

# **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

## **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

## **159;160/10. Fuchs and Köhler**

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

## **141/11. HÖRNFELDT**

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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