

AGE DISCRIMINATION IN EU LAW

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Overview

The EU was given competency to legislate on to prohibit discrimination on a series of new grounds, including age, by the Treaty of Amsterdam in 1997, which inserted Article 13 into the EC Treaty.¹ The enabling power contained in Article 13 was subsequently used as a basis for the enactment of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the ‘Framework Employment Equality Directive’, referred to in general in what follows as ‘the Directive’).

Age discrimination in employment and occupation is prohibited by the provisions of Directive 2000/78/EC, whose general provisions apply to age as they do to the other grounds that come within its scope. Thus Article 2(2) of the Framework Employment Equality Directive prohibits direct and indirect discrimination in employment and occupation on the grounds of age, as well as on the other non-discrimination grounds covered by the Directive, namely sexual orientation, religion or belief and disability. Article 2(3) of the Directive also prohibits harassment on the grounds of age. Article 2(4) prohibits instructions to discriminate, while victimisation as a result of bringing an age discrimination claim is prohibited under Article 11.

However, age differs from other non-discrimination grounds covered under EU law in certain important aspects. To begin with, there are a greater range of circumstances where age may constitute be a rational and legitimate reason for distinguishing between different groups of persons than is the case for the other non-discrimination grounds. Age-based distinctions are often based upon stereotyping and prejudice. However, the use of such distinctions may also at times be rooted in rational considerations and serve valuable social and economic objectives: the same is rarely true of the other non-discrimination grounds such as sexual orientation, gender, race or religion.

In particular, age may be a useful and fair method of selecting which groups of individuals may benefit from particular measures, or to identify groups for differential treatment, especially when age serves as a rational ‘proxy’ or indicator that particular groups possess certain characteristics in general, such as experience, maturity, good physical capability, or financial stability.

As a result, age discrimination legislation must establish a framework for distinguishing between circumstances where the use of age to differentiate between individuals is justified, and when it is not.

¹ Article 13 permitted the European Council, acting unanimously on a proposal from the Commission and after consultation with the European Parliament, to take ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

That framework is provided by Article 6 of the Directive, and in particular via the provisions of Article 6(1), which provides as follows:

‘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.’

Article 6(1) proceeds to give a number of examples of such justified differences in treatment, which include the ‘setting of special conditions on access to employment and vocational training’ in order to promote the vocational integration of particular age categories of workers or to ‘ensure their protection’; the ‘fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment’; and ‘the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.²

In other words, a rule or a policy which subjects employees to less favourable treatment on the grounds of age will not constitute discrimination if it a) is designed to achieve a ‘legitimate aim’, and b) is ‘appropriate and ‘necessary’ to achieve that particular aim, even it would otherwise constitute direct discrimination – with the text of Article 6(1) providing examples of such justified differences of treatment.

This marks age as different from other non-discrimination grounds, as direct discrimination based on the other grounds is not permitted. This reflects the unique nature of age discrimination, as discussed above.

Other, more minor differences exist between age and the other non-discrimination grounds within the framework of the Directive.

Under Article 6(2), member states are permitted to allow occupational security schemes to fix age limits for admission of new potential beneficiaries, or to set age limits as to when beneficiaries may become entitled to retirement or invalidity benefits (which can include fixing different ages for employees or groups of employees), or to use age criteria in actuarial calculations in such schemes, provided that this does not result in sex discrimination. No similar exception exists for the other grounds.

Article 3(4) also specifically permits member states to exempt their armed forces from the age provisions of the Directive: of the other grounds covered by the Directive, such an exception only also exists for disability.

The Age Discrimination Case-law of the CJEU

² Article 6(2) also provides that states may exempt age-limits that govern admission to occupational social security schemes or entitlement to the benefits they provide from the prohibition on age discrimination.

General Trends

The provisions of Article 6(1) have been the subject of multiple references to the Court. The questions referred by national courts to the CJEU have primarily focused on how the objective justification test set out in Article 6(1) should be interpreted and applied in situations where an employee has been subject to less favourable treatment on the grounds of age.

In response, the Court has acknowledged that age constitutes a specific form of discrimination: differences of treatment on grounds of age may be justified in a wider range of circumstances than is the case for the other non-discrimination grounds. The Court has also given member states a wide margin of discretion in determining what constitutes a legitimate objective of public policy, while private employers also enjoy some flexibility in this regard. Member states are not required to draw up a specific list of age-based differences in treatment which may be justified by a legitimate aim, while policy objectives can be pursued which are not explicitly mentioned in the text of Article 6(1).³ Furthermore, national legislatures and private employers have also been given a degree of leeway in choosing how to design employment and vocational training policies, especially when it comes to setting mandatory retirement ages.

However, none of this means that age does not constitute a ‘suspect’ ground. The Court has stated that Article 6(1) constitutes a very specific derogation from the general principle of equal treatment.⁴ As such, this exception is to be read narrowly, in line with the general interpretative approach that the Court has applied in interpreting the provisions of the 2000 Directives.

Furthermore, as the Court made clear in *Fuchs*, the right to work was protected by Article 15(1) of the EU Charter, and the provisions of Article 6(1) had to be read subject to this fundamental entitlement.⁵ As a result, the objective justification test set out in Article 6(1) has to be applied in a rigorous and demanding manner. Age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of the ‘appropriate and necessary’ leg of the test.⁶

Even the wide leeway given to states to determine public policy goals is not unlimited. The Court made it clear in its judgment in the case of *Age Concern* that public policy objectives should be designed to advance the public interest rather than simply reducing costs for

³ Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569, [43].

⁴ *Age Concern*, [60]-[67].

⁵ Joined Cases C-159/10 and 160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011, [62]. See also Case C-141/11, *Hörmfeldt v Posten Meddelande AB*, Judgment of the Court (Second Chamber) 5 July 2012, [37].

⁶ The wording of the objective justification test set out in Article 6(1) differs from that set out in respect of indirect discrimination in Article 2(2)(b) of the same Directive, in that the wording of Article 6(1) requires that a difference in treatment be ‘objectively and reasonably justified’ [the author’s italics]. However, in *Age Concern*, the Court made it clear that this difference in wording was not significant: Case C-388/07, *Age Concern England (Incorporated Trustees of the National Council for Ageing)*, [2009] ECR I-1569, [53]-[67].

employers or enhancing their competitiveness, although it is open for a national rule to provide a 'certain degree of flexibility for employers' in pursuit of a legitimate public interest.⁷ In *Prigge*, the Court concluded that public safety could not qualify as a legitimate aim under Article 6(1), whose scope only extended to cover social policy objectives 'such as those related to employment policy, the labour market or vocational training'.⁸ In *Fuchs*, the Court also ruled that 'while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1)'.⁹ Both of these are significant limitations, as it limits the range of public policy or economic cost objectives that can justify the use of age as a differentiating factor.

Furthermore, the Court in its judgment in *Age Concern* has emphasised that 'Article 6(1) imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification': while member states enjoy broad discretion in 'choosing the means capable of achieving their social policy objectives', 'that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age'.¹⁰ Furthermore, in the same judgment, the Court stated that:

*Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying a derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim...*¹¹

In *Fuchs*, the Court also made it clear that arguments in support of the use of age distinctions had to be supported by 'evidence of probative value'.¹²

The case-law of the Court has thus given a clear interpretation to the provisions of Article 6(1) and ensured that strong protection now exists in EU law against age discrimination in employment and occupation. However, this remains a complex area of law. Age-based distinctions are commonly used across Europe to differentiate between different categories of employee.¹³ Often these distinctions are based on generalisations, stereotyping and prejudice. However, at times, their use may be based on rational considerations.¹⁴ National

⁷ *Age Concern*, [46].

⁸ Case C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011, [81].

⁹ *Fuchs*, [74].

¹⁰ *Age Concern*, [67].

¹¹ *Ibid.* [51]. The Court here cross-referred to its case-law on the application of the objective justification test in the context of equal pay, citing in particular 'by way of analogy' its judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, [75] – [76].

¹² *Fuchs*, [76]-[83].

¹³ See D. O'Dempsey and A. Beale, *Age and Employment*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2011).

¹⁴ See C. O'Conneide, *Age Discrimination and European Law*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2005).

legislatures, governments and courts are often unsure as to how to apply the requirements set out in Article 6(1) of the Directive. This uncertainty is amplified by the fact that age is a relatively 'new' ground of discrimination: few European legal systems have a history of prohibiting age discrimination.

As a result, despite having set out the broad contours of how Article 6(1) is to be interpreted and applied, the CJEU continues to receive a steady flow of preliminary references from national courts on the topic of age discrimination: a high volume of age discrimination cases have come from Germany in particular. This means that the Court has developed a detailed jurisprudence on the interpretation and application of Article 6(1), where it has taken the general approach described above and applied it to a variety of national laws and practice. This case-law has had a considerable impact, and requires detailed scrutiny.¹⁵

Age Discrimination and the Question of Objective Justification

As discussed above in Part 1, the first reference concerning the 2000 Directives that reached the Court was the age discrimination case of *Mangold*, which concerned German legislation which had limited the employment rights of older workers by giving employers greater freedom to conclude fixed-term contracts with workers over the age of 52. This judgment established that the prohibition on age discrimination set out in Directive 2000/78/EC was an aspect of the general principle of equal treatment, and therefore the objective justification test set out in Article 6(2) should be applied with rigour on the basis it constituted a derogation from the principle of non-discrimination. It also set out how the objective justification test should be applied by national courts, and the Court has subsequently applied this template in the flow of age discrimination cases that have followed *Mangold*.

When considering whether the German legislation at issue satisfied the first leg of the objective justification test, i.e. whether it was directed towards achieving a legitimate aim, the Court in *Mangold* considered that the purpose of the legislation was 'plainly to promote the vocational integration of unemployed older workers' by giving employers an incentive to hire them in preference to younger workers who enjoyed greater employment rights. It took the view that 'the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt' and therefore concluded that objectives of this kind would 'as a rule' constitute a legitimate aim under Article 6(1). The Court thus granted the national legislature a considerable margin of discretion when it came to setting public policy objectives.¹⁶

Turning then to the question of whether the legislation was 'appropriate and necessary' and therefore satisfied the second leg of the objective justification test, the Court stated that member states 'unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy'. However, the

¹⁵ For a comprehensive analysis, see D. Schiek, 'Age Discrimination before the Court of Justice – Conceptual and Theoretical issues' (2011) 48(3) *Common Market Law Review* 777-799.

¹⁶ Case C-144/04, *Mangold v Helm* [2005] ECR I-9981, [59]-[61].

Court went on to note that the legislation limited the employment rights of all workers who were older than 52, irrespective of their previous employment history. It concluded that the manner in which age had been used as the ‘only criterion’ for defining the disadvantaged group of workers, ‘regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned’, went beyond what was objectively necessary to attain the objective of promoting the vocational integration of older workers.¹⁷ The Court thus held that states enjoy broad discretion in setting national employment policy, but the use of age as a criterion has to be clearly shown to be proportionate and necessary to achieve the policy objectives at issue.

The *Mangold* judgment was controversial for a number of reasons, including the way in which the CJEU viewed the prohibition on age discrimination as constituting a specific aspect of the more general principle of equal treatment. In the wake of the *Mangold* judgment, Mazák AG in his opinions in *Palacios de la Villa* and *Age Concern* argued that age was not a ‘suspect ground, at least when compared to race or sex’, and suggested that the Court should recognise that ‘age-based differentiations, age-limits and age-related measures are...widespread’, ‘simple to administer’ and ‘clear and transparent’.¹⁸ However, in subsequent cases, the Court has remained faithful to the approach it adopted in *Mangold*, and thus to the general interpretative approach it has adopted in applying all of the provisions of the 2000 Directives.¹⁹

As a result, the use of age-based distinctions which are inconsistent with or not rationally linked to the policy objectives they are supposed to advance, or which are disproportionate in the sense of being over-inclusive or under-inclusive, will be incompatible with the requirements of Article 6(1). This is illustrated by the judgment of the Court in *Kücükdeveci*, where as discussed above the Court concluded that the exclusion of periods of work undertaken by employees under the age of 25 from the calculation of notice periods furthered the legitimate aim of encouraging employers to hire younger workers but was disproportionate as it applied to all employees, regardless of their age or experience.²⁰

A similar approach was adopted in the case of *Hütter v Technische Universität Graz*, which raised the question of the compatibility with the Directive of Austrian legislation which provided that periods of work under the age of 18 were excluded when calculating an employee’s grading for salary purposes.²¹ In this case, the applicant, Mr *Hütter*, completed a period of apprenticeship as a laboratory technician together with a female colleague. However, when they were both subsequently employed as full-time employees, the fact that his colleague was older than him and therefore had been over 18 years of age for a

¹⁷ Ibid. [63]-[65].

¹⁸ Case C-411/05, *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, Opinion of Mazák AG delivered on 15 February 2007; Case C-388/07, *Age Concern England* [2009] ECR I-0000, Opinion of Mazák AG, delivered on 23 September 2008, [74]-[76].

¹⁹ See for instance Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365; see also on this point C. O’Cinneide, ‘Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age’ (2009-10) 2 *Revue des Affaires Européennes* 253-276.

²⁰ Case C-555/07, *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

²¹ Case C-88/08, *Hütter v Technische Universität Graz* [2009] ECR I-5325.

longer period of her apprenticeship meant that she was recruited at a higher grade than him. The Austrian Government asserted that the law in question was designed to achieve two legitimate aims, namely encouraging those under 18 to stay in secondary education while simultaneously promoting the integration of young people who have pursued vocational training into the labour market.

In its judgment, the Court considered that both these objectives could constitute legitimate aims of public policy in their own right, and reiterated that states enjoyed wide discretion in deciding which measures to adopt in pursuit of their chosen employment and social policy goals. However, the Court questioned whether the law could be said to rationally advance either of these two legitimate aims: the age limit applied irrespective of whether students had staying in secondary education or undergone vocational training, while it also could 'lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages'.²² Therefore, the age limit 'did not single out a group of persons defined by their youth in order to give them special conditions of recruitment intended to promote their integration into the labour market', and therefore could not be said to advance the aim of integrating particular groups of younger workers into the labour market. As such, the national law could not be said to be objectively justified under Article 6(1).

In *Andersen*,²³ the CJEU developed its case-law further by drawing a distinction between requirements set out in Article 6(1) that an age distinction had to be both 'appropriate' and 'necessary'. This reference concerned Danish legislation which provided that workers employed in the same undertaking for at least 12 years were entitled to a severance allowance unless, on termination of the employment relationship, they had reached the age at which they were entitled to receive a pension. This legislation was challenged by the applicant, who was dismissed by his employer at the age of 63 but wished to remain in the job market rather than retiring and collecting his pension. The Court accepted the Danish government's argument that this age-linked restriction was intended to achieve the legitimate aim of ensuring that employers did not pay double compensation to dismissed employees (in the form of the severance allowance and the pension). It also accepted that the primary objective of the measure was to provide extra income protection for long-serving workers who were made unemployed but who still intended to participate in the labour market: as most employees who were entitled to an old-age pension usually left the labour market after their contracts were terminated, the Court therefore concluded that the legislation was not 'manifestly inappropriate' in light of this objective. However, the legislation did not allow older workers who wished to remain in the labour market to temporarily waive their pension entitlement in favour of obtaining a severance allowance, as Mr Andersen wished to do in this case. This meant that an entire category of employees defined by their age were denied the opportunity of benefiting from the extra income

²² *Hütter*, [39].

²³ Case C-499/08, *Ingeniørforeningen i Danmark (acting on behalf of Ole Andersen) v Region Syddanmark*, Judgment of the Court (Grand Chamber) 12 October 2010.

protection provided by the allowance. In the Court's view, this was 'unnecessary' and therefore the legislation was incompatible with the requirements of Article 6(1).

The Court thus followed the approach proposed by Kokott AG in her opinion in this case and distinguished between the requirement that age distinctions be 'appropriate', in the sense of being rationally linked to the achievement of the relevant legitimate aims, and the requirement that they be 'necessary', i.e. that they are suitably tailored and do not impose a disproportionate penalty on the disadvantaged age group. The Danish legislation at issue in *Andersen* was appropriate, but not necessary.

The CJEU again differentiated between 'appropriate' and 'necessary' measures in the case of *Prigge*,²⁴ which concerned the provisions of a collective agreement which required Lufthansa pilots to retire at the age of 60. This age limit had been agreed by the social partners to ensure the safety of airline passengers. However, as noted above, the Court concluded that this could not qualify as a legitimate aim under Article 6(1), on the basis that it was a public policy objective which did not relate to employment policy, the labour market or vocational training. The Court went on to reject the argument that the age limit could be justified as coming within the provisions of Article 2(5) of Directive 2000/78/EC, which provides that its provisions are 'without prejudice to measures laid down by national law which, in a democratic society, are necessary' for *inter alia* the protection of public health. It accepted that the age limit as set out in the collective agreement came within the scope of Article 2(5) and was an 'appropriate' measure to give effect to the aim of preserving public safety. However, national and international legislation set an upper age limit of 65 for pilots, and no evidence has been presented to justify why a lower age limit has been set in the collective agreement. The Court therefore concluded that the measure was not 'necessary'.²⁵

In the case of *Petersen*,²⁶ the Court again concluded that age limits which were not applied consistently across a profession could not be justified as being 'necessary' under the provisions of Article 2(5). This reference from the German labour courts concerned an age limit of 68, after which dentists providing public care under the German health insurance system lost their authorisation to continue this work. The German Government attempted to justify the age limit on two separate grounds. Firstly, it argued the time limit was justified under the provisions of Article 2(5) in order to protect the health of patients obtaining dental care under the national statutory health insurance scheme, as 'general experience' indicated that dentists suffered a decline in performance after the relevant date. Secondly, the Government also argued that the measure was justified under the provisions of Article 6(1) as necessary to give effect to the legitimate employment policy objective of sharing out

²⁴ C-447/09, *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011.

²⁵ The Court also made it clear that the provisions of Article 2(5) as a derogation to the principle of equal treatment had to be interpreted narrowly, again in line with its overall interpretative approach: see *Prigge*, [56].

²⁶ Case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

employment opportunities across the different generations: the age limit served to open up new places on the public care panel for younger dentists.

In its judgment, the CJEU took the view that the protection of public health could constitute a legitimate aim for the purposes of Article 2(5). However, the age limit did not apply to dentists in private practice. As a result, the Court held that it was inconsistent to argue that an age limit was necessary to protect patients against possible decline in the skills of dentists but not to apply this protection to patients receiving care from private practitioners. It therefore concluded that the age limit was not 'necessary' and therefore was not objectively justified under the provisions of Article 2(5).

However, the Court went on to say that the age limit could in principle be objectively justified under the provisions of Article 6(1) on the basis of the second alleged legitimate aim, i.e. on the grounds that it was necessary to maintain an equitable balance between older and younger dentists, and to keep open paths of career progression within the public health panels. The necessity for such an age limit would depend on the circumstances of the specific labour market in question and whether there was an excess of dentists wishing to occupy places on the public panel, which the Court considered should be determined by the national courts.

Petersen is thus interesting for a number of reasons. The rigour of the objective justification test is demonstrated by the Court's refusal to accept that the age limit could be justified under Article 2(5) as necessary to protect the health of patients. However, the Court was also prepared to accept that age limits may be justified if they advance 'inter-generational solidarity'.

In Case C-143/16, *Abercrombie & Fitch v. Antonino Bordonaro*, the CJEU held that national legislation allowing employers to conclude 'on-call contracts' with workers of under 25 years of age which could be terminated after they reached that age pursued a legitimate aim of employment and labour market policy – namely facilitating the entry of young people to the labour market. It also concluded that the legislation was appropriate and necessary, taking into account 'the broad discretion enjoyed by the Member States... to achieve a degree of flexibility on the labour market' [41]. The Court placed particular emphasis on the background context, namely a 'persistent economic crisis and weak growth' [42]. This recent judgment is difficult to reconcile with the rigour of the approach applied in *Mangold*, and suggests that the Court may be willing to loosen the application of the objective justification approach in particular contexts.

The same could be said of Case C-548/15, *de Lange v Staatssecretaris van Financiën*, Judgment of 10 November 2016, where the Court concluded that a taxation scheme allowing workers under the age of 30 to deduct in full, under certain conditions, vocational training costs from their taxable income was objectively justified. Again, this could be seen as representing a loosening of the strict approach applied in *Mangold* – perhaps reflecting concerns about intergenerational equity.

Age Discrimination and Mandatory Retirement

In general, the Court has given states a relatively wide margin of discretion when it comes to setting retirement ages. The case of *Palacios de la Villa*, concerned the provisions of a national collective agreement which established that employees in workplaces covered by the agreement would cease to be employed at the fixed retirement age of 65, subject to a condition that the employees affected had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. Legislation in 2005 had permitted the inclusion of such compulsory retirement age provisions in collective agreements, after a process of extensive debate as to the potential impact of the abolition of retirement ages on the operation of the Spanish labour market.²⁷ The Court took the view that considered that the retirement age provisions in question could be regarded as objectively justified under Article 6(1) of the Directive, on the basis that they were objectively and reasonably justified by a legitimate aim relating to employment policy and the effective functioning of the Spanish labour market.

In particular, the Court highlighted that the measure in question ‘was adopted, at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations’.²⁸ The Court also went on to note that the measure took into account both the age of employees and also their pension entitlements, as well as allowing collective agreements to modify the operation of the retirement age scheme. Therefore, it concluded that the national legislation in question could be regarded as coming within the ‘broad discretion’ accorded to member states in setting and implementing employment policy.

Subsequently, the Court adopted a similar analysis in *Age Concern*.²⁹ This case involved a challenge brought by a civil society organisation against the provisions of the UK Employment Equality (Age Discrimination) Regulations 2006 that had transposed the age provisions of Directive 2000/78/EC into UK law. These Regulations permitted employers to terminate the employment contracts of employees who are older than 65: employees who wished to continue to work after this ‘mandatory retirement age’ can request to stay on, and if they continue to work are protected against unfair dismissal, but employers needed only to ‘consider’ this request. The applicants claimed that these provisions were not compatible with the Directive.

This case differed from *Palacios* in three important respects. Firstly, the UK Government cited the workforce management needs of employers to justify the retirement age provisions: however, this is not specifically listed as a legitimate aim in the list of examples of legitimate aims set out in the text of Article 6(1) (see above), unlike ‘employment policy’, the aim cited by the Spanish Government in *Palacios*. Secondly, unlike the case in *Palacios*, age was the sole criterion taken into account in the application of the UK retirement age provisions: employees could be dismissed at 65 if an employer wished to make use of the mandatory retirement age provisions, even if they had not made enough contributions to

²⁷ *Fuchs*, [61]-[63].

²⁸ [53].

²⁹ Case C-388/07, *R (The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-1569.

qualify for a full pension under the relevant social security legislation. Finally, the UK retirement age provisions had not been agreed through a process of consultation with the social partners. Nevertheless, the Court considered that the UK legislation could in principle be considered to be objectively justified, and reiterated that Member States enjoyed a broad discretion in the area of national employment policy.

In *Rosenbladt*, the CJEU confirmed that national legislation which permitted employers to terminate employment contracts at the age of 65 was compatible with the provisions of Article 6(1). In this case, the applicant, Ms Rosenbladt, had worked as a cleaner for 39 years at a barracks in Hamburg: when she reached 65, her employment contract was terminated, leaving her only in receipt of a statutory old-age pension of EUR 253.19 per month. However, the Court held that the relevant provisions of the German legislation in question struck a defensible balance between the needs of older workers and the interest of employers in workforce planning and distributing employment opportunities between different generations. It reiterated that states enjoyed a wide discretion in this area of employment policy, and emphasised that the age limits in question could be adjusted by the social partners through collective agreements. The national court highlighted that the automatic termination of her employment relationship would cause substantial financial hardship to Ms Rosenbladt: however, in response, the CJEU noted that the legislation in question did not require employees to leave the labour market or denied them protection against age discrimination.³⁰

Subsequently, in the recent case of *Hörnfeldt*,³¹ the Court similarly held that Swedish legislation which permitted employment contracts to be terminated at 67 was not incompatible with the requirements of Article 6(1). Again, the Court emphasised that the legislation struck an appropriate balance between the interests of employees and employers and did not force individuals to withdraw from the labour market.

Similar arguments also prevailed in *Georgiev*,³² where the Court held that restrictions laid down by national legislation on the employment of university lecturer after the age of 65 could be objectively justified under Article 6(1). In this case, a professor had his employment contract terminated at 65: he then worked for two more years on the basis of fixed-term contracts, but was obliged to retire at 68 in accordance with the relevant provisions of the Bulgarian Labour Code. The Court considered that these age limits were capable of opening up employment and promotion opportunities for younger academics: it also took the view that these age limits could help to ensure that a mix of generations would exist among academic staff which could enhance the quality of teaching and research.³³ As in *Petersen*, the Court was thus willing to grant states a reasonably wide margin of discretion when age limits are justified on the basis they promote inter-generational fairness. However, in *Georgiev*, the Court nevertheless made it clear that the national courts were still required to

³⁰ *Age Concern*, [71]-[77].

³¹ Case C-141/11, *Hörnfeldt v Posten Meddelande AB*, Judgment of the Court (Second Chamber) 5 July 2012.

³² Joined Cases C-250/09 and C-268/09, *Georgiev v Technicheski universitet – Sofia, filial Plovdiv* [2010] ECR I-11869.

³³ *Ibid.*[46].

assess whether the age limits were necessary in the light of current labour market conditions and were applied consistently across the different categories of academic staff.³⁴

In the case of *Fuchs*,³⁵ the CJEU adopted a similar analysis. The legislation at issue in this case provided that state prosecutors should retire at 65, subject to a possibility of continuing to work until 68 if it was in the interests of the state: the applicants in this case had worked until they were 65, when they had their application to continue working rejected by their employer. The Court considered once again that such an age limit could be justified on the basis that it established a 'favourable age structure' that opened up posts for younger employees.³⁶ In general, it concluded that the age limit struck a fair balance between the right to work of older employees (as protected by Article 15 of the EU Charter) and the aim of establishing a balanced age structure, taking into account the salaries and pension entitlements of older staff and the inherent flexibility built into the legislation. The Court also considered that the fact that some prosecutors could continue to work until 68, and that the retirement age for civil servants employed by other Länder and the federal government was being gradually raised to 67, did not make the legislation incoherent.

Some criticism has been directed against the Court's case-law on retirement ages, on the basis that it gives states an excessive degree of discretion. The Court has certainly applied the objective justification in a less exacting manner in this context than it has in others. In so doing, it has consistently emphasised that states have a legitimate interest in ensuring that an appropriate balance is struck between the interests of older and younger workers. This concern with inter-generational equity is certainly consistent with the Court's general interpretative approach, with its emphasis on protecting the rights of all workers. However, concern has been expressed that the Court's approach allows states considerable leeway when it comes to fixing retirement ages.³⁷

Age Discrimination and Salary Adjustments

The Court has also given states and employers a relatively wide margin of discretion when it comes to adjusting existing practices to reflect the new emphasis on age equality. In *Hennings*,³⁸ the CJEU concluded that a collective agreement, which replaced a system of pay which discriminated on the basis of age with a new non-discriminatory system while making provision for a transitional period when certain age-based pay inequalities were maintained in place, was compatible with the requirements of Article 6(1). The Court ruled that this temporary transition period was an appropriate and necessary measure which was intended to achieve the legitimate aim of protected established salary entitlements. However, in the same case, the Court concluded that provisions of collective agreements which provided

³⁴ [67]-[68].

³⁵ Joined Cases C-159/10 and 160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011.

³⁶ The Court also made clear that the limited number of individuals affected did not prevent the measure from being justified on the basis it pursued a legitimate goal of public policy: [51].

³⁷ For analysis, see D. O'Dempsey and A. Beale, *Age and Employment*, Thematic Report of the European Network of Legal Experts in the Non-discrimination Field (Brussels: European Commission/MPG, 2011), at 13-14.

³⁸ Case C-297/10, *Hennings v Eisenbahn-Bundesamt/ Land Berlin v Mai*, Judgment of the Court (Second Chamber) 8 September 2011.

that the basic 'pay step' of employees within each salary group was to be determined by reference to their age on appointment were not objectively justifiable. In general, the judgment of the Court in *Hennings* appears to strike a good balance: it permits employers some flexibility when it comes to adjusting their pay practices, while also making it clear that 'built-in' age-based inequalities will usually not survive challenge under the age discrimination provisions of Directive 2000/78/EC.

Thus, in C-530/13, *Schmitzer v. Bundesministerin für Inneres*, Judgment of 11 November 2014, the CJEU accepted that 'respect for the acquired rights and the protection of the legitimate expectations of [those] 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'. However, this cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of a discriminatory system was designed to eliminate.³⁹ But in C 501/12 *Specht v. Land Berlin* the Court found a transitional scheme to be objectively justified: even though the former 'tainted' pay levels would be taken into account, this was justified given the costs and disruption of alternative approaches.

In *Commission v. Hungary*, the CJEU found that the lowering of the retirement age for senior judges was disproportionate, because the transition process was too quick and brutal in terms of career impact.

Age Distinctions as Genuine Occupational Requirements

The question of when age limits may be justified on the basis that they constitute 'genuine occupational requirements' in line with the provisions of Article 4(1) of Directive 2000/78/EC arose in the case of *Wolf*.⁴⁰ This reference concerned a regulation which prevented individuals over the age of 30 applying to the fire service. The German Government suggested that this measure was justified in line with the requirements of Article 4(1), on the basis that it was necessary to achieve the legitimate aim of ensuring the effective functioning of the fire service. The Government argued that evidence showed that few fire service employees over the age of 45 years of age would have sufficient physical capacity to fight fires and rescue persons in danger, and that the age limit ensured that individuals recruited to the fire service could perform these tasks for a sustained period of time before they were assigned to less physically demanding duties.

The Court accepted that an age limit in these circumstances could be objectively justified under Article 4(1) of the Directive, referring in particular to Recital 18 to the Directive which provides that its provisions do not require emergency services to recruit or retain persons who cannot carry out the range of functions that they may be called upon to perform in their job. In the view of the Court, high physical capability was a genuine and determining

³⁹ See also C-417/13, *Starjakob*; Case C- 482/16, *Stollwitzer*.

⁴⁰ Case C-229/08, *Wolf v Stadt Frankfurt am Main*, Judgment of the Court (Grand Chamber) 12¹ January 2010.

occupational requirement for the posts in question, and the imposition of a maximum age limit served as an adequate and effective ‘proxy’ for the required level of physical fitness.⁴¹

However, in *Prigge*, the Court was not prepared to accept that a requirement in a collective agreement for Lufthansa pilots to retire at the age of 60 could be justified by reference to Article 4(1), on the basis that national and international legislation imposed a compulsory retirement age of 65 and no evidence had been presented to show that the lower age-limit was necessary when it came to ensuring the safety of Lufthansa passengers in particular. In reaching this conclusion, the Court emphasised that Article 4(1) had to be interpreted narrowly, on the basis that it represented a derogation from the principle of equal treatment. (The Court adopted a similar approach in respect of the provisions of Article 2(5) of Directive 2000/78/EC, as discussed previously.) This is a significant point: the use of age as a proxy for physical capacity needs to be scrutinised with care.⁴²

In general, the *Prigge* decision makes it clear that the Court will adopt a restrictive approach to the interpretation and application of the genuine occupational requirement provisions of Article 4(1), in line with its general interpretative approach in this context and its previous case-law on gender equality.⁴³

However, note Case C-190/16, *Fries v Lufthansa CityLine GmbH*, where the Court concluded that Annex I to Commission Regulation (EU) No 1178/2011 of 3 November 2011, which prohibits holders of a pilot’s licence who have attained the age of 65 from acting as pilots of aircraft engaged in commercial air transport is an appropriate means of maintaining an adequate level of civil aviation safety in Europe. At [53], the Court said that ‘as regards the issue of whether such a measure goes beyond what is necessary for achieving its objective and unduly prejudices the interests of holders of a pilot’s licence aged over 65, that measure must be viewed against its legislative background and account must be taken both 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’.

The case of C-416/13, *Perez v. Ayuntamiento de Oviedo* concerned Spanish laws permitting the fixing of a maximum age (generally 30) for access to the police force. The Court held that such a maximum recruitment age could constitute a GDOR if it can be shown that ‘evidence must show that the characteristic is inevitably related to a particular age and is not found in persons (over or under) that age’, which was not the case here in line with the approach adopted in *Wolf*. However, in C-258/15, *Salaberria Sorondo v. Academia Vasca de Policia y*

⁴¹ This judgment contrasts with a decision of an UK employment tribunal in the case of *Baker v National Air Traffic Services*, ET 2203501/2007, which considered that an upper age limit of 36 in recruitment of air traffic controllers could not be considered to be objectively justified, on the basis that the employer had failed to show that the age limit was necessary to achieve similar legitimate aims as those cited in the *Wolf* case. However, in the *Baker* case, there was no evidence that the performance of air traffic controllers generally declined with age, unlike the case with the fire fighters in *Wolf*.

⁴² There is a need for great caution in assuming that performance declines with age: medical evidence demonstrates that this is not necessarily the case: see J. Grimley-Evans, ‘Age Discrimination: Implications of the Ageing Process’, in S. Fredman and S. Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Oxford: Hart, 2003), 11-20.

⁴³ See Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case C-273/97, *Sirdar v The Army Board* [1999] ECR I-7403.

Emergencias, Judgment of 15 November 2016, the Court ruled that legislation providing that candidates for posts as police officers who are to perform all relevant operational duties must be under 35 years of age, on the basis that alternative means of assessing their capacity were not feasibly available and there was evidence of physical decline after the age of 35. .

Indirect Age Discrimination

In the case of *Tyrolean Airways*,⁴⁴ the collective agreement which governed the grading and remuneration of employees of Tyrolean Airways did not take account of skills and knowledge which some employees had gained while serving with another airline. An Austrian court asked the CJEU whether this collective agreement indirectly discriminated against older workers by only taking account of the skills and experience they had acquired while working with one airline and not the other, even though the knowledge acquired was ‘substantively identical’ in both cases.

However, the CJEU ruled that the difference in treatment at issue was not ‘directly or indirectly based on age or an event linked to age’. The Court considered that the experience not taken into account by the terms of the collective agreement was ‘neither inextricably...nor indirectly linked to the age of employees’, even though a consequence of this omission might be that some staff members advanced a grade at a later age than others.⁴⁵ As a result, no issue of indirect discrimination arose.

This judgment is notable for its insistence that a difference of treatment must affect a particular group defined by their age or some other protected characteristic, or otherwise clearly differentiate between different categories of persons on the basis of a non-discrimination ground, before a claim for indirect discrimination could arise. It remains to be seen how this requirement will be applied in future indirect discrimination cases. For now, the judgment in *Tyrolean Airways* serves as a warning that a difference of treatment must be shown to affect specific categories of persons defined by reference to one of the non-discrimination grounds set out in the 2000 Directives.

In Case C-539/15, *Bowman v Pensionsversicherungsanstalt*, Judgment of 21 December 2016, the Court concluded that a national collective labour agreement which allowed periods of school education to be taken into account for career advancement could be objectively justified, ‘as long as that extension applies to every employee benefiting from the inclusion of those periods, including retroactively to those having already reached the next steps’.

Recent Case-law

The CJEU’s recent case-law has adhered closely to the approach developed in the first few years of its age discrimination jurisprudence.

⁴⁴ Case C-132/11, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, Judgment of the Court (Second Chamber) 7 June 2012.

⁴⁵ *Ibid.* [29].

In *Rasmussen*⁴⁶ the CJEU confirmed that, even in disputes between private persons, the courts must disapply non-compliant national law even in situations where it might disrupt existing established expectations. [This judgment has proved to be controversial in Denmark.]

In C-159/15, *Lesar v. Telecom Austria AG*, Judgment of 16 June 2016, a pension scheme fixed the age from which members began to pay contributions to the civil service pension scheme and acquired the right to receive a full retirement pension. The CJEU held that the legislation sought to ensure the ‘fixing ... of ages for admission or entitlement to retirement or invalidity benefits’ within the meaning of Article 6(2), and was therefore within the exception created by that provision of the Directive.

In Case C-443/15, *Parris v Trinity College Dublin*, Judgment of 24 November 2016, the Court concluded that ‘Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule, such as that at issue in the main proceedings, which, in connection with an occupational benefit scheme, makes the right of surviving civil partners of members to receive a survivor’s benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, does not constitute discrimination on grounds of age.’ The Court also refused to apply an intersectional analysis in this case: ‘Articles 2 and 6(2) of Directive 2000/78 must be interpreted as meaning that a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation’.

A Final Comment

Age discrimination law could be viewed as an attempt to balance individual age-based dignity with the demands of inter-generational fairness, subject to the point that dignity may sometimes support a finding that objective justification exists: see [50] of the UK Supreme Court’s decision in *Seldon v. Clarkson Wright and Jakes* [2012] UKSC 16. This concept of ‘dignity’ remains underdeveloped in the EU age discrimination framework, and may need expansion in the years ahead.

⁴⁶ C441/14. *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*.