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AGE AND EMPLOYMENT

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Cloisters
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Age and Employment

- Report on Age and Employment prepared on the authority of the European Network of Legal Experts in the non-discrimination field.
- Based on country reports with a cut-off date of 31/12/2009.
- Main points of interest arising from the reports:
 - (a) justification of direct age discrimination;
 - (b) specific example of minimum/maximum ages for entry to professions and retirement ages.



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Justification of direct age discrimination

- Long-standing assumption that discrimination on grounds of age is valid and useful.
- Many entrenched practices are directly discriminatory on grounds of age, e.g.:
 - retirement ages (state and employer-specific);
 - minimum and maximum ages for entering professions;
 - pension ages;
 - benefits or special conditions for older/younger workers.



Justification of direct age discrimination

Directive makes clear that *some* direct age discrimination may be valid:

"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."



Justification of direct age discrimination

- Lack of clarity in the Directive?
- Are public interest/social policy aims required for justification, or will a broader range of aims be considered legitimate as in the case of indirect discrimination on other grounds?



Justification of direct age discrimination

How have the justification provisions been transposed into domestic law?




Transposition Method	Number of Countries
Closed list	8
Entirely open	6
Verbatim transposition	4
Open with examples of Directive	8




CLOISTERS **Occupational Pension Schemes: a contrast**

- Art 6(2) sets out clear exceptions to the prohibition of direct age discrimination in relation to occupational pension schemes.
- The vast majority of reporting states simply transposed these exceptions into national legislation, resulting in greater uniformity across the Member States.




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- Art 6(1) specifically states that the following may be justified:
 - fixing of minimum ages/seniority/experience for access to employment or particular conditions,
 - and/or
 - fixing of maximum ages for recruitment.
- All reporting states have taken advantage of these provisions.



CLOISTERS **Minimum/maximum ages**

- Majority of reporting states set a minimum age for employment, ranging from 15 to 18, with exceptions e.g. for the performing arts.
- 13 states have made general provision for the fixing of minimum and maximum ages for entry to employment/training, with a requirement for justification.
- Some states have legislation permitting a minimum/maximum age for entry to particular professions (usually the public service) without the need for justification in the individual case.

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Retirement ages


- Article 6 contains no reference to the linked question of retirement ages, but recital (14) in the preamble to the Directive states that it is:

“without prejudice to national provisions laying down retirement ages”
- CJEU held in *Palacios de la Villa v Cortefiel Servicios SA* that retirement ages are subject to the direct age discrimination provisions of the Directive.

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Retirement ages

- Only a minority of reporting states (6) impose a blanket mandatory retirement age, and in 4 of those cases, employment can be extended by agreement between employer and employee.
- However, most states have a mandatory retirement age for public servants, or certain categories of public servants.

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Has the Directive changed national practice?

- Almost all of these national provisions permitting the use of minimum/maximum ages and retirement ages pre-date the implementation of the Directive.
- The country reports show that little consideration has been given to whether such provisions comply with the Directive.



Has the Directive changed national practice?

Some exceptions:

- Austria: compulsory retirement for civil servants ruled unconstitutional in 2003;
- Belgium and the Netherlands: legislation being screened for potential age-based discrimination;
- Denmark: discussion of abolishing mandatory civil service retirement at 70;
- France: collective agreements fixing retirement ages between 60 and 65 rendered invalid from 2006;
- Germany: abolition of retirement age of 68 for physicians, dentists and psychotherapists from 2008.



Has the Directive changed national practice?

- Country reports therefore suggest that the Directive has had little early impact on pre-existing national provisions which are prima facie discriminatory.
- Individuals wishing to challenge such provisions have had to take cases to the CJEU for clarification of the law.
- The Directive's exemplar wording has neither the flexibility of previous indirect discrimination proportionality provisions, nor the clarity of a prescriptive closed list of exceptions.



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Age Discrimination in ECJ cases – individual contracts v collectivity


Declan O'Dempsey



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ECJ cases on Age

Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH Case C-427/06 [2008] ECR I-7245, AG at [47], until recently differentiating on the basis of age was considered obviously relevant for the purpose of termination of employment.



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The directive

recital 25 to the Directive, after recognising that the “prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce
States



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Age

- “However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.”



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Is this how we feel?

- age is not “binary” in nature (man or woman, black or white, gay or straight) but a continuum which changes over time.
- Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years.
- So what?



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- This means that younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as a mandatory retirement age.



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Palacios

Félix Palacios de la Villa v Cortefiel Servicios SA, Case C-411/05

allowing collective agreements to prescribe retirement ages, provided that the worker had qualified for a retirement pension

The encouragement of recruitment was a legitimate aim



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Age Concern

R (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform, Case C-388/07

states were not required to draw up a list of differences in treatment which might be justified by a legitimate aim [43]. Lack of precision as to the aims which might be considered legitimate did not automatically preclude justification, although it was necessary to be able to identify the aim in order to review whether it was legitimate and the means of achieving it were appropriate and necessary [44, 45]



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Appropriate and necessary

- Inappropriate: rewarding experience is not achieved by age related pay scales which apply irrespective of experience . (So relevance to aim and impact on achieving aim);
- Unnecessary: go further than is (reasonably) necessary in order to achieve the aim and thus be disproportionate.
- necessary to weigh the aim against the seriousness of the detriment to the disadvantaged group.
- Have the least discriminatory means been adopted?



A rights based approach

- is the objective sufficiently important to justify limiting a fundamental right?
- is the measure rationally connected to the objective?
- are the means chosen no more than is necessary to accomplish the objective?




Aims

- “It was apparent from article 6(1) of Directive 2000/78 that the aims which may be considered ‘legitimate’ within the meaning of that provision ... are social policy objectives, such as those related to employment policy, the labour market or vocational training.



Public interest and aims


- 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.”



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Hutter

- *David Hütter v Technische Universität Graz*, Case C-88/08
- The law governing public service stipulated that service before the age of 18 was not to be taken into account in determining the pay grade
- aims of not discouraging people to stay in secondary education, of not making apprenticeship costly for the public sector, and of promoting the integration of young apprentices into the labour market (see [16]) were social policy aims of the kind which could be justification under article 6(1) [43]




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Petersen

Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe, Case C-341/08

protecting the health of patients and controlling public health expenditure were legitimate objectives under the exception in article 2(5) for measures "necessary . . . for the protection of health". Prohibiting practice as a panel dentist but not private practice over the age of 68 was inconsistent with the former aim but not inconsistent with the latter [63, 64]. The other possible aim, of sharing out employment opportunities between the generations, could be regarded as an employment policy measure under article 6(1) [68]


too many panel dentists or a "latent risk" of such [73, 77]



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Wolf


- *Wolf v Stadt Frankfurt am Main*, Case C-229/08
- referring court had asked about justification under article 6(1), the Luxemburg court considered that it could be justified under article 4(1), because the physical capabilities required for the job were related to age



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Küçükdeveci


- *Küçükdeveci v Swedex GmbH & Co KG*, Case C-555/07
- The aim of facilitating the recruitment of young people, who could react more easily to the loss of their jobs, by increasing the flexibility of personnel management did “belong to employment and labour market policy” within the meaning of article 6(1) [35, 36];



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Rosenblatt


- *Rosenblatt v Oellerking GmbH*, Case C-45/09
- about a clause in the collective agreement for employees in the commercial cleaning sector
- the aims of sharing employment between the generations, making it easier for younger workers to find work, particularly in a time of chronic unemployment, while protecting the rights of older workers whose pensions serve as replacement income, and not requiring employers to dismiss them on grounds of incapacity, which may be humiliating [43] were in principle capable of objectively and reasonably justifying a difference in treatment on grounds of age [45]



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collectivity favoured?

- Authorising clauses like this could not generally be regarded as prejudicing the legitimate interests of the workers concerned [47]. It is based not only on age but also on entitlement to a replacement income [48]. Also, unlike dismissal or resignation, it has its basis in an agreement.
- “That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that 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 (*Palacios de Villa*, [74]).” [49]




CLOISTERS *Ingeniørforeningen*

- *Ingeniørforeningen i Danmark v Region Syddanmark*, Case C-499/08
- The general (and legitimate) aim of the severance allowances was to facilitate the move to new employment of people who might find it difficult to find new employment because of the length of time they had been with their old employer



CLOISTERS *Georgiev,*

- *Georgiev v Technicheski Universitet Sofia, Filial Plovdiv*, Joined Cases C-250/09 & C-268/09



CLOISTERS *Fuchs v Land Hessen,*
C-159/10 and C-160/10

- states may not frustrate non-discrimination read in the light of the fundamental right to engage in work [62]. Particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life [63]. This interest must be taken into account in respecting the other, potentially divergent, interests [64].



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Fuchs v Land Hessen,
C-159/10 and C-160/10

- "Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people's working life or, conversely, to provide for early retirement (*Palacios de la Villa*, [68] and [69]). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (*Palacios de la Villa*, [69], [71], *Rosenbladt* [44])." [65]



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Hennigs & Mai
C-297/10 and C-298/10

- "Rewarding experience was a legitimate aim
- length of service was appropriate to achieve that aim, age did not always correlate with experience [74, 75, 76]



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Prigge v
Deutsche Lufthansa AG,
Case C-447/09

- a collective agreement providing for the employment of Lufthansa pilots to terminate automatically at the age of 65 could not be justified. This was not an article 6(1) case, as the suggested aims had to do with the safety and security of air travel, which fell within article 2(5), or the physical capabilities required for flying a plane, which fell within article 4(1).



*Prigge v
Deutsche Lufthansa AG,
Case C-447/09*

- The importance of collective agreements within the Treaty;
- Are they an aim in themselves?
- Prigge AG Opinion para 82 and following



*Prigge v
Deutsche Lufthansa AG,
Case C-447/09*

- Quant à son insertion dans la catégorie de «politique sociale», il convient de rappeler que l'article 151 TFUE, qui ouvre le titre X du traité, consacré précisément à la «politique sociale» de l'Union, énonce, parmi les objectifs de cette politique, le «dialogue social», et l'article 155, inclus sous ce même titre, se réfère également au dialogue entre partenaires sociaux au niveau de l'Union.
