

Age Discrimination: recent cases from the CJEU

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- A 1 of Directive 2000/78 provides that the purpose of that directive 'is to lay down a general framework for combating discrimination on the grounds of age as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'
- A 2: direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation,...
- A 6: 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.
 - Such differences of treatment may include, among others ...



We will look at

Justification of direct age discrimination under article 6

The use of Genuine Occupational Requirements

The use of Article 2(5) derogations

The case law of the CJEU

Summary of principles

Approach to judicial decision making in direct age discrimination cases.



Summary of where justification of direct age discrimination now is

Many states have closed lists of justification; some require aims to be analogous to those in the Article 6(1) list. However for any national system which is not closed the following interpretation of Article 6(1) needs to be applied.

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.



HK Danmark, v Experian A/S, [2013]

EUECJ C-476/11

Facts: 19 November 2007, at the age of 29 K's employment starts. Her contract provided that she would be from 19 August 2008 be part of **Experian's** compulsory pension scheme managed by Scandia.

E paid 2/3 of the premium, K contributed 1/3

K had a separate contract with Scandia. She was promised old-age insurance and sickness insurance to be provided at the same time as the contract of employment.

However the applicable rates were different depending on age: Under 35: K's contribution = 3% & E's = 6%; From 35 to 44: : K's contribution = 4% & E's = 8%; 45+ : K's contribution = 5% & E's = 10%



HK Danmark, v Experian A/S, [2013] EUECJ C-476/11

The progress through the national courts:

The OPS stemmed solely from the contract of employment.

K therefore had agreed basic salary plus the employer's pension contribution of 6%, amounting to to DKK 22 790 per month. If K had been between 35 and 44, she would have received DKK 23 220 per month, and if over 45, she would have received DKK 23 650.

K resigned from 31 October 2008. She claimed pursuant to the Anti-Discrimination Law, the payment of an amount corresponding to nine months' salary by way of compensation, as well as back payment of pension contributions at the rate applicable to employees of over 45 years of age, on the ground that the pension scheme set up by **E** constituted unlawful discrimination on grounds of age.

E rejected those claims on the ground that pension schemes, generally, are not covered by the prohibition of discrimination on the grounds, in particular, of age, laid down by the Anti-Discrimination Law.



HK Danmark, v Experian A/S, [2013]

EUECJ C-476/11: Principles:

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.



HK Danmark, v Experian A/S, [2013]

EUECJ C-476/11 Principles:

A6(2) Directive 2000/78 applies simply to occupational social security schemes covering risks of old age and invalidity.

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



HK Danmark, v Experian A/S, [2013] EUECJ C-476/11
Justification

The aim of the OPS:

(i) 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 was a means 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.



HK Danmark, v Experian A/S, [2013]
EUECJ C-476/11 Proportionality

Proportionality: was for the national court



Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet, [2013] EUECJ C-546/11

Facts: Dismissed by reason of redundancy from 31 December 2006. Mr Toftgaard was not entitled to availability pay as he was then 65 years old and therefore entitled, from 31 December 2006, to a civil service pension.

T was entitled, but not obliged, to retire (until 70). He told the Ministry he wanted to be transferred to a different post and that he was willing to take a reduction in salary if necessary.

T said the refusal to grant him availability pay was discrimination on grounds of age. He argued that paragraph 32(4)(2) of the Law on Civil Servants is contrary, in particular, to Directive 2000/78.

The DJØF (for T) claimed that availability pay is not an occupational social security scheme within the meaning of Article 6(2) of Directive 2000/78 and that the age-limit of 65 is not an appropriate and necessary means of achieving a legitimate aim within the meaning of Article 6(1) of that directive.



Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet, [2013] EUECJ C-546/11

A6(2) of Directive 2000/78 only exempts occupational social security schemes covering the risks of old age and invalidity.

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



Dansk Jurist- og Okonomforbund, v Indenrigs- og Sundhedsministeriet, [2013] EUECJ C-546/11

Aim: prevents claims by those not seeking to take up a new post but who would receive a replacement income in the form of a retirement pension.

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



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Valeri Hariev Belov [2012] EUECJ C-394/11

justification - identify the aim (para 100);

Is the measure adopted proportionate to the aim. = 'appropriate and necessary' for achieving it; D must prove 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;

- 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:)

- contributes in appreciable way to the achievement of the aim;

if suitable then ask the question whether it is also necessary for the identified purpose.

-equally suitable but more lenient means. (the cost of alternative means can be taken into account).



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

Facts: collective agreement relating to group companies in the airline industry 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.

indirect discrimination

Did result in a difference in treatment depending on the date of recruitment by the employer concerned, but was not based directly or indirectly on age, nor an event linked to age.



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

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).

See paragraph 29

Better analysis: the parties were not in comparable positions for the purposes of discerning disadvantage.

The experience with airline X is taken into account regardless of the age of the cabin crew. (Subtext: those with experience in airline Y are not comparable)



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

Aims: aims had to do with the safety and security of air travel, which fell within article 2(5) and not within Art 6(1), 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.

Such aims are not labour market aims; did they not relate to physical capabilities – a characteristic linked to age? But Art 4 rejected.



*Fuchs and another v Land Hessen, Joined Cases
C-159/10*

Aim: generational balance; encouraging recruitment and promotion of young people; avoiding capability disputes for older workers;

NB: member states cannot frustrate the prohibition of discrimination on the grounds of age read in the light of the fundamental right to engage in work;

The aim must be read in the light of the aim of the participation of older workers in the workforce.

Budgetary considerations might underpin social policy, but could not per se be an aim.



Perez v Ayuntamiento de Oviedo C-416/13

- minimum recruitment ages for the local police and the concept of genuine occupational requirements
- Article 4: it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement.
- The possession of particular physical capacities could be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) of Directive 2000/78 for the purposes of employment as a local police officer.
- In article 4, ensuring the operational capacity and proper functioning of the police service constitutes a legitimate aim.



Perez v Ayuntamiento de Oviedo C-416/13

- However recital 23 in the preamble states that Art 4 is to apply in 'very limited' circumstances.
 - As it is a derogation, it must be interpreted strictly.
 - The following were relevant factors for proportionality:
 - Different areas had different ages and some had none.
 - No age was set for the national police force.
 - Wolf was based on a finding "on the basis of scientific data submitted to it
 - The national court had found in this case that the physical capacities required were not of that high capacity.
- Therefore the local law was disproportionate under Art 4.



Perez v Ayuntamiento de Oviedo C-416/13

- A 6: Aims: "based on the training requirements of the post in question and the need for a reasonable period of employment before retirement or transfer to another activity."
- They were capable of being legitimate aims "since those objectives are stated in point (c) of the second sub-paragraphs of article 6(1)..."
 - broad margin in relation to the choice of measures capable of meeting their objectives, but cannot frustrate the implementation of the principle of non-discrimination.
 - notice of competition states that before entering service the applicants who have passed the competition must follow a period of 'selective training', the length of which is set by the regional academy of local police services or by the Ayuntamiento.
 - No evidence was submitted to the CJEU to show that the age limit for recruitment is appropriate and necessary in the light of the objective of ensuring training of the officers concerned.
 - The aim of ensuring a reasonable period of employment: the age of retirement for local police officers is fixed at 65 years of age & transfer to another activity at the age of 58,
 - merely an option offered to local police officers at their request and has no bearing on retirement age.



Perez v Ayuntamiento de Oviedo C-416/13

Therefore the national legislation which fixed a maximum recruitment age of 30 for local police officers, could not be considered necessary in order to ensure that those officers have a reasonable period of employment before retirement for the purposes of point (c) of the second subparagraph of Article 6(1) of Directive 2000/78. The fact that the 'normal' retirement age under the general social security scheme is fixed at 67 is entirely irrelevant in that regard.



Schmitzer v Bundesministerin für Inneres

The Directive must be interpreted as precluding national legislation which, with a view to ending age-based discrimination, takes into account periods of training and service prior to the age of 18 but which, at the same time, introduces — only for civil servants who suffered that discrimination — a three-year extension to the period required in order to progress from the first to the second incremental step in each job category and each salary group.



Schmitzer v Bundesministerin für Inneres

Member States can take account of budgetary considerations at the same time as political, social or demographic considerations, BUT in so doing they must observe, in particular, the general principle of the prohibition of age discrimination.

Respect for the acquired rights and the protection of the legitimate expectations of civil servants favoured by the previous system with regard to their remuneration, ... constitute legitimate employment-policy and labour-market objectives which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age



Schmitzer v Bundesministerin für Inneres

But if

- the measure maintains *definitively* the age based difference in treatment, as part of the equalising transition:
 - Then even if it is capable of ensuring the protection of acquired rights and legitimate expectations with regard to civil servants favoured by the previous system, it is not appropriate for the purpose of establishing a non-discriminatory system for civil servants who were disadvantaged by that previous system
- Cf C 501/12 *Specht*.



C 501/12 Specht

Proportionality: to determine whether the transitional law went too far, it must be placed in its context and the damage that it is liable to cause for the persons concerned must be considered,

- high number of CS, the length of the period concerned,
- the diversity of their respective backgrounds and
- the difficulties that may have arisen in connection with the determination of earlier periods of activity that those civil servants could validly have claimed,
- the method entailing examination of individual cases would have been excessively complex (and would have involved a high risk of error).
- Proportionate



Case C 417/13, ÖBB Personenverkehr AG v Gotthard Starjakob

if the MS has the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation of previous periods of service even without financial compensation (by setting a new increment reference date and at the same time extending the period for advancement to the next salary step), in particular where such a solution, having a neutral effect on pay, is intended to preserve the employer's liquidity and avoid unreasonable expense resulting from recalculation?



*Case C 417/13, ÖBB Personenverkehr AG v
Gotthard Starjakob*

EU law precludes national legislation which, to end discrimination based on age, takes account of the periods of service prior to the age of 18, but which, simultaneously, includes a rule, applicable in reality only to employees who are subject to that discrimination, which extends by one year the period required for advancement in each of the three first salary steps and which, in so doing, definitively maintains a difference in treatment based on age.



*Case C 417/13, ÖBB Personenverkehr AG v
Gotthard Starjakob*

Effect of Article 16: as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining
That approach is intended to apply only if there is a valid point of reference (Specht and Others, C 501/12 to C 506/12, paragraph 96). Re-establishing equal treatment, in a case such as that at issue in the main proceedings, involves granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, both as regards the recognition of periods of service completed before the age of 18 and advancement in the pay scale.



Case C 417/13, ÖBB Personenverkehr AG v Gotthard Starjakob

where a system to abolish discrimination on grounds of age in a way that conforms with the provisions of Directive 2000/78 has not been adopted, re-establishing equal treatment entails granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, as regards the recognition of periods of service completed before the age of 18 but also advancement in the pay scale.

See also Case C 530/13, *Leopold Schmitzer v Bundesministerin für Inneres*



UK Supreme Court: Seldon v Clarkson Wright Jakes [2012] UKSC 16

In English, but summarises:

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

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

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

Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Case
C-341/08

Wolf v Stadt Frankfurt am Main, Case C-229/08

Kücükdeveci v Swedex GmbH & Co KG, Case C-555/07

Rosenblatt v Oellerking GmbH, Case C-45/09

Ingeniørforeningen i Danmark v Region Syddanmark, Case C-499/08

Georgiev v Tehnicheski Universitet Sofia, Filial Plovdiv, Joined Cases C-250/09



The Charter and direct horizontal effect?

1. if the underlying EU law has direct effect, the Charter provision will also have effect.
2. *Kamino International Logistics* (Advocate General's Opinion) [2014] EUECJ C-129/13_O (25 February 2014) the Advocate General provides the argument that the persons concerned must be able to rely on the right to be heard directly before the national courts, in order to avoid those rights remaining a dead letter or a pure formality. The CJEU in its judgment confirmed that the Charter could (in respect of the right of defence, be enforced directly by individuals in the national courts (para 35) (see also *Association de mediation sociale v Union locale des syndicats CGT* (C-176/12) although in that case the relevant provision required more specific expression than it had been given in order to be directly effective as between individuals).
3. C-144/04 *Mangold v Helm* & Case C-555/07 *Kücükdeveci v Swedex* EU Charter provisions which reflect general principles of EU law will have horizontal direct effect.



Summary of where justification of direct age discrimination now is

Suggested content for a test for justification:

1. Can the D show what D's aim was in treating C less favourably?
2. Is that aim lawful without reference to the Directive?
3. Was that aim of the type mentioned in article 6(1) (public interest employment policy)
4. If so does D actually have that aim? (You don't have an aim you don't need in your business);
5. If so can D show that the treatment was an appropriate means of achieving that aim?
6. If so can D show that there were no more lenient/less discriminatory means of achieving that aim?

Only if D can satisfy all of these steps is the defence of justification of direct age discrimination proven.

