

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

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1

## **A. Overview**

**I. At the start of the contract:**  
- job-related maximum age

**II. During the contract:**  
- age-related pay

**III. At the end of the contract:**  
- periods of notice  
- age limits

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2

## B. Political objectives in the light of demographic change

European Council, 17 June 2010, Agenda for Europe 2020

- “aiming to raise to 75% the employment rate for women and men aged 20-64, including through the greater participation of young people, older workers ...”
- continuation of Lisbon strategy, i.e. to reduce early retirement incentives

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3

## C. Jurisprudence of the CJEU

**Starting point Directive 2000/78/EC**

*Article 4*

*Occupational requirements*

1. *Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a **characteristic constitutes a genuine and determining occupational requirement**, provided that the objective is legitimate and the requirement is proportionate.*

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4

## C. Jurisprudence of the CJEU

**Starting point for justification** Directive 2000/78/EC

Article 6:

Justification of differences of treatment on grounds of age

(1) 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

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5

## Proportionality Test Art. 6

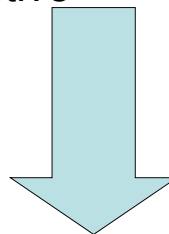
How can proportionality be tested?

Starting point:

Legislative objective

Means: Appropriate

Proportionate



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In concrete terms...

**Legitimate aim:**

- e.g. explanatory memorandum to law (legislator has broad scope)

**Appropriateness:**

- at minimum, not unreasonable and not incoherent (internally contradictory)

**Suitability:**

- no less severe means of achieving the aim, legislation may not go beyond what is needed for that aim

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7

## I. Job-related maximum age for recruitment

CJEU 12/1/2010 C-229/08 Wolf

### 1. The issue:

Review of maximum recruitment age of 30 for active fire-fighters

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8

# I. Job-related maximum age for recruitment

## 2. Judicial review

Question from VG Frankfurt about justifications as provided by **Art. 6** 2000/78/EC

– CJEU’s reply follows **Art. 4** 2000/78/EC: high physical capacities; aim is to ensure functioning fire service – from 45, physical strength typically declines (proof was provided by expert opinions prepared by specialists in sports medicine!!), so age limit is justified in order to ensure 15 years of active fire-fighting. Limit is not justified without evidence (CJEU 13/11/2014 C-416/13, age limit 30 years for local police officers).

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9

# II. During the contract

## Age-related pay

CJEU 8 Sept. 2011 Cases C-297/10 and C-298/10 Hennigs

- Age-related pay is not justified (Art. 6(1) – close examination if capabilities match age). Discrimination because additional expense and professional experience differ from “age”, but maintenance of established rights is legitimate aim

CJEU 7 June 2012 C-132/11 Tyrolean Airways

- Only professional experience acquired as a crew member of a specific airline may be taken into account

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10

## II. During the contract

Subsequent decisions:

**CJEU 19 June 2014 - C-501/12 Specht**

- Continuation of discrimination resulting from transitional rules protecting acquired rights? Yes, but justified because it is not possible to examine every individual case.

**CJEU 7 June 2012 C-132/11 Tyrolean Airways**

- Only professional experience acquired as a crew member of a specific airline may be taken into account

## II. Execution of the employment contract

### 2. Age-dependent reduction in pay

**CJEU 26.9.2013 C-546/11 Toftgaard**

Civil servants dismissed for operational reasons receive their pay for 3 years and must remain available; no entitlement at 65; at 65 entitlement to pension, the statutory retirement age is 70

## According to CJEU

Disproportionate,  
because aim (availability when protection is needed) can also be met if based on actual and not just possible pensionability. Civil servant is otherwise forced to leave the labour market with a smaller pension at 65; discrimination not justified.

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13

## Conversely justified

Sliding scale of pension contributions by age in occupational pension scheme

**CJEU 26.9.2013 – C-476/11 HK Danmark**

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### **III. At the end of the contract**

#### **1. Periods of notice**

#### **2. Age limits**

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15

### **1. Periods of notice**

CJEU 19/1/2010 C-555/07(Kücükdevici)  
Section 622 (2) sentence 2 BGB violates  
the prohibition of age discrimination and  
is not to be applied by the national court  
because, although the rule is justified by  
a legitimate aim, the means of achieving  
it are not proportionate.

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16



## Article 6 Directive 2000/78/EC

Justification of differences of treatment on grounds of age

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17

## Proportionality Test

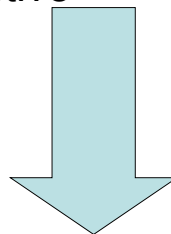
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Starting point:

Legislative objective

Means: Appropriate

Proportionate



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18

## Concrete ...

### Legitimate aim:

- Employers' interest in flexibility, also less need to protect **younger workers**

### Proportionate means?

- **Older workers** are also affected
- Transposition already fails to reflect the legislative aim

## Equally strict standard....

- CJEU 18 June 2009 – C-88/08 – “Hütter” Exclusion of periods of service completed under the age of 18 designed to prevent discrimination against pupils in general education – CJEU-> in this case, need to refer to this characteristic. Discriminatory legislation (question on limitation period CJEU 16/1/2014 – C-429/12 Pohl, question on construction of system other than by “deferred” promotion for disadvantaged groups – CJEU 28/1/2015 C-417/13 Starjakob)
- CJEU 22 Nov. 2005 – C-144/04 Mangold – Conclusion of fixed-term contracts, with no objective justification, easier as of age 58:  
*“...it has not been shown that “fixing an age threshold, as such, ... is objectively necessary to the attainment of the objective which is the vocational integration of unemployed older workers, and as that legislation therefore beyond what is appropriate and necessary in order to attain the objective pursued.”*

## 2. Age limits

Difference in terms of justification:

Justification related to occupational activity  
(Article 4)

and

Justification related to employment policy  
(Article 6)

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21

### a) Justification related to occupational activity

CJEU "Prigge" 13 Sept. 2011 C-447/09

- No statistics submitted showing that retirement at age 60 is necessary for public security in accordance with Article 2(5); international practice is age 65
- Art. 4: see above lack of statistics, same standard as for criterion "gender"
- Art. 6: Aviation safety is not a legitimate aim within the meaning of Art. 6

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22

## b) Justification related to employment policy

aa) From Palacios (CJEU 16 Oct. 2007 – C-411/05) to Rosenblatt (12 Oct. 2010 C-45/99) Standard retirement age

### **Palacios standard (Standard retirement age in the law)**

Legitimate aim: concrete reference to labour market

Proportionate: reasonable provision for old age

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23

## aa) From Palacios to Rosenblatt

**Rosenblatt standard (standard retirement age in collective agreement industrial cleaning)**

*"It must be observed that the automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement."*

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24

## aa) From Palacios to Rosenblatt

And, in particular, age limits in collective agreements - Rosenblatt:

*“67 In the light of the assessment made by the referring court, it must be observed that the clause on the automatic termination of employment contracts at issue in the main proceedings is the result of an agreement negotiated between employees’ and employers’ representatives exercising their right to bargain collectively which is recognised as a fundamental right (...). The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each party may, where appropriate, opt not to adopt the agreement.”*

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25

## bb) Application of Rosenblatt standard in other decisions

- CJEU 18 Nov. 2010 Georgiev (university professor) C-250/09
- CJEU 21 July 2011 Köhler/Fuchs (prosecutors) C-159/10 and C-160/10 (even explicit recognition of mixed age structure and protection of employees against dismissal because of decline in performance)
- CJEU 5 July 2012 – C-141/11 Hörnfeldt (collective agreement limit for postal service; age limit “irrelevant” if it already worked in Rosenblatt ...)

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26

cc) On the other hand, other,  
stricter standard applied in ...

(1) CJEU 12 Jan. 2010 – C-341/08 Petersen  
paragraph 53

*“...legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.”*

Problem: No maximum age for dentists outside panel!! Consequently, disproportionate with regard to the aim pursued – however, provision in national health system is not unreasonable – age limit (+)

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27

cc) On the other hand, other,  
stricter standard applied in ...

(2) Andersen CJEU 12 Oct. 2010 C–499/08

Facts: By law, no payment of severance allowance to workers (with more than 12 years of service in undertaking) who are entitled to old-age pension

No justification because legislation is not related to facts but to entitlement (**pension scheme joined before attaining 50 years of age!!!**) and hence deprives older workers of assistance in finding new employment

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28

cc) On the other hand, other, stricter standard applied in...

(3) CJEU 6 November 2012, C-286/12  
Lowering of retirement age to 62 years

Not proportionate

- No protection of legitimate expectations
- Not clear that age structure will be improved

And quite confusing in this context

CJEU 26/2/2015 C-515/13

Ruling: exclusion from eligibility for  
severance payment on basis of length of  
employment (state retirement pension  
deferred from age 65 to 67) can be justified  
under Article 6

because

## Differs from *Andersen*

Point 39: “This is not the case in the main proceedings, which concern the exclusion of severance allowance where the salaried employee is entitled to receive a State retirement pension upon termination of the employment relationship. The documents before the Court state that that provides for the needs of a dismissed employee having already reached the national age of retirement. From 1999 to 2023, the minimum age for a State retirement pension was 65, which will be progressively increased to 67 by 2027.”

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31

## Different justification standards?

CJEU simply “rubber-stamps” standard age limit for drawing a pension (65 or 67), while applying a stricter standard in all other cases (e.g. *Mangold*)

Follow-up question:

- Which standard is the right standard?
- Is there a hierarchy within anti-discrimination legislation?

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32



## **Is there a hierarchy within anti-discrimination legislation?**

No, is contrary to Article 21 of the Charter of Fundamental Rights:

Anti-discrimination legislation is at the same level, individual equality rights

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## **What standard is the right standard?**

Has to be the strict standard applied in Mangold or in settled case-law on gender discrimination (referred to as being at the same level in Charter of Fundamental Rights)

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34

## What if Rosenbladt jurisprudence was applied to Defrenne

*“In the light of the assessment made by the referring court, it must be observed that the clause on the automatic termination of employment contracts at issue in the main proceedings **is the result of an agreement negotiated between employees’ and employers’ representatives exercising their right to bargain collectively which is recognised as a fundamental right (...).** The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each party may, where appropriate, opt not to adopt the agreement.”*

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35

## But why does the CJEU then rubber-stamp age limits of 65/67?

Exclusively for political reason, not for dogmatic reasons:

- European Council agenda 2012: Goal is to increase the share of **workers up to 64 years of age** by 75%
- Lisbon strategy: to increase share of workers **up to 64 years of age** by 50% by the year 2010;

**But also:**

To reduce incentives for early retirement

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36

## Answer:

In the final analysis, result of a political objective, i.e. to accept a certain retirement age while at the same time reducing incentives for early retirement

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37

## Conclusion

- CJEU recognises political objectives relating to standard age limits, i.e. participation in labour market beyond standard age limit is not politically wanted
- This standard is not applicable in other fields of age discrimination
- This means that the strict standard applies outside standard age limits (in keeping with the political objective cited above -> reduction of incentives for early retirement)

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38