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THE PROHIBITION OF AGE DISCRIMINATION AND THE ECJ

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Auf der Wiesen

DIRECTIVE 2000/78/EC

- Art. 1: Prohibition of (inter alia) age discrimination**
- Art. 2: Prohibition of indirect & direct discrimination and harassment**
- Art. 7: Exception for positive action**
- Art. 4: Exception for particular occupational requirements**
- Art. 6 Specific exceptions related to age**

AGE IS ALWAYS

- ***Any* age, whether young, middle or old**
- **Unlike United States formerly: age discrimination only prohibited from 40 upwards**

ALL TYPES OF DISCRIMINATION ARE PROHIBITED (Art. 2)

- ***Indirect* discrimination**
e.g. “We need people aged 30-40”
- ***Direct* discrimination**
e.g. “We want a cleaner with 30 years’ experience”
- ***Harassment* (e.g. bullying older workers)**

GENERAL EXCEPTIONS I

Art. 7: *Positive action*
to prevent/compensate for
disadvantages

Examples:

- booster training for jobless under 25
- preference to candidates over 55 when all are equally qualified

GENERAL EXCEPTIONS II

Art. 4 *Occupational requirement:*

A particular age is

- **a *genuine occupational requirement* because of the nature of the work**
- **and *necessary and appropriate* in pursuit of a legitimate objective**

Examples:

Firefighters – age cap at 30 (ECJ Wolf)

PROBLEMS

- **Pilots: enforced retirement at 60? (pending at the ECJ)**
- **Romeo and Juliet (the centenarian Johannes Heesters)? (authenticity)**
- **We are seeking to recruit a venerable grey-haired banker aged 50 or over? (client expectations)**

AGE-SPECIFIC EXCEPTIONS

**Art. 6 of Directive 2000/78/EC:
Different treatment on grounds of
age must be**

- objective and reasonable**
- justified by a legitimate aim**
- achieved by appropriate and
necessary means**

NO BOUNDARIES

- Different treatment can be
accepted anywhere in the world of
employment as long as these
criteria for admissibility are met.**
- Art. 6 I a) - c) simply list examples!**

IN PARTICULAR ...

**this can include, under Art. 6 a):
special conditions to promote the vocational integration or ensure the protection of young people or older workers.**

Examples:

- **rules limiting the conditions in which young people may work**
- **special courses targeting jobless over 52**

IN PARTICULAR ...

**this can include, under Art. 6 b):
minimum requirements of age, professional experience or seniority in service in order to gain access to the job or certain advantages.**

Examples:

- **years of experience in different areas for executive positions**
- **incremental pay linked to years in employment**

IN PARTICULAR ...

this can include, under Art. 6 c):

a maximum age of recruitment because of training requirements or the need for a reasonable period in employment

Examples:

- **career development structure (trainees)**
- **application to be a pilot with long training**

BUT:

Different treatment can be accepted anywhere in the world of employment

as long as the criteria for admissibility set down in Article 6 of the Directive are met.

PROBLEMS IN PRACTICE I

When employment begins

- **Is it admissible to ask about age?**
- **Access and *minimum age* for civil servants/judges (e.g. 40)?**
- ***Maximum age* for civil servants (e.g. 30, 35, 40)?**
- **Can recruitment be limited to applicants in their first year of employment?**
- **Recognising early employment (Hütter)**

PROBLEMS IN PRACTICE II

During employment: pay

- **Lower pay for young people?**
- **Flat-rate deductions for young workers?**
- **Age categories in public service? (pending at the ECJ)**
- **Guaranteed pay elements for older workers?**

PROBLEMS IN PRACTICE III

During employment: terms of contract

- **More holiday for older workers?**
- **Shorter working week for older workers?**
- **Partial retirement schemes**

PROBLEMS IN PRACTICE IV

Termination with notice

- **Longer periods of notice for certain ages?**
- **Period of notice: years in job under 25 not counted? (Küçükdevici)**
- **Collective bargaining agreement annulling regular notice arrangements in the case of older workers?**
- **Grouping people into age bands in a social points system for selecting redundancies**

PROBLEMS IN PRACTICE V

Termination by fixed-term contract

- **Fixing a term easier with workers over 52 (Mangoldt)?**
- **Fixing a term easier with workers over 58 (Kumpan)?**
- **All employment to end at 65? (Palacios, Rosenblatt ...)**

PROBLEMS IN PRACTICE IV

Age discrimination in severance arrangements

- **Higher rate of severance with older workers**
- **Reduction with even older workers**
- **No severance pay when statutory retirement approaches? (Andersen)**

ECJ TERMS OF EMPLOYMENT I

- 9/12/2004 Hlozek**
(bridging allowance and different retirement ages)
- 3/10/2006 Cadman**
(seniority and indirect discrim.)
- 22/11/2005 Mangold**
(recurrent fixed terms from 52)

ECJ TERMS OF EMPLOYMENT II

- 18/6/2009 Hütter**
(recognition of years in service under a certain age)
- 19/1/2010 Küçükdevici**
(recognition of years in service for periods of notice)
- 12/10/2010 Andersen**
(severance pay and pension)

ECJ TERMS OF EMPLOYMENT III

18/11/2010 Kleist

(no notice upon reaching full pension age when it is 60 for women and 65 for men)

Pending: Kumpan

Unlimited fixed-term contracts from 58: *Bundesarbeitsgericht* reference in 2009

ECJ MAXIMUM RECRUITMENT AGE

Maximum age limits imposed on access

12/1/2010 Wolf

(public servants seeking to enter active firefighting : age 30)

ECJ MAXIMUM EMPLOYABLE AGE

***Specific* maximum age limits triggering termination of employment**

12/1/2010 Petersen

(dentists contracted by health insurers to maximum age of 68)

Pending:

Pilots on passenger planes: age capped at 60 (*Bundesarbeitsgericht* reference in 2009)

COMPULSORY RETIREMENT AT 65

Automatic termination of employment at a certain age (usually 65)

- **legal statute**
- **collective bargaining agreement**
- **works agreement**
- **individual employment contract**

CLAUSES ON MAXIMUM AGE

“Employment terminates, without any requirement for notice to be served, upon reaching the age of 65 in the case of men and 60 in the case of women.”

“Employment terminates without notice at the end of the month when the worker becomes eligible for the full statutory retirement pension.”

ECJ ON AGE CAP AT 65

- **16/10/2007 C-411/05 Palacios**
- **05/03/2009 C-388/07 Age Concern England**
- **12/10/2010 C-45/09 Rosenblatt**
- **18/11/2010 C-250 and 268/09 Georgiev**

ECJ PALACIOS I

- **Age limit of 65 falls within the scope of the Directive**
- **The aim behind the age limit does not have to be set out explicitly**
- **Elements relating to a legitimate aim must be identifiable, then the age limit is seen as in principle appropriate and necessary**
- **The legislator retains broad discretion**

ECJ PALACIOS II

- **Proportionality principle: exceptions are appropriate and necessary**
- **The aim is in the public interest**
- **The aim must be “reasonable”**
- **The interests of the worker must not be unduly prejudiced**
- **Pension must not be unreasonably low**

ECJ AGE CONCERN I

- **States have a broad choice of methods**
- **Elements of a legitimate aim can be identified from the context**
- **Social policy objectives in the public interest (employment policy and labour market)**
- **Specific interests of the employer are conceivable**

ECJ AGE CONCERN II

- **Legislator has broad discretion**
- **Were the justifications reasonable and did they hold up under scrutiny?**
- **Burden of proof rests with the state**
- **Measure is governed by the proportionality principle**
- **Sole jurisdiction in all matters: exercised by the national court**

ECJ ROSENBLADT I

Case (referred by labour tribunal in Hamburg):

- **Cleaner working 10-hour week, 37 years in the same job, now aged 65**
- **Gross income before retirement:**
€307.48
- **Pension now at 65: €253.00**

ECJ ROSENBLADT II

- **General assertions about the labour market are sufficient**
- **Does not hinge on the specific age of statutory retirement**
- **Does not hinge on the specific situation of the plaintiff**
- **The employer does not have to replace the worker**

ECJ ROSENBLADT III

The real reason?

Decisively, it was not the intention of the legislature to call into question, in the name of combating discrimination on the grounds of age, *the existing situation*, in which clauses on automatic termination of employment contracts when an employee reaches retirement age are widely used regardless of social and demographic conditions and of the situation on the employment market. (§ 42)

ECJ ROSENBLADT IV

Criticisms:

- **Limited to “objective not unreasonable”**
- **Mere assertions about labour market policy justifications are sufficient**
- **Few obtain the age limit of 65**
- **The employer has the sole right to decide about continued working**
- **Driven into poverty**
- **Incoherence: forced termination followed by new application**

ROSENBLADT V a

Judgment of the Hamburg Court on 25/1/2011:

The age limit of 65 in the collective bargaining agreement for cleaners is admissible under EU law, however, it does contravene the general equality principle in Section 3(I) of Germany's Basic Law.

ROSENBLADT V b

There is no justification for discontinuing the need to give notice to workers over 65 – there are no differences of a nature and weight that might justify this unequal treatment.

THIS CONCLUDES:

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