

Discrimination on the grounds of age: recent case law of the CJEU

**Applying EU anti-discrimination laws
23 September 2013, ERA, Trier, Germany**

**Helen Meenan
Visiting Professor,
Kingston University, Surrey,
United Kingdom**

2011-2013: Age discrimination cases decided by the ECJ

- 2011-2013: 8 judgements which, represent 42% of age discrimination cases at the ECJ (total number is 19 inc. *Bartsch*)
- In September 2013 the total number of cases on Dir. 2000/78 and the Race Directive = 35
- Age cases represent just over 50% of all cases under these Directives

Today's 8 cases can be broken down as follows:

4 compulsory retirement, 1 FTC, 1 compensation on termination,

1 salary determined by age, 1 salary decided by reference to date of recruitment *and*,

Art. 6(1), Art. 4(1), Art. 2(5), 2(2)(b) & Art. 258 TFEU failure to fulfil obligations

Declan O'Dempsey et al. *Age and Employment*, (European Commission, 2011)

- The framework of EU law prohibiting age discrimination ...is unique in European discrimination law. It provides for a far broader range of exceptions to the principle of equal treatment than is permitted [for] any other protected characteristic. In particular, the Directive provides that direct discrimination on grounds of age may be justified; whereas direct discrimination on any of the other grounds covered by the Directive may not.

Age and Employment...

- This creates an inherent vulnerability at the heart of the prohibition on age discrimination, and means that a careful balance has to be struck in order to ensure that the prohibition is meaningful.
- It points towards the need for consistent guidance on the facts of ageing being made centrally available so that the prohibition can be applied with some consistency in identical factual situations in different Member States.

- **The Court of Justice's involvement in this area of law has ... been dominated by justification of direct discrimination**
- **Insofar as the European Commission intended such justification to be exceptional, it appears that justification of direct age discrimination is not exceptional in any way...**
- **A comprehensive survey of age differences in national law should be undertaken as it is known there are a great many in use, but no reliable survey exists to permit consistency. pp. 5-7.**

- Article 6 has been interpreted as allowing a very wide range of behaviour which differentiates on the ground of age. p.13
- Some protective provisions (such as the prohibition on individuals working as a fire fighter beyond the age of 45 in Hungary)...may violate the Directive, if they are not supported by clear objective evidence. p. 37
- Germany has the most comprehensive list of max./min. ages for particular professions! p51.

Finally,

- Note: *Age and Employment* reminds us that countries are obliged to ensure that all rules that offend against the principle of equal treatment are abolished (Art. 16 directive), but this is a difficult task in respect of age rules, as so many of them are used in employment.
- Because [they span] a very large number of legal and factual situations, this process of clarification may be protracted! p. 96.

The Bigger Picture

- We are living longer, healthier lives
- 1 in 5, 20 year olds today will surpass 100!
- Super centenarian is an emerging concept
- By 2050 the old and the young will represent an equal share of the population, (UN Population Division)
- Organizational cultures have not yet accommodated to these transformative socio-economic changes...intentional and unintentional ageist attitudes pervade the contemporary workplace.- P. Brownwell et al Eds. *Ageism...* (2013), at p. xi-xii

The Human Dimension

What is ageism?

R.N. Butler, ((1989), p.139) but more recently,

“Ageism is a system of stereotypes, policies, norms and behaviours that discriminate against, restrict and dehumanize people because of their age”, Chris Blauth et al., *Age-Based Stereotypes: Silent Killer of Collaboration and Productivity*, 2011, p.6.

- But age is a primary social category
- Dangers if we directly link age to capability
- Age *v* ageing: chronology *v* process

Themes, *include...*

- Evidence (*Mangold!*) *Prigge, Commission v Hungary*
- Coherence / Consistency *Fuchs*
- Fitness *Prigge*
- Collective agreements, comparable discretion, greater flexibility, (*Mai/Hennigs, Odar*)
- Social partners must respect Dir. 2000/78
Prigge, Tyrolean, Odar
- More references to EU Charter: Right to work & right to collective bargaining

Deutsche Lufthansa AG v Gertraud Kumpan, Case C-109/09

- Cabin crew fixed term contracts (FTCs) only after, 55 if fit (no justification for FTC after 58)
- But not within 6 months of indefinite contract
- *GK* FTCs from 2000 – 2004, refused FTC 2005
- Qs referred 1) under Arts. 1, 2(1) and 6(1) Dir. 2000/78 and 2) under Art. 5(1) Framework Agreement
- ECJ answered 2) F Agreement to assume a close connection with indefinite contract where uninterrupted succession of FTCs (avoided Q 1)

Gerhard Fuchs, Peter Kohler v Land Hessen,
C 159/10, C-160/10

- **After 65, state prosecutors may request extending work by periods of 1 year up to 68 if “in the interests of the service”**
- **Q1 did Dir. 2000/78 preclude this?**
- **Retirement at 65 was a difference in treatment**
- **Legitimate aims: creation of a ‘favourable age structure’, planning staff departures, promotion of civil servants, prevention of disputes over fitness beyond retirement age or budgetary savings (latter deduced by national court)**
- **ECJ: accepted first three aims. Budgetary considerations may underpin social policy, but they cannot be an aim, paras. 50 & 74**

- retirement must be appropriate and necessary
- the number of posts were limited & permanent
- The prohibition on age discrimination, Dir. 2000/78 must be read in light of the right to work, Art. 15(1), EU Charter F Rights, Para. 62
- National court must find a balance between potentially divergent interests
- Pension at 65 was 72% of salary, may work to 68
- Q.2 what evidence necessary from national court?
- The national court must assess under rules of national law, probative value, inc. statistical evidence

Hooray!

Note the national court explained that law was introduced when view was that fitness for work declines after 65 but said current research shows such fitness varies from person to person, Para. 24.

It also referred to the increase in life expectancy resulting in increase to retirement at 67 for some

Q.3 Coherence of measure as other federal and private employees could work to 67.

A. The law does not lack coherence.

*Sabine Hennigs v E.B., Land Berlin v
Alexander Mai, Case C-297/10 and C-298/10*

- Collective agreement pay decided by age at recruitment
- Mr. Mai, 43 requested same pay as 47 year old
discrimination against younger workers?

ECJ: there was a difference in treatment

Aims: higher pay rewards longer experience and loyalty and is compensation for their financial needs which in most cases are greater because of their social environment

- First aim justified the difference in treatment
- Second failed, not shown that there is a direct correlation between age and needs
- Pay by reference to age exceeded what was appropriate and necessary for first aim

Q.2. Ms Hennigs transferred to pay system based on objective criteria (not age) but transitional measures still used age.

Aim: to protect established rights, temporary in nature, any other solution would reduce pay of older employees.

ECJ: Legitimate and not excessive

Reinhard Prigge & Ors. v Deutsche Lufthansa, Case C-447/09

- Collective agreement terminates pilots at 60
- National court said age directly linked to the reduction of physical capabilities, para. 28
[Evidence? Sector specific?]
- Aims protection of public health, avoid risk of accidents, protect health of pilots, passengers and persons in areas over which aircraft fly
- Is air traffic security included in Art. 2(5)?
Yes & collective agreements may concern security and protection of health.

- As international & national law merely restricted activities after 60, the rule was not necessary to achieve these aims
- Art. 4(1) (GODOQ)?

Citing *Wolf*, it is essential that airline pilots possess *inter alia*, particular physical capabilities in so far as physical defects ...may have significant consequences. It is also undeniable that those capabilities diminish with age. Certain physical capabilities may be a GDOQ in art. 4(1) and, air safety may be a legitimate aim [Evidence...?]

Was age 60 a proportionate requirement?

- No
- For reasons of the national and international legislation AND,
- Para. 74,

The reasons why they are no longer considered to possess the physical capabilities from the age of 60 are not apparent from the information in the file or the observations presented to the court!

Tyrolean Airways, Case C- 132/11

- At issue Art. 2(2)(b) Dir. 2000/78
- T. Airways collective agreement, 3 years service to move employment grade (pay)
- Did not recognise service with other airlines in same group
- Discrimination against older workers? No
- The ECJ saw it as a difference based on date of recruitment which is not directly or indirectly based on age or on an event linked to age. It is experience that is not taken into account..., Para. 29

Torsten Hornfeldt, Case C-141/11

- Mr H, postal worker terminated at 67
- No compulsory retirement before 67 in Sweden
- Did rule infringe Art. 6(1) Dir. 2000/78 as failed to take account of his pension?

6 aims:

- To avoid humiliating older workers
- To adjust pensions over whole career
- To enable people to work beyond 65 (pension)
- To adapt to demographic change/ labour shortage
- A right to work to 67
- Retirement age helps young people to work

Citing *Fuchs & Kohler*,

The Prohibition of discrimination on grounds of age in Dir. 2000/78 must be read in light of the right to engage in work in Art. 15(1) EC Charter of Fundamental Rights.

Participation of older workers contributes to the diversity of the workforce and to the realising the potential and quality of life of the workers concerned, Para. 37.

The aims justify difference in treatment

But were they appropriate and necessary?

- Year 67 rule not unreasonable to achieve aims, but qualified last aim, where the number of employees affected is limited, rule makes it easier for young people to get work
- *Rosenbladt* test applied re- necessity, background, hardship *v* benefits to society
- Mr H worked part-time, smaller pension but
- ECJ it is not automatic retirement at 67
- Some can obtain FTC, 65 is the pension age, and top up to low pension is guaranteed

European Commission v Hungary, Case C-286/12

Art. 258 TFEU failure to fulfill obligations re-
Arts. 2 and 6(1) Dir. 2000/78

- Lowering of age limit to retire judges, prosecutors and notaries from 70 to 62 but other workers could work after 62
- Two aims 1) standardisation of retirement age in public sector...improving quality in administration of justice, 2) a 'more balanced age structure', access for young people & accelerated career
- ECJ Both could be legitimate

In principle appropriate. But necessary?

- *Rosenbladt* – hardship *v* benefits
- Abruptly and significant lowering of age
- No transitional measures
- Hungary failed to show evidence that more lenient provisions would not have worked
- Or explain why it lowered retirement age by 8 years while increasing it to 62 to 65 with notice for other public employees

ECJ: not necessary to achieve standardisation;
not appropriate for balanced age structure
& provisions not proportionate

Johann Odar v Baxter Deutschland GmbH, *Case C-152/11*

- Dr Odar, severely disabled employee left job in his late 50s
- Compensation calculated by special formula for workers over 54 took account of earliest possible date pension was payable,
- It was half the amount under standard formula for workers under 54 which took account of length of service
- Q for ECJ: Did Dir. 2000/78 preclude this for workers over 54?

Reduction in compensation was within scope

Was it justified under Art. 6(1) (& Art. 2(2)) Dir 2000/78?

- Aims: The social plan was aimed at granting compensation for the future, protecting younger workers and aiding their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources. Also to prevent workers who intend to retire from claiming severance allowance.
- They could justify different treatment (Art, 6(1)(a))
- Reduction in compensation to workers who are financially secure is not manifestly inappropriate.

Did Art. 2(2) Dir. 2000/78 preclude the special formula for workers over 54 which takes account also of early disability pension?

- Severely disabled workers retire at 60, three years earlier than other workers
- Results in less compensation under the special formula because of their disability

ECJ: Q. are disabled workers in the same age bracket, in a comparable situation to non-disabled workers in Art. 2(2)(b) Dir.2000/78?

A. Rejected claim that earlier disability pension was an advantage.

- The Social partners had neglected relevant factors affecting severely disabled workers, including their need to anticipate a worsening of their condition, with advancing age...
- Less compensation has an excessive adverse effect on a severely disabled worker, Para. 67-70
- Note: Dr Odar would have received more than EUR 500,000 (instead of c. EUR 308,000) if he had not been severely disabled!