



RECENT DEVELOPMENTS IN EU ANTI-DISCRIMINATION LAW

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EVOLUTION OF ECJ CASE LAW ON AGE DISCRIMINATION

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Introduction

1. It is a great pleasure to be invited to speak at this conference on recent developments in EU Anti – discrimination law and to focus on the evolution of ECJ case law on age.
2. The main focus of my paper will be on the position after the implementation of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“Directive 2000/78/EC”).² However I must start by recalling that the ECJ has had to consider age as a component of employment policy in other contexts before that. One key context is pensions where men and women have been eligible for state and other pensions from different ages.
3. Within Europe it has always recognised that there are limitations to the extent to which, and the speed at which, pension policy differences for

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² This Directive is sometimes called the Framework Directive but as there is more than one Framework Directive this can be confusing.

men and women can be equalised. Thus the EEC made a special derogation in Article 7(1)(a) of Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.³

4. In a number of cases it has been asked whether this meant that different treatment of men and women in relation to termination of employment at different ages was also justified. A long time ago in Case 152/84 *Marshall I* [1986] ECR 723 the ECJ held that it was not.
5. In a judgment given on the 18th November 2010 the Second Chamber has again had to consider the impact of differential pension ages in a gender context in Case C-356/09 *Pensionsversicherungsanstalt v Christine Kleist*. It reaffirmed the seminal judgment in *Marshall I* and held that this was impermissible gender discrimination.
6. Although the question of age discrimination was also raised in the hearing the court did not consider it as it was not part of the reference: [44] – [45].
7. Advocate – General Kokott noted in her Opinion in *Kleist* at [20]⁴ that an analysis on the basis of age discrimination was not particularly helpful because -

...the Court has already held that compulsory retirement upon reaching the statutory normal pensionable age may be justified on employment policy grounds, meaning that there is no age discrimination.

Two key points

8. Two key points emerge from these preliminary considerations.
9. Firstly it is always important to analyse a situation of potential discrimination from *all* possible points of view. Age discrimination may easily also be gender discrimination; yet a case concerning the intersection

³ Article 7(1)(a) said “1. this Directive shall be without prejudice to the right of Member States to exclude from its scope: (a) the determination of pensionable age for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits;...”

⁴ See Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 at [77].

of age and gender may be unlawful as gender discrimination while possibly being lawful as age discrimination. Other intersections between age and different grounds could arise.

10. Secondly a rule that is potentially age discriminatory may in some circumstances be justified nonetheless. It is these possibilities for *justification* which I shall focus on. However first I need to set out the basis for the current prohibitions on age discrimination.

The Charter of Fundamental Rights

11. We must of course now start with the Charter of Fundamental Rights of the European Union. The Charter was initially agreed on the 7 December 2000, and adapted at Strasbourg, on 12 December 2007. It is now part of the Lisbon Treaty which at Article 6(1) says -

1. The ... Charter ... shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

12. Chapter III of the Charter deals with the principle of equality. It states that -

Article 20 - Equality before the law

Everyone is equal before the law.

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

13. On the 1st March 2011 the Grand Chamber stated in Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres* at [16] that -

Article 6(2) [TEU], provides that the European Union is to respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Those fundamental rights are incorporated in the Charter, which, with effect from 1 December 2009, has the same legal status as the Treaties.⁵

14. This is important since the Charter makes *no* distinction between gender and age discrimination. On the other hand in its subordinate legislation the Union has permitted derogations to be made from the principle of equal treatment as it applies to age.

Directive 2000/78/EC

15. Directive 2000/78/EC was made pursuant to Article 13 EC (now Article 26 TFEU) for the implementation of the principle of equal treatment in relation to employment and occupation in relation to discrimination on grounds of age, sexual orientation, disability and religion and belief.⁶
16. This Directive prohibits both direct and indirect discrimination and also harassment and victimisation: see in particular Article 2(2).
17. However it also provides in Article 6 that member states may derogate from the protection from direct age discrimination -

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

⁵ On this see Article 6(1) TEU.

⁶ For a discussion of the background to the Directive and also the Race Directive (Directive 2000/43/EC) see ed. Meenan H. *Equality Law in an Enlarged European Union. Understanding the Article 13 Directives* Cambridge : Cambridge University Press , 2007

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.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) 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. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

18. The Directive was to be implemented within 3 years but it gave an extended period within which member states might bring the provisions in relation to age into effect. This extended period has been used by many states and as a result it has taken some time for the case law of the ECJ to develop. However this is now developing fast and will form the main theme of my contribution.

19. The first deep jurisprudential question raised in the case law concerned the question whether age discrimination was somehow materially different from gender and other grounds of discrimination.

Is age discrimination different?

20. The Charter does not of course differentiate between age discrimination and other forms of discrimination. It probably should be seen as drawing inspiration from Article 14 of the European Convention on Human Rights and also the International Covenant on Civil and Political Rights, which likewise make no such distinction.
21. However it has been argued that age discrimination is materially different from gender. Thus it has been said that because Article 6 of Directive 2000/78/EC makes it clear that there can be derogations this must mean that age discrimination is meant to be seen as materially less significant than gender discrimination.
22. However the ECJ stated from an early stage in the jurisprudence that the prohibition on age discrimination is merely a particular expression of the general principle of equal treatment.
23. Thus in Case C-144/04 *Mangold* [2005] ECR I-9981 the ECJ said at [74] – [75] -

74. Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation. Indeed, in accordance with Article 1 thereof, the sole purpose of the directive is ‘to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation’, the source of the actual principle underlying the prohibition of those forms of discrimination being found, as is clear from the third and fourth recitals in the preamble to the directive, in various international instruments and in the constitutional traditions common to the Member States.

75 The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. Where national rules fall within the scope of Community law, ... and reference is made to the Court for a preliminary ruling, the Court must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with such a principle (Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 30 to 32).

24. The question whether this passage was correct has vexed some Advocates – General. AG Sharpston in her Opinion in Case C-227/04 P *Lindorfer* [2007] ECR I-6767 noted at [55] -

In its judgment [in *Mangold*], the Court emphasised that the source of the actual principle underlying the prohibition of the forms of discrimination identified in Article 1 of Directive 2000/78 was to be found in various international instruments and in the constitutional traditions common to the Member States. ⁷ That reference must surely be to the general principle of equality.

25. She added -

The specific prohibition of age discrimination is, in both national and international contexts, too recent and uneven to meet such a description.⁸

26. Notwithstanding, the Court has recently reiterated the approach taken in *Mangold* in Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* given on the 19th January 2010: see [21] – [22].

Age as a transitional status

27. However there is a different and very important difference between age and the other grounds. It is self-evident that a person's race is not something that changes, nor usually does a person's gender.⁹ A person cannot be treated as disabled if they are merely ill; there must be a degree of permanence to that illness which transforms the status of the person from a merely ill able-bodied person to someone who is truly disabled: Case C-13/05 *Chacón Navas* [2006] ECR I-6467.

⁷ See [74].

⁸ For example, the Commission's 1999 Report on Member States' legal provisions to combat discrimination states, at p. 70: 'There is very little legislation on age discrimination in the Member States. However, several countries have recently introduced measures to facilitate the employment of older workers.' See also 'EC legislation prohibiting age discrimination: "Towards a Europe for All Ages"?', Clare McGlynn, *Cambridge Yearbook of European Legal Studies* (2000) p. 179.

⁹ Of course a person's gender can change and if so must be protected: xx

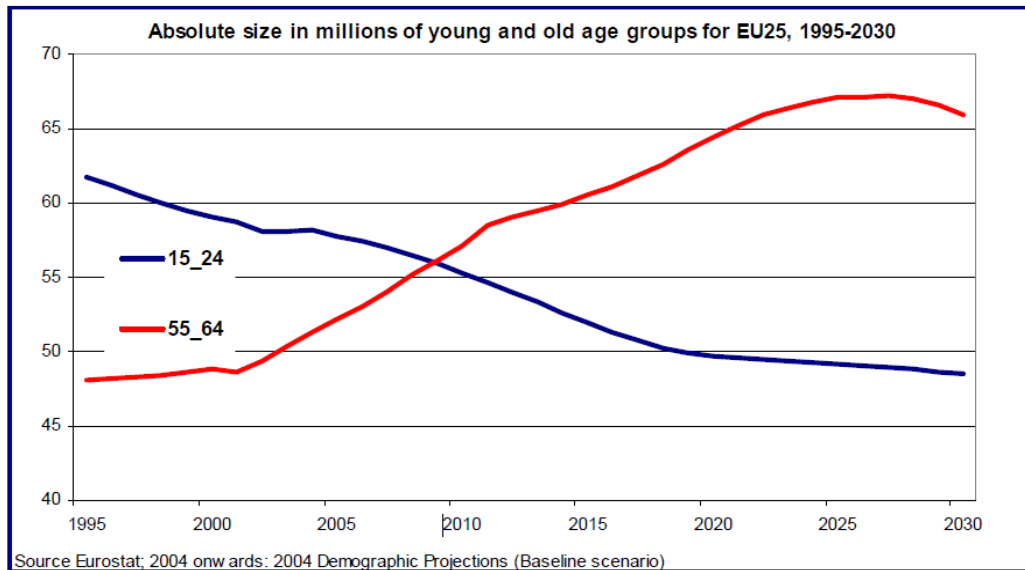
28. Pregnancy is a transitional status of short and always finite duration but a person's age is always in a state of transition. This fact has led to specific arguments about the treatment of age discrimination concerned with ideas such as fairness over a lifetime or fairness between different age groups. The place and implication of these ideas have yet to be fully worked out.
29. They will undoubtedly form a bigger part of the discussion about age for simple but dramatic statistical and demographic reasons whose effects the wider public are now beginning to feel in the discussion about the sustainability of pension provision in a time of economic hardship.
30. It is important for us lawyers to be aware of these since they will form any debate about the reach and effect of age discrimination law.

Age and demographics

31. The Commission has been very aware that the workforce of the Union is aging rapidly and the relationship between the generations is altering fast.
32. This point was made recently by the Commission in a Green Paper¹⁰ and can be seen in this chart of what are sometimes called the first and last ordinary cohorts of working age –

¹⁰ ¹⁰ “Confronting demographic change: a new solidarity between the generations”, Brussels, 16.3.2005 COM(2005) 94 final.

GRAPH 5: SIZE OF THE YOUNGEST (15-24) AND OLDEST (55-64) WORKING AGE GROUPS



33. It can be seen in this chart that 2009 was a transition year.

34. The report from which this chart was taken explained that –

In 2050 there are expected to be 66 million persons of 55-64 and only 48 million of 15-24. This means that the working age population will start declining soon after 2010 and that the labour market will increasingly have to rely on older workers.

35. We are now in that period of decline as many of you will already recognise and if not now then very soon as a fact of life in your own communities and member states.

36. This is why above all else giving substantive effect to the law against age discrimination is going to be increasingly important but why also it is so difficult to predict how it will develop.

37. Another point is reflected in this chart; across Europe average longevity is increasing very fast. In the UK a person 65 today is on average going to live 2 months more than a person who was 65 on the same day one year

previously! This perhaps explains why the reach of age discrimination law to retirement was one of the first issues to be discussed in the ECJ.

Retirement

38. The Directive provided in Recital 14 as follows -

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

39. One of the first questions was whether Recital 14 meant that Directive 2000/78/EC applied to retirement decisions at all.

40. The answer is yes. Thus the ECJ stated in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 at [44] that -

[Recital 14] merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.

41. The next question was therefore: on what basis was a derogation by a Member State from the strict rule that direct age discrimination could not be justified consistent with Article 6 in the context of the forced retirement at a specific age?

Palacios de la Villa

42. In *Palacios de la Villa* the ECJ had to consider the justification for a national provision enabling specific sectors of employment to reach binding agreements imposing a retirement age on that specific sector of the workforce in Spain. The facts may seem complicated and understanding them is key to understanding this first case on retirement and age.

43. The Spanish system was characterised by the following distinctive elements:

- a. The rule in question was introduced at a time of high unemployment;
- b. The aim of the Spanish legislation in introducing compulsory retirement at 65 was to promote intergenerational fairness;
- c. The relevant statutory provision provided initially that the government would set the maximum working age by reference to the resources of the social security system and the labour market. However retirement ages might be agreed freely by collective bargaining without prejudice to the social security provisions.
- d. However that statute was repealed and the Spanish courts held that the compulsory retirement clauses included in a number of collective agreements were no longer lawful.
- e. Thereafter the social partners, employers' organisations and trade union organisations lobbied for and got the reinstatement of compulsory retirement by Law 14/2005 of 1 July 2005 on clauses in collective agreements concerning the attainment of normal retirement age ('Law 14/2005'), which came into force on 3 July 2005. This stated -

'Collective agreements may contain clauses providing for the termination of a contract of employment on the grounds that a worker has reached the normal retirement age stipulated in social security legislation, provided that the following requirements are satisfied:

- (a) Such a measure must be linked to objectives which are consistent with employment policy and are set out in the collective agreement, such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment.

(b) A worker whose contract of employment is terminated must have completed the minimum contribution period, or a longer period if a clause to that effect is contained in the collective agreement, and he must have satisfied the conditions laid down in social security legislation for entitlement to a retirement pension under his contribution regime.'

- f. The legislation before the Court of Justice involved a single transitional provision which provides as follows -

'Clauses in collective agreements concluded prior to the entry into force of this Law, which provide for the termination of contracts of employment where workers have reached normal retirement age, shall be lawful provided that the agreement stipulates that the workers concerned must have completed the minimum period of contributions and that they must have satisfied the other requirements laid down in social security legislation for entitlement to a retirement pension under their contribution regime.'

- g. Thus in Spain before employment was deemed to come to an end by virtue of retirement the worker had to have completed the minimum period of contributions and satisfied the other requirements laid down in social security legislation for entitlement to a pension under the worker's contribution regime.
- h. In short forced retirement was dependent on the worker attaining a minimum level of retirement income.

44. The ECJ assessed the proportionality of the relevant provision at [68] – [75] and said -

68 ... as Community law stands at present, the Member States and, where appropriate, the social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see, to that effect, Case C-144/04 *Mangold* [2005] ECR I-9981,

paragraph 63).

69 As is already clear from the wording, 'specific provisions which may vary in accordance with the situation in Member States', in recital 25 in the preamble to Directive 2000/78, such is the case as regards the choice which the national authorities concerned may be led to make on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement.

70 Furthermore, the competent authorities at national, regional or sectoral level must have the possibility available of altering the means used to attain a legitimate aim of public interest, for example by adapting them to changing circumstances in the employment situation in the Member State concerned. The fact that the compulsory retirement procedure was reintroduced in Spain after being repealed for several years is accordingly of no relevance.

71 It is, therefore, for the competent authorities of the Member States to find the right balance between the different interests involved. However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the Member State concerned.

72 It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.

73 Furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable.

74 Moreover, the relevant national legislation allows the social partners

to opt, by way of collective agreements – and therefore with considerable flexibility – for application of the compulsory retirement mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question.

75 In the light of those factors, it cannot reasonably be maintained that national legislation such as that at issue in the main proceedings is incompatible with the requirements of Directive 2000/78.

Adequate compensation in retirement – a balance to the loss of opportunity to work

45. The ECJ balanced the way in which the personal autonomy of a worker who might wish to continue to work against the need to address unemployment by reference, not only to the age of the worker, but also to the fact that the worker would have to be entitled to financial compensation by way of at retirement pension at a reasonable level.
46. It is probably important also to note that the level of occupational pension in Spain was relatively high and intended to provide a living retirement wage.

An agreement between the social partners

47. Secondly it must be noted that the retirement age was not imposed on workers by the state but was the product of a negotiation between the workers' and employers' representatives – i.e. the social partners.
48. Indeed the ECJ noted that the social partners were permitted under the statutory provision to opt for the application of the compulsory retirement mechanism thereby giving to both sides of employment “considerable flexibility”.
49. This is a very different situation to that in member states where retirement ages are imposed by the state.

Age England and the limits of Article 6

50. The next important case from the ECJ was Case C-388/07 *Age Concern England* [2009] ECR I-1569. This case¹¹ was part of a strategic campaign to end a national default retirement age (DRA) in the United Kingdom which will indeed happen with effect from the 1st October 2011.
51. The case concerned the question first whether or not there were any limits on the kinds of derogations that a member state could make under Article 6. This was important since the domestic legislation in the UK did not make clear on its face why employers could dismiss at will anyone who was 65 or over without facing any challenge in the courts.
52. The case arose because the terms of Article 6 make it clear that a member state does not have an unlimited discretion as to the nature of the aims that may be considered legitimate in applying domestic law transposing the Directive.
53. *Age Concern* argued that there was a requirement to list such aims generically so as to comply with Article 6. There was a basis for this argument in the *travaux préparatoires*. Such a list would have provided legal certainty as to the nature of the derogation and so explained the class of aims that were legitimate.
54. Although the ECJ did not accept this submission, it did not opt for a construction of Article 6 that permitted a total absence of specificity.
55. On the contrary it made it clear that in the absence of such a list, legal certainty had to be provided in other ways that were consistent with European law. It said -

42. The transposition of a directive into domestic law does not moreover always require that its provisions be incorporated formally in express, specific legislation. Thus, the Court has held that the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of

¹¹ In which I was instructed for *Age Concern England*

the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts (see, to that effect, Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, and Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7). A directive may also be implemented by way of a general measure provided that it satisfies the same conditions.

43 In accordance with those principles, Article 6(1) of Directive 2000/78 cannot be interpreted as requiring Member States to draw up, in their measures of transposition, a specific list of the differences in treatment which may be justified by a legitimate aim. Moreover, it is clear from the words of that provision that the legitimate aims and the differences in treatment referred to therein are purely illustrative, as evidenced by the Community legislature's use of the word 'include'.

44 Consequently, it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision (see, to that effect, *Palacios de la Villa*, paragraph 56).

45 In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary (*Palacios de la Villa*, paragraph 57). (Emphasis added)

56. Accordingly where a member state opts, *not* to set out the basis for a derogation under Article 6 in express specific legislation, the questions for the domestic court in reviewing the legislation are -

- a. What general principles or general legal context are relied on?
- b. If so in what way is it said that they operate?

- c. Are they appropriate for the purpose of guaranteeing in fact the full application of the directive?
 - d. Is the legal position arising from those general principles or that general legal context sufficiently precise and clear?
 - e. Can the persons concerned ascertain the full extent of their rights and, where appropriate, rely on them before the national courts?
57. Obviously there is a degree of overlap between questions c – e. One way of putting it is to ask whether or not Claimants have accessible rights.
58. Another is to ask whether general principles or general legal context make it superfluous to have specific legislation as to the nature of the aims that are within the derogation which the member state has made under the power in Article 6. These are questions about legal certainty and practicability.

Age Concern and legitimate aims

59. The next point made by the ECJ in *Age Concern* was to consider what aims a member state was permitted to have in making a derogation under Article 6.
60. The ECJ stated that to be legitimate such aims must be “social policy” aims of the member state thus -

46 It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered ‘legitimate’ within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.

61. The ECJ has reiterated this point in Case C-88/08 *Hütter* [2009] ECR I-5325, at [41].

Maximum recruitment ages

62. On 12th January 2010 the ECJ gave a very important judgment in Case C-341/08 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe and others*.

63. This case concerned the decision of the Respondent to the reference (the appeals board for dentists for the district of Westphalia and Lippe) to refuse to authorise Ms Petersen to practice as a panel dentist after the age of 68 years.

64. The Belgian court referring the case to the ECJ asked a very large number of questions as to whether this was legal or not under Directive 2000/78/EC.

65. The ECJ ruled -

1. Article 2(5) of Council Directive 2000/78/EC ... must be interpreted as precluding a national measure, such as that at issue in the main proceedings, setting a maximum age for practising as a panel dentist, in this case 68 years, where the sole aim of that measure is to protect the health of patients against the decline in performance of those dentists after that age, since that age limit does not apply to non-panel dentists.

Article 6(1) of Directive 2000/78 must be interpreted as not precluding such a measure where its aim is to share out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim.

It is for the national court to identify the aim pursued by the measure laying down that age limit, by ascertaining the reason for maintaining the measure.

2. If legislation such as that at issue in the main proceedings, having regard to its objective, were contrary to Directive 2000/78, it would be for the national court hearing a dispute between an individual and an administrative body such as the [Appeals Board] to decline to apply that

legislation, even if it were prior to that directive and national law made no provision for disapplying it.

66. The ECJ pointed up the inconsistency between the regulation of public and private dentistry and held that because Ms. Petersen could carry out private dentistry after this age then she should not be restricted from doing so on competence grounds using age as a proxy in the public sphere.
67. However the ECJ did countenance arguments based on intergenerational fairness as being proper aims for such a rule. Here it was also aware of the fact that the age chosen – 68 – was relatively high.
68. On the same day it gave a judgment in another case, Case C- 229/08 *Wolf v. Stadt Frankfurt am Main* in which it ruled that the Directive 2000/78/EC did not preclude national legislation, which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years.
69. The case had been put to the ECJ on the basis that the domestic law provision was a derogation permitted by Article 6 of the Directive. However the ECJ recast the issue and considered whether or not there was a justified general occupational requirement for recruits to be under 31.
70. The ECJ said -

36 To examine whether the difference of treatment based on age in the national legislation at issue in the main proceedings is justified, it must be ascertained whether physical fitness is a characteristic related to age and whether it constitutes a genuine and determining occupational requirement for the occupational activities in question or for carrying them out, provided that the objective pursued by the legislation is legitimate and the requirement is proportionate.

37 As regards, first, the objective pursued by that national legislation, the German Government's statements show that the aim pursued is to guarantee the operational capacity and proper functioning of the professional fire service.

38 In this respect, it must be pointed out that the professional fire service forms part of the emergency services. Recital 18 in the preamble to the Directive states that the Directive does not require those services to recruit persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

39 It is thus apparent that the concern to ensure the operational capacity and proper functioning of the professional fire service constitutes a legitimate objective within the meaning of Article 4(1) of the Directive.

40 As regards, second, the genuine and determining occupational requirement for the activities of the fire service or for carrying them out, it follows from the uncontradicted information provided by the German Government that persons in the intermediate career of the fire service perform tasks of professional firefighters on the ground. In contrast to the management duties of persons in the higher careers of the fire service, the activities of persons in the intermediate career are characterised by their physical nature. Those persons take part in fighting fires, rescuing persons, environment protection tasks, helping animals and dealing with dangerous animals, as well as supporting tasks such as the maintenance and control of protective equipment and vehicles. It follows that the possession of especially high physical capacities may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(1) of the Directive for carrying on the occupation of a person in the intermediate career of the fire service.

41 As regards, third, the question whether the need to possess high physical capacities is related to age, it should be noted that the German Government submits, without being contradicted, that some of the tasks of persons in the intermediate career of the fire service, such as fighting fires or rescuing persons, require exceptionally high physical capacities and can be performed only by young officials. The German Government produces scientific data deriving from studies in the field of industrial and sports medicine which show that respiratory capacity, musculature and endurance diminish with age. Thus very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities. As for rescuing persons, at the age of 50 the officials concerned no longer have that capacity. Officials who have passed those ages work in the other branches of activities mentioned above. It follows that the need

to possess full physical capacity to carry on the occupation of a person in the intermediate career of the fire services is related to the age of the persons in that career.

42 As regards, fourth and finally, the question whether national legislation such as that at issue in the main proceedings, which sets at 30 years the maximum recruitment age for officials having the high physical capacity to carry on an occupation in the intermediate career in the fire service, is proportionate, it must be examined whether that limit is appropriate for achieving the objective pursued and does not go beyond what is necessary to achieve it.

43 As has just been stated, the fire-fighting and rescue duties which are part of the intermediate career in the fire service can only be performed by younger officials. Officials older than 45 or 50 carry out other duties. To ensure the efficient functioning of the intermediate career in the fire service, it may be considered necessary for the majority of officials in that career to be able to perform physically demanding tasks, and hence for them to be younger than 45 or 50. Moreover, the assignment of officials older than 45 or 50 to duties which are less physically demanding requires them to be replaced by young officials. The age at which an official is recruited determines the time during which he will be able to perform physically demanding tasks. An official recruited before the age of 30, who will have to follow a training programme lasting two years, can be assigned to those duties for a minimum of 15 to 20 years. By contrast, if he is recruited at the age of 40, that period will be a maximum of 5 to 10 years only. Recruitment at an older age would have the consequence that too large a number of officials could not be assigned to the most physically demanding duties. Similarly, such recruitment would not allow the officials thus recruited to be assigned to those duties for a sufficiently long period. Finally, as the German Government submits, the rational organisation of the professional fire service requires, for the intermediate career, a correlation between the physically demanding posts not suitable for older officials and the less physically demanding posts suitable for those officials.

44 Consequently, it is apparent that national legislation such as that at issue in the main proceedings which sets the maximum age for recruitment to intermediate career posts in the fire service at 30 years may be regarded, first, as appropriate to the objective of ensuring the operational capacity and proper functioning of the professional fire service

and, second, as not going beyond what is necessary to achieve that objective.

71. It seems evident that there was very little challenge to the facts at first instance and that the ECJ were not necessarily seeking to affirm all such maximum age rules in areas where safety was concerned.¹²

72. There is an outstanding reference in Case C-447/09 *Reinhard Prigge, Michael Fromm and Volker Lambach v Deutsche Lufthansa AG* which raises similar questions in relation to air line pilots -

Must Article 2(5), Article 4(1) and/or Article 6(1), first sentence, of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and/or the general Community-law principle which prohibits discrimination on grounds of age be interpreted as precluding rules of national law which recognise an age-limit of 60 for pilots established by collective agreement for the purposes of ensuring air safety?

Kücüdeveci - The legitimacy of other age rules

73. In *Kücüdeveci* the ECJ held that Union law precludes national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

74. Although the aim of the legislation was to afford employers greater flexibility in dismissing young workers, the legislation was held not to be appropriate for achieving that aim since it applies to all employees who joined the undertaking before the age of 24, whatever their age at the time of dismissal.

Andersen

¹² Contrast the judgment of the United Kingdom Employment Tribunal in *Baker v. National Air Traffic Control* where the evidence was very much challenged and indeed in large part rejected, and the maximum age for recruitment was held unlawful.

75. In its judgment given on the 12th October 2010 Case C-499/08 *Ingeniørforeningen i Danmark (acting for Andersen) v Region Syddanmark* the Grand Chamber of the ECJ held that a national law that excluded workers from receipt of a severance allowance on dismissal in circumstances where they were entitled to claim a pension was incompatible with the Directive because it entailed an unjustifiable difference of treatment directly on grounds of age. The judgment brought together some of the earlier jurisprudence to which I have referred.
76. The key to understanding the decision lay in its approach to justification. Although the aim pursued by the severance allowance of protecting workers with many years of service and helping them to find new employment fell within the category of legitimate labour markets objectives, the measure went beyond what is necessary to attain the objective pursued in that it treated those who will actually receive an old-age pension from their employer in the same way as those who are eligible for such a pension.
77. The measure actually made it more difficult for workers who are eligible for an old-age pension to exercise their right to work because they are not entitled to the severance allowance when seeking new employment.
78. Its reasoning is instructive -

32. It is also necessary to ascertain, according to the actual wording of that provision, whether the means used to achieve those aims are 'appropriate and necessary'. In the present case it must be examined whether Article 2a(3) of the Law on salaried employees enables the attainment of the employment policy objectives pursued by the legislature without unduly prejudicing the legitimate interests of workers who, as a result of that provision, find themselves deprived of the severance allowance on the ground that they are entitled to an old-age pension to which the employer has contributed (see, to that effect, Case C411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 73).

33 In that regard, it should be noted that the Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy (Case C-144/04

Mangold [2005] ECR I-9981, paragraph 63, and *Palacios de la Villa*, paragraph 68). However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age (Case C-388/07 *Age Concern England* [2009] ECR I-1569, paragraph 51).

34 Restricting the severance allowance to only those workers who, on termination of the employment relationship, are not entitled to an old-age pension to which their employer has contributed does not appear unreasonable in the light of the objective pursued by the legislature of providing increased protection for workers for whom it is very difficult to find new employment as a result of their length of service for an undertaking. Article 2a(3) of the Law on salaried employees also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment.

35 Therefore, it must be considered that a provision such as Article 2a(3) of the Law on salaried employees does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the legislature.

36 It still needs to be ascertained whether that measure goes beyond what is necessary to attain the objective pursued by the legislature.

37 In that regard, it is apparent from the explanations provided by the national court, the parties to the main proceedings and the Danish Government that, in exercising the broad discretion which it enjoys in the field of social and employment policy, the legislature sought to strike a balance between legitimate yet competing interests.

38 According to those explanations, the legislature weighed the protection of workers who, because of their length of service, are generally among the oldest workers, against the protection of younger workers who are not entitled to a severance allowance. The drafting history of Law No 1417 of 22 December 2004, which implemented Directive 2000/78, cited by the national court, shows, in that regard, that the legislature took account of the fact that the severance allowance, as an instrument for reinforced protection of a category of workers defined in relation to their length of service, constitutes a form of difference of treatment to the detriment of younger workers. The Danish Government thus points out that the

restriction of the scope of the severance allowance provided for in Article 2a(3) of the Law on salaried employees makes it possible not to extend a social protection measure which is not intended to apply to younger workers beyond what is necessary.

39 In addition, that government stated that the measure at issue in the main proceedings seeks to strike a balance between the protection of workers and employers' interests. The measure thus aims to ensure, in accordance with the principle of proportionality and the need to counter abuse, that the severance allowance is paid only to those for whom it is intended, namely those who intend to continue to work but, because of their age, generally encounter more difficulties in finding new employment. That measure, it submits, also makes it possible to prevent employers from being forced to grant the severance allowance to persons to whom they will also be paying an old-age pension on termination of the employment relationship.

40 It is apparent from the foregoing that Article 2a(3) of the Law on salaried employees, in so far as it excludes from entitlement to the severance allowance workers who will receive, on termination of the employment relationship, an old-age pension from their employer, does not go beyond what is necessary to attain the objectives which it pursues.

41 However, that finding does not provide a complete answer to the question referred by the national court. That court pointed out that that provision treats those who will actually receive an old-age pension from their employer in the same way as those who are eligible for such a pension.

42 It is true that the Danish legislature intervened in order to prevent such an exclusion from unduly prejudicing the legitimate interests of workers. Since 1996 Article 2a(3) of the Law on salaried employees has provided that the exclusion from entitlement to the severance allowance is not applicable to workers who have joined an old-age pension scheme with their employer after attaining the age of 50 years. That provision thus permits the allowance to be paid to workers who, although eligible for a pension, have not been affiliated to their pension scheme for long enough to receive a pension which is sufficient to guarantee them a reasonable income.

43 The fact none the less remains that Article 2a(3) of the Law on

salaried employees excludes from entitlement to the severance allowance all workers who are eligible, on termination of the employment relationship, for an old-age pension from their employer and who joined that pension scheme before attaining the age of 50 years. It must therefore be examined whether such an exclusion goes beyond what is necessary to achieve the pursued objectives.

44 It is apparent from the explanations provided by the national court and the Danish Government that that exclusion is based on the idea that, generally speaking, employees leave the labour market if they are eligible for an old-age pension from their employer and joined that pension scheme before attaining the age of 50 years. As a result of that age-based assessment, workers who satisfy the criteria for eligibility for a pension from their employer yet wish to waive their right to their pension temporarily and to continue with their career will not be able to claim the severance allowance even though it is intended to protect them. Thus, in pursuing the legitimate aim of preventing that allowance from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension, the measure at issue actually deprives workers who have been made redundant and who wish to remain in the labour market of entitlement to the severance allowance merely because they could, inter alia because of their age, draw such a pension.

45 That measure makes it more difficult for workers who are eligible for an old-age pension subsequently to exercise their right to work because, unlike other workers with the same years of service, they are not entitled to the severance allowance when in the process of seeking new employment.

46 In addition, the measure at issue in the main proceedings prohibits an entire category of workers defined on the basis of their age from temporarily waiving their right to an old-age pension from their employer in exchange for payment of the severance allowance, which, after all, is aimed at assisting them in finding new employment. That measure may thus force workers to accept an old-age pension which is lower than the pension which they would be entitled to if they were to remain in employment for more years, leading to a significant reduction in their income in the long term.

47 Consequently, by not permitting payment of the severance

allowance to workers who, although eligible for an old-age pension from their employer, none the less wish to waive their right to such a pension temporarily in order to continue with their career, Article 2a(3) of the Law on salaried employees unduly prejudices the legitimate interests of workers in such a situation and thus goes beyond what is necessary to attain the social policy aims pursued by that provision.

48 Therefore, the difference of treatment resulting from 2a(3) of the Law on salaried employees cannot be justified under Article 6(1) of Directive 2000/78.

Rosenblatt

79. In another judgment given on the 12th October 2010 in *Rosenblatt v Gebäudereinigungsges* the ECJ had to construe legislation derived from a collective agreement concerning the cleaning industry. It held that Article 6(1) of the Employment Equality Directive did not preclude legislation which provided for automatic termination of employment contracts at age 65, the age at which an employee was eligible to retire and claim a retirement pension.
80. The case is interesting because of the wide range of aims of the legislation but requires care because of the rather thin reasoning.
81. The Court held that aims described by the German Government, based on the notion of sharing employment between generations, must, in principle, be regarded as “objectively and reasonably justifying” a difference in treatment on grounds of age such as that in this case.
82. Those aims included the fact that the automatic termination of the employment contracts on reaching retirement age were said to benefit young workers directly by making it easier for them to find work.
83. This proposition as a generality is highly contentious. By some commentators it is sometimes called the myth of job blocking. Certainly it can be the case that for a particular sector of employment there may be a

limited number of posts but it would not be accepted by UK labour market economists that this is true of the cleaning industry.

84. Indeed it is very interesting that the UK Government has said that it considers that job blocking as a generality is a myth. Thus in *Phasing out the default retirement age: January 2011* it said that the government -

... does not believe that the abolition of the DRA [UK provisions for a default national retirement age] will have a negative impact on opportunities for younger workers. As set out in the impact assessment, the effect on economic activity and labour supply of removing the DRA is likely to increase economic activity in the economy as a whole. Furthermore, it is not often the case that younger and older workers are direct substitutes. Where there are genuine succession planning considerations (perhaps involving particular training requirements) employers could consider retaining a retirement age if it can be objectively justified.

85. The Regulatory Impact Assessment published with that document provides a much more detailed set of reasons for that conclusion.¹³ In that document the Government has said -

...although there is a persistent assumption that older people in work 'block' younger people from finding work, evidence suggests this is incorrect. The number of jobs in the economy is not fixed, but depends on Government and private spending (when spending increases the number of jobs increases). Evidence suggests the employment rate of older people has little effect on the employment of younger people, and if anything a higher employment rate of older people tends to slightly increase the employment rate of younger people. Gruber et al. (2009)¹⁴ considered a variety of evidence from 12 countries and follows a number of analytical estimated techniques, coming to the conclusion that "the overwhelming weight of the evidence, as well as the evidence from each

¹³ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/p11-634-phasing-out-default-retirement-age-impact-assessment.pdf>

¹⁴ Gruber J, Milligan K, Wise D (2009) Social Security Programs and Retirement Around the World: The Relationship to Youth Employment, Introduction and Summary, National Bureau of Economic Research Working Paper No. 14647, January 2009

of the several different methods of estimation, is contrary to the fixed job theory. We find no evidence that increasing the employment of older persons will reduce the employment opportunities of youth” (Gruber et al., 2009). The same paper found that attempts in Denmark to raise youth employment by encouraging older employees to retire had the opposite effect – youth employment fell and unemployment rose.

86. So the basis for the approach taken by this case should not be without much more analysis of the position in the employment sector in question.
87. There was a second basis for the ECJ accepting the rule as justified. It noted that the rights of older workers are adequately protected as most of them wish to stop working as soon as they are able to retire and the pension they receive serves as a replacement income once they lose their salary.
88. The Court also considered an argument about dignity without any very obvious evidence. It held that the automatic termination of employment contracts also has the advantage of not requiring employers to dismiss employees on the ground that they are no longer capable of working, which may be humiliating for those who have reached an advanced age.
89. Here again it is significant that it did not consider the opposite issue that it can be and indeed often is thought to be humiliating for those who wish to work on and who are able to do so to be told that they are too old.
90. Again the position in the UK may be contrasted. Here the policy of the UK Government is to the opposite effect. The Regulatory Impact Assessment on the abolition of the DRA said -

Wider aims of Government policy

This measure [the abolition of the DRA] is one of the steps that the Government is taking to enable and encourage people to work for longer, alongside raising the State Pension Age (SPA) to 66 faster than currently scheduled and ensuring there is effective support for those out of work to find work. There are a wide variety of reasons for pursuing these policies, including demographic change; the financial benefits to both the

individual and the wider economy; and the health and social benefits many gain from working later in life.

The Government announced on 3 November 2010 that the State Pension Age for men and women will be increased to 66 between April 2018 and April 2020, following equalisation of women's state pension age with men's in 2018 (Command Paper: A sustainable State Pension: when the State Pension age will increase to 66 www.dwp.gov.uk/spa-66-review).

91. In the UK the Regulatory Impact Assessment has commented that -

Reasons for retiring

Recent survey findings show that the reasons employees currently aged 50+ are planning to retire later are mostly financial in nature. Fifty one per cent say that they cannot afford to retire. Others mention savings and pensions not being high enough or still supporting children financially.¹⁵ In the same way that financial necessity is the main reason for wishing to retire later, financial reasons are the most commonly mentioned explanation for retiring at or before 65.¹⁶

Despite the high demand for staying on work it is unlikely that all who intend or would like to continue working will do so. Research shows that for some it may be blocked by ill-health. Studies show that this is the primary reason for leaving the labour market before State Pension Age.¹⁷

Georgiev

92. At the end of last year on the 18th November the Second Chamber of the ECJ gave its ruling in a case about academic posts. This is a subject which has caused much discussion in America where professors who never retire are sometimes accused of preventing the development of new academic thinking.

¹⁵ Smeaton D, Vegeris S & Sahin-Dikmen M (2010) Older workers: employment preferences, barriers and solutions, Equality and Human Rights Report 43. Manchester: EHRC

¹⁶ McKay S (2010) Never too old? Attitudes towards longer working lives in Park et al (Eds) British Social Attitudes 26th Report, Sage, London

¹⁷ Meadows P (2003) Retirement ages in the UK: a review of the literature on key issues, DTI Employment Relations Research series No 18; Smeaton D, Vegeris S & Sahin-Dikmen M (2010) *ibid*

93. The case is known as *Joined Cases C-250/09 and C-268/09, Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv*.

94. The ruling of the Court was that the Employment Equality Directive -

... does not preclude national legislation, such as that at issue in the main proceedings, under which university professors are compulsorily retired when they reach the age of 68 and may continue working beyond the age of 65 only by means of fixed-term one-year contracts renewable at most twice, provided that that legislation pursues a legitimate aim linked *inter alia* to employment and labour market policy, such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations, and that it makes it possible to achieve that aim by appropriate and necessary means. It is for the national court to determine whether those conditions are satisfied.

95. It will be seen that the judgment did not rule definitively on the issue of justification. What is important is that it considered the delivery of quality teaching and allocation of posts as potentially good aims. In this way it has offered Europe an escape route from some of the worst problems that have been encountered in America.

96. The Court noted however that it could only comment to a limited extent since the reference from the domestic court contained little or no information on the basis for the aims of the legislation. The Court stated it was essential to identify “precisely the aim which it pursues”. This may well be very important whenever the aim of the provisions permitting justification of direct discrimination are in issue.

97. The Court proceeded carefully stating -

45. In that regard, the training and employment of teaching staff and the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, put forward by the University and the Bulgarian Government, may be consonant with the intention of allocating the posts for professors in the best possible way between the generations, in particular by appointing young professors. As regards the latter aim, the Court has already held that encouragement

of recruitment undoubtedly constitutes a legitimate aim of Member States' social or employment policy (*Palacios de la Villa*, paragraph 65), in particular when the promotion of access of young people to a profession is involved (see, to that effect, *Petersen*, paragraph 68). Consequently, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute such a legitimate aim.

46 Furthermore, as the Advocate General pointed out in point 34 of his Opinion, the mix of different generations of teaching staff and researchers is such as to promote an exchange of experiences and innovation, and thereby the development of the quality of teaching and research at universities.

47 However, the case-file does not permit the finding that the aims mentioned by the German and Slovak Governments and the Commission correspond to those of the Bulgarian legislature. A doubt exists in particular in the light of Mr Georgiev's remarks in his written observations. Mr Georgiev submits that the University and the Bulgarian Government merely make assertions and maintains that the legislation at issue in the main proceedings is not aligned to the reality of the labour market concerned. He submits that the average age of university professors is 58 and that there are not more than 1 000 of them, a situation which is explained by the absence of interest on the part of young people in a career as a professor. The legislation at issue in the main proceedings does not, in his view, therefore encourage the recruitment of young people.

48 In that regard it is for the national court to examine the facts and determine whether the aims asserted by the University and the Bulgarian Government correspond to the facts.

New references

98. There are various new references that are currently outstanding. Firstly in Case C-297/10 *Sabine Hennigs v. Eisenbahn-Bundesamt* the German Bundesarbeitsgericht has asked the ECJ important questions about transitional arrangements from previously discriminatory collective agreements-

Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter of Fundamental Rights of the European Union, 'CFREU'), does a collective pay agreement for public sector employees, which, as in Paragraph 27 of the Bundesangestelltentarifvertrag (Federal collective agreement for contractual public sector employees, 'BAT') in conjunction with the Vergütungstarifvertrag (collective pay agreement) No 35 under the BAT, determines basic pay in individual salary groups by age categories, infringe the primary-law prohibition of age discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?¹

If question 1 is answered in the affirmative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the ruling of the Court of Justice in the preliminary reference proceedings:

Does the right to collective bargaining give the parties to a collective agreement the discretion to eliminate such discrimination by transferring the employees to a new collective pay structure based on job, performance and professional experience, whilst preserving the entitlements they acquired in the old tariff structure?

Must question 2 a) in any event be answered in the affirmative if the final assignment of the transferred employees to the grades within a pay group of the new collective pay structure does not depend solely on the age category attained in the old tariff structure and if the employees who are admitted to a higher grade of the new structure typically have more professional experience than the employees assigned to a lower grade?

3. If questions 2 (a) and (b) are answered in the negative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:

(a) Is indirect discrimination on grounds of age justified by the fact that it is a legitimate aim to preserve acquired social entitlements and because it is an appropriate and necessary means of achieving that aim to temporarily continue to treat older and younger employees differently for the purposes of a transitional arrangement, if this difference of treatment is being gradually phased out and the only alternative in practice would be to reduce the pay of older employees?

(b) Taking into account the right to collective bargaining and the

associated autonomy in collective bargaining, must question 3(a) be answered in the affirmative if parties to a collective agreement agree on such a transitional arrangement?

4. If questions 3(a) and (b) are answered in the negative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:

Even taking into account the associated additional costs for the employer concerned and the right of the parties to a collective agreement to collective bargaining, must the infringement of the primary-law prohibition on age discrimination, which is inherent in a collective pay structure and which makes it invalid as a whole, always only be eliminated by taking the highest age category as a basis in each case when applying the collective pay agreements until a new system which is in conformity with Union law comes into force

5. If question 4 is answered in the negative by the Court of Justice of the European Union or by the Bundesarbeitsgericht on the basis of the principles set out by the Court of Justice in its preliminary ruling:

Having regard to the right of the parties to a collective agreement to collective bargaining, would it be compatible with the Union law prohibition on age discrimination and the requirement for an effective sanction in the event of a breach of that prohibition, to grant the parties to a collective agreement a manageable deadline (e.g. six months) in which to retrospectively correct the invalidity of the pay structure they have agreed, and stipulate that in the event that no new structure which is in conformity with Union law is introduced within the deadline, in applying collective rules in each case the highest age category will be taken as a basis and, if so, what discretion in terms of the duration of the retrospective effect of the new structure which is in conformity with Union law could be granted to the parties to a collective agreement?

99. The difficulty of transitioning from old directly discriminatory age rules to new age neutral rules is universal across Europe! It will be interesting to see what the ECJ makes of this.

100. In Case C- 298/10 *Land Berlin v. Alexander Mai* the German Court asked a rather shorter question -

Taking into account the right of parties to a collective agreement to collective bargaining which is guaranteed by primary law (now Article 28 of the Charter of Fundamental Rights of the European Union, 'CFREU'), does a collective pay agreement for public sector employees, which, as in Paragraph 27 of the Bundesangestelltentarifvertrag (Federal collective agreement for contractual public sector employees, 'BAT') in conjunction with the Vergütungstarifvertrag (collective pay agreement) No 35 under the BAT, determines basic pay in individual salary groups by age categories, infringe the primary-law prohibition of age discrimination (now Article 21(1) of the CFREU) as given expression by Directive 2000/78/EC?

101. The short answer to be expected to this question is “yes!” However it is to be expected that some discussion of the possibilities of justifying age related provisions in collective agreements will form part of the Court’s determination. So this too is a case that we will need to watch out for.

102. Another case that is not yet decided is Case C-159/10 *Gerhard Fuchs v Land Hessenin* in which the ECJ has been asked (and see also Case C-160/10 *Peter Köhler v Land Hessen* to the like effect) -

1. Are the rules laid down in the Hessisches Beamtengesetz (Civil Service Law of the Land of Hessen) on what is in principle the compulsory retirement age for civil servants based on an aim in the public interest in accordance with standards of Union law?

The following main questions arise in this respect:

What specific requirements in Union law should such an aim prescribed in the public interest satisfy? What additional issues relating to the clarification of the facts of the case should the referring court consider?

Does an interest in saving budgetary resources and labour costs, in the present context by avoiding the recruitment of new staff and so reducing expenditure on personnel, represent a legitimate aim within the meaning

of Article 6(1) of Directive 2000/78/EC?1

Can an employer's aim of enjoying a degree of planning certainty as regards the retirement of civil servants be recognised as a legitimate aim in the public interest, even if every employer governed by the Hessisches Beamtenengesetz or the Beamtenstatusgesetz (Law on the Status of Civil Servants) may develop and implement staff management ideas of his own?

Can an interest in a 'favourable age stratification' or 'favourable age structure' be recognised as an aim in the public interest, despite the absence of general standards or statutory rules on what constitutes a correct age stratification or age structure?

Can an interest in creating opportunities for the promotion of civil servants already in place be regarded as a legitimate aim in the public interest within the meaning of Article 6(1) of Directive 2000/78/EC?

Does the adoption of rules on retirement ages to preclude individual legal disputes with older employees over their continued fitness for service constitute the pursuit of a legitimate aim in the public interest?

Does the reference to the public interest within the meaning of Article 6(1) of Directive 2000/78/EC presuppose a labour market policy concept extending beyond individual employers in the area of employment, and if so, how uniform and binding must it be?

Is it in fact possible for individual employers to pursue aims in the public interest for groups of employees, limited here to civil servants governed by the Hessisches Beamtenengesetz, with retirement age rules of such limited scope?

Under what conditions can the aim, which can be pursued by individual employers, but is not mandatory, of occupying posts vacated by retired employees with new recruits, where necessary after existing employees have been promoted, be regarded as being in the public interest within the meaning of Article 6(1) of Directive 2000/78/EC? Must the reference to the public interest be backed not only by general claims that the rules serve that purpose, but also by statistics or other findings from which it can be inferred that such an aim is sufficiently serious and can actually be achieved?

2. What specific requirements should be satisfied by the reasonableness

and suitability of a retirement age arrangement within the meaning of the rules laid down in the Hessisches Beamtenengesetz?

Are more thorough investigations needed to determine the ratio of the - probable - number of civil servants remaining in service voluntarily after retirement age to the number who wish to receive a full pension on reaching retirement age, if not earlier, and therefore certainly want to leave the service? Would it not be appropriate in this respect to give voluntary retirement preference over compulsory retirement, provided that arrangements are made for pensions to be reduced where they are taken before the set retirement age is reached so as to preclude unreasonable pension budget spending and associated labour costs (voluntary departure rather than compulsion as the more appropriate and, in effect, hardly less suitable arrangement)?

Can it be deemed reasonable and necessary to assume it to be irrefutable that all civil servants cease to be fit for service on reaching a given higher age, such as 65 years in this case, and so automatically to terminate their employment as civil servants at that age?

Is it reasonable for the possibility to remain employed in the civil service at least until the age of 68 years to be entirely dependent on the employer having special interests, but for employment in the civil service to be terminated with no legal possibility of securing reappointment where no such interests exist?

Does a retirement age arrangement which leads to compulsory retirement, rather than being confined to specifying the conditions for entitlement to a full pension, as permitted under Article 6(2) of Directive 2000/78/EC, result in an unreasonable devaluation of the interests of older people relative to the fundamentally no more valuable interests of younger people?

If the aim of facilitating recruitment and/or promotion is deemed to be legitimate, what more precise requirements must actually be satisfied to demonstrate the extent to which such opportunities are actually seized by each employer taking advantage of the retirement age arrangement or by all employers, in and outside the general labour market, to whom the statutory arrangement applies?

In view of the gaps already to be seen in the labour market owing to demographic trends and of the impending need for skilled staff of all

kinds, including staff for the public service of the Federal German and Land governments, is it reasonable and necessary to force civil servants able and willing to continue working to retire from the civil service at a time when there will soon be a major demand for personnel which the labour market will hardly be able to meet? Will it possibly be necessary in the future to collect sectoral labour market data?

3. What requirements need to be met as regards the coherence of Hessen's and possibly Federal German legislation on retirement ages?

Can the relationship between Paragraph 50(1) und Paragraph 50(3) of the Hessisches Beamtengesetz be regarded as consistent if the possibility in principle of remaining in employment beyond retirement age depends entirely on the employer's interests?

Should Paragraph 50(3) of the Hessisches Beamtengesetz possibly be interpreted to mean, in compliance with the Directive, that, to preclude unreasonable discrimination on the grounds of age, employment must always continue unless service factors prevent this? What requirements should then be satisfied to prove the existence of any such factors? Must it be assumed in this respect that the interests of the service require continued employment if only because unjustifiable discrimination on the grounds of age would otherwise occur?

How might advantage be taken of such an interpretation of Paragraph 50(3) of the Hessisches Beamtengesetz for a continuation or resumption of the applicant's employment as a civil servant, even though that employment has meanwhile been terminated? Should, in that case, Paragraph 50(1) of the Hessisches Beamtengesetz remain inapplicable at least until the age of 68 years?

Is it reasonable and necessary, on the one hand, to impede the taking of voluntary retirement at the age of 60 or 63 years, with a permanent reduction in pension, and, on the other hand, to rule out the voluntary continuation of employment after the age of 65 years unless the employer has, by way of exception, a special interest in its continuation?

Do the rules on retirement ages laid down in Paragraph 50(1) of the Hessisches Beamtengesetz cease to be reasonable and necessary as a result of the more favourable rules on part-time work on the grounds of age on the one hand and fixed-term civil servants on the other?

What significance for coherence can be attributed to the various rules laid down in employment (public and private sector) and social insurance law which, first, are seeking permanently to raise the age at which a full pension can be drawn, second, prohibit the termination of employment on the grounds that the age specified for the standard retirement pension has been reached and, third, make it compulsory for employment to terminate when that precise age is reached?

Is it relevant to coherence that the gradual raising of retirement ages in the social insurance and civil service law relating to the Federal German authorities and some Länder primarily serves the interests of employees in delaying as long as possible the need to meet the more stringent requirements for a full retirement pension? Are these questions insignificant because retirement ages have not yet been raised for civil servants governed by the Hessisches Beamtengesetz, although this is due to become effective in the near future in the case of employees in employment relationships?

Conclusion

103. Shakespeare set out what has been the traditional view of ageing in the following wonderful poem in his play "As You Like It".¹⁸ It is known to every school child in the UK as

THE SEVEN AGES OF MAN

"All the world's a stage,
And all the men and women merely players;
They have their exits and their entrances;
And one man in his time plays many parts,
His acts being seven ages. At first the infant,
Mewling and puking in the nurse's arms;
And then the whining school-boy, with his satchel
And shining morning face, creeping like snail
Unwillingly to school. And then the lover,
Sighing like furnace, with a woeful ballad
Made to his mistress' eyebrow. Then a soldier,
Full of strange oaths, and bearded like the pard,
Jealous in honour, sudden and quick in quarrel,

¹⁸ I apologise for the ancient English but the gist of this is probably reasonably easy to understand! See As You Like It, II, vi

Seeking the bubble reputation
Even in the cannon's mouth.

And then the justice,
In fair round belly with good capon lin'd,
With eyes severe and beard of formal cut,
Full of wise saws and modern instances;
And so he plays his part. The sixth age shifts
Into the lean and slipper'd pantaloon,
With spectacles on nose and pouch on side;
His youthful hose, well sav'd, a world too wide
For his shrunk shank; and his big manly voice,
Turning again toward childish treble, pipes
And whistles in his sound. Last scene of all,
That ends this strange eventful history,
Is second childishness and mere oblivion;
Sans teeth, sans eyes, sans taste, sans everything.

104. Increased longevity means that this will have to be re-written for the 21st century, with at least one more “age” added somewhere between the original 6th and 7th.
105. In this new age a person is still fit but is about 60 – 65 years old. Characteristically, he or she will be an older worker, desperate to continue working to offset the inadequacy of his or her pension, but facing difficulty in the labour market as a result of disbelief about capacity or willingness to work, or he or she is a person protesting about the removal of their pension by the state as it fights to make savings on its national expenditure.
106. But it will not always be quite like this: such a person will be much in demand in the future as our workforce diminishes post 2009.
107. We must expect employers across the Union to want to entice retired and older workers to continue working through their 60s to maintain production by financial inducements. They will need to pay good wages to succeed in some places.
108. So perhaps in this new “age” we shall have a marathon running 60+ year old with a small pension but a salary to induce him or her to keep ever fit and working!

Robin Allen QC

Cloisters

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