

**The challenge of a European ageing
population: problems, recent case-law
and mainstreaming**

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Helen Meenan

Solicitor & Visiting Professor

Kingston University

United Kingdom

The Life Of Man

“And the life of man, solitary, poore, nasty, brutish, and short.” Thomas Hobbes, (1651)

“People are eating regularly and working hard...” Paul Hoffman, LIFE (1951)

In reality, since 1951 life for many in Europe became pleasant, healthy and long.

In **2011** life is healthy, (pleasant) and long. But financial crises and the volume of our extra years could render our elder years unsure, unpredictable, worrying and potentially burdensome...

What is demographic ageing?

At its simplest, it is the,

- combined effects of longer lives, 20 years has been added to the lifespan since 1950 (UN 2002) and,
- lower fertility (migration - role in population)

European Union - Life Expectancy

In 2004 'EU 15 (west)' Women 82.4, Men 76.4 years and in 'EU +10 (east)' Women 78.7, men 70.4 years But,

By 2050, 6 more years will be added to life of all in EU 25, (*Europe's Demographic Future, 2007*)

Lower Fertility

- 2005 In EU 25, 1.5 children per woman
- 2050 In EU 25, 1.5-1.6 children per woman

But 2.1 children per woman needed for full replacement (*Europe's Demographic Future, European Commission, 2007*)

Selected Effects

- Those born 1945-1965 will lead population change when they retire shortly...
- Dependency ratio: '15 - 64 years' to 'over 65s' 4:1 to 2:1 by 2060 (*Eurostat, 2008*)
- By 2050 over 80's 11.4% of EU population

Evolution of Rhetoric of Ageing

- Ageing is simultaneously a sign of and a result of socio-economic development, expected and foreseeable and,
- all aspects of ageing are interrelated (UN, 1982).
- *UN Principles for Older Persons, 1991*, Care includes, Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility....

- 1999 IYOP, Towards a Society for All Ages, a ‘celebration’.
- 2002, Ageing a ‘demographic triumph’ goals include “full realization of human rights”, *International Plan of Action on Ageing, Madrid, 2002 (MIPAA)*.

EU Adapting retirement ages to longer lives and better health, activity rates for all age groups to be as high as possible, *Towards a Europe for all Ages, 1999*

“... from Challenge to Opportunity,” more jobs to work longer, *Communication, 2006*

- 2012 European Year for Active Ageing

Before the financial crises

Goals: (awareness? preparedness?), life course approach to ageing, lifelong learning, increase labour participation of older workers (Lisbon), etc.

Predicted age-related pressures on

Pensions, health care, care for the elderly, productivity and economic growth, social security and public funds

2006/7 2.1 million British elders living in poverty, (Age Concern England, 2009)

The Financial Crises

2008 but continuing in some EU Member States (e.g. Ireland)

The 2010s were considered ... the window of opportunity to address the challenges posed by aging to the sustainability of public finances... it will not be for long with the expected acceleration in spending starting in 2020. (Standard & Poor's, *Global Aging 2010: An Irreversible Truth*)

After the Financial Crises

- Public servant and private final salary and gold-plated pensions under attack
- National pension age rises in some States
- Early retirement under threat e.g. Civil servants ...
- Allowed to work after 65 e.g. in UK, 2011
- Some pensions and investments devalued/lost, second homes a burden
- National austerity measures – e.g. Automatic free health benefits taken from over 70s in Ireland!

The Human Cost

- Expectations of a 'rosy' retirement have been reduced even for many state workers
- 'Prudent' retirement savers have also lost funds
- The goal posts have moved, where / how is safe to save and invest for retirement?
- Working longer was always necessary for some now more important than ever for more
- AGE (2009) - growing number of old people will live just above poverty level in EU, older workers among most affected by financial crisis, life cycle and age neutral employment policies needed.

ECJ Case Law the story so far...

- 11 decided cases on age and 2000/78
- Age judgments outnumber all other grounds in 2000/78 and 2000/43, by up to 10 to 1
- Why? Perhaps,
- Age restrictions are common across EU in collective agreements, employment contracts, employment policy and law
- Major contrast with other grounds
- Age rules affect jobs of many workers!
- Any desire to conceal age not as great as might be with sexual orientation, ethnicity, religion...

Age Cases - A vast and varied landscape?

Mangold v Helm, Case C-144/04

- Fixed term contracts for workers over 52, no objective reason required (age sole criterion)
- ECJ decided means used were not appropriate and necessary per Art. 6(1), Dir. 2000/78 as would deny older workers benefit of stable employment for a long time
- Declared non-discrimination on grounds of age a general principle of Community law
- M. States enjoy broad discretion in choice of measures ... in social and employment policy

Palacios de la Villa, Case C-411/05

- Collective agreement – automatic retirement of workers aged 65 who are entitled to retirement pension
- ECJ – clarified Recital 14, M. States retain competence to decide retirement age but Dir. 2000/78 applies to conditions for termination of employment when that age is reached
- Public interest aim was sound and means used were not inappropriate and unnecessary
- When the aim is not stated in the text of the measure the general context of the measure may be examined to find it

Age Concern England, Case 388/07

- Did Dir. Apply to dismissal at 65? Yes, *Palacios*
- Does Art. 6.1 require a list of differences of treatment which could be justified by M. States?
- ECJ - No list required and permissible aims are social policy objectives, therefore public interest nature. Contrast with individual interest of employer but overlap possible...
- ECJ also warns M. States about their “broad discretion” - mere generalisations will not be enough (evidence for measure needed) and a high standard of proof for the legitimacy of the aim

Hutter Case, C-88/08

- Rule excluded apprenticeship before 18 years in calculating starting salary in public service
- Difference in treatment based on age but some aims were contradictory
- Rule was not appropriate to promote recruitment of young people from vocational education
- Dir. 2000/78 must preclude such a rule

Petersen, Case C-88/08

- Maximum age to practice as panel dentist 68
- Main aims: to protect health of patients and to share employment among generations of dentists
- ECJ decided public health issue under Art. 2(5) - rule was precluded as did not apply to private dentists. Avoided question of assumption of drop in performance after 68 *v.* individual ability
- Art. 6(1) does not preclude aim to share employment opportunities among generations “if, taking into account the situation on the labour market ... the measure is appropriate and necessary”.

Kucudeveci, Case C-555/07

- Ms K started work at 18 but law ignored service before age of 25 in calculating notice period for dismissal
- Aims of law - flexibility in managing workforce and “it is reasonable to require greater personal and occupational mobility from younger workers ... ”
- ECJ - Charter of F. Rights and Dir. 2000/78
- Law not appropriate to aim as applied to all who joined before 25, no matter what age when dismissed

Wolf, Case C-229/08

- Maximum recruitment age 30 for intermediate career fire-fighter in Frankfurt
- Mr W. applied aged 30 but rejected shortly after when aged 31
- National court asked question about Art. 6(1)
- ECJ answered it under Art. 4(1) (GORs)
- asked if physical fitness is a characteristic related to age and is a GOR
- Aims – occupational capacity and proper functioning of fire service
- Referred to Recital 18 on emergency services

Wolf, Continued...

- Intermediate fire-fighters role based on physical tasks – high physical fitness is a GOR for them
- Scientific data showed few over 45 fit enough
- ‘Full physical capacity’ related to age of intermediate fire-fighter
- Age limit was proportionate as directly linked to length of time at physically demanding stage

(Note: *Bulicke*, Case C-246/09 – remedies, limitation periods for age discrimination)

Rosenblatt, Case C-45/09

- Automatic retirement at 65 in collective agreement for cleaners
- ECJ said Art. 6(1) did not preclude rule which was justified by aim (main) of sharing employment between generations
- Rule like *Palacios* based on age and eligibility for pension and coll. agreement
- ECJ- termination of employment of older workers ‘directly benefits young workers’!

Would this reasoning transfer to many other industries??

Andersen, Case C-499/08

- Mr A was unfairly dismissed at 63 years but not entitled to severance pay as eligible for pension paid by employer
- Aim was to give greater protection to workers who find it hard to get new job due to length of service with one firm
- Law deterred “an entire category of workers defined on the basis of their age” from temporarily waiving their pension. Ultimately could receive lower pension
- Law exceeded what was necessary

Georgiev, Joined Cases C-250/09 and C-268/09

- After 65 university lecturers may only work on 1 year contracts, renewable twice
- Compulsory retirement at age 68
- ECJ aims were not clear - it is essential to identify precisely the aim the legislation pursues, (para. 43)
- ECJ suggested legitimate aim “such as, the delivery of quality teaching and the best possible allocation of posts for professors between the generations”
- National court to decide what aims were

The ECJ has

- Clarified issues such as retirement and GORs under the Directive
- Has given guidance on legitimate aims, maximum recruitment ages, retirement ages, limits of M. States' discretion of choice of measures, (high) standard of proof for legitimacy of aim, need for evidence to support measures
- Sensitive to large numbers involved re-compulsory retirement and work (e.g. *Mangold*, *Andersen*)

Overall cases reveal age as an employment policy tool unlike other grounds

The ECJ has not yet

- Contextualised age in terms of longer life, ageing of whole population
- Grappled with general assumptions about drop in performance after certain age versus individual capability. Nor presented with,
- Intersectional discrimination involving age. Note Robin Allen QC, “Age discrimination may easily also be gender discrimination; yet a case concerning the intersection of age and gender may be unlawful as gender discrimination while possibly being lawful as age discrimination”. (ERA, March 2011)

Newsflash...

- New threshold of old age 82 years by 2040 (G. Reday-Mulvey, *Working Beyond 60...*, Palgrave, Macmillan 2005)
- March 2011 UK Government plans to link state pension age to longevity so,
- Today's 17 year-old may not get pension till 77 years old (John Lawson, Standard Life, per Simon Bain, *Pension age May Increase to 77...* The Herald Scotland, March 24, 2011)
- But, people don't die from working hard for longer! *The Longevity Project*, Friedman & Martin 2011

Last but not least...

What has mainstreaming to do with it?

“inclusion of a particular issue into all aspects of social, political, economic and cultural life” UN Programme on Ageing

- UN Resolutions to mainstream ageing
- Madrid Plan 2002 follow up - agreement to mainstream concerns of older persons
- EU role for mainstreaming beyond disability, gender, race?
- AGE lobbies for mainstreaming intergenerational solidarity in flexicurity & new Social Agenda, (2008)

Mainstreaming ageing in our own lives?

- Longer lives put off but do not avoid decrepit old age
- Personal responsibility and legal planning for later life
- The foundation for a healthy and enriching old age is laid early in life, *UN International Day of Older Persons, 2006*
- A new design for your life/work?
- Happiness begins at 70! *You're Looking Very Well The Surprising Nature of Getting Old*, Lewis Wolpert (Faber & Faber, 2011)

Forthcoming Cases – Age and dir. 2000/78

- C-447/09 *Prigge, Fromm and Lambach v Deutsche Lufthansa*

Do Art. 2(5), 4(1) & 6(1) Dir. 2000/78 preclude national rule age limit of 60 for airline pilots established by collective agreement for air safety?

- C-159/10 *Gerhard Fuchs v Land Hessen*
- C-160/10 *Peter Kohler v Land Hessen*
- C-297/10 *Sabine Hennigs v Eisenbahn Bundesamt*
- C-298/10 *Land Berlin v Alexander Mai*