

# The prohibition of age discrimination in light of ECJ case-law

23 November 2010



# Case law

## ▼ *Mangold v Helm*; Case C – 144/04

### ▼ ECJ –

- ▼ Community law/the Directive precludes a provision of domestic law which authorises (unless the individual was previously engaged by the employer on a permanent basis) the conclusion of fixed-term contracts of employment after the age of 52
- ▼ National courts must set aside any provision of national law which may conflict with Community law, **even where the period prescribed for transposition of that directive has not yet expired**
- ▼ The principle of non-discrimination on grounds of age is a ***general principle*** of Community law



# Case law

- ▼ *Palacios de la Villa v Cortefiel Servicios SA*; Case C – 411/05
  - ▼ ECJ –
    - ▼ The Directive does not preclude national legislation such as that at issue provided:
      - ▼ It is **objectively and reasonably justified** by a legitimate aim relating to employment policy and the labour market, and
      - ▼ The means put in place to achieve that aim **do not appear to be inappropriate and unnecessary** for the purpose



# Case law

- ▼ *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH; Case C – 427/06*
  - ▼ ECJ –
    - ▼ Alleged discriminatory treatment must contain a link to community law; and
    - ▼ No such link can arise from a Directive (either directly or indirectly) before the time-limit allowed for transposition has expired
      - ▼ Case described as a “step back” from *Mangold*



# Case law

- ▼ *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform; Case C-388/07*
  - ▼ ECJ –
    - ▼ National rules such as those at issue [i.e. Regs. 3, 7(4)&(5) and 30 of the Employment Equality (Age) Regulations 2006] fall within the scope of the Directive



# Case law

- ▼ *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform; Case C-388/07*
  - ▼ ECJ –
    - ▼ The Directive does not preclude a national measure which **does not contain a precise list** of the aims justifying derogation from the principle prohibiting age discrimination
      - ▼ It is for **the national court** to ascertain whether the legislation is consonant with a legitimate aim and whether the national legislative/regulatory authority could legitimately consider that the means chosen were appropriate and necessary to achieve the aim



# Case law

- ▼ *Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform; Case C-388/07*
  - ▼ ECJ –
    - ▼ The Directive **gives Member States the option** to provide for certain kinds of differences in treatment on the grounds of age if they are “objectively and reasonably” justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary
      - ▼ Member States are required to establish to a high standard of proof the legitimacy of the aim relied on as a justification. **No particular significance should be attached to the fact that the word “reasonably” in Article 6(1) does not appear in Article 2(2)**



# Case law

## ▼ *Kücükdeveci v Swedex*; Case C – 555/07

### ▼ ECJ –

- ▼ The Directive precludes national legislation which provides that periods of employment completed before the age of 25 are not taken into account in calculating the notice period for dismissal
- ▼ The preliminary ruling mechanism is an **optional mechanism** and national courts may disapply offending national legislation independently of whether reference to the ECJ is made
  - ▼ Decision leaves a question unanswered
  - ▼ New case law from the Federal Labour Court





# Case law

- ▼ *David Hütter v Technische Universität Graz*; Case C-88/08
  - ▼ ECJ –
    - ▼ National legislation providing for the exclusion of professional experience acquired before the age of 18 (when determining an employee's grading) constituted age discrimination which was not legitimately objectively justified



# Case law

- ▼ *Wolf v Stadt Frankfurt Am Main*; Case C – 229/08
  - ▼ ECJ –
    - ▼ A maximum age of 30 for recruitment to a post in the fire service involving front-line fire fighting duties is **not age discriminatory** as
      - ▼ Physical fitness is a genuine and determining occupational requirement
        - ▼ Article 4(1) of the Directive applied



# Case law

- ▼ *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*; Case C – 341/08
  - ▼ ECJ –
    - ▼ Setting a maximum age (68) 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, is precluded by the Directive **as that age limit does not apply to non-panel (i.e. private) dentists**



# Case law

- ▼ *Ingeniorforeningen I Danmark for Ole Andersen v Region Syddanmark*; Case C – 499/08
  - ▼ ECJ –
    - ▼ Articles 2 and 6(1) of the Directive preclude national legislation pursuant to which workers who are eligible for an old-age pension from their employer (under a pension scheme which they joined before reaching the age of 50) cannot, **on that ground alone**, claim a severance allowance aimed at assisting workers with more than 12 years of service in finding new employment



# Case law

- ▼ *Gisela Rosenblatt v Oellerking Gebäudereinigungsgesellschaft*; Case C – 45/09
  - ▼ ECJ -
    - ▼ Article 6(1) of the Directive does not preclude a national provision under which clauses on the automatic termination of employment contracts upon the employee reaching the age of retirement are considered to be valid, in so far as:
      - ▼ that provision is objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market; **and**
      - ▼ the means of achieving that aim are appropriate and necessary
        - ▼ The implementation of that authorisation by means of a collective agreement is not, as such, exempt from any review by the courts but, in accordance with the requirements of Article 6(1) of that directive, must itself pursue a legitimate aim in an appropriate and necessary manner



# Case law

- ▼ *Gisela Rosenblatt v Oellerking Gebäudereinigungsgesellschaft*; Case C – 45/09
  - ▼ ECJ -
    - ▼ Article 6(1) of the Directive does not preclude a collective agreement providing for the automatic termination of employment contracts when employees reach retirement age (set at 65)
    - ▼ Articles 1 and 2 of the Directive do not preclude a Member State from declaring a collective agreement containing a clause on the automatic termination of employment contracts to be of general application...
      - ▼ provided that it does not deprive employees who have reached retirement age of the protection from discrimination on grounds of age conferred on them by those provisions



# Case law

▼ *Bulicke v Deutsche Büro Service GmbH*; case C-246/09

▼ ECJ –

- ▼ A two month time limit in which to raise age discrimination claims under German law does not breach the Directive provided:
  - ▼ The time limit is **no less favourable** than the time limit applicable to other similar claims in domestic law; and
  - ▼ It **does not make it excessively difficult** for claimants to exercise rights under the Directive



# Pending cases

- ▼ *Deutsche Lufthansa AG v Gertraud Kumpan*; Case C – 109/09
  - ▼ Preliminary reference from Germany regarding the legality of national laws permitting:
    - ▼ Fixed-term employment contracts (without further conditions) for workers over the age of 58; and
    - ▼ Successive fixed-term contracts for workers over the age of 58 without objective justification (provided the employee has not worked for the employer previously on a permanent basis)
      - ▼ Separately, whether the national courts **MUST** disapply either national law if it is found to be unlawful





# Pending cases

- ▼ *Vasil Ivanov Georgiev v Tehnicheski universitet; Case C – 250/09 & Case C – 268/09*
  - ▼ **Advocate General –**
    - ▼ A national stipulation providing that an employment contract with a university professor who has reached 65 years of age can be terminated (or can only be extended by a fixed-term contract of one years duration a maximum of three times) constitutes direct discrimination according to the Directive
    - ▼ However, it is not contrary to the Directive if the aim of this provision is to enable balanced employment activity between the generations within this professional group



# Pending cases

- ▼ *Reinhard Prigge and others v Deutsche Lufthansa AG; Case C – 447/09*
  - ▼ Preliminary reference from Germany regarding:
    - ▼ the legality of rules of national law which recognise an age-limit of 60 for pilots established by collective agreement for the purposes of ensuring air safety



# Pending cases

- ▼ *Hüseyin Balaban v Zelter GmbH*; Case C – 86/10
  - ▼ Preliminary reference from Germany regarding:
    - ▼ the legality of national legislation which, in the selection of workers to be dismissed for redundancy, allows age groups to be formed to ensure a balanced structure and a proportionate selection of employees from various age groups



# Pending cases

- ▼ *Gerhard Fuchs & Peter Köhler v Land Hessen*; Case C – 159/10 & Case C – 160/10
  - ▼ Preliminary reference from Germany regarding:
    - ▼ Whether the rules laid down in the Civil Service Law of the Land of Hessen, on the compulsory retirement age for civil servants, are based on an aim in the public interest in accordance with standards of Union law (i.e. the Directive)



# Pending cases

- ▼ *Sabine Hennigs v Eisenbahn-Bundesamt & Land Berlin v Alexander Mai*; Case C-297/10 & Case C-298/10
  - ▼ Preliminary reference from Germany regarding, generally:
    - ▼ Whether, taking into account the right of parties to a collective agreement to collective bargaining, a collective pay agreement for public sector employees, which determines basic pay in individual salary groups by age categories, infringes the primary-law prohibition of age discrimination as given expression by the Directive



# Questions?

Dr. Martin Nebeling, Partner

Phone: +49 (0)211 2005 6240

Fax: +49 (0)211 2005 6011

[martin.nebeling@twobirds.com](mailto:martin.nebeling@twobirds.com)

