

The Prohibition of Discrimination on Grounds of Age in the Light of ECJ Case-Law

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IV. Summary

I. Job-related maximum age for recruitment

ECJ 12/1/2010 C-229/08 Wolf

1. The issue:

Review of maximum recruitment age of 30 for active fire-fighters

I. Job-related maximum age for recruitment

2. Judicial review

Question from VG Frankfurt about justifications as provided by **Art. 6** 2000/78/EC

– ECJ's reply follows **Art. 4** 2000/78/EC: high physical capacities; aim is to ensure functioning fire service – from 45, physical strength typically declines, so age limit is justified in order to ensure 15 years of active fire-fighting.

Note! What the ECJ does not say: nothing about typical job-related termination limits!!

II. During the contract

1. Age-related pay:

a) Employment Appeals Tribunal (LAG) Hessen
22/4/2009 – 2 Sa 1689/08 – ECJ C-298/10:

Provision in collective agreement violates Section 7(2) Equality Act (AGG) and hence principle of “levelling up”

Problem: older collective agreements, older civil & judicial service agreements and preserving vested rights upon transfer.... BAG reference 20/5/2010 – 6 AZR 319/09 – ECJ C-297/10

II. During the contract

- Problem of age-related pay

b) Legal framework:

- ECJ 3/10/2006 – C-17/05 – Cadman Job experience (length of service) can be reflected in pay
- Supreme court ruling
No reference to age
- Solution in breach of Section 7 (2) AGG (+) but legal consequences merit consideration, examination of Section 140 Civil Code (BGB), translation into length of service is difficult

II. During the contract

2. Age-related annual leave

Employment Tribunal in Wesel upheld by High Court in Düsseldorf on 18/1/2011 – 8 Sa 1274/10

The issue:

Annual leave increases gradually from age 20

-> not a legitimate objective

-> problematic legal consequences of maximum leave for all?

III. At the end of the contract

1. Periods of notice
2. Socially selective age groups
3. Fixed-term contracts as in Section 14(3) Part-Time/Fixed-Term Employment Act (TzBfG)
4. Age limits (and preliminary rulings)

1. Periods of notice

- a) **Starting point:** Implementing ECJ
19/1/2010 C-555/07 (Kücükdevici)

Reasoning of ECJ:

Section 622 (2) sentence 2 BGB violates the prohibition of age discrimination and is not to be applied by the national court because, although the rule is justified by a legitimate aim, the means of achieving it are not proportionate.

Text of Section 622(2)2 BGB

paragraph 2:

“For notice of termination by the employer, the notice period is as follows if the employment relationship ...

1. has lasted for two years, one month...

2. has lasted for five years, two months...”

sentence 2:

“... time periods prior to completion of the twenty-fifth year of life of the employee are not taken into account”

1. Periods of notice

b) Essentials:

- age discrimination
- possibility of justification

Criteria in Directive 2000/78/EC

b) Essentials

aa) Criteria in Directive 2000/78/EC

Article 6:

Justification of differences of treatment on grounds of age

(1) Notwithstanding Article 2(2), 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

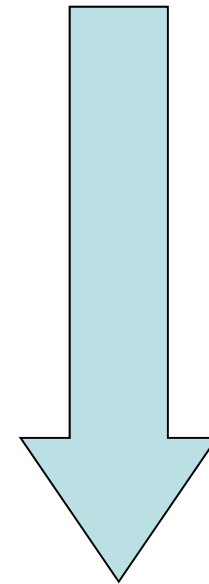
bb) Transposition in Section 622(2) 2 BGB

Proportionality reviewed by ECJ

What is the review procedure?

Legislative aim

Means: appropriate
proportionate



bb) Transposition in Section 622 (2) 2 BGB

Legitimate aim:

- Employers' interest in flexibility, also less need to protect younger workers

Proportionate means?

- Older workers are also affected
- Transposition already fails to reflect the legislative aim

Hence no justification for this rule, as means of implementation not appropriate

... as in ECJ 18/6/2009 – C-88/08 – Hütter (exclusion of job experience before the age of 18 intended to prevent those taking advanced school exams being placed at a disadvantage – ECJ-> then take this characteristic as the point of reference).

cc) Implications for Section 622 (2) 2 BGB

BAG ruled on 9/9/2010 – 2 AZR 714/08
that Section 622 (2) 2 BGB shall not be
applied

Wording of the law is still unchanged...

2. Socially selective age groups

Reference by Employment Tribunal Siegburg 27/1/2010
– 2 Ca 2144/09 – (ECJ C-86/10) Is discrimination
justified by the formation of age groups?

Section 1(3) sentence 2 of Protection Against Dismissal
Act (KSchG):

*“Workers whose continued employment ... is in the
company’s justified interest in order to secure a balanced
personnel structure may not be included in the social
selection described in the first sentence.”*

Social selection within age groups can result in age-
related disadvantage – Question: Is there justification
pursuant to Art. 6 Directive 2000/78/EC?

a) Concerns of Siegburg court:

aa) Is preserving age structure a legitimate aim? After all, according to previous ECJ case-law:

“... improving competitiveness is given as an example of an employer’s interest that does not provide legitimate justification for unequal treatment, whereas preserving age structure presumably merely helps to maintain competitiveness.”

bb) Correct: competitiveness could just about justify recourse to discriminatory prejudices....

b) Federal Labour Court (BAG): Formation of age groups is justified

BAG 12/3/2009 – 2 AZR 418/07 – and 2 AZR 523/07 :

- employers' interests may also be a legitimate aim
- "... different benefits of different age groups can only bear fruit in the framework of successful long-term collaboration if as many age groups as possible work in the undertaking. **Neither is it justified to make exclusively positive claims about the physical capacity of young workers, nor is it correct to make purely negative claims about the deterioration of physical capacity in older workers. It cannot be seriously disputed, however, that physical capacity declines with increasing age or that there is a quantifiable statistical correlation between age and the propensity to illness.**"

c) Review

1. Justification even if protection is withdrawn?
2. Legitimate aim
 - a) Where is the reference? “personnel structure in justifiable company interest” (in grounds for adopting the Act, but nowhere else!)
 - b) Conflict with objective of the Directive itself?
Need to weigh up purpose of Directive
-> must be reasoned in concrete terms, typologies are insufficient as they endorse the discriminatory prejudice

and it must not simply be about the employer's competitive interest ...cf.

ECJ 5/3/2009 C-388/07

Age Concern:

“It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered ‘legitimate’ within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. 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.”

Possible ECJ ruling?

Relatively open:

- If the criterion is drawn from ECJ 19/1/2010 C-555/07 (Kücükdevici), no justification
- If the flexibility demonstrated in ECJ 5/3/2009 C-388/07 (Age Concern) is retained, justification is possible

Problem: If the criterion is broad, it is no problem to circumvent the protection from discrimination

3. Fixed term without material grounds Section 14(3) TzBfG

- a) Less stringent rule if a worker has reached the age of 52 upon commencing employment and has previously been “without employment” for 4 months:

Term can be fixed without material grounds

Upper limit 5 years – extendable at will

3. Fixed term without material grounds Section 14(3) TzBfG

b) Tested against EU law but still controversial

Previous wording of the Part-Time and Fixed-Term Employment Act (TzBfG):

No material reason need be given for limiting the duration of an employment contract if the worker has reached the age of 58 before the contract begins. The duration may not be limited if there is a close material relationship with a previous employment contract of unlimited duration with the same employer. In particular, a close material relationship may be deemed to exist if a period of less than six months has elapsed between such contracts. *Until 31 December 2006, the age of 58 is substituted by the age of 52 when applying the first sentence.*

3. Fixed term without material grounds Section 14(3) TzBfG
Rebuke from ECJ 22/11/2005
(Mangold case) Section 14(3) old wording. New condition:
prior to the contract: 4 months
between contracts (not registered unemployed!)

Problem: Is the new provision EU-compliant?

ECJ in Mangold:

...not proven that “fixing an age threshold as such is objectively necessary to the attainment of the objective, which is the vocational integration of unemployed older workers, beyond what is appropriate and necessary”.

Section 14(3) old wording

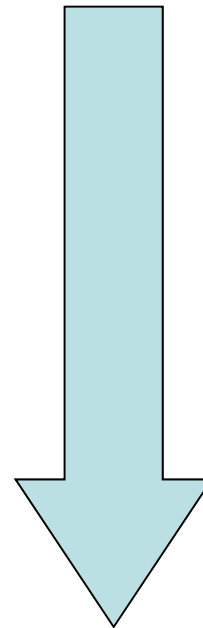
Rule not proportionate

What is the test procedure?

Legislative aim

Means

Appropriate



Section 14(3) new wording

Dubious efficacy

Rule includes everyone “without an employment contract” – “more moderate means” would have been a reference to being “unemployed”

4. Age limits

- a) ECJ 12/1/2010 – C 341/08 – “panel dentists”
 - aa) statutory upper age limit (68 years) for panel dentists
 - Aims:
 - Protect patients (declining ability)
 - Share professional opportunities
 - Finance the health system

ECJ 12/1/2010 – C 341/08

bb) Review:

Essentially legitimate aims, the state regulates health protection

(1) but need to test suitability of maximum age of 68 in response to declining performance:

ECJ 12/1/2010 – C 341/08 – (53):

“It must be remembered that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.”

Problem: No upper age limit is imposed on dentists not operating within the panel system!!

ECJ 12/1/2010 – C 341/08:

There is therefore an inconsistency between this exception (no maximum age outside the panel system) and the aim of protecting patients from declining performance after the age of 68:

“measure lacks consistency... In that case, the age limit imposed on panel dentists is not necessary for the protection of health”

(2) Transposition is appropriate to achieving other aims, as “not unreasonable” (70)

b) ECJ 18/11/2010 Georgiev C-250/09

The issue: compulsory retirement for university professors at 68, fixed term easier from 65

ECJ: legitimate aim of opening employment market to younger colleagues as long as older workers are entitled to an income, task of the national court to assess whether that is so (presentation of the legitimate aims was unclear, endorsement of panel dentist and Palacios)

4. Age limits

c) ArbG Hamburg reference 20/1/09 – 21 C 235/08;
ECJ 12/10/2010 C-45/09 Rosenblatt

Section 19 RTV Gebäude:

“Unless otherwise agreed in collective bargaining, employment terminates at the end of the calendar month when the worker becomes eligible for a retirement pension ... at the latest at the end of the month when the worker attains the age of 65 years.”

Justification on grounds of labour market policy:

- aa) According to ArbG Hamburg (22/9/09 – 21 Ca 352/08 and text of Reference 20/1/09 - 21 Ca 235/08) no justification, as upper age limit not explicitly mentioned in Section 10 Equality Act (AGG) and also as no legitimate aim (defined by legislative) can justify the collective bargaining provision.
- bb) According to BAG (18/6/2008 - 7 AZR 116/07 passed down before deadline for transposing Directive) justification possible via general clause in Section 10 AGG and legislative aim expressed in reasons for amending Section 41 Social Code (SGB) Book VI.

Reasons for repealing Section 41 SGB VI

What was this about?

In its old wording, Section 41 only permitted age limits if they had been adopted 3 years earlier or endorsed by the worker before s/he reached the limit. The Federal Labour Court ruled (20/10/1993 - 7 AZR 135/93) that this also applied to age limits laid down in collective bargaining. Parliament then repealed Section 41 (4) 3rd sentence of SGB VI in its old version, precisely to permit employment to be ended by collective bargaining provisions once retirement age was reached. The reasons given for the legislation stated categorically that “in the light of the difficult situation in the labour market ... it is not acceptable for older workers whose income ... is ensured to block jobs” (German Parliament doc. 12/8040, 1).

cc) ECJ: Justification exists

(1) Legitimate aim?

It is sufficient if elements taken from the context of the national law permit identification of the aim (ECJ 16/10/2007 – C-411/05 – paras. 54 and 57). Here (+).

(2) Appropriate and proportionate? According to ECJ (12/1/2010 C-341/08) “not unreasonable”
Interests are taken into account

dd) Question marks in the ruling...

- Not tested (like in ECJ, 16/10/2009 C-441/05 Palacios) whether the pension was appropriate
- But:
it was reasoned, when addressing whether a measure is appropriate, that the worker was not forced to take a pension as he could continue working and was protected from discrimination by the Equality Act.

(74) According to the explanations ... “German employment law does not prevent a person who has reached the age at which he is eligible for payment of a pension from continuing to work” and “a worker ... continues to enjoy protection from discrimination on grounds of age under the AGG” as “the AGG prevents a person, after termination of her employment contract on the ground that she has reached retirement age, from being refused employment, either by her former employer or by a third party, on a ground related to her age.”

(75) “Viewed against that background, the termination by operation of law of an employment contract as a result of a measure such as Paragraph 19(8) of the RTV does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market. It follows that that provision does not establish a mandatory scheme of automatic retirement.”

d) Andersen ECJ 12/10/2010 C-499/08

The issue: A provision in law that there will be no severance pay (after at least 12 years in the undertaking) if an old-age pension can be taken

Cannot be justified, as the provision does not refer to actually drawing pension but to eligibility (before reaching age of 50) and so older workers are deprived of income if they seek to continue their careers in another job

4. Age limits –

e) References for preliminary ruling

aa) BAG 17/6/2009 – 7 AZR 112/08 – (would like to keep age limit):

Age limit 60 in collective agreement for pilots

Job-related justification is flight safety

BAG's question:

- necessity for empirical evidence (BAG explains the limit is based on commonly held views)?

- test (Palacios “not unreasonable”)

Additional question about necessity: Is individual evidence possible? NB: inconsistent rules – collective agreement in cargo sector sets limit at 65!!

4. Age limits

- bb) BAG 16/10/2008 – 7 AZR 253/07
(considers limit to be without effect):
age limit of 60 in collective agreement
for cabin crew
- problem with job-related justification (unlike
pilots no major strain)

IV. Summary

Unresolved and problematic:

1. Legal consequences if age-related pay is without effect
2. Social selection based on age groups
3. No more age limits based on ability to perform
4. Method
 - a) testing a legitimate aim
 - b) testing what is appropriate