

# The CJEU & Age Discrimination

*Trends and the problem of a mandatory retirement age*

Aaron Baker, Durham University, UK



## Overview

Basis for EU protection against age discrimination

Structure of discrimination analysis and proportionality assessment

Themes

Cases:

Age as a criterion for pay, seniority, and other benefits

Maximum age requirements

Retirement

The problem of specific mandatory retirement ages

Themes (again)



# The Basis for EU Age Protection

Framework Directive: 2000/78/EC Directive

Article 3(1): employment across public and private sectors

Article 2(2): less favourable treatment on ground of age

Article 2(5): Public security exception

Article 4(1): Genuine Occupational Requirement

Article 6(1): Employment policy, labour market, vocational training objectives

EU Charter of Fundamental Rights Articles 21 and 25



# Discrimination Analysis

Direct age discrimination:

- Treated less favourably
- Than another person is (or has been, or would be) treated
- In a comparable situation
- On the basis of age

Indirect age discrimination:

- A neutral provision, criterion, or practice (PCP)
- Would put people of a particular age at a disadvantage
- Not an appropriate & necessary means to a legitimate aim



## Proportionality/Justification

Does the distinction or PCP pursue a legitimate aim?

- Under Article 6(1), the aim must relate to employment policy, labour market, or vocational training objectives

Is it appropriate to achieve that end?

Is it necessary for the achievement of the objective?

- No more than necessary (ie, least discriminatory means)?
- Are the negative effects intolerable, outweighing the objective?
- Stricto sensu* proportionality?



## Themes

Age is treated as a proxy for many different concerns—would we accept this with regard to other grounds of discrimination?

Are age discrimination exceptions essentially positive action on the basis of age? Again, why is that OK with age?

Is intergenerational balance/solidarity the answer to both questions?

Do we accept the intergenerational balance model? Does it have a sound theoretical basis? A sound empirical basis?

Is the CJEU jurisprudence built entirely on stereotypes?



## Age-Related Benefits

It has long been common across the Member States to decide promotion, pay, severance pay, and similar benefits on the basis of age, often as a proxy for long service or experience

As with all areas of age discrimination the real problem is whether age is a good proxy for these things, and whether it is practicable to use the underlying motives instead of the proxy

CJEU cases in this area tend to turn on whether the challenged means are appropriate to achieving the stated aims, but necessity is also a consideration



## *Andersen (499/08) (2010)*

Severance scheme excluded those (over 60) entitled to a pension (although full pension entitlement came at 65)

Legitimate aim: Severance smoothed the transition to new employment; exclusion prevented a double benefit

The exclusion was not necessary: some might choose to defer their pension and keep working, yet they were excluded for no legitimate objective (as they would not get a double benefit)

Consider also *C-546/11 Toftgaard (2013)*: 3 years availability pay



## *Odar (152/11) (2012)*

Those over 54 received less compensation on termination than those 54 and under, getting less the closer they were to receiving a state pension

The court found this justified as equitable sharing of scarce resources: younger workers had more need for the severance than those close to retirement

However: on the facts this was indirect discrimination on the basis of the claimant's disability, as he was entitled to a pension at an earlier age



## *Küçükdeveci (555/07) (2010)*

A notice period was calculated by disregarding employment before the age of 25

Legitimate aim: to encourage the hiring of younger workers

Not appropriate: It did not actually further the stated aim, as it applied to all employees, whatever their age at dismissal



## *Hütter (88/08) (2009)*

Salary increments were calculated by disregarding service before the age of 18

Legitimate aim: There were two aims: (1) to encourage students to complete secondary education and (2) to integrate those who pursued vocational training into the workforce

Not appropriate: The age of 18 was not a good proxy for these concerns, as people with the same levels of either secondary education or vocational training could be earning different amounts exclusively because of age



## *Hennings & Mai (297;298/10) (2011)*

Grading of pay categories in a collective agreement was determined by age categories

Legitimate aim: rewarding longer professional experience of older Employees

Not appropriate: experience relates to length of service, not age, so age was a poor proxy

Tyrolean Airways (132/11) (2012) (no evidence of connection between service at other airlines and age)



## *Kristensen (476/11) (2013)*

An occupational pension scheme (OPS) called for different employee and employer contributions depending on age

This was not excluded by 6(2) (exception for rules about “ages for admission or entitlement to retirement or invalidity benefits”) because this was pay

Legitimate aims: (1) allow workers who entered the OPS when older to amass a decent pension and (2) allow younger workers to enter the scheme early and keep more take-home pay

Proportionality for national court



## *Landin (515/13) (2015)*

At first glance very similar to *Andersen*: severance payments for long-serving workers made redundant were denied to those aged 65 or older, thus eligible for a full pension

Legitimate aims: (1) smooth the transition of long-serving workers to new employment (2) prevent double-payment, and (3) limit the more favourable treatment of older workers

Distinguished from *Andersen* on the ground that those 65 and above, entitled to a full pension, were more likely retire

Distinguished from *Toftgaard*: minimal effect on building of pension



## The Transition Cases

*Sprecht (501; 506/12) (2014)*

*Schmitzer (530/13) (2014)*

*Starjakob (417/13) (2015)*

Protection of acquired rights while maintaining cost neutrality is legitimate, but only real infeasibility of alternatives (*Sprecht*) can justify perpetuating past age discrimination



## Maximum Age Cases

*Wolf (229/08) (2010)*

Upper age limit of 30 for recruiting firefighters is justified under Articles 4(1) and 6(1), to ensure physical fitness for work

*Vital Pérez (416/13) (2014)*

The same is not true of police, as the discriminatory effects are not necessary in the context of the demands of police work as compared to the work of firefighters





## The Retirement Cases

*Palacios de la Villa (411/05) (2007)*  
*Age Concern England (388/07) (2009)*  
*Petersen (341/08) (2010)*  
*Rosenblatt (45/09) (2010)*  
*Georgiev (250;268/09) (2010)*  
*Prigge (447/09) (2011)*  
*Fuchs and Köhler (159;160/10) (2011)*  
*Hörmfeldt (141/11) (2012)*  
*Commission v. Hungary (286/12) (2012)*



## *Palacios (411/05) (2007)*

Spain allowed collective agreements to reintroduce compulsory retirement so long as those affected had a pension to turn to

Legitimate aim: Encouraging recruitment of younger workers  
(intergenerational balance)

“Necessary”: because it allowed exceptions where no pension was available



## *Age Concern UK (388/07) (2009)*

Challenge to the UK's implementation of the directive that simply made direct age discrimination justifiable if proportionate to a legitimate aim.

The Court noted that a lack of specified aims was not fatal, but that the aims that are suitable under 6(1) must be distinguished from those that are suitable under 2(2)(b)

The transposition was acceptable, so long as the UK (courts) ensured that direct discrimination was only permitted for aims that would be permitted under 6(1)



## *Petersen (341/08) (2010)*

A retirement age of 68 was set for dentists listed on state panels, although no such age applied to dentists in private practice

Two aims put forward: (1) to protect public health (from the possibility of declining capability) and (2) to protect public health expenditure which, if not controlled, could affect public health

Not appropriate to the first aim, as there was no limit on private practitioners, but possible to justify on the second (2(5))

Another possible aim under 6(1) was sharing out employment opportunities among generations, but only where that was shown to be an issue



## *Rosenblatt (45/09) (2010)*

The law allowed provisions in collective (and individual) agreements to set a compulsory retirement age for legitimate reasons, and this one set it at the point when a pension was available but no later than 65, in the commercial cleaning sector.

The court made much of the need to share opportunities among generations, suggesting that the possible hardship needed to be weighed against the general problem of unemployment

The aim of sharing opportunities was legitimate, and means acceptable because (a) a pension was available, (b) it was by agreement, and (c) those affected could seek other work

It was not a problem that the claimant had an insufficient pension



## *Georgiev (250;268/09) (2010)*

The law dictated that university lecturers/professors would be retired at 68 and be on fixed term contracts from 65.

The aims were apparently to distribute opportunities among the generations (average age of Bulgarian professors was 58) and to ensure the best mix of ages for educational purposes

These were legitimate under 6(1), and necessary, as five years higher than pensionable age, and those retired could choose to continue to work.



## *Prigge (447/09) (2011)*

A collective agreement at a particular airline set 60 as the compulsory retirement age

Legitimate aims: protection of pilot health and air traffic safety (2(5))

Not necessary for safety as general national age was 65.

Not a 6(1) aim.

Not genuine and determining under 4(1)



## *Fuchs and Köhler (159;160/10) (2011)*

State prosecutors were required to retire at 65, but could be permitted to work until 68 if it was "in the interests of the service"; other regions were raising the retirement age to 67

Legitimate aims: a balanced age structure to encourage the recruitment and promotion of young people; preventing disputes concerning employees' fitness to work beyond a certain age

Budgetary concerns cannot in themselves be a legitimate aim, but can play a part in the choice of measure

Forecasts can be evidence of necessity; law need not move always at the same pace; letting some work longer not inconsistent



## *Hörnfeldt (141/11) (2012)*

Much like *Rosenblatt*, in facts and result. Collective agreement guaranteed work until 67, followed by immediate retirement

Legitimate aims: (inter alia) (a) reducing obstacles for those who wished to work beyond their 65th birthday; (b) adapting to demographic developments and anticipation of the risk of labour shortages; (c) avoiding the termination of employment contracts in situations which were humiliating for elderly workers; and (e) making it easier for young people to enter and/or remain in the labour market.

Retired workers were not forbidden to seek work elsewhere, and had a pension to fall back on (although in this case too small), so the measure was proportionate



## *Commission v. Hungary (286/12) (2012)*

Judges were compulsorily retired at 62 instead of 70; the changes were sudden

Legitimate aim: standardisation of retirement rules and getting younger lawyers into the judiciary

Not appropriate: there was no evidence to suggest there were in fact younger lawyers eligible and ready to fill the vacancies, so no balanced age structure would be achieved

Not necessary: it cause unnecessary hardship to older judges and threatened the independence of the judiciary.



## Retirement: the Big Picture

Very important to have a clearly articulated aim

Acceptable aims: balancing employment opportunities across age groups (intergenerational solidarity?); avoiding humiliation or disputes over continuing capability; personnel planning

Appropriate: should not be inconsistent with other related retirement ages; must be evidence that retirement will lead to job opportunities for younger workers

Necessary: evidence needed to show aim is not achievable without hardship to retired workers



## Justifying a Specific Retirement Age

*Seldon v Clarkson, Wright and Jakes* (UK series of cases)

Economic circumstances: fleshing out the empirical basis of intergenerational justice claims

Availability of a pension

Impact on the right to work and earn a livelihood

Agreement or consent to the specific age



## Themes

Age is treated as a proxy for many different concerns—would we accept this with regard to other grounds of discrimination?

Are age discrimination exceptions essentially positive action on the basis of age? Again, why is that OK with age?

Is intergenerational balance/solidarity the answer to both questions?

Do we accept the intergenerational balance model? Does it have a sound theoretical basis? A sound empirical basis?

Is the CJEU jurisprudence built entirely on stereotypes?

