



**Legal seminar 6 October 2009
on the implementation of EU law on equal opportunities and anti-discrimination**

**SUMMARY WORKSHOP PROCEEDINGS
AGE DISCRIMINATION**

Panel members

Chair: Ms Anne-Sophie Parent, Director of AGE, the European Older People's Platform
Panellists: Prof. Mark Freedland, University of Oxford, expert non-discrimination network
Mr Declan O'Dempsey, Barrister, Cloisters Barristers' Chambers
Rapporteur: Ms. Neža Kogovšek, researcher, the Peace Institute, Slovenia, expert non-discrimination network

The panel was opened by Ms. Anne-Sophie Parent, who introduced the two speakers. The first speaker, Prof. Freedland, gave a theoretical background to age discrimination law, while Mr O'Dempsey took a more practical approach by presenting legal standards established through case law.

Prof. Freedland explained that within the EU Member States age discrimination law has to some extent already been developed in two modes:

- 1) employment law and policy and
- 2) constitutional law and policy.

This means that provisions prohibiting age discrimination or stipulating specific protection for older people can be found in constitutional and employment law. Employment law in particular contains numerous detailed provisions, while constitutional provisions have not often been used to control age discrimination because too few specifics are given. Often it is not even mentioned and is not given high priority as a ground of inequality.

EU anti-discrimination law has had an impact on the law of the Member States:

- 1) Almost all Member States have enacted specific provisions on age in employment;
- 2) The Directives have encouraged some Member States to see constitutional provisions as control mechanisms for age discrimination;
- 3) The policy discretion of the Member States might defer the further development of age equality as a constitutional notion. The ECJ's *Mangold* case could represent the high point of that development.

There is a risk that this process might stall in three ways:

1. Many Member States have simply copied the provisions of Directive 2000/78/EC into national legislation, which is a too static approach. The Directive takes a qualified approach since indirect age discrimination may be justifiable. Simple copying puts these justifications out of context.
2. There is a risk that general constitutional provisions provide for formal rather than substantive control.
3. Risk of stasis: age equality might become less important because of the discretion allowed to the Member States and employers. The *Palacios de la Villa* and *Heyday* cases suggest the start of this risk.

We can foresee that EU law will further influence both national constitutional and employment provisions, and that the two modes will also influence each other and strengthen the base, which is a potentially positive dynamic. But there is also a possibility of a negative dynamic where the two modes are driven apart, making the base weaker. EU law can therefore have a double level of influence: on one hand it builds in an important element of deference into the social policies of the Member States, while on the other hand it builds in a further margin of appreciation for decision-making by employers and the Member States. The primary testing ground for this dynamic is the issue of the mandatory retirement age.

In the ensuing discussion, many interesting issues were raised including the definition of age discrimination and the risk of non-recognition of age discrimination. Participants were concerned that age would be excluded as a relevant characteristic, or that the new Directive will make age a sub-sub-category. After all, the Member States fear age equality legislation because it challenges the basis of their social policies. However, the statement that “we all age and not everybody can be protected” denies the possibility of protection against age discrimination. Instead, the position should be that since we may face discrimination compared to another of a different age at any time, we should be protected at all times against it. It is also important to be aware that decisions made and legislation passed in the field of employment can also be used for access to goods and services (including health and other social services, especially relevant for older people). The goal is also to keep in the protected grounds you cannot control (e.g. one cannot control their race or age etc).

The second speaker was Mr O’Dempsey, who presented the development of age equality standards through ECJ case law. The relevant provisions are Article 13 of the EU Treaty and Article 6/1 of Directive 2000/78/EC, which gives scope for the justification of direct discrimination. The speaker addressed the question of what legitimate aims can be taken into account to justify discrimination. The guideline is that these aims have to be proven to a high standard. The cases discussed were:

- The issue in the *Mangold* case (ECJ) was fixed term contracts for workers over the age of 52. The aim of this measure was to promote the employment of older workers. This was a legitimate aim but the means used were disproportionate, since the only criterion used was age. The arguments to uphold such age discrimination were legal certainty and specificity of the personal grounds of “age”, comparing to other personal grounds, which simply means that the justification of age discrimination was a political compromise.
- The issue in the *Palacios* case (ECJ) was automatic termination of employment when certain conditions were met, namely age and sufficiency of pension provision. The need to regulate the labour market was considered a legitimate aim. The Court also stated that legitimate aims are public policy aims which involve public interest, not the interest of the employer. Cost alone can never be a legitimate aim. The aim of encouraging “confidence in the labour market” means that retirement ages are beneficial because they allow employees to retire with dignity, without competency tests. The Court has said that aims have to be “proven to a high standard”. What this could mean is that the state has to provide empirical evidence to justify the aim.
- In the *Kucukdevici* case (ECJ) the issue was minimum notice of termination: can a worker aged under 25 have a shorter notice period than other workers, and is there a legitimate aim for this? The Government stated that the aim was to increase flexibility in the labour market and increase employment of young workers, but the Court stated that this was not a legitimate aim.

- In the *Hutter* case, one of the aims was educational: periods of work under the age of 18 were excluded when calculating an employee's salary based on years of experience. The Court said that the aims were contradictory and not legitimate.
- In the *Peterson* case the issue was the age limit of 68 on certain dentists continuing work. The aim was stability of the insurance market. This aim was seen as subsidiary, while the main aim should be public health.

Several insightful comments were made by the audience, of which a comment highlighting the underused potential of NGOs in promoting substantive equality merits particular attention. It was noted that NGOs could have an important role in taking cases to court and in working with companies to promote change. This would reduce an individual complainant's risk of victimisation.