

Employer Justified Retirement Ages

Introduction

Age discrimination is treated differently than the other grounds of discrimination contained in the equality directives. I am not altogether sure why it should be treated differently but we know that it is. For example it is possible to justify direct discrimination on the grounds of age; something that I do not believe is possible with the other grounds of discrimination. Widespread age discrimination is practiced by governments, employers and others.

There is evidence that

- Older workers find it much more difficult to get a new job than younger workers; so unemployment rates start to rise steeply after the age of 50 years and there are surveys which show that many employers still have stereotypical views about ages in recruitment and promotion.
- A number of countries still have compulsory retirement systems which eject people from the workforce because they have reached a certain age. This was certainly the case in my own country, the UK, prior to 2011; something that was challenged in the Age UK case¹; one can look at the recent judgment of the CJEU in *Torsten Hörnfeldt*² where Mr H had to leave the workforce even though he did not have an adequate pension because in Sweden there is a 67 year old rule which means that people have no right to work after this age; in Spain it is possible to remove people from the workforce by collective agreement as in *Palacios*³, where poor Mr Palacios had to leave his job because the unions and employers had agreed that this should happen when the age of 65 years was reached.
- Older people face extra difficulties outside the employment sphere; e.g. in getting insurance cover - I recently had an email from my own bank offering, amongst other matters, free travel insurance in exchange for upgrading my account – this travel insurance was limited to those aged under 65 years; and also in getting proper medical treatment where age is seen as a way of rationing services.

I highlight older people here because this is the subject of my presentation, but we know also that age discrimination takes place against younger people too and there have been two cases at the CJEU which have considered this, namely the cases of *Hütter*⁴ and of *Kücükdeveci*.⁵

¹Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform*

²Case C-141/11 *Hörnfeldt v PostenMeddelande AB*

³C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA*

⁴Case C-88/08 *David Hütter v Technische Universität Graz*

⁵Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG*

That much needs to be done in tackling age discrimination is shown by an EU wide survey conducted in 2008.⁶ It asked a very interesting question: ‘Is belonging to one of the following groups an advantage or a disadvantage?’ The response from all over the EU was:

Group	advantage (%)	disadvantage (%)
Being disabled	3	79
Being a Roma	3	77
Being aged over 50	5	69
Being of a different ethnic origin	4	62
Being homosexual	2	54
Different religion	3	39
Being a woman	11	33
Being under 25	39	20
Being a man	49	4

More than two thirds of the respondents saw that being aged over 50 years was a disadvantage with only 5% seeing it as an advantage.

Retirement

The Framework Directive is, of course, limited to tackling discrimination in employment only.⁷ Article 6 is concerned with age. It actually provides for specific exceptions to the principle of equal treatment. Firstly it again states that differences of treatment on grounds of age shall not constitute discrimination under certain circumstances. They must be ‘objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives’. In addition the means of achieving the aim must be ‘appropriate and necessary’. It is not clear what ‘legitimate employment policy’ means, but the result is that the ultimate boundaries of age discrimination legislation are effectively left to the courts. Age discrimination is the only ground of discrimination in the Framework Directive that receives this special attention of having its own specified lists of areas where discrimination is to be justified.⁸

⁶ ‘Discrimination in the European Union: Perceptions, experiences and attitudes’ (2008) Special Eurobarometer 296, European Commission

⁷ Council Directive 2000/78/EC OJ L303/16 02/12/2000.

⁸ The list consists of the setting of special conditions on access to employment and vocational training, employment and occupation (including dismissal and remuneration conditions) for young

The Court of Justice has accepted on numerous occasions that compulsory retirement amounts to age discrimination. It means treating someone less favourably purely because they have reached a certain chronological age. To have a compulsory retirement age one must show that it is a proportionate means of achieving a legitimate aim. The SC in the UK in an important recent case⁹ looked at the various legitimate aims accepted by the CJEU as justification for having a compulsory retirement age. These included:

- (a) promoting access to employment for younger people (*Palacios de la Villa, Hütter, Küçükdeveci*);
- (b) the efficient planning of the departure and recruitment of staff (*Fuchs*¹⁰);
- (c) sharing out employment opportunities fairly between the generations (*Petersen*¹¹, *Rosenblatt*¹², *Fuchs*);
- (d) ensuring a mix of generations of staff so as to promote the exchange of experience and new ideas (*Georgiev*¹³, *Fuchs*);
- (e) rewarding experience (*Hütter, Hennigs*¹⁴);
- (f) facilitating the participation of older workers in the workforce (*Fuchs*, see also *Mangold v Helm*¹⁵);
- (g) avoiding the need to dismiss employees on the ground that they are no longer capable of doing the job which may be humiliating for the employee concerned (*Rosenblatt*); or
- (h) avoiding disputes about the employee's fitness for work over a certain age (*Fuchs*).

Some of these are general issues of social policy and not within the remit of individual employers, but they can be used by employers to show justification. The SC in the UK also asked the question about what would happen if the social policy aims conflicted, say between the needs of young people and the needs of older people.

people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; the fixing of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment; and the fixing of a minimum age for recruitment which takes into account the training period and the need for a reasonable period of work before the individual retires.

⁹*Seldon v Clarkson Wright and Jakes* [2012] UKSC 16

¹⁰ Cases C-159/10 and C-160/10 *Gerhard Fuchs, Peter Köhler v Land Hessen*

¹¹ Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*

¹²

¹³ Cases C-250/09 and C-268/09 *Vasil Ivanov Georgiev v Tehnicheski Universitet*

¹⁴

¹⁵ Case C-144/04 [2006]

The Court of Justice

The Court of Justice has shown a somewhat alarming readiness to accept that the compulsory retirement policies of employers can be justified as being a 'legitimate aim' in the context of creating job opportunities for other workers and especially in the context of creating job opportunities for young workers.

*Palacios*¹⁶ was a Spanish case concerning a collective agreement which contained an agreed retirement age. Mr Palacios was born in February 1940 and had worked for his employer since 1981. In accordance with the collective agreement he was dismissed when he reached the age of 65, after which he made a complaint of age discrimination. The collective agreement stated that 'in the interests of promoting employment', there would be a retirement age of 65 'unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period.' So there was a caveat that the employee would be entitled to a full pension before being compulsorily retired. The Court of Justice accepted, as it has done in all cases concerned mandatory retirement, that the policy amounted to less favourable treatment on the grounds of age and, therefore needed to have a legitimate aim and show that retirement was an appropriate and necessary means of achieving that aim. The retirement policy seems to have been adopted in Spain, according to the Court, at the instigation of the social partners, as part of a policy of promoting intergenerational employment. The Court stated that this was a legitimate aim. The Court concluded by stating that

It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings 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.¹⁷

Thus the Court accepted that an exception could be made to the general principle of equality, with regards to age, in order to facilitate the employment of younger workers. This was to be done by a process of mandatory retirement of older workers. The problem with this approach is that there is absolutely no evidence that intergenerational employment results from removing older workers from the workforce. Subsequently the Court of Justice has taken a similar approach to the justification of mandatory retirement, especially in cases concerning professions. These include dentists¹⁸, university professors¹⁹, and public prosecutors.²⁰

¹⁶ C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA*

¹⁷ Para XX

¹⁸ Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*

¹⁹ Cases C-250/09 and C-268/09 *Vasillvanov Georgiev v Tehnicheski universitet*

²⁰ Cases C-159/10 and 160/10 *Gerhard Fuchs, Peter Köhler v Land Hessen*

*Petersen*²¹ was a German case which concerned a complainant who was admitted to the practice of panel dentists in 1974 and reached the age of 68 in 2007, when she was retired. There were a number of legitimate aims put forward, including the problem of older dentists not being as good as younger ones. One aim concerned the sharing out of opportunities amongst the generations, so that 'a measure intended to promote the access of young people to the profession of dentist... may be regarded as an employment policy measure'.²² The Court of Justice concluded that

'... it does not appear unreasonable for the authorities of a member state to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones'.²³

In *Georgiev*, the complainant began work as a lecturer in 1985 and his employment contract was terminated in 2006 when he reached the age of 65. He was given, in accordance with Bulgarian law, a one year contract extension which was then extended for a further year. In 2007 he was appointed professor. Subsequently his contract was extended for one more year. In 2009, at the age of 68 years, his employment was finally terminated. National legislation precluded entering into contracts of indefinite duration after the age of 65 and those that reach the age of 68 are compulsory retired.

The aims of the legislation put forward by the Bulgarian government and the university were, firstly, the need to allocate the posts for professors 'in the best possible way between the generations'²⁴ and that the mix of different generations promotes an exchange of experience and innovation and thereby the 'development of the quality of teaching and research at universities'.²⁵

Mr Georgiev argued that the evidence was that the Bulgarian legislation did not encourage the recruitment of young people. Indeed he claimed that the average age for professors was 58 years and there were only a few of them. The Court of Justice recognised the arguments but stated that it was for 'the national court to examine the facts and determine whether the aims asserted correspond to the facts'.²⁶ Despite this the Court of Justice repeated its conclusion in *Petersen* that 'it does not appear unreasonable' to consider that the application of an age limit 'leading to the withdrawal from the labour market of older practitioners may make it possible to promote younger ones'.²⁷

*Fuchs*²⁸ concerned state prosecutors in the Land Hessen in Germany. The applicants were both born in 1944 and worked as state prosecutors until the retirement age of 65; both were given a one year extension and then made to retire.

²¹ Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*

²² Para xxx

²³ Para 70

²⁴ Para 45

²⁵ Para 46

²⁶ Para 48

²⁷ Para xxx

²⁸ Cases C-159/10 and 160/10 *Gerhard Fuchs, Peter Köhler v Land Hessen*

The actual retirement age for civil servants is left to the Land, although the retirement age for federal civil servants has been raised to 67.

The national court explained that the retirement provisions were originally introduced at a time when the prevailing view was that fitness for work declined after that age, although it also stated that current research showed that such fitness varied from one person to another. The law was originally introduced in 1962 and amended by the Law of 14 December 2009 (HGB). It was said that the aim was to promote the employment of younger people and thus to ensure an appropriate age structure.

Firstly the Court of Justice dealt with the fact that the HGB did not state what the aim of measure of having a retirement age of 65 was. The Court stated that the lack of precision did not lead to an inference that the measure cannot be justified. More interestingly it stated that the altering of the aim over a period of time did not necessarily preclude the law from pursuing a legitimate aim (so it is possible to update your legitimate aim).

The Land Hessen and the German Government had submitted that the obligation to retire at the age of 65 was designed to establish a balance between the generations. In addition to which the national court referred to three further aims: efficient planning of the departure and recruitment of staff; encouraging the recruitment and promotion of young people; and avoiding disputes relating to employees' ability to perform their duties beyond the age of 65. It was also claimed that the presence within the relevant civil service of staff of different ages also helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge, thus contributing to the provision of a high-quality public justice service.²⁹

However, according to the Court, there was also a need to respect also other divergent interests. Those who reach retirement age and have an entitlement to a pension could 'in the interests of sharing work among the generations' aid the entry of young workers into the labour force.³⁰ Despite the evidence to the contrary in this case and a recognised obligation to help keep older workers in the workforce, the Court of Justice recited all the reasons why mandatory retirement was a legitimate means to achieving various ways of helping younger people into the workforce. These included:

- (a) encouragement of recruitment is a legitimate aim especially when the promotion of access of young people to a profession is involved (citing *Georgiev*, paragraph 45).³¹
- (b) the mix of different generations of employees can also contribute to the quality of the activities carried out by promoting the exchange of experience (citing *Georgiev*, paragraph 46).³²
- (c) establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes

²⁹ Para 48

³⁰ Para 64

³¹ Para 49

³² Para 49

concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service.³³

Whilst accepting these as legitimate aims, the Court of Justice did recognise that there were some doubts about the applicability in this case and that the national court was clearly unsure of whether an aim which was to promote the employment of younger people and thus to ensure an appropriate age structure constituted objective justification. There was evidence that a 'significant proportion' of the ministry's staff already consisted of young people³⁴ and that recent studies had shown that there was no correlation between the compulsory retirement of persons having reached retirement age and young persons entering the profession. The Court of Justice stated that 'it is for the national court to assess, according to the rules of national law, the probative value of the evidence adduced, which may, inter alia, include statistical evidence'.³⁵

It is very tempting to link the employment opportunities of young people with the need to retire older people. Youth unemployment is at near record levels in the EU as a whole, with a current unemployment rate of 21 per cent. The EU figures mask a wide range from an unemployment rate of 45 per cent in Spain and 21 per cent in the UK, to 7 per cent in the Netherlands.³⁶ The unemployment rate for young people has been consistently high and for the last decade has been around twice the unemployment rate for the total population.³⁷

It is really interesting to consider the issues with regard to the so called 'lump of labour fallacy', because it reveals how the European Court of Justice appears willingly to have accepted the assumptions that underlie it, even when there is evidence indicated to the contrary. The lump of labour fallacy is essentially a belief that the number of jobs available in an economy is fixed. The phrase is said to have originated in the nineteenth century in an article by a UK economist David F. Schloss (1891).³⁸ One result of this assumption is that employment opportunities can be created for young people by removing older workers from the labour force. This can result in such policy measures as mandatory retirement or early retirement schemes; putting a ceiling on the number of working hours per week; or measures to reduce the number of women working. There is no evidence of a correlation between youth unemployment and older workers' employment.

³³ Para 59

³⁴ Para 25

³⁵ Para 82

³⁶ These figures are for the second quarter of 2011 and include the age group 15-24 years; the figures come from the Eurostat website (accessed October 12 2011):

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Table_youth_unemployment_MS.png&filetimestamp=20110930132346

³⁷ Eurostat:

http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics(accessed October 12 2011).

³⁸ Walker, T. (2007) 'Why Economists Dislike a Lump of Labor' *Review of Social Economy* 65(3) 279-291' cited in Banks, James; Blundell, Richard; Bozio, Antoine and Emmerson, Carl 'Releasing Jobs for the Young? Early Retirement and Youth Unemployment in the United Kingdom' IFS Working Paper W10/02 (2008) Institute for Fiscal Studies

Oxford University Aim of EJRA

The EJRA is considered to provide a proportionate means of:

- safeguarding the high standards of the University in teaching, research and professional services;
- promoting inter-generational fairness and maintaining opportunities for career progression for those at particular stages of a career, given the importance of having available opportunities for progression across the generations, in order, in particular, to refresh the academic, research and other professional workforce and to enable them to maintain the University's position on the international stage;
- facilitating succession planning by maintaining predictable retirement dates, especially in relation to the collegiate University's joint appointment system, given the very long lead times for making academic and other senior professional appointments particularly in a university of Oxford's international standing;
- promoting equality and diversity, noting that recent recruits are more diverse than the composition of the existing workforce, especially amongst the older age groups of the existing workforce and those who have recently retired;
- facilitating flexibility through turnover in the academic-related workforce, especially at a time of headcount restraint, to respond to the changing business needs of the University, whether in administration, IT, the libraries, or other professional areas;
- minimising the impact on staff morale by using a predictable retirement date to manage the expected cuts in public funding by retiring staff at the EJRA; and
- in the context of the distinctive collegial processes through which the University is governed, avoiding invidious performance management and redundancy procedures to consider the termination of employment at the end of a long career, where the performance of the individual and/or the academic or other professional needs of the University have changed.

Conclusion

The Supreme Court in the UK has summarised all the legitimate aims as being the two issues of dignity and inter generational fairness.

The question is where is the evidence?

There is no evidence that suggests that retiring older workers creates opportunities for younger ones.

There is no evidence that retiring people against their will is a dignified way of exiting the workforce.