

THE PROHIBITION OF AGE DISCRIMINATION IN LIGHT OF ECJ CASE LAW

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INTRODUCTION

Age discrimination poses a sort of paradox that seeps through all the case law on a European and national level.

On the one hand, we have a rather straightforward criteria, age, which is universal, visible and statistically identifiable compared to other grounds. It has bred a rather impressive body of EU case law since the enactment of the 2000/78 directive: Mangold¹, Palacio², Bartsch³, Age Concern (Heyday)⁴, Hutter cases⁵ and two pending cases.⁶ In these cases, national employment and retirement policies based on age have been subjected to judicial scrutiny.

On the other hand, there is strong ambivalence behind the concept of age discrimination compared to other grounds as it triggers a series of queries on how to define age as a criteria or category. Age is often confused or automatically associated with age proxies like the right to retirement and some justifications for disparate treatment based on age are accepted or at least interpreted by the Court. Age is not always seen as a suspect class and can be considered as indicative of biological aging, perceived as incompatible with certain jobs.

This brings us to identify two questions: the ambivalent concept of age discrimination and the judicial focus on exceptions to age discrimination through ECJ case law.

¹ ECJ Werner Mangold v Rüdiger Helm C-144/04 November 22 2005

² ECJ Palacios de la Villa v Cortefiel Servicios SA C-411/05 October 23, 2007

³ ECJ Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH C-427/06 23 Sept 2008

⁴ The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07 March 5th 2009

⁵ ECJ Hütter -v - Graz Technical University June 18 2009 ,C-88/08

⁶ Pending case C-229/08 Wolf ; pending case C-341/08 Petersen

Indeed, the ambivalence of age is actually reflected in the way the ECJ case law has not attempted to contribute to a definition of age as a category or a cause of discrimination but has mainly construed the exceptions to age discrimination.

I- The ambivalent concept of age discrimination through ECJ case law:

There is no specific definition of the contours of age in EU law but the directive sets right out an exception to the prohibition of age discrimination reflected in ECJ case law.

A-No meaning of age in EU case law :

Three queries come to mind: are we concerned with age categories or no? The law protects age or aging? Is age a suspect class?

1- What are the EU, national norms and case law protecting age or an age category?

No EU norm defines age exactly (same for other criteria for that matter). Article 13 of the Amsterdam Treaty and the 2000/78 Directive only refer to age and define the forms of discriminations, direct or indirect discrimination regardless of the criteria.

Moreover, most countries have not defined the age categories: they have just transposed the extensive coverage to all ages.

The Netherlands is an exception considering age and age categories:

“The notion of “distinction” includes first all direct unequal treatment, whereupon age is used directly as the ground for distinction. This is so not only if a distinction is made on grounds of a particular age but also if age categories are adopted. An example of adopting a specific age is the fixing of an age limit in a job advertisement or allowing additional days holiday based on age. An example of the use of age categories may be found in the Dismissals Order. In the light of this Order, age categories may be adopted for group severance when fixing the order of severance. The Order refers to 5 age categories: the youngest category includes employees aged 15 to 25, the oldest, employees aged 55 and over.”⁷

The EU case law gives examples of different ways to consider the age spectrum:

Direct discrimination examples:

Most cases deal with **advanced age** (Mangold, Palacios, Age Concern⁸...):

In the Mangold case, the issue was indefinitely renewable fixed term contracts starting at the age of 52. In Palacios, the question was a collective bargaining agreement setting an automatic compulsory retirement age when workers reached

⁷ Explanatory Memo. To the Act on Equal Treatment on Grounds of Age/2001

⁸ See notes 1,2 and 4

65 and could receive their full pension. The Age Concern (Heyday) decision reviewed an exception to the prohibition of the age discrimination prohibition in a regulation which allowed the dismissal of workers without redundancy when they reached the retirement age of 65 and over.

However, the Hutter case involved a **young age** considering the possible discriminatory effect of an Austrian public authority which did not take into account professional experience often through apprenticeship under 18 years of age to determine the wage level of certain workers.

How about **age disparities** used in the case law? There are two ways to consider them:

Should we encompassing an age differential which denies rights? In the Bartsch case, an occupational pension scheme did not allow a much younger widow (more than 25 years) than her deceased husband to benefit from his pension from his former employer because of the difference in age.

Here age is perceived as relative.....The pension rule/guideline was probably linked to the cost of paying this pension for a too long period.

Another question is raised if one considers age disparities to prove disparate treatment or direct discrimination? Is a big difference in age more significant in proving discrimination which favors one individual over another (a young worker of 22 getting a promotion rather than a fifty year old for example)? No discussion on this point in the case law yet.

Indirect discrimination examples:

Can we reconcile apparently neutral practices which have a disparate impact on an older category because it is based on seniority when it might have the opposite effect on a younger category of workers.

How does age discrimination legislation protect all age categories simultaneously with conflicting interests and indirect cumulative rights?

One recent French Supreme Court decision recognized⁹ the indirect effect of limiting the influence of seniority in calculating severance pay after dismissal which was considered to indirectly affect older workers who are more senior.

A lot of questions remain linked to the different ways of considering numerical age.

2- Is age equivalent to aging or to what extent is it a social construct subject to bias?

The directive 2000/78 (art. 4 § 1), among other grounds, considers that a certain age can be an essential requirement for the job justifying a difference in treatment:

⁹ Soc April 30 2009 n° 07-43.945

Examples of pending cases that might involve a discussion of the risks linked to aging:

In the Petersen case, a German court questions the legitimacy of a legislation which sets a maximum of 68 years of age to deliver an authorization to practice as an accredited dentist based on the presumption that, empirically, job performance decreases with age. This refusal of authorization would apparently protect the health of clients in the health system which requires accreditation. This presumption of physical decline is not backed by German medical studies in the legislative history of the law and therefore is not used by the Advocate general as an argument to justify the law based on age. The Advocate pinpoints a lack of coherence in the law since there are exceptions to the authorization refusal for older dentists when a region does not have many dentists or substitutes are needed when dentists are absent. Physical decline would not be presumed to interfere in these cases? The Advocate General justifies the exclusion based on the risks of aging with article 6 of the 2000 Directive for budgetary reasons to limit the number of accredited dentists and to open up to new generations of dentists. No debate in the pending case about how experience might compensate the physical risks of aging.

In the Wolf case, a 30 age recruitment limit is set for fire fighters in Germany, a policy apparently to maintain the balance between generations. The Advocate general explains in this case that physical capacities naturally decline with age but refers back to German medical expertise included in the law. He explains the diversity of tasks which fire fighters assume and some would be more physically challenged and should be left to younger colleagues so there is a need for balance between the generations according to article 4 §1 of the 2000 Directive. He pursues and considers the measure objective and the means to accomplish this selective recruitment process necessary and appropriate.

In fact, the existence of bias which is not often evaluated by the Court in the presence of stereotypes can lead to generalizations in legislation for example in the Mangold case, this is mentioned:

A case which involved offering indefinitely renewed short term contracts to older workers over 52 (it was 58 first), the Court considered whether there were other alternatives to promote the employment of older workers and the short term contract indefinitely renewed was not necessarily the most reasonable one: “conveying the idea older workers could have trouble finding a job.....”

There are negative labels linked to ageism, phenomenon coined by Gerontologist Robert Butler, former Director American National Institute on Aging: “old fart”, “dead wood”.¹⁰ We know, in the US courts, applying the ADEA, have given careful consideration to bona fide occupational qualifications (BFOQ) for jobs which involve the security of passengers, discarding age as an essential factor if experts could

¹⁰ C. O’Cinneide, Age Discrimination and European Law, European Commission Report/April 2005/website Migration Policy Group; M. Mercat-Bruns, Vieillesse et droit à la lumière du droit français et du droit américaine, LGDJ 2001

show low risks but presence of stereotypes. In *TWA¹¹ v. Thurston* (1985) and *Western Airlines v. Criswell* (1985), Court shows that employer must prove that reference to age is reasonably necessary to essence of business. The standard of proof is to show that “for substantially all persons, age prevents from doing the job effectively, safely” or, if impossible to prove need for BFOQ on an individual basis. In no case should customer preference justify a BFOQ. Experience or know-how skills can compensate sometimes for decline in physical health. The miraculous landing of a plane in the Hudson bay in NY by an experience pilot recently is one small example of how experience in despite of relative physical weakness with age can influence qualification, skills in multiple jobs.

3- It is not considered a suspect class:

Age is considered less a suspect class like race or sex, the Court looks less at the social prejudice which age can imply and more at the reasonableness of the social policies which the government implements and that’s maybe why there is more litigation at the EU level (because a lot of policies refer to lower or upper age limits to give rights. Age discrimination protection came from the economic impetus to allow workers to go back to work to safeguard retirement systems.

National constitutional cases often raise this issue for example in the US Supreme Court *Murgia* case,¹² older workers are not an “insular historically disenfranchised minority. Some legislation limit protected age like Ireland: only for those who are not obliged to attend school (over 18).

In this equality framework, age can justify public policies in vocational training (Hutter) and retirement (Palacios, Petersen)...for reasons of public interest.

We will see in the second part of this presentation that the ECJ seems clear on the foundations of age discrimination and its policy implications the Court reviews.

So a second characteristic of age discrimination is the existence of exceptions to the application of the law which narrows its breadth.

B- EU directive 2000/78 includes specific exception to age discrimination:

Article 6 2000/78 Directive states that:

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.

¹¹ Cases under the 1967 Age Discrimination in Employment Act (ADEA) in the U.S.

¹² The Supreme Court case *Massachusetts Board of Retirement v. Murgia* of 1976 justifies mandatory retirement of police officers based on the rational state interest in the statute of protecting citizens for security reasons.

Through this exception, the directive and the national laws that have to conform open Pandora's box. It seems like without saying it explicitly: age becomes a proxy for being eligible or not for retirement, access to employment or education ...

Age, for example, can be a proxy for being eligible or not for retirement... Retirement policies are often at issue in age discrimination law cases at the EU and national level. In France, an illustration of this is the case law which pertains to eligibility for full pension where age can become unlawfully the first motivation of dismissal.¹³

We mentioned the Bartsch decision and the young widow who could not benefit from her deceased husband's pension rights.

We see it also in the Spanish Palacios case. It is even clearer: the whole case revolves around lawfulness of mandatory retirement at age 65 in collective bargaining agreement and the contours of age are not the question.

The Age Concern case on dismissal of workers upon retirement without redundancy is more hopeful in that respect because it deals with the fact that employers alone cannot identify internal justification for retirement age without reference to legitimate social policies. On September 25, 2009, this was confirmed by the High Court: mandatory retirement is lawful but should be subject to scrutiny and evolve in the future. Reaching 65 cannot be maintained as a proportionate means to justify the policy and so there is a compelling case to change the law. The British government in this respect, the question of the objectiveness of the policy and the arbitrariness of employment practices on a wider scale in businesses is at issue.

So age is sometimes considered as a functional measuring tool but often it serves as a proxy, to a certain extent, as framed by government interests not subjected to private, functional, business justifications.

Now coming back to article 6 of the 2000/78 Directive, what justifications does the Court deem reasonable and proportionate? This is the second specificity of age discrimination which welcomes interpretation by the European court.

II- The judicial focus on exceptions to age discrimination through ECJ case law:

One could have thought that the Mangold case which acknowledged the existence of a general principle of age discrimination could have opened the door to widespread prohibition of age discrimination. " It is the responsibility of the national courts to guarantee the full effectiveness of the general principle of non discrimination with respect to age and set aside any provision of national law which may conflict with community law." This was not the case.

The Bartsch case seems to limit the breadth of this principle and denies direct applicability of article 13 of the Treaty of Amsterdam which mentions age because the case at hand happened before the Directive was transposed and the retirement

¹³ For example, Soc.25 mars 1992 , Bull Civ V, n°213 arrêt n°1

pension guidelines were not seen as possible implementation of the Directive so there was no recognized link between case and EU law. The Bartsch case avoids to ask the question about the force of the principle of antidiscrimination claiming no applicability of EU law.

However, the string of cases from Mangold, Palacio, Bartsch and Age concern to Hutter provide insight essentially on what are legitimate justifications to age differences in public policies applying article 6 of the 2000/78 Directive.

The Court provides a multi tier analysis which consists of understanding what social policy (often on employment or retirement) based on age is implemented in the national context, whether this policy is legitimate (objective and reasonable) and whether the means to achieve the policy aim are appropriate and necessary.

A- What policy measures are implemented?

In Mangold, the Court recalls that Member States enjoy broad discretion in choosing the measures to attain the policy objectives which are appropriate and necessary. The Hutter case confirms the array of State action as mentioned by Wolf and Petersen. The measures which can come under strict scrutiny are not always strictly in the public sphere; they extend to dismissals in the private sector based on national legislation which imposes compulsory retirement (Palacios and Age concern cases).

B- What is a legitimate policy?

The difficulty is that the legitimacy of policies evolve with the economic context. Palacios' mandatory retirement was justified by an economic downturn. The influence of the economic context on policymaking is a true question as confirmed in Petersen since the government had planned to abolish the contested refusal of authorization by older accredited dentists when the case came to court. In other words when do you appreciate legitimacy of policy at the time when legislation was adopted or when the ECJ is reviewing the policy ?

It is a social policy which contains objective and reasonable aims and, as the Age Concern case confirms, the goal is to consider legitimate employment, retirement or training policies. It is not simply to declare generally that a policy measure contributes to further employment or continuing education and presumes its legitimacy. The ECJ requires a high level of judicial scrutiny and a high level of proof produced by State to legitimize policy (not a presumption of legitimacy).

Legitimate goals are not solely those of employers like individual goals to reduce costs or gain a competitive edge (Age Concern case) even though policies can take into account the need for business flexibility.

The Hutter case even has a somewhat ambivalent holding because the Court recognizes again the Member states freedom of action to choose public measures to further employment and social policies (to promote apprenticeship for example) but

the Court looks much closer at the means to implement the policy to see if they are appropriate and necessary. The fact the policy discards work experience before the age of 18 is not seen as appropriate according to art. 6 Directive 2000/78 without further explanation (Hutter). Some policies are contradictory: ignoring experience before the age of 18 sends mixed signals: to promote vocational training at a lesser cost and also to promote general education by not emphasizing vocational training before 18: much contradiction...

National laws can list legitimate policies. For example, in France, special conditions to recruit young employees. This list is not mandatory (Age concern case).

C- What means to implement policies are considered appropriate and necessary?

The Mangold case is very explicit on this point: the renewable short term contract only for older workers (over 52) is seen as going beyond what is necessary to promote employment of older workers.

In the Palacios decision, the capacity to implement retirement policies which are appropriate according to the employment goals set is extended to the social partners and the payment of a pension is seen as “not inappropriate and unnecessary” to promote the policy without focusing solely on the age of the beneficiary. It is interesting to note that the Court uses the negative form though.

One must show a causal link between an age distinction and the legitimate aim of the policy without other less discriminatory alternatives (Mangold and Hutter cases). Hutter gives a broad interpretation of the choice of measures to further the aims of retirement and vocational training policies.

These cases seem to suggest that the Court is more deferent in evaluating the means of obtaining a public policy goal through age distinctions when the policy is focused on retirement (Palacio, Age Concern, Bartsch) rather than employment (Hutter, Mangold).

CONCLUSION

In sum, the ECJ has been quite proactive in applying standards of evaluation of distinctions based on age which derive from social policies. Article 6 of the Directive sets a comprehensive framework for this judicial scrutiny and gives the ECJ a relatively strong capacity to determine what policies are discriminatory in the Member States.

One can regret that age bias, the non economic dimension of age discrimination and indirect discrimination are not more targeted in these cases. The pending cases of Wolf and Petersen will hopefully give us more insight on the perceptions of aging in the workforce. Other considerations could include looking at the articulation of employment objectives and budgetary questions linked to the challenges for the social security system and managing, without discrimination, the balance between the generations in the workforce.