

CJEU case law on age discrimination

Dr. Xavier Solà i Monells
Professor of Labour and Social Security Law at the
Autonomous University of Barcelona

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ASPECTS TO BE DEALT WITH

1. EU legal framework: primary law and secondary law (short reminder)
2. The role of the CJEU (overview)
3. Recent judgements (in-depth analysis)

AGE DISCRIMINATION: GENERAL OVERVIEW OF THE EU LEGAL FRAMEWORK

PRIMARY LAW

Art. 21 of the CFR
General principle of EU law (CJEU)
with direct vertical and horizontal effect



SECONDARY LAW

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment & occupation

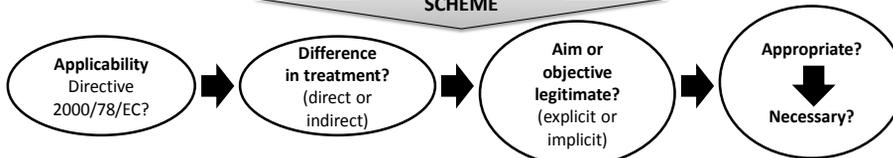
→ Prohibition of direct/indirect discrimination, with a broad scope of application (public/private sector, "employment" in the broad sense...)

→ Scope for situations where the difference in treatment is justified and therefore non-discriminatory (exceptions)

→ Art. 4.1: where age or a related requirement constitutes an "genuine and determining occupational requirement" + "legitimate objective" + "proportionality"

→ Art. 6.1: "legitimate aim" + "appropriate and necessary means" (exemplified in letters a, b and c)

CJEU ANALYSIS SCHEME



AGE DISCRIMINATION: THE ROLE OF THE CJEU IN THE APPLICATION OF THE DIRECTIVE (OVERVIEW-I-)

QUANTITATIVE/QUALITATIVE SIGNIFICANCE AND DIVERSITY

ACCESS TO EMPLOYMENT

1. Maximum age of recruitment

- * CJEU judgment of 12/1/2010 (C-229/08, Wolf): maximum 30 years to access the fire brigade.
- * CJEU judgment of 13/11/2014 (C-416/13, Vital Pérez): maximum 30 years to access the local police.
- * CJEU judgment of 15/11/2016 (C-258/15, Gorka Salaberria): maximum 35 years to access the autonomous police of the Basque Country.
- * CJEU judgment of 4/12/2018 (C-378/17): non-application of upper age limit for Irish national police (principle of primacy)

2. Diminished conditions to facilitate recruitment

- * CJEU judgment of 22/11/2005 (C-144/04, Mangold): sacrificing job stability (German rule that allowed to conclude fixed-term contracts without limit with persons older than 52 years).
- * CJEU judgment of 19/7/2017 (C-143/16, Abercrombie): sacrificing job stability (Italian rule that allowed to conclude intermittent on-call contracts with workers under the age of 25 and automatic termination when they reach that age)

AGE DISCRIMINATION: THE ROLE OF THE CJEU IN THE APPLICATION OF THE DIRECTIVE (OVERVIEW-II-)

EMPLOYMENT CONDITIONS

1. Salary adjustments

1.1 Determination of pay level on the basis of previous work experience (excluding, in some cases, periods of work under the age of 18).

- * CJEU judgment of 18/6/2009 (C-88/08, Hütter case).
- * CJEU judgment of 11/11/2014 (C-530/13, Schmitzer case).
- * CJEU judgment of 28/1/2015 (C-417/13, Starjakob case).
- * CJEU judgment of 14/3/2018 (C-482/16, Stollwitzer case)
- * CJEU judgment of 8/5/2019 (C-396/17).
- * CJEU judgment of 8/5/2019 (C-24/17).

1.2. Determination of pay level according to their age at the time of appointment.

- * CJEU judgment of 8/9/2011 (C-297/10 and C-298/10, Hennigs and Mai cases)
- * CJEU judgment of 19/6/2014 (C-501/12 to C-506/12, 540/12 and 541/12, Specht case)
- * CJEU judgment of 9/9/2015 (C-20/13, case Unland)

1.3. Increased (supervening) requirement for salary advancement at the first level of the pay scale (indirect discrimination)

- * CJEU judgment of 21/12/2016 (C-539/15, Bowman case)

1.4. Salary reductions having a special or exclusive impact on the first levels of the salary scale (indirect discrimination)

- * CJEU judgment of 14/2/2019 (C-154/18)
- * CJEU judgment of 7/2/2019 (C-49/2018)

2. Rights relating to the termination of employment

* CJEU judgment of 19/1/2010 (C-555/07, case Küçükdeveci): calculation of the notice period for dismissal without taking into account the period of employment completed before the age of 25.

* CJEU judgment of 12/10/2010 (C-499/08), STJUE of 26/2/2015 (C-515/13) and CJEU judgment of 19/4/2016 (C-441/14): loss of severance allowance if he is entitled to an old-age pension .

AGE DISCRIMINATION: THE ROLE OF THE CJEU IN THE APPLICATION OF THE DIRECTIVE (OVERVIEW-III-)

TERMINATION OF EMPLOYMENT

Termination upon attainment of a certain age

* CJEU judgment of 16/10/2007 (C-411/05, case of Palacios de la Villa): validity of the Spanish collective agreement clauses providing for compulsory retirement.

* CJEU judgment of 5/3/2009 (C-388/07, Age Concern England case): English rule allowing the employer to terminate the contract at the age of 65.

* CJEU judgment of 12/1/2010 (C-341/08, Petersen case): German rule imposing a 68 years age limit to practice as a panel dentist.

* CJEU judgment of 12/10/2010 (C-45/2009, Rosenbladt case): collective agreement establishing termination of the employment relationship on reaching the age of 65.

* CJEU judgment 18/11/2010 (C-250/09 and C268/09, Georgiev case): Bulgarian rule providing for the compulsory retirement of university professors when they reach the age of 68.

* CJEU judgment of 13/9/2011 (C-447/09, Prigge case): German collective agreement that provides for the automatic termination of the employment relationship of pilots when they turn 60.

* CJEU judgment of 21/7/2011 (C159/10 and 160/10, Fuchs case): German rule imposing compulsory retirement of prosecutors at the age of 65 (exceptionally 68 years).

* CJEU judgment of 5/7/2012 (C-141/11, Hönlreldt case): Swedish rule allowing the employer to terminate the employment relationship at the age of 67.

* CJEU judgment of 6/11/2012 (C-286/12, Commission v Hungary): Hungarian rule requiring compulsory retirement of judges and prosecutors when they reach the age of 62

* CJEU judgment of 5/5/2017 (C-190/06, Fries case): German rule prohibiting commercial air pilots to work beyond the age of 65.

* CJEU judgment of 28/2/2018 (C-46/17, John case): German rule that allows the exception for compulsory retirement by mutual agreement, without requirements and several times.

CJEU JUDGMENTS ON AGE DISCRIMINATION IN THE LAST YEAR: FIRST ANALYSIS

Coincidence in
GENERIC HYPOTHESIS:
differences in
treatment as regards
remuneration



DIFFERENT ASSUMPTIONS
(some already analysed, others new)
Determination of the **pay level on the basis of previous work experience, excluding periods prior to 18 years of age.**
2. **Salary reductions that have a singular or exclusive impact** on the first levels of the salary scale.



PROBLEMS (diverse and interesting)

1. Direct and indirect discrimination
2. Legitimate Objectives
3. Adequacy and necessity of the measures
3. Correction of situations of discrimination
 - 3.1. Regulatory reform (Art. 15 Directive 2000/78/EC)
 - 3.2. Transitional solution

DIRECT PAY DISCRIMINATION ON THE GROUNDS OF AGE: NON-COMPLIANCE AND EFFECTS: CJEU 8 May 2019, C-396/17 (1)

DISPUTE (Austria)

The **Civil Service Remuneration Act** was amended in 2015 and 2016 to eliminate the age discrimination generated by the previous remuneration system which excluded for the calculation periods of activity completed before the age of 18, a discrimination evidenced by various CJEU judgments. The reform entailed the introduction of a new remuneration system that eliminated this exclusion with respect to new staff and reclassified (art. 169.c) pre-existing staff in accordance with the so-called "*reclassification amount*", equivalent to the last salary received under the previous system.

A police officer harmed by the previous remuneration scheme claims that the reclassification should take into account the experience acquired before the age of 18 and the retroactive payment of the difference in remuneration.

Once his request was rejected, he appealed to the Federal Administrative Court, which submitted various questions to the CJEU.

PRELIMINARY QUESTIONS

1. Has the new remuneration system effectively eliminated discrimination?

If discrimination persists, how should it be corrected?

TJUE

1. Discrimination persists because:

(a) (Para. 31-38) The introduction of the new remuneration system **maintains a difference in treatment** that it is based on a classification amount calculated in accordance with previous discriminatory rules. See CJEU cases of 11 November 2014 (C-530/13, Schmitzer) and of 28/1/2015 (C-417/13, Starjakob).

(b) **There is no objective justification:**

- (Para. 43) Neither "*financial neutrality*" nor "*administrative economy*" "*can alone constitute a legitimate objective for the purposes of Article 6(1)*".

- (Para. 44-49) The "*maintenance of acquired rights*" and the "*protection of legitimate expectations*" of staff favoured by the old regime does not justify the indefinite maintenance of a difference in treatment, but during a "*transitional period*" allowing for "*gradual convergence*". Connected with CJEU cases of 8/9/2011 (C-297/10 and C-298/10, Hennigs and Mai) and of 19/6/2014 (C-501/12 to C-506/12, 540/12 and 541/12, Specht)

DIRECT PAY DISCRIMINATION ON THE GROUNDS OF AGE: NON-COMPLIANCE AND EFFECTS: CJEU 8 May 2019, C-396/17 (2)

2. Redress of discrimination requires 'granting civil servants disadvantaged by the previous remuneration and advancement system the same benefits as those enjoyed by the civil servants treated more favourably by that system'.

- (Para. 69) Obligation to set aside a national provision contrary to the principle of non-discrimination on grounds of age where it is not possible to interpret it in conformity with EU law, without having to request or await its prior removal by the legislature.

- (Para. 70-72) "where **discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category**".

And "that obligation persists regardless of whether or not the national court has been granted competence under national law to do so"; "only if there is a valid point of reference".

→ Application to the case in question (Para. 75-76):

- (a) Recognition of periods of service completed before the age of 18 and advancement in the pay scale
- (b) Payment, by his employer, of compensation in the sum of the difference between the amount of remuneration that the civil servant concerned ought to have received had he not been treated in a discriminatory manner and the amount of the remuneration which he in fact received.

ASSESSMENT:

* **Satisfactory "re-establishment"** of equal treatment. In contrast with the CJEU case of 19/6/2014 (C-501/12 to C-506/12, 540/12 and 541/12, Specht)

* Art. 16 Directive 2000/78/EC generates a **complex challenge**, which has been dealt with disparate results: CJEU case of 11 November 2014 (C-530/13, Schmitzer) and of 28/1/2015 (C-417/13, Starjakob) versus CJEU case of 14/3/2018 (C-482/16, Stollwitzer).

INDIRECT PAY DISCRIMINATION ON THE GROUNDS OF AGE (II): CJEU judgment of 7 February 2019 (C-49/18)

DISPUTE (Spain)

Through the Law on the National Budget for 2011 (Art. 31.1) and in the context of reducing the public deficit, a **salary reduction** is adopted for judges and magistrates, which **has a different impact on each remuneration group**, bigger for those who receive lower remuneration: 5.90% in pay grade 1, 6.64% in pay grade 4 and 7.15% in pay grade 5 (according to a report by the Ministry of Justice).

A judge from a Social Court in Barcelona considers that such a measure implies discrimination on the grounds of age, because the salary reduction is stronger in Group 5, which is the entry point to the judiciary and contains the youngest members with the shortest length of service.

The High Court of Justice of Catalonia first poses a **question of unconstitutionality to the Constitutional Court** (declared inadmissible on 15/12/2015 on the grounds that there are no comparable situations) and then a preliminary question.

PRELIMINARY QUESTIONS

1. Is there indirect discrimination on grounds of age?
2. Is there a violation of the principle of judicial independence?

CJEU

ADMISSIBILITY OF THE REQUEST despite the scarcity of the factual context (age of the applicant is not specified, nor the age profiles of the different groups, nor the specific quantitative impact of the salary reduction...) and the legal background (incomplete national legal framework), because the information provided in the order for reference is supplemented by the written observations submitted by the Spanish Government and by the Commission, being **'sufficient as a whole'**.

→ Impact on the analysis (messy) and the response (conditional/nuanced)

REPLY

1. (Para. 49) *It is for the referring court to carry out the necessary verifications in order to establish whether the members of the judiciary on those pay grades belong to a particular age group, but it does not appear that it has an indirect link with age* → **No indirect discrimination**

2. (Para 53-55) The reduction is identical in the basic salary of each group (9.73 %) and is diversified in the additional remuneration (seniority bonus, assignment allowance, special allowance), which take into account "objective factors which differentiate between the separate categories of members of the judiciary" → **No comparable situations**

**INDIRECT PAY DISCRIMINATION ON THE GROUNDS OF AGE (II):
CJEU judgment of 14 February 2019 (C-154/18)**

DISPUTE (Ireland)

In a context of budgetary restraints, the Irish Government introduces two measures that affect the salary rights of new public servants from 1/1/2011, without altering the rights of the already employed public servants. As far as teachers are concerned, such restrictions, specified through Circular 40/2011, imply:

(a) a 10 % reduction in pay at all levels

(b) classification at the first point of the relevant pay scale (not at the 2nd or 3rd, as in "previous practice")

70% per cent of teachers recruited in 2011 had a maximum age of 25.

Justification of the Irish Government: "*budgetary constraints*" and "*maintaining good industrial relations with existing civil and public servants*".

Mr Horgan and Ms Keegan (primary school teachers recruited in 2011) challenge these measures as discriminatory on grounds of age. The *Equality Tribunal* refers a number of questions to the CJUE.

PRELIMINARY QUESTIONS

- ↓
1. Is there indirect discrimination on the grounds of age?
 2. Is there an objective justification for the eventual difference in treatment?

CJUE RESPONSE

Following the usual analysis scheme it establishes:

1. (Ap. 20-21) There is a clear difference in treatment between two groups: staff recruited before and after 1/1/2011.
2. (App. 22) The work carried out by both groups is "*comparable*".
3. (App. 26-27) The difference in treatment derives from the **date of incorporation**, a criterion which is not *inextricably or indirectly linked to the age of the teachers* and therefore **there is no indirect discrimination**.

* **ASSESSMENT:** significance of accredited age profiles, connection with CJEU case of 7 June 2012 (C-132/11, Tyrolean Airways) and CJEU case of 21/12/2016 (C-539/15, Bowman), would the difference in treatment have been justified?