatment may be justifiable are particularly complex.”¹⁴
- 2) Age discrimination is regarded in some quarters as less wrong than other forms of discrimination.¹⁵
- 3) Age, whether of the young or old or in-betweens is frequently subject to stereotypes as regards performance, commitment, productivity and ability.

Yet, these approaches and views neglect the fact that older people in particular and people in any age group enjoy tremendous heterogeneity. As long ago as 1948, JH Sheldon documented the fact that older people are not a homogenous group.¹⁶ More recently in 1997, Walker and Maltby see the perception of older people as a homogenous group as excused by ageism.¹⁷ More recently still in 2001, Finnish studies reveal that individual differences in functional ability vary greatly with age within an occupational group.¹⁸ Perhaps of greater interest is the fact that this is so even among people of the same age within an occupational group.¹⁹

The issues of age limits and stereotypes are facilitated by the common use of chronological age in employment, law and society. Other meanings of age are possible such as sociological age and physiological age. It is my contention that although age is not defined (just as none of the other Article 13 Directives are defined) in the Directive, it is the chronological meaning of age that is intended by the Directive. In 1997, Eurolink Age UK proposed the following definition of age discrimination, ‘[Age discrimination] is a difference in treatment and opportunities for citizens solely on grounds of their chronological age’.

This seemingly simple definition continues to have relevance in 2007 especially when reflecting on the age strand of the Employment Equality Directive. I shall argue later that while age has not been defined in the Directive it was the chronological meaning of age that was in mind (or most easily fits the provisions of the Directive) when the Directive was drafted and adopted. However, I would like to suggest that this definition could usefully be updated by adding the phrase ‘and their perceived chronological age’. That is because perceptions of a certain age in years whether older or younger can attract prejudice. As this audience knows some EU Member States have recognised this by legislating against perceived grounds of discrimination when

¹⁴ Oliver Brettle ‘An unequal union’, *Employment Law Journal* December 2006/January 2007, pp. 5-9 at p. 5.

¹⁵ Note the discussion in H. Meenan, ‘Age Discrimination - Of Cinderella and *The Golden Bough*’, at p. 281, *infra*.

¹⁶ J.H. Sheldon, ‘The Social Medicine of Old Age Report of an Inquiry in Wolverhampton (Oxford University Press, 1948) at p. 2.

¹⁷ A. Walker and T. Maltby, ‘Age in Europe’, (Open University Press, 1997) AT P.9.

¹⁸ J. Ilmarinen, ‘Ageing Workers in Finland and in the European Union: Their Situation and the Promotion of Their Working Ability, Employability and Employment’, (2001) Vol. 2, No. 4 *Geneva Papers on Risk and Insurance*, pp. 623-641.

¹⁹ C. Oswick and P. Rosenthal in M. Noon and E. Ogbonna, ‘Equality, Diversity and Disadvantage in Employment (Palgrave, 2001) at p. 9 and Stein et al., ‘Age and the University Workplace: A case Study of Remaining, Retiring or Returning Older Workers’, *Human Resource Development Quarterly*, 11:1 (spring 2000), at p. 73.

transposing the Article 13 Directives even though these Directives do not explicitly embrace discrimination on perceived grounds.²⁰ Nor it seems has age been defined in the transposing legislation of the Member States where it is "generally assumed to be an objective characteristic with a natural meaning".²¹

A physiological approach to age and ageing in the workplace would reveal that ageing is in fact highly individualised and would be more humane, more accurate and more sophisticated than a chronological age approach to functional ability. This is notwithstanding the psychological and logistical barriers for employers (and indeed employees) to individual testing, which is carried out regularly and naturally for some occupations such as airline pilot. Chronological age as a tool for allowing or disallowing access to employment effectively masks the heterogeneity of older workers and older people and hides the individual and person behind the age, described purely in years. It also treats human beings by category, which must offend against human dignity, which Lung-chu Chen reminds us covers, the entire life span.²²

The Employment Directive and Age²³

The Directive contains a variety of recitals and provisions that concern age. Three broad categories of non-application and potential non-application (by choice or through justification) can be identified.

In the first category, the Directive does not affect two areas that would ordinarily concern age as follows:

- Recital 14 states that the Directive is without prejudice to national provisions laying down retirement ages. However, *Palacios de la Villa* has now shed some light on this, as we shall see below.
- Article 3.3 excludes payments made by state schemes, including social security or social protection schemes payments.

Arguably, social security laws may have been unworkable without these, so age may have remained isolated outside the Directive without such political compromises.

I understand that Recital 14 was not included in the proposal for the Directive but was included later largely at the request of the British Government.

The second category gives Member States a choice whether to effectively exempt two fields from the age strand. It comprises

- Article 3.4 permitting Member States not to apply the age and disability provisions of the Directive to their armed forces.²⁴

²⁰ For example, Ireland.

²¹ The European Network of Legal Experts in the Non-Discrimination Field, *European Anti-Discrimination Law Review*, Issue No. 4, November 2006 at p. 24.

²² Note Lung-chu Chen below at p. 169-171. He also reminds us at p. 171 that "Human dignity is best achieved by treating each person according to his or her unique capability and potential".

²³ This section is adapted from H. Meenan, 'Age Discrimination - Of Cinderella and *The Golden Bough*', above at pp. 295-297.

²⁴ This has been relied upon by a small number of Member States, including Germany. In Denmark the armed forces may request the Ministry for permission to exclude applicants of a particular age or with disabilities from specific positions by virtue of genuine occupational qualifications. By contrast Maltese regulations do not apply to the armed forces in respect of discriminatory treatment on grounds

- Article 6.2 allowing Member States to provide that fixing ages of admission or entitlement to retirement or invalidity benefits for occupational social security schemes will not be age discrimination provided this does not result in sex discrimination.

Article 6.2 again goes to the workability of the law and national social security systems. The British Government required the insertion of Article 3.4.²⁵

The third category contains just one provision - Article 6.1, which is unique within the anti-discrimination package adopted in 2000, in that it permits the Member States to justify direct discrimination solely on the ground of age. Article 6.1 is quite vague²⁶ and potentially the most open-ended provision in all EC anti-discrimination legislation.

- Article 6.1 allows Member States to provide that differences of treatment based on age will not be 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**”. (Emphasis added)

This is neither a case of exclusion from the Directive’s ambit or a case of choosing not to apply a provision.

Outside these three categories lie two Recitals that help to illuminate age within the Directive. Recital 17 states,

"This 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, without prejudice to the obligation to provide reasonable accommodation for people with disabilities".

Recital 25 states,

"..... 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". This Recital helps to support Article 6.1 and the ECJ in *Palacios de la Villa* has endeavoured to clarify the kind of factors that would give rise to differing provisions on age among the Member States.

Emerging case law and a higher profile for age

If age had a lower profile than any other Article 13 ground this has arguably been rectified by the ECJ's decision in *Mangold v Rudiger Helm*.²⁷ This was the first case to come before the European Court of Justice on any Article 13 ground and in it the

of age and disability; see *European anti-Discrimination Law Review*, Issue 1, April 2005 at 44 and 61 respectively.

²⁵ A. Evans-Pritchard ‘Business criticises EU ban on jobs bias’, *Daily Telegraph*, 18 October 2000.

²⁶ John Cridland, CBI is quoted in the *Daily Telegraph* article above, as saying that the age clause “leaves too many unanswered questions”.

²⁷ Case C-144/04, Judgment 22 November 2005.

ECJ clarified that the Employment Directive does not itself lay down the principle of equal treatment in employment and occupation.²⁸ Rather the source of the prohibition of discrimination on the grounds of religion or belief, disability, age or sexual orientation was to be found in international treaties and the constitutional traditions common to the Member States.²⁹ It consequently (and without having specified which international Treaty or which constitutional traditions was the principal source) declared that the principle of non-discrimination on grounds of age must be regarded as a general principle of Community law,³⁰ which in effect implied that this principle already existed in EC law. The ECJ thus appeared to open the way for a robust interaction between its traditional methods of declaring general principles and the Employment Directive.

This process appears stalled following its later decision in *Sonia Chacon Navas v Euresst Colectividades SA*³¹ concerning the ground of disability, in which the ECJ refused to extend the grounds contained in Article 13 by interpretation or analogy stating, "It is true that fundamental rights which form an integral part of the general principles of Community law include the general principle of non-discrimination.... However, it does not follow from this that the scope of Directive 2000/78 should be extended by analogy beyond the discrimination on the grounds listed exhaustively in Article 1 thereof".³²

Mangold stripped bare

As is well known Mangold involved the question of whether a German law, which permitted employers to offer fixed term contracts (FTC), to all workers over 52 without objective justification, was compatible with Article 6.1 of the Employment Directive. This age limit had been temporarily reduced from 58 to 52 until 31 December 2006, a couple of weeks after the extended transposition date allowed under the Directive for age and disability. Advocate-General Tizzano had already established that the reduction in age was in light of a Government report describing the poor employment prospects of workers aged over 55. The ECJ confirmed that the successive reductions in age for the award of FTCs were justified by the need to encourage the employment of older persons.³³

The key question referred to the ECJ was whether Article 6.1 of Directive 2000/78 precluded a national law authorising the conclusion of FTCs with workers of 52 years and over, without any objective reason? The ECJ examined the German provision against the three steps in Article 6.1 and found as follows,

Step I the measure introduced a difference in treatment on grounds of age.

Step II the ECJ declared that the vocational integration of unemployed older workers is a legitimate objective, which 'objectively and reasonably' justifies a difference in treatment.

Step III It asked if the means used were appropriate and necessary? The ECJ decided that the means used were disproportionate. Although "Member States enjoy

²⁸ Para. 74.

²⁹ Idem.

³⁰ Para. 75.

³¹ Case C-13/05, Judgment 11 July 2006.

³² Para. 56.

³³ Para. 53 and 59.

unarguably broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy",³⁴ it found that,

1) the application of this legislation leads to a situation where all workers who have reached the age of 52, without distinction as to whether they had been employed before the FTC or not

"may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which, however, as the Framework Agreement makes clear, constitutes a major element in the protection of workers".³⁵

2) The ECJ stoutly objected to the age of the worker being the sole criterion for the award of a FTC without demonstrating that the age threshold of 52 was objectively necessary to achieve the vocational integration of older workers, "regardless of any other consideration linked to the structure of the labour market or the personal situation of the person concerned".³⁶

In reaching this outcome, the ECJ overcame the following hurdles of varying impacts:

- the date for transposition had not yet expired.³⁷
- The reduction from 58 to 52 years was unconnected to transposition of the Employment Directive.
- The German law was due to expire on 31 December 2006.
- The issue of Horizontal direct effect, as this case was effectively between two individuals Mr Mangold and his private employer, Mr Helm.

The ECJ relied *inter alia* on the principle of non-discrimination on grounds of age, which it had just declared in this case to overcome the fact that the transposition period had not yet expired.³⁸

In reaching its decision that Article 6.1 did preclude such a rule, the ECJ was clearly influenced by the reduction in employment protection for workers of 52 and above. However, it could usefully have also questioned the lowering of the age threshold to 52 on the basis of our increased life spans, when many of us can expect to reach at least 80 years of age and which will require many people to work for longer to help finance their extra years. Furthermore, it could also have examined the greater impact of such a law on female workers who frequently have interrupted and different career-patterns to men, due to a variety of factors such as, child-rearing, caring, lower pay, lower status work, atypical work and sex discrimination.³⁹ Thus female workers of 52 have an arguably greater need for stability in employment and the opportunity to save and build up their pension

³⁴ Para. 63.

³⁵ Para. 64.

³⁶ Para. 65.

³⁷ Pre-existing case law had established a duty to refrain from measures contrary to a directive during the transposition period, para. 66-68.

³⁸ Para. 76.

³⁹ H. Meenan, 'Age Discrimination - Of Cinderella and *The Golden Bough*', in H. Meenan Ed. supra at p. 288.

contributions than men. Indeed, the Employment Directive though not dealing with the ground of sex, alludes to the vulnerability of women to discrimination.⁴⁰

Palacios de la Villa

On 16 October 2007, the Grand Chamber of the ECJ handed down its judgment in *Felix Palacios de la Villa v Cortefiel Servicios SA*.⁴¹ The ECJ decided that the prohibition on age discrimination contained in the Directive, did not preclude a Spanish law under which compulsory retirement clauses in collective agreements are lawful when the sole requirements are that workers have reached the retirement age of 65 and they fulfilled the conditions for entitlement to a retirement pension under the social security legislation.

In reaching that decision the Court clarified Recital 14 of the Directive, which states, "Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages". The meaning of this recital was not fully known before this case. According to the Court, "that recital merely states that **the Directive does not affect the competence of the Member States to determine retirement age** and does not in any way preclude the application of that directive to national measures governing the conditions of employment contracts where the retirement age, thus established, has been reached."⁴² (Emphasis added) As the Spanish rule permitted the automatic termination of an employment relationship and affected the worker's ability to engage in an occupation, preventing him from future participation in the labour force, the Directive applied to it.⁴³

The key question for the Court was whether the principle of equal treatment on grounds of age contained in Article 13 EC and Article 2(1) of the Directive precludes a national law under which retirement clauses in a collective agreement are lawful subject to the sole requirements that the worker has reached the retirement age and qualifies for a retirement pension under social security legislation.

The Court applied the three steps of Article 6.1 of the Directive.

Step I the law in question established a difference in treatment directly based on age.

Step II (aim) The Court accepted that the law was adopted as "part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations".⁴⁴ As the law itself did not specify this objective the Court sought its general context and underlying aim. As a result of this process the Court declared that the "provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment" and that the legitimacy of such an aim could not reasonably be called into question.⁴⁵

Step III (means) The Court asked if the means employed to achieve that aim were 'appropriate and necessary'? It stated in the spirit of *Mangold* that "the social partners at national level enjoy a broad discretion in their choice, not only to

⁴⁰ Recital 3 and Article 6.2.

⁴¹ Case C-411/05.

⁴² Para. 44.

⁴³ Para. 45.

⁴⁴ Para. 53.

⁴⁵ Para. 62 and 64.

pursue a particular aim... but also in the definition of measures capable of achieving it".⁴⁶ The Court referred to Recital 25 of the Directive, which acknowledges that differences in treatment on grounds of age may be justified and may require "specific provisions which may vary in accordance with the situation in Member States". However, here again the Court attempted to provide clarity in relation to Recital 25 by stating,

"such is the case as regards the choice which the national authorities may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement".⁴⁷

While it is heartening to see the ECJ show some awareness of demographics, it is potentially alarming to see it include a reference to budgetary or political considerations in this context. The Court then stated that the competent authorities at national, regional or sectoral level must have "the possibility of altering the means used... by adapting to changing circumstances in the employment situation in the Member State concerned".⁴⁸ It was for "the competent authorities of the Member States to find the right balance between the different interests involved".⁴⁹

By the time the ECJ came to the end of its Judgment, it referred to the legitimate aim as "consisting in the promotion of full employment by facilitating access to the labour market" and declared "it is **not apparent** that the means put in place to achieve the aim of public interest are **inappropriate** and **unnecessary** for the purpose".⁵⁰ (Emphasis added)

In *Palacios de la Villa* age was not the sole criterion for forced retirement at 65. The Court appears to have been impressed by the second requirement that the workers also qualify for a retirement pension and that the social partners could opt under the national legislation to apply compulsory retirement to take account not only of the overall situation in the labour market but also of the specific features of the particular jobs.⁵¹ In the words of the court, the social partners enjoyed "considerable flexibility".⁵²

The English language version of the judgment, as emphasised above, seems to imply that a low enough standard was applied to the third limb of the test in Article 6.1 on this occasion. Perhaps an intriguing contrast can be drawn with the evolution of justification of **indirect** discrimination in Ireland, now that objective justification of indirect sex discrimination at EU and Member State level (in Ireland and other jurisdictions), indirect discrimination of all grounds in the Employment Directive and direct age discrimination under Article 6.1 of the

⁴⁶ Para. 68.

⁴⁷ Para. 69.

⁴⁸ Para. 70.

⁴⁹ Para. 71.

⁵⁰ Paras. 72 and 77.

⁵¹ Paras. 73 and 74.

⁵² Para. 74.

Employment Directive, have converged to an extent (though Article 6.1 states "objectively **and reasonably** justified by a legitimate aim", for instance).

The Employment Equality Act, 1998 which was a model for the Directive, originally provided that it was a defence to indirect discrimination if it was reasonable in all the circumstances. The Equality Act 2004 amended this Act so that indirect discrimination on nine covered grounds, including sex and age, followed the wording of Article 2.2(b) of the Directive. The Irish Labour Court in *NBK Designs v Marie Inoue*,⁵³ a case concerning primarily sex⁵⁴ but not age, held that the provision must satisfy a real need⁵⁵ on the part of the firm as well as being appropriate to the aim and necessary. It went beyond the idea of reasonableness⁵⁶ to a test that the requirement be "**essential**".⁵⁷

The Labour Court approached the appropriate and necessary means, element of justification as follows, "In the Court's view the value of the benefit, which accrued to the employer, when balanced against the discriminatory effect of the method by which it was achieved, could not satisfy the requirement of proportionality". It also decided that the employer must show that there were no alternative means that had a less discriminatory effect that could have achieved the objective in question. The employer failed the test of proportionality and the alternative means test.

In *Palacios de la Villa* the ECJ stated that it was for the competent authorities of the Member States to find the right balance between the different interests involved.⁵⁸ This is also in line with the broad discretion left to Member States to pursue a particular aim and in the means they use to achieve it.⁵⁹ However, wider contexts such as demographic ageing and significantly longer lives might suggest a less hands-off and more indicative approach by the ECJ might be necessary to the important issues of access to employment, employment protection of older workers and solidarity between generations. The question of alternative means to achieving the aim in view may some day help to inspire a more robust protection of the jobs of older workers as mandatory retirement is one of the best examples of direct age discrimination. The collective agreement had a similar universal application in its sector as the age limit for FTCs in *Mangold*. However, in *Palacios de la Villa* it concerned a much more realistic age of 65, (although this age is becoming younger due to our longer lives), plus the protection afforded by a retirement pension.

A Pending Challenge to the UK's National Default Retirement Age of 65

On 24 July 2007, the High Court in England referred a number of questions to the ECJ concerning the defence for dismissal by an employer of an older worker

⁵³ Judgment 25 November 2002, Labour Court ED/02/34 determination EED 0212.

⁵⁴ It also concerned the grounds of marital status and family status, which are also covered by the Irish Employment Equality Act 1998 as amended by the Equality Act 2004.

⁵⁵ Relying on the test for objective justification set out in *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, Case 170/84 [1986] ECR 1607.

⁵⁶ Following earlier Irish case law on this point.

⁵⁷ In addition to the Labour Court Judgment see the comments of Michelle N. Longain in 'The ABC of PQE', *Gazette of the Law Society of Ireland*, (2006) 100(8) pp. 22-23, 25 and 27 at p. 25.

⁵⁸ Para. 71.

⁵⁹ Para. 68.

where he has reached the normal retirement age (NRA) or if there is no NRA, the age of 65 (the default retirement age).⁶⁰ The questions referred in *R. (on the Application of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* are as follows:

"1. National retirement ages and the scope of the Directive

i) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?
ii) Does the scope of the Directive extend to national rules, which permit employers to dismiss employees aged 65, or over by reason of retirement where they were introduced after the Directive was made?
iii) In the light of the answers to (i) and (ii) above (1) were section 109 and/or 156 of the 1996 Act, and/or (2) are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations, national provisions laying down retirement ages within the meaning of Recital 14?

2. The definition of direct age discrimination: justification defence

iv) Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?

3. The test for the justification of direct and indirect discrimination

v) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Directive?"⁶¹

Initial reactions to *Palacios de la Villa* in the UK were pessimistic for the *Age Concern* case, which will not be heard until late 2008 or 2009. The Judgment in *Palacios de la Villa* would likely have some bearing on the first set of questions above, however, I believe there is scope for testing the English rule against the individual elements of Article 6.1 even though this was not specifically requested by the English High Court.

Other Cases Pending Before the ECJ

At the time of writing two other cases are pending before the ECJ, they are:

Case C-427/06 *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, concerns inter alia,

Whether the primary legislation of the European Communities contain a prohibition of discrimination on grounds of age the protection by which must be guaranteed by the Member States even if the possibly discriminatory treatment is not connected to Community law?

⁶⁰ See Regulation 30 of the Employment Equality (Age) Regulations, 2006.

⁶¹ Taken from the website of Age Concern England and are available at <http://www.ageconcern.org.uk/AgeConcern/6181A345BF3B44E2AB4521A1CF45F6F5.asp>

And,

Is a provision of an occupational pension scheme, which provides that a survivor's pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, within the scope of the prohibition of discrimination on grounds of age?

Case C-277/04, which interestingly is an appeal from the Court of First Instance in a staff case, *Maria-Luise Lindorfer v Council of the European Union*. Both the first Advocate-General and the second⁶² regard this case as engaging sex discrimination only and not age discrimination. This case also concerns pension rights.

Conclusion

Age arguably had the most to gain by inclusion in Article 13 EC and the Employment Equality Directive. However, there is a sense in which the age strand of the Directive is a work in progress. Clarity will gradually emerge through preliminary rulings and possibly future amendments to the Directive. The abiding question remains whether Article 6.1 of the Directive was really necessary⁶³ in light of all the recitals on age and the other possibilities provided by the Directive to side-step the application of its provisions to age, especially Recital 17, which is imbued with common sense. In the words of Lung-chu Chen "The appropriate criterion should be whether a person is currently capable of performing the task required, not when he or she was born".⁶⁴

The author Kurt Vonnegut once asked his son "What is life all about? To which his son replied, "Father, we are here to help each other get through this thing, whatever it is".⁶⁵ In this spirit, I am not yet convinced that we have found the very best way of helping ourselves and each other get through the challenges (and opportunities) posed by demographic change especially when it comes to the distribution of jobs between our young selves and our older selves. This I acknowledge is no easy task.

⁶² Advocates-General Jacobs and Sharpston, respectively.

⁶³ Although its importance in securing the inclusion of age in the Directive cannot be ignored, perhaps its usefulness could be re-visited at a future date.

⁶⁴ Lung-chu Chen, 'Aging: A new Human Rights Concern-A Policy-Oriented Perspective', *American Society of International Law Proceedings*, 1987, 38, pp. 164-179 at p. 171.

⁶⁵ Kurt Vonnegut, *A man without a country*, (Bloomsbury, Great Britain, (2007)) at p. 66.