AGE DISCRIMINATION - RECENT CASE LAW OF THE CJEU

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1. EU law measures
2. Compulsory retirement
3. Restrictions on termination
4. Maximum age for firefighters
5. Seniority and minimum age

Conclusions
1. AGE DISCRIMINATION IN EU LAW

AGE DISCRIMINATION IN EU LAW

- EU Charter Article 21
- 2000/78/EC Directive
- Which to apply?
- ECJ case law – high number of cases
ECJ TEST

1. Falls within the **scope** of the Directive?

2. Contains a **difference of treatment** within the meaning of the Directive?

3. If so, the difference in treatment is **justified**?

SCOPE (Art. 3.1)

In both public and private sectors:

- Access to employment, self-employment
- Employment and working conditions, including dismissal and pay
- Retirement age!
DIFFERENCE OF TREATMENT
(Art 2.2)

Direct discrimination is used:
• Treated less favourably
• than another is, has been or would be treated
• In a comparable situation
• on the ground of age
Not stated: Tyrolean Airways case

JUSTIFICATION: GENERAL TESTS

• Art. 2(5) public security, protection of health – Petersen, Prigge
• Art. 4(1) genuine and determining occupational requirement (GOR) – Wolf
• Art. 6(1) special age test – all others
JUSTIFICATION: SPECIAL TEST (Art. 6.1)

• Objectively and reasonably justified by a legitimate aim
• Employment policy, labour market, vocational training objectives
• Very wide range
• Eg. balanced age structure

• Appropriate: genuinely reflects a concern to attain the aim in a consistent, systematic manner
• Necessary: account of the hardship that it may cause to the persons concerned and of the benefits derived from it by society in general and by the individuals who make up society
2. COMPULSORY RETIREMENT AGE

„Clauses on automatic termination of the employment contracts of employees who reach retirement age could, in the interests of sharing work among the generations, promote the entry of young workers into the labour force…” Fuchs, para 64
411/05. PALACIOS de la Villa

Compulsory retirement at 65, if eligible for pension
Lack of precision regarding the aim
Legitimate aim: better distribution of work between generations, fighting unemployment

388/07. Age Concern England

Compulsory retirement at 65 is not discrimination
Legitimate aim: public interest nature, employment or social policy, and a certain degree of flexibility for employers
Proportionate means of achieving a legitimate aim
341/08. PETERSEN

Mandatory age limit of 68 for panel dentists
2(5): Control public health expenditure
   Protection of patients’ health is not achieved
6(1): sharing of burdens between generations - legitimate

45/09. ROSENBLADT

Automatic termination (by contract) at retirement or 65
Legitimate aim: sharing employment between generations, planning of personnel
Appropriate, necessary: pension as replacement income (even if not sufficient), by agreement
**250;268/09. GEORGIEV**

Compulsory retirement at 68, 3 fixed-term contracts after 65 for professors

Legitimate aim: not clear - renew teaching staff, balance between generations??

65: higher than Mangold (52) and may choose to work

68: 5 years above retirement age

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**447/09. PRIGGE**

Compulsory retirement of pilots at 60 by CA (law 65)

Legitimate aim: protection of pilots’ health and air traffic safety

2(5) not necessary for public security and protection of health

4(1) disproportionate

6(1) air traffic safety is not a social policy objective
Compulsory retirement of civil servant at 65, may work until 68
Legitimate aim: several (changing) aims – finally the principal aim: ‘favourable age structure’, but also prevent disputes concerning employees’ fitness to work
measure must not appear unreasonable in the light of the aim and must be supported by evidence

Compulsory retirement at 67
Legitimate aim precised by ECJ: frees up posts for younger workers, avoid humiliating termination appropriate and necessary means
286/12. Commission v. Hungary

Compulsory, sudden retirement of judges at 62 instead of 70
Legitimate aim: standardisation of retirement rules and entry of young lawyers
Not appropriate: cannot result in a balanced age structure
Not necessary: hardship caused, abruptly
Political issue: judicial independence

RETIREMENT AGE DECISIONS

Political decision
Results in a loose test
Legitimate aim: many kinds, often hard to identify
Proportionately: hardly used
Exception: Hungarian judges and pilots
3. OTHER AGE RESTRICTIONS ON TERMINATION

499/08. ANDERSEN

No severance allowance for those entitled to employer’s old-age pension scheme (over 60)
Legitimate aim: facilitate the move to new employment by Sev. Pay, no double compensation
Not necessary: those excluded, who wish to work instead of pension
Role of the strict proportionality test!
152/11. ODAR

Lower compensation (half) on termination after the age of 54
Justified by not seeking employment: compensation for future and fair distribution of limited resources
However: discrimination based on disability

4. MAXIMUM AGE FOR CERTAIN PROFESSIONS
229/08. WOLF

Maximum recruitment age of 20 in fire services

Article 4(1) Legitimate objective: operational capacity and proper functioning

GOR: high physical capacities

Appropriate and necessary: assigned to duties for 15-20 years

5.

SENIORITY BEFORE A MINIMUM AGE
88/08. HÜTTER

Service before 18 is disregarded at calculating salary increments
Legitimate aim: encourage passing secondary education and also apprenticeship, avoid costly apprenticeship in public sector
Not appropriate: contradictory aims

555/07. KÜCÜKDEVECİ

Employment before 25 is disregarded at calculating the notice period
Legitimate aim: afford employers flexibility in personnel management
Not appropriate: applies to all employees, whatever their age at dismissal
297;298/10. MAI

In collective agreement gradation of pay by age categories
Legitimate aim: rewarding longer professional experience of older employees; transition avoiding losses
Not appropriate: experience derives from length of service and not age

132/11. Tyrolean Airways

In collective agreement determination of pay by 3 years experience acquired as a cabin crew member of a specific airline
Not linked to age
CONCLUSIONS

- High number of cases
- Same test for laws and CAs
- Legitimate aim: public nature, wide range, often unclear
- Broad discretion in choice of measures
- Direct discrimination
• Uneven scrutiny
• Lenient test for retirement age
• Proportionality: basis of a stricter scrutiny on all other issues
• Is there a hierarchy between topics and discrimination grounds?

Thank you for your attention!

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