

Recent Court of Justice cases on age discrimination: Declan O'Dempsey

I have chosen to examine cases after 2010, primarily for this talk. However I will set out a summary of where the CJEU cases appear to be at the moment on the distinctive issue in age discrimination of justification.

As Baroness Hale noted in the *Seldon* case, to which I refer extensively in this paper, the references to the CJEU forming the initial basis for analysis of justification have concerned national laws or provisions in collective agreements authorised by national laws.

It is clear that the law applies to individual contracts of employment. The *Bartsch* concerned the rules of a particular employers' pension fund; and *Prigge* case concerned a collective agreement governing the employees of a single employer, Deutsche Lufthansa.

Lindorfer Should also be mentioned. The comparability of situations is less rigorous in cases in which the general principle of equal treatment is relied upon, as opposed to the rules defined in the Directive 2000/78 (see AG Sharpston's Opinion (2nd Opinion in the case at paras 21-23 and 60 and following).

Aims of a measure must be social policy objectives, such as those related to employment policy, the labour market or vocational training. They must be of a public interest nature, which is "distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness" (*Age Concern, Fuchs*). However in *Prigge* it is clear that a significantly narrower approach was taken to the kinds of aims that are permissible. They must be not simply social policy aims, but those related to employment policy. Flexibility for employers is not in itself a legitimate aim; but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.

The measure must be appropriate and necessary to achieve the legitimate aim.

With that in mind I now look at 5 recent cases which are relevant to age discrimination.

1. *HK Danmark, v Experian A/S*, [2013] EUECJ C-476/11 (26 September 2013) ([2013] EUECJ C-476/11)

A 21 Charter of Fundamental Rights of the EU is given specific expression by Council Directive 2000/78/EC (in particular, Arts 2 and 6(1)) which does not preclude an occupational pension scheme (OPS) in which an employer paid, as part of pay, pension contributions which increased with age, provided that the difference in treatment on grounds of age that arose therefrom was appropriate and necessary to achieve a legitimate aim.

A6(2) Directive 2000/78 applies simply to occupational social security schemes covering risks of old age and invalidity (see Case C-546/11) below). But the pension contributions in *Experian* were part of the employees' pay.

The age-related increases in them could produce effects going beyond merely fixing ages for admission or entitlement to retirement benefits.

A 6(2) must be interpreted strictly. Only aspects of an Occupational Social Security scheme covering the risks of old age and invalidity that were expressly referred to in A6(2) were covered by it.

Therefore the age-related increases in the pension contributions did not fall within it.

The CJEU therefore considered if they were capable of being justified under A6(1).

The aim of the OPS: (i) intended to enable, first, older workers, who entered the service of the employer at a later stage in their working life, to build up reasonable retirement savings over a relatively short contribution period. (ii) to include young workers in the same OPS at an early stage, while making it possible for them to have at their disposal a larger proportion of their wages, account being taken of the lower rate of employee contribution that was applied to them.

The OPS gave a way for all employees to amass reasonable retirement savings, to use when they retired.

Aims such as those, which took account of the interests of all employees, in the context of social, employment and labour market policy concerns, with a view to ensuring retirement savings of a reasonable amount when an employee retired, might be regarded as legitimate aims.

Proportionality: It was for the national court to determine whether the age-related increases in contributions complied with the principle of proportionality (appropriate and necessary) to the pursuit of those aims.

2. *Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet, [2013] EUECJ C-546/11* (26 September 2013)

Concerned a refusal to grant availability pay to the claimant (C) because he was aged 65 in a OPS. Availability pay was paid for three years to civil servants who had been dismissed on the ground that their post had ceased to exist provided that they were available to take up any suitable post which they might be offered during that period. It was not paid to people aged 65 and over because at that age civil servants became entitled to draw their pension although they were not obliged to retire until the age of 70.

A6(2) of Directive 2000/78 only exempts occupational social security schemes covering the risks of old age and invalidity. Availability pay was not part of an occupational social security scheme, but in any event it was neither a retirement benefit nor an invalidity benefit. So A6(2) did not apply.

A6(1) of the Directive: Both civil servants who wished to retire and civil servants who wished to pursue their professional career within the public administration beyond the age of 65 were excluded from receiving availability pay.

Aim: preventing availability pay from being claimed by civil servants who were not seeking to take up a new post but who would receive a replacement income in the form of a retirement pension,

Effect: deprives civil servants wanting to remain in the labour market of the entitlement to availability pay simply because they could because of their age, draw a pension.

This might force them to accept a retirement pension which was lower than the pension to which they would be entitled if they were to remain in employment for more years (in particular where they had not made contributions for a sufficient number of years to be entitled to draw a full pension).

The aims could be achieved by less restrictive, but equally appropriate, measures.

Because civil servants who were eligible to draw a retirement pension were automatically excluded from receiving availability pay, the legislation went beyond what was necessary to ensure the objectives.

3. *Valeri Hariev Belov* [2012] EUECJ C-394/11 (20 September 2012) **Advocate General Kokott**. Case concerned the height of electricity metres in Roma areas of Bulgaria. The AG's opinion gives a useful guide to how to analyse a justification argument.

1. identify the aim (para 100);
2. Is the measure adopted proportionate to the aim. This would require the measure to be 'appropriate and necessary' for achieving the legitimate aims pursued;
3. the fact that the reasons for the measure are generally known does not release the D from proving that the principle of equal treatment has not been breached; how well known the motives for the undertaking's conduct are does not say anything about their justification and in particular their proportionality;
4. A measure is appropriate if it is suitable for achieving the legitimate aim pursued; this means that the measure can actually achieve the aim. (para 108:)
5. "It should be noted that the suitability of a measure must always be assessed having regard to the aim pursued by it". It will be suitable, for example, if it contributes in appreciable way to the achievement of the aim;
6. if suitable then ask the question whether it is also necessary for the identified purpose. "A measure is necessary where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means. It must therefore be explored whether or not there were less restrictive means of....[achieving the aim]" (and see at para 116

- where the question appears to be whether the equally suitable means have less detrimental effects);
7. in looking at necessity the cost of alternative means can be taken into account, when considering whether the alternative means are equally suitable. The question of cost will be whether the alternative means to achieve the aim can be adopted at a financially reasonable cost.

4. *Tyrolean Airways Tiroler Luftfahrt Gesellschaft* [2012] EUECJ C-132/11

1. There was no AG Opinion in this case.
2. It concerned a provision in a collective agreement relating to group companies in the airline industry. The Collective Agreement took into account experience acquired as a cabin crew member from the date of recruitment by a specific airline company for the purposes of grading in the employment categories provided for in that agreement and did not take account of anything else. It thereby determined the level of pay.
3. It was alleged that this was indirect discrimination on grounds of age because the agreement did not take account of the skills and knowledge of older workers acquired with other airlines.
4. The CJEU held that while the provision which recognised experience only from the date of recruitment with a particular airline did result in a difference in treatment depending on the date of recruitment by the employer concerned, it was not based directly or indirectly on age, nor an event linked to age.
5. It made no difference that sometimes the result was that cabin crew members who had acquired experience with one particular airline obtained advancement at an earlier stage than those who had gained that experience elsewhere. The CJEU held that the provision did not constitute indirect discrimination within the meaning of article 2(2)(b) of Directive 2000/78.
6. The referring court did not provide any evidence of a link between the starting age of employees at the particular airline and the criteria (otherwise an indirect link to age might have been established). In the absence of that factual basis the CJEU was able to say

29 However, while a provision such as that the tenor of which is set out in paragraph 21 of this judgment is likely to entail a difference in treatment according to the date of recruitment by the employer concerned, such a difference is not, directly or indirectly, based on age or on an event linked to age. It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment. That provision is therefore based on a criterion which is neither inextricably (see, *a contrario*, Case C-499/08

Ingeniørforeningen i Danmark [2010] ECR I-0000, paragraph 23) nor indirectly linked to the age of employees, even if it is conceivable that a consequence of the application of the criterion at issue may, in some individual cases, be that the time of advancement of the cabin crew members concerned from employment category A to employment category B is at a later age than the time of advancement of staff members who have acquired equivalent experience with Tyrolean Airways.

In some ways this is a peculiar analysis. There is a neutral rule that only experience gained at Airline X will count; employees of X may have the same experience gained at another airline. That rule is applied without regard to age. (So far this just makes it suitable for analysis as indirect discrimination).

The CJEU appears to be looking at whether the rule must be indirectly linked to the age of the employee. It rejects the traditional analysis of indirect discrimination which is to look to see whether a neutral rule has a disadvantageous impact on an age group which it does not have on another age group. That does not depend on whether the rule is linked to the age of employees.

It is more likely that the court did not feel able to identify any particular disadvantage to an age group. However the way in which the judgment is expressed is unfortunate.

5. *Prigge and Others (Social policy)* [2011] EUECJ C-447/09

The Grand Chamber found that a collective agreement providing for the employment of Lufthansa pilots to terminate automatically at the age of 65 could not be justified. This was not an article 6(1) case, as the suggested aims had to do with the safety and security of air travel, which fell within article 2(5), or the physical capabilities required for flying a plane, which fell within article 4(1). But as neither international nor national legislation considered that an absolute ban at the age of 65 was necessary to achieve these aims, it could not be justified.

6. *Fuchs and another v Land Hessen*, Joined Cases C-159/10 and C-160/10:

1. The claimed aims were
 1. to achieve a balance between the generations the efficient planning of the departure and recruitment of staff,
 2. encouraging the recruitment or promotion of young people,
 3. avoiding disputes about older employees' ability to perform their duties [47]; and also
 4. to promote interchange between the experience of older colleagues and the recently acquired knowledge of younger ones [48]. All of these could constitute legitimate aims [49], [50].
2. Member states may not frustrate the prohibition of discrimination on grounds of age, read in the light of the fundamental right to engage in work [62].

3. Particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life [63]. This interest must be taken into account in respecting the other, potentially divergent, interests [64].

"Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, [68] and [69]). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (...*Palacios de la Villa* ... [69], [71] ...*Rosenblatt*... [44])." [65]

4. Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim within article 6(1) [74].
 1. This measure might be appropriate to the aim of facilitating access to employment by younger people, in a profession where the number of posts is limited (citing *Petersen and Georgiev*) [58, 59, 60]. Nor did it go beyond what was necessary to achieve its aims, given that the prosecutors could retire at 65 on generous pensions, continue working until 68, and practise as lawyers if they left [68].

7. *Hennigs v Eisenbahn-Bundesamt; Land Berlin v Mai*, Joined Cases C-297/10 and C-298/10): determining pay grades by reference to age at first appointment could not be justified. Rewarding experience was a legitimate aim (see *Hütter*), but while length of service was appropriate to achieve that aim, age did not always correlate with experience [74, 75, 76].

8. Earlier case law demonstrates that in order to justify direct age discrimination, the aim cited must relate to "employment policy, the labour market or vocational training", (legitimate), and not "purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness", (not legitimate)¹.

¹ See the UK Supreme Court case of *Seldon v Clarkson Jakes Wright* (leading judgment by Brenda Hale JSC and now deputy president) [2012] UKSC 16 @ [30], which deals with the Age Concern England CJEU judgment @ para 46 in this respect. other footnoted references to paragraphs are references to the *Seldon* judgment for those who wish to examine this aspect further.

9. Consistency with employment policy aims is probably not enough for Article 6(1). CJEU case law² establishes that “...the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination ...”³. The objectives which may be relied on to justify direct discrimination are fewer than those justifying an indirect difference in treatment.
10. Mere employer flexibility is difficult to see as a legitimate aim in itself. It might be a means of achieving other legitimate aims⁴. Aims such as cost reduction and improving competitiveness, will not be legitimate, but aims relating to employment policy, the labour market and vocational training, might.
11. In each case it is important to clarify what is meant by the Defendant’s stated aim:
- (i) *inter-generational fairness* means, depending upon the circumstances of the employment:
 - a. facilitating youth access to employment;
 - b. enabling older people to remain in the workforce;
 - c. fairly sharing limited opportunities to work in a profession between the generations;
 - d. promoting diversity and the interchange of ideas between younger and older workers.⁵
 - (ii) *Dignity* may mean avoiding the need to dismiss older workers on the grounds of incapacity or underperformance (preserving their dignity and avoiding humiliation); or as avoiding the need for costly and divisive disputes about capacity or underperformance.⁶

Earlier CJEU age cases on justification and social policy.

12. Baroness Hale JSC conducted a comprehensive survey of the case law of the CJEU on the issue of justification and direct age discrimination in the UK case of *Seldon*, and I base the summary of the jurisprudence, (with very few changes) gratefully on that analysis.⁷ In most of the cases Judge Lindh was the Juge Rapporteur.

13. *Félix Palacios de la Villa v Cortefiel Servicios SA*, Case C-411/05

1. Spain’s compulsory retirement legislation used to encourage recruitment was abolished when economic circumstances improved and it wanted to encourage people to stay in work. It reintroduced it by allowing collective agreements to prescribe retirement ages, provided that the worker had

² *Seldon* SC Judgment [2012] UKSC 16 @ [50]

³ *Seldon* @ [51]

⁴ See AG Bot in *Küçükdeveci*,

⁵ @ [56]

⁶ @ [57]

⁷ At 32-50 of that judgment.

qualified for a retirement pension. The CJEU held that, despite recital 14, requiring retirement at a particular age is direct age discrimination within the meaning of article 2(1) and 2(2)(a) and has therefore to be justified.

2. A6(1) did not preclude such national legislation even if the social policy aims were not spelled out in the legislation, as long as it could be decided from the context and other sources what those aims were.
3. The encouragement of recruitment was a legitimate aim.
4. The means employed had still to be both appropriate and necessary, although member states (and where appropriate social partners) enjoyed a broad discretion in the choice both of the aims and of the means to pursue them. The measure in question did not unduly prejudice the legitimate claims of the workers because it was based, not only on a specific age, but also on having qualified for a pension.

14. *R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07:*

1. member states are not required to draw up a list of differences in treatment which might be justified by a legitimate aim [43].
2. Lack of precision as to the aims which might be considered legitimate does not automatically preclude justification, although it is necessary to be able to identify the aim in order to review whether it is legitimate and the means of achieving it are appropriate and necessary [44, 45]. [46]:

"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 ... 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."

15. The Court did observe that the scope of article 2(2)(b) and article 6(1) is not identical [58]. [65]:

". . . it is important to note that [article 6(1)] is addressed to the member states and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued."

16. *David Hütter v Technische Universität Graz, Case C-88/08:* The law governing public service stipulated that service before the age of 18 was not to be taken into account in determining the pay grade. This discriminated against those who had undertaken apprenticeships in the public sector compared with those who had stayed in general education.

1. The aims of not discouraging people to stay in secondary education, of not making apprenticeship costly for the public sector, and of promoting the integration of young apprentices into the labour market (see [16]) were social policy aims of the kind which could be justification under article 6(1) [43].
2. Those aims were contradictory [46] and the law was not "appropriate" to achieve them [50].

it is not enough for the aims of a measure to be legitimate: the measure must still be carefully scrutinised to ensure that it is both "appropriate" to meeting those aims and a proportionate means of doing so.

17. *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08: law prohibited practice as a panel dentist after reaching 68.

1. Both protecting the health of patients and controlling public health expenditure were legitimate objectives under the exception in article 2(5) for measures "necessary . . . for the protection of health".

Prohibiting practice as a panel dentist but not private practice over the age of 68 was inconsistent with the former aim but not inconsistent with the latter [63, 64].

The other possible aim, of sharing out employment opportunities between the generations, could be regarded as an employment policy measure under article 6(1) [68].

It might be necessary to impose such an age limit where there were too many panel dentists or a "latent risk" of such [73, 77].

It is for the national court to identify the aim which was actually being pursued by the measure [78].

18. *Wolf v Stadt Frankfurt am Main*, Case C-229/08: Land Hessen regulation set an age limit of 30 for recruitment as a firefighter.

1. CJEU considered that it could be justified under article 4(1), because the physical capabilities required for the job were related to age.

19. *Kçükdeveci v Swedex GmbH & Co KG*, Case C-555/07 a law which calculated the length of notice to which employees were entitled disregarded all service (the basis on which the notice length was calculated) before 25 years of age.

1. The aim of facilitating the recruitment of young people, who could react more easily to the loss of their jobs, by increasing the flexibility of personnel management did "belong to employment and labour market policy" within the meaning of article 6(1) [35, 36];
2. but the law was not "appropriate" to that aim because it applied to all employees who joined before 25 irrespective of their age at dismissal [40].
3. Nor was it appropriate to the aim of strengthening the protection of workers according to their length of service [41].

20. The aim the CJEU was considering was more than mere flexibility – it was flexibility designed to encourage the recruitment of young people.

21. Advocate General Bot found it difficult to accept that the flexibility granted to employers could be an aim in itself, because the Court in *Age Concern* had made it clear that legitimate objectives are of a public interest nature [AG44-49].

22. *Rosenbladt v Oellerking GmbH*, Case C-45/09: a clause in the collective agreement for employees in the commercial cleaning sector (RTV) provided for automatic termination when an employee became entitled to a retirement pension and at the latest at the end of the month when she reached 65. Para 10.5 of the General Law on Equal Treatment (AGG) listed agreements providing for automatic termination on reaching the age when an employee might claim an old age pension among the examples of differences in treatment which might be justified if necessary and appropriate for a legitimate aim.

1. The aims of sharing employment between the generations, making it easier for younger workers to find work, particularly in a time of chronic unemployment, while protecting the rights of older workers whose pensions serve as replacement income, and not requiring employers to dismiss them on grounds of incapacity, which may be humiliating [43] were in principle capable of objectively and reasonably justifying a difference in treatment on grounds of age [45].
2. Authorising such clauses like this could not generally be regarded as prejudicing the legitimate interests of the workers concerned [47]. It is based not only on age but also on entitlement to a replacement income [48]. It has its basis in an agreement.

"That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question (*Palacios de la Villa*, [74])." [49]

3. Art 6(1) does not preclude a measure such as that of the national law; but the collective agreement implementing it must itself pursue a legitimate aim in an appropriate and necessary manner [53].
4. The clause offered stability of employment and the promise of foreseeable retirement while offering employers "a certain flexibility" in the management of their staff, thus reflecting "a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment" [68]. So it was not unreasonable for social partners to regard the clause as appropriate [69].

5. But was it necessary, given the significant financial hardship caused to workers in the commercial cleaning sector, where poorly paid part time employment is typical [71]? Were there less onerous measures? People who had reached retirement age could continue to work, and must not be discriminated against on grounds of age in finding work [74], so they were not forced to withdraw from the labour market [75]. So the measure was not precluded.
 6. No suggestion that its actual application to Frau Rosenblatt, who needed to carry on working because her pension was so small, had also to be justified.
23. *Ingeniørforeningen i Danmark v Region Syddanmark*, Case C-499/08: a Danish law on severance allowances did not apply to people dismissed when they had qualified for a retirement pension. This was not justified.
1. The general (and legitimate) aim of the severance allowances was to facilitate the move to new employment of people who might find it difficult to find new employment because of the length of time they had been with their old employer. Excluding people who had qualified for a pension and who actually intended to retire was not inappropriate [34, 35].
 2. But it was not necessary to exclude those who wished to waive their pension claims in order to try to continue working [44–47].
24. *Georgiev v Tehnicheski Universitet Sofia, Filial Plovdiv*, Joined Cases C-250/09 & C-268/09: national legislation under which university professors are compulsorily retired when they reach 68 and may only work beyond 65 on one year fixed term contracts renewable at most twice,
1. This was justified provided that it pursued a legitimate aim linked to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations and that it makes it possible to achieve that aim by appropriate and necessary means [68].
 2. The average age of Bulgarian professors was 58 and younger people were not interested in entering the career, it was for the national court to decide whether these actually were the aims of the Bulgarian legislature.

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