The prohibition of discrimination based on age in the light of the ECJ case law

ERA - 9 November 2010

Jean-Philippe Lhernould, Professor of Law,
University of Poitiers

1

ECJ 22 November 2005

Werner Mangold

v. **Rüdiger Helm**

C-144/04

Facts and procedure (1)

- On 26 June 2003 Mr M., then 56 years old, concluded with Mr H., who practises as a lawyer, a contract that took effect on 1 July2003
- Article 5 of that contract provided that "The duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers, since the employee is more than 52 years old".
- According to Mr M., Article 5, inasmuch as it limits the term of his contract, is, although such a limitation is in keeping with Paragraph 14(3) of the TzBfG, incompatible with the Framework Agreement and with Directive 2000/78

Facts and procedure (2)

- The Arbeitsgericht München is uncertain whether rules such as those contained in Paragraph 14(3) of the TzBfG are compatible with Article 6 of Directive 2000/78, in that the lowering, by the Law of 2002, from 58 to 52 of the age at which it is authorised to conclude fixed-term contracts, with no objective justification, does not guarantee the protection of older persons in work

Legal questions

- Is Article 6 of Directive 2000/78 to be interpreted as precluding a provision of national law which authorises the conclusion of fixed-term employment contracts, without any objective reason, with workers aged 52 and over, contrary to the principle requiring justification on objective grounds?
- If so, must the national court refuse to apply the provision of domestic law which is contrary to Community law and apply the general principle of internal law, under which fixed terms of employment are permissible only if they are justified on objective grounds?

ECJ's reply

- Paragraph 14(3) of the TzBfG, by permitting employers to conclude without restriction fixed-term contracts of employment with workers over the age of 52, introduces a difference of treatment on the grounds directly of age
- Article 6(1) of Directive 2000/78 provides that the Member States may provide that such differences of treatment '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'

ECJ's reply:legitimate aim

- The purpose of that legislation is plainly to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work.
- The legitimacy of such a public-interest objective cannot reasonably be thrown in doubt

ECJ's reply: proportionality test

- However, it still remains to be established whether, according to the actual wording of that provision, the means used to achieve that legitimate objective are 'appropriate and necessary'.
- In this respect the Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy

ECJ's reply: proportionality test

- In so far as such legislation takes the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, it must be considered to go beyond what is appropriate and necessary in order to attain the objective pursued

ECJ's reply: general principle of law

- The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law.
- It is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law

ECJ 16 October 2007

Félix Palacios de la Villa *v.*

Cortefiel Servicios SA

C-411/05

Facts and procedure

- By letter of 18 July 2005, Cortefiel notified Mr P. of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age provided for in the third paragraph of Article 19 of the collective agreement
- Mr P. had completed the periods of employment necessary to draw a retirement pension under the social security scheme amounting to 100% of his contribution base of € 2 347.78, without prejudice to the maximum limits laid down by national legislation
- Mr P. brought an action before the Juzgado de lo Social No 33, Madrid. He requested that the measure taken be declared null and void on the ground that it was in breach of his fundamental rights and, more particularly, his right not to be discriminated against on the ground of age, since the measure was based solely on the fact that he had reached the age of 65

Legal questions

- Does the principle of equal treatment, which prohibits any discrimination whatsoever on the grounds of age and is laid down in Article 13 EC and Article 2(1) of Directive 2000/78, preclude a national law pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Spanish State for entitlement to a retirement pension under their contribution regime?

ECJ's reply: applicability of the directive

- The legislation at issue, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 65, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force
- Consequently, legislation of that kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c) of Directive 2000/78

ECJ's reply: legitimate aim

- National legislation according to which the fact that a worker has reached the retirement age laid down by that legislation leads to automatic termination of his employment contract, must be regarded as directly imposing less favourable treatment for workers who have reached that age as compared with all other persons in the labour force. Such legislation therefore establishes a difference in treatment directly based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78
- it is clear from Article 6(1) of the directive that such inequalities will not constitute discrimination prohibited under Article 2 'if, within the context of national law, they are objectively and reasonably justified by a legitimate aim"

ECJ's reply: legitimate aim

- The single transitional provision, which allows the inclusion of compulsory retirement clauses in collective agreements, was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations. It is true, as the national court has pointed out, that that provision does not expressly refer to an objective of that kind.
- However, It cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision
- Placed in its context, the single transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment

ECJ's reply: proportionality test

- It remains to be determined whether, in accordance with the terms of that provision, the means employed to achieve such a legitimate aim are 'appropriate and necessary'.
- the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it
- It is, therefore, for the competent authorities of the Member States to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the Member State concerned

ECJ's reply: proportionality test

- It does not appear unreasonable for the authorities of a Member State to take the view that such a measure may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.
- Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life
- It is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose

ECJ 23 September 2008

Birgit Bartsch *v.*

Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH

C-427/06

Facts and procedure

- Mrs B., who was born in 1965, married Mr B. in 1986. The latter was born in 1944 and died on 5 May 2004. On 23 February 1988 Mr B. had concluded an employment contract with Bosch-Siemens Hausgeräte GmbH ('BSH')
- After the death of her husband, Mrs B. requested BSH to pay her a survivor's pension on the basis of the company guidelines
- BSH rejected Mrs B.'s request since Mrs B. is more than 15 years younger than her deceased husband

Legal questions

- Does the primary law of the EC contain a prohibition of discrimination on grounds of age, protection under which must be guaranteed by the Member States even if the allegedly discriminatory treatment is unconnected to EC law?
- If question (a) is answered in the negative, does such a connection to Community law arise from Article 13 EC or – even before the time-limit for transposition has expired – from Directive 2000/78 ?

ECJ's reply

- Neither Directive 2000/78 nor Article 13 EC enable a situation such as that in issue to be brought within the scope of Community law
- the death of Mr B. occurred before the time-limit allowed to the Member State concerned for transposing the directive had expired
- Article 13 EC, which permits the Council of the EU to take appropriate action to combat discrimination based on age, cannot, as such, bring within the scope of Community law, for the purposes of prohibiting discrimination based on age, situations which do not fall within the framework of measures adopted on the basis of that article, specifically Directive 2000/78 before the time-limit provided therein for its transposition has expired
- The application, which the courts of Member States must ensure, of the prohibition under Community law of discrimination on the ground of age is not mandatory where the allegedly discriminatory treatment contains no link with Community law. No such link arises from Article 13 EC

ECJ 5 March 2009

The Incorporated Trustees of the National Council on Ageing (Age Concern England) *v.*

Secretary of State for Business, Enterprise and Regulatory Reform

C-388/07

Facts and procedure

- "Age Concern England" is a charity which aims to promote the welfare of older people
- In essence, it submits that, by providing in UK Regulation 30 for an exception to the principle of non-discrimination where the reason for the dismissal of an employee aged 65 or over is retirement, the Regulations infringe Article 6(1) of Directive 2000/78 and the principle of proportionality
- Age Concern England submits that, by having recourse, in the second subparagraph of Article 6(1) of Directive 2000/78, to a list of objective and reasonable justifications, the Community legislature intended to impose on MS the obligation to set out in their instruments of transposition a specific list of the differences of treatment which may be justified by reference to a legitimate aim

Legal questions

- Does Article 6(1) of the Directive permit MS 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 MS 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)?
- 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?'

ECJ's reply

- A directive is to be binding, as to the result to be achieved, upon each MS to which it is addressed, but is to leave to the national authorities the choice of form and methods
- The transposition of a directive into domestic law does not moreover always require that its provisions be incorporated formally in express, specific legislation.
- The implementation of a directive may, depending on its content, be effected in a MS by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear

ECJ's reply: legal wording of justification

- Therefore, Article 6(1) of Directive 2000/78 cannot be interpreted as requiring MS to draw up, in their measures of transposition, a specific list of the differences in treatment which may be justified by a legitimate aim.
- Moreover, it is clear from the words of that provision that the legitimate aims and the differences in treatment referred to therein are purely illustrative

ECJ's reply: proportionality test

- It is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to determine whether and to what extent a provision which allows employers to dismiss workers who have reached retirement age is justified by 'legitimate' aims within the meaning of Article 6(1)
- In choosing the means capable of achieving their social policy objectives, the MS enjoy broad discretion. However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim

ECJ's reply: proportionality test applicable to firm policies

- By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers

ECJ's reply: links between Art. 2(2) and 6(1)

- If a provision, a criterion or a practice does not constitute discrimination within the meaning of the directive, by reason of an objective justification within the meaning of Article 2(2)(b) thereof, it is as a consequence not necessary to have recourse to Article 6(1) of the directive

ECJ 18 June2009

David Hütter *v.*

Technische Universität Graz

C-88/08

Facts and procedure

- Mr H. was born in 1986. Together with a female colleague, he completed a period of apprenticeship, from 3 September 2001 to 2 March 2005, as a laboratory technician with TUG, a public body
- As Mr H.'s colleague was 22 months older than him, she was recruited at a higher incremental step, which translated into a difference in monthly salary of EUR 23.20.
- That difference stems from the fact that the period of apprenticeship completed by Mr H. after attaining his majority was only approximately 6.5 months, as contrasted with 28.5 months in the case of his colleague.
- Mr H. brought an action before the Landesgericht für Zivilrechtssachen Graz. He sought payment of compensation equivalent to the difference in treatment he received due to his age

Legal questions

- Are Articles 1, 2 and 6 of [Directive 2000/78] to be understood as precluding national legislation which excludes accreditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18?

ECJ's reply

- The directive applies, within the framework of the areas of competence conferred on the Community, 'to all persons, as regards both the public and private sectors, including public bodies'
- National legislation such as that at issue in the main proceedings imposes less favourable treatment for persons whose professional experience has, albeit only in part, been acquired before the age of 18 as compared with those who have acquired experience of the same nature and of comparable length after attaining that age. Such legislation establishes a difference in treatment between persons based on the age at which they acquired their professional experience.

ECJ's reply: legitimate aim

- The Austrian legislature intended to exclude accreditation of professional experience acquired before full legal capacity has been attained, at the age of 18, in order not to place persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education (= incentive to pursue secondary studies)
- Desire of the legislature to avoid making apprenticeship more costly for the public sector and thereby promote the integration of young people who have pursued that type of training into the labour market

ECJ's reply: legitimate aim

- The aims mentioned by the national court come within that category of legitimate aims and may justify differences in treatment associated with 'the setting of special conditions on access to employment …, including … remuneration conditions, for young people … in order to promote their vocational integration' and 'the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment' referred to in Article 6(1)(a) and (b), respectively, of Directive 2000/78.

ECJ's reply: proportionality test

- the MS unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy
- …but it should be pointed out that the aims mentioned by the national court may, at first sight, appear contradictory. One of those aims is to encourage pupils to pursue a general secondary education rather than vocational education. Another aim is to promote the recruitment of persons who have had a vocational education rather than of persons with a general education

ECJ's reply: proportionality test

- it must also be observed that the national legislation relies on the criterion of previous professional experience for the purposes of determining grading within the scale and, consequently, the pay of contractual public servants.
- The fact remains, however, that national legislation does not merely reward experience but also establishes, where experience is equal, a difference in treatment on the basis of the age at which that experience was acquired. In those circumstances, such an age-related criterion therefore has no direct relationship with the aim, so far as the employer is concerned, of rewarding professional experience.

ECJ's reply: proportionality test

- As regards the aim of not treating a general secondary education less favourably than a vocational education, the criterion of the age at which previous experience was acquired applies irrespective of the type of education pursued. It excludes accreditation both of experience acquired before the age of 18 by a person who has pursued a general education and of that acquired by a person with a vocational education. That criterion may therefore lead to a difference in treatment between two persons with a vocational education or between two persons with a general education based solely on the criterion of the age at which they acquired their professional experience
- the criterion of the age at which the vocational experience was acquired does not appear appropriate for achieving the aim of not treating general education less favourably than vocational education
- Consequently, legislation with the characteristics at issue cannot be regarded as appropriate within the meaning of Article 6(1) of Directive 2000/78.

ECJ 12 January2010

Colin Wolf *v.*

Stadt Frankfurt am Main

C-229/08

Facts and procedure

- By a letter received by the fire service directorate of the City of Frankfurt am Main on 4 October 2006, Mr W., who was born on 9 December 1976, applied for an intermediate career post in the fire service
- By letter of 28 February 2007, the City told Mr W. that his application could not be considered, because he was older than the age limit of 30 years.
- On 12 April 2007 Mr W. claimed compensation from the City on the basis of Paragraph 21 of the AGG

Legal questions

- The referring court raises the question of the discretion open to the national legislature to provide that differences of treatment on grounds of age do not constitute discrimination prohibited by Community law.
- It asks in particular whether aims such as the concern to ensure a long career for officials, to limit the amount of social benefits paid, to set up a balanced age structure within an occupation, or to ensure a minimum period of service before retirement are legitimate within the meaning of Article 6(1) of the Directive, and whether setting the maximum recruitment age for intermediate career posts in the fire service at 30 years is an appropriate and necessary means of achieving such aims.

ECJ's reply

- Even if, formally, the referring court has limited its question to the interpretation of Article 6(1) of the Directive in relation to a possible justification of the difference of treatment resulting from the application of the national legislation at issue in the main proceedings, that does not prevent the Court from providing that court with all the elements of interpretation of Community law which may be of assistance in adjudicating in the case pending before it

ECJ's reply: "genuine and determining occupational requirement"

- It is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement
- Therefore, it must be ascertained whether physical fitness is a characteristic related to age and whether it constitutes a genuine and determining occupational requirement for the occupational activities in question or for carrying them out

ECJ's reply: "genuine and determining occupational requirement"

- The concern to ensure the operational capacity and proper functioning of the professional fire service constitutes a legitimate objective within the meaning of Article 4(1)
- The activities are characterised by their physical nature. Those persons take part in fighting fires, rescuing persons, environment protection tasks, helping animals and dealing with dangerous animals, as well as supporting tasks such as the maintenance and control of protective equipment and vehicles. It follows that the possession of especially high physical capacities may be regarded as a genuine and determining occupational requirement

ECJ's reply: "genuine and determining occupational requirement"

- As regards the question whether the need to possess high physical capacities is related to age, the German Government submits that some of the tasks of persons in the intermediate career of the fire service, such as fighting fires or rescuing persons, require exceptionally high physical capacities and can be performed only by young officials. The German Government produces scientific data deriving from studies showing that very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities.

ECJ's reply: proportionality test

- Is the 30 years old limit appropriate for achieving the objective pursued and does not go beyond what is necessary to achieve it?
- The age at which an official is recruited determines the time during which he will be able to perform physically demanding tasks
- Recruitment at an older age would have the consequence that too large a number of officials could not be assigned to the most physically demanding duties. Similarly, such recruitment would not allow the officials thus recruited to be assigned to those duties for a sufficiently long period.

ECJ's reply: coordination between Art.4(1) and 6(1)

- It is apparent that national legislation which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years may be regarded, first, as appropriate to the objective of ensuring the operational capacity and proper functioning of the professional fire service and, second, as not going beyond what is necessary to achieve that objective.
- Since the difference of treatment on grounds of age is justified with regard to Article 4(1) of the Directive, there is no need to examine whether it could be justified under Article 6(1) of the Directive.

ECJ 12 January2010

Domnica Petersen *v.*

Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe

C-341/08

Facts and procedure

- Ms P., who was born in 1939, reached the age of 68 in 2007. She was admitted to practise as a panel dentist from 1974.
- By decision of 25 April 2007, the admissions board for dentists found that Ms P.'s authorisation to provide panel dental care would expire on 30 June 2007.
- Ms P. lodged a complaint against that decision
- The Law on the safeguarding and structural improvement of the statutory health insurance scheme provides that, from 1 January 1999, admission to practise as a panel doctor expires at the end of the calendar quarter in which the panel doctor completes his 68th year.

Legal questions

- Does Article 6(1) of the Directive preclude a national measure setting a maximum age for practising as a panel dentist, in order to protect the health of patients insured under the statutory health insurance scheme, since it is thought that the performance of those dentists declines from that age?

ECJ's reply: legitimate aim

- National legislation has the consequence that dentists are treated less favourably than other persons practising the same profession on the ground that they have exceeded the age of 68 years. Such a provision introduces a difference of treatment on grounds of age within the meaning of the Directive.
- The referring court mentioned several objectives: the protection of the health of patients covered by the statutory health insurance scheme (the performance of dentists declines after a certain age); the distribution of employment opportunities among the generations; the financial balance of the German health system.

ECJ's reply: legitimate aim

- The national legislation in question does not specify the aim pursued, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate
- It is ultimately for the national court to seek out the reason for maintaining the measure in question and thus to identify the objective it pursues.

ECJ's reply: legitimate aim+test

- First objective: the field of the health of patients, considered from the point of view of the competence of doctors and dentists + financial balance of healthcare system.
- In the context of Article 2(5) of the Directive, a MS may find it necessary to set an age limit for the practice of a medical profession such as that of a dentist in order to protect the health of patients
- To assess whether the measure is necessary in relation to the objective pursued, it must be ascertained whether the exceptions to the age limit at issue in the main proceedings interfere with the consistency of the legislation in question by leading to a result that is contrary to that objective

ECJ's reply: legitimate aim+test

- 4th exception: outside the "panel system", dentists can practise their profession at any age, and patients can consequently be treated by dentists older than 68
  - a measure to which there is so broad an exception as that for dentists practising outside the panel system cannot be regarded as essential for the protection of public health
  - if the objective pursued by the measure at issue in the main proceedings is the protection of the health of patients, from the point of view of the competence of doctors and dentists, that measure lacks consistency
  - If the aim of the measure is to preserve the financial balance of the public healthcare system, the fourth exception does not interfere with the objective pursued

ECJ's reply: legitimate aim+test

- Second objective: namely to share out among the generations employment opportunities in the profession of panel dentist.
- Analysed under Article 6(1)
- Encouragement of recruitment undeniably constitutes a legitimate social policy or employment policy objective of the Member States, and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers

ECJ's reply: legitimate aim+test

- The question arises, however, of whether the application of an age limit is appropriate and necessary for achieving the aim pursued
- having regard to the discretion available to the MS, it must be acknowledged that, faced with a situation in which there is an excessive number of panel dentists or with a latent risk that such a situation will occur, a MS may consider it necessary to impose an age limit
- However, it is for the national court to

ECJ's reply: legitimate aim+test

- It would still remain to be ascertained whether the measure at issue is consistent, taking into account the four exceptions
- The first three exceptions, designed either for specific situations in which there is a shortage of panel dentists or for a limited period of time, do not interfere with the objective of promoting the entry to the labour market of young panel dentists. The fourth exception concerns the non-panel sector and has no effect whatever on the entry to the labour market of young dentists practising in the panel system.

ECJ's reply: summary

- Article 2(5) precludes a national measure setting a maximum age for practising as a panel dentist where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists;
- Article 6(1) of the Directive does not preclude such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim;
- It is for the national court to identify the aim pursued by the measure laying down that age limit, by ascertaining the reason for maintaining the measure.

ECJ 19 January2010

Seda Kücükdeveci *v.*

Swedex GmbH & Co. KG

C-555/07

Facts and procedure

- Swedex dismissed Mrs K. by letter of 19 December 2006 with effect, taking account of the statutory notice period, from 31 January 2007. The employer calculated the notice period as if the employee had three years' length of service, although she had been in its employment for 10 years.
- In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account

Legal questions

- Does a national provision under which the periods of notice to be observed by employers are extended incrementally as the length of employment increases, but the employee's periods of employment before the age of 25 are disregarded, infringe the Community law prohibition of discrimination on grounds of age, in particular primary Community law or Directive 2000/78
- In legal proceedings between private individuals, must a court of a Member State disapply a statutory provision which is explicitly contrary to Community law?

ECJ's reply: general principle of law

- it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether EU law precludes national legislation such as that at issue in the main proceedings

ECJ's reply: legitimate aim+test

- Objectives of the kind mentioned by the German Government (hat young workers generally react more easily and more rapidly to the loss of their jobs) clearly belong to employment and labour market policy within the meaning of Article 6(1) of Directive 2000/78
- However, the legislation is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal
  - the extension of the notice period for dismissal according to the employee's seniority in service is delayed for all employees who joined the undertaking before the age of 25, even if the person concerned has a long length of service

ECJ's reply: EU law primacy

- The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of EU law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so

Pending cases

- ***Deutsche Lufthansa* (C-109/09)**
  - The referring Court asks the ECJ essentially if a provision of national law under which fixed-term employment contracts may be agreed without further conditions with workers simply because the latter have reached the age of 58 is compatible to EU law
- ***Andersen* (C-499/08)**
  - compatibility with Directive 2000/78/EC of a provision of national law which allows to refuse to pay a severance allowance upon termination of employment, when the dismissed person is entitled to an old-age pension from a pension scheme to which the employer has contributed

- ***Prigge* (C-447/09)**
  - Under the collective agreement which applies to aircraft pilots, without any need for notice of termination of employment to be given, their employment relationship terminates at the end of the month in which they reach 60 years of age
- ***Koehler* (C-159/10)**
  - The plaintiff has been civil servant in the service of the Land Hessen. After reaching his compulsory retirement age of 65 he requested prolongation of his active status as civil servants. The employer refused the prolongation by stating that there is no interest of the service to keep the plaintiff in active service.

- ***Rosenbladt* (C-45/09)**
  - The complainant was dismissed by her employer because of reaching the age of 65. The employer justified its decision by referring to a provision of a collective labour agreement permitting employers in the commercial cleaning sector to end the employment for the reason of reaching the age of 65