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Published in:
Essays in Honour of Michael Bogdan

2013

[Link to publication](#)

Citation for published version (APA):

Numhauser-Henning, A., & Rönmar, M. (2013). Compulsory retirement and age discrimination - The Swedish Hörnfeldt case put in perspective. In P. Lindskoug, U. Maunsbach, G. Millqvist, P. Samuelsson, & H.-H. Vogel (Eds.), *Essays in Honour of Michael Bogdan* (pp. 401-415). Juristförlaget i Lund.

Total number of authors:
2

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ESSAYS IN HONOUR
OF
MICHAEL BOGDAN

OFFPRINT

Juristförlaget i Lund
2013

COMPULSORY RETIREMENT AND AGE DISCRIMINATION – THE SWEDISH *HÖRNFELDT* CASE PUT IN PERSPECTIVE

1 Introduction

The Court of Justice of the European Union (CJEU) delivered its judgment in the Swedish *Hörnfeldt* case² on 5 July 2012. The case concerned the Swedish ‘67-year rule’, which allows employers to terminate an employment at will when the employee reaches the age of 67. It is but one of a number of cases in relation to the European Council’s Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation³ (the Framework Directive) and dealing with compulsory retirement and its relation to the ban on age discrimination.⁴

A ban on age discrimination was introduced in EU law by the Framework Directive, following Art. 13 in the Amsterdam Treaty (now Art. 19 of the TFEU) to be implemented by 2 December 2003, or at the latest by 2 December 2006. Notwithstanding, as early as the *Mangold* case,⁵ the CJEU stated that the principle of non-discrimination on grounds of age is to be regarded as a general principle of EU law. German legislation making way for an unlimited series of fixed-term employments already from the age of 52 was found to be

¹ Both authors are members of the Norma Research Programme (on Normative Development in the Social Dimension from a European Integration Perspective). This contribution stems from the programme’s Elder Law Research Environment, funded by Ragnar Söderberg’s Foundation and the Marianne and Marcus Wallenberg Foundation.

² *Torsten Hörnfeldt v. Posten Meddelande AB*, C-141/11, [2012] ECR I-0000.

³ *OJ* 2 December 2000 L 303/16.

⁴ See *Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05 [2007] ECR I-8531, *Age Concern England v. Secretary of State for Business, Enterprise and Regulatory Reform*, C-388/07 [2009] ECR I-01569, *Rosenblatt v. Oellerking Gebäudereinigungsges mbH*, C-45/09 [2010] ECR I-09391, *Georgiev v. Technicheski Universitet, Sofia*, C-250/09 and C-268/09 [2010] I-11869, *Fuchs and Köhler v. Land Hessen*, C-159/10 and C-160/10 [2011] ECR I-00000, and, the somewhat later case the *European Commission v. Hungary*, C-286/12 [2013] ECR I-00000. See also *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, C-341/08 [2010] ECR I-00047, *Ole Andersen v. Region Syddanmark*, C-499/08 [2010] ECR I-09343, *Prigge v. Deutsche Lufthansa AB*, C-447/09 [2011] ECR I-00000, and, *Johann Odar v. Baxter Deutschland GmbH*, C-152/11 [2013] ECR I-00000.

⁵ *Mangold v. Helm*, C-144/04 [2005] ECR I-9981.

disproportionate in relation to the general aim of further employment for people 52+ years old, and this despite the fact that the Framework Directive should not yet have been implemented – the case involved the implementation of the Fixed-term Work Directive. Age is also among the non-discrimination grounds in the (non-exhaustive) list in Art. 21 of the EU Charter on Fundamental Rights 2000, after the Lisbon Treaty a part of primary law (cf. Art. 6 TEU). Art. 25 of the EU Charter also contains a more general rule on the rights of the elderly to lead a life of dignity and independence, and to participate in social and cultural life, whereas Art. 34.1 mentions social security and social assistance in the case of old age.⁶

The Framework Directive thus contains a ban on discrimination on the grounds of age – among other grounds, in working life and related areas such as the membership of a trade union, etc. Both direct and indirect discrimination are prohibited. In terms of age, however – and in contrast to other discrimination grounds⁷ – there are vast possibilities to justify not only indirect but also direct discrimination.

The Framework Directive does not apply to rules on retirement age in social security pension schemes and the like (cf. recital 14). However, it does apply to the termination of employment contracts.⁸ One would therefore think, at first glance, that rules on compulsory retirement at a certain age should be contrary to the ban on age discrimination. Nevertheless, as is reflected in case law, this is far from the truth. A general background motive for this – as is stated in recital 25 – is that ‘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.’ This ‘ambiguous’ position as regards differential treatment on the grounds of age is reflected in Art. 6.1 of the Framework Directive concerning the justification of such treatment. According to this Article, Member States may provide that differences of

⁶ Compare also the 1989 Community Charter of Fundamental Rights of Workers, referring to the protection of elderly persons, but not from an equal treatment perspective. For a more extensive description of international developments concerning the protection of the elderly, see for instance Neal, Alan, ‘Active Ageing’ and the Limits of Labour Law”, in: Hendrickx, Frank, (ed.), *Active Ageing and Labour Law*, Intersentia 2012.

⁷ With the exception of part-time work and fixed-term work discrimination – compare Art. 4 in the Part-time Work Directive 97/81/EC, [1998] OJ L14/9, and Fixed-term Work Directive 99/70/EC, [1999] OJ L175/43, respectively.

⁸ Compare *Palacios de la Villa* and *Age Concern England*.

treatment on the grounds of age shall not constitute discrimination if they are ‘objectively and reasonably justified by a legitimate aim, including legitimate employments policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’.

Thus, up to this point, the scope for differential treatment according to Art. 6.1 in the Framework Directive has been an issue for interpretation by the CJEU in quite a number of cases.⁹ Regarding case law on compulsory retirement, Monika Schlachter has stated that ‘there are almost no limits to the discretion of Member States in adopting mandatory retirement rules’.¹⁰ At the same time, Schlachter distinguishes between two separate standards when it comes to justification of differential treatment: one ‘control standard’ as regards more general systems for compulsory retirement, such as the *Rosenbladt* case, and another, considerably stricter standard when it comes to specific professional groups, such as in the cases *Petersen*, *Georgiev*, *Fuchs and Köhler* and, recently, *Commission v Hungary*. Claire Kilpatrick has also pointed to the fact that in these cases, the CJEU has developed quite another framework for analysis than the one hitherto applied in sex discrimination cases – ‘a looser proportionality test’.¹¹ Frank Hendrickx refers to these characteristics in terms of ‘a collective public interest approach’ as opposed to the more traditional ‘individual rights approach’ in discrimination cases.¹²

Thus, in light of an increasingly ageing population, there are complex issues involving compulsory retirement and the need on the one hand to make people work longer to ensure the sustainability of society, and on the other the traditional way of organising both labour markets and societies. In this contribution we will highlight some of these complexities as we describe and discuss the Swedish *Hörnfeldt* case from the perspective of age discrimination in a broader policy context. In addition, and in line with Michael Bogdan’s own interest in and experience of comparative law, the discussion will include references to the UK experience, reflecting recent statutory reforms linked to compulsory retirement – very much at the heart of our discussion.

⁹ Compare Numhauser-Henning, Ann, “Om avgång med pension och åldersdiskriminering”, in: Nyström, Birgitta et. al (eds.), *Nedslag i den nya arbetsrätten*, Liber 2012.

¹⁰ Schlachter, Monika, “Mandatory Retirement and Age Discrimination under EU Law”, in: *The International Journal of Comparative Labour Law and Industrial Relations* 27, no. 3 (2011), pp 287-299, p. 290.

¹¹ Kilpatrick, Claire, “The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture”, in: *Industrial Law Journal* Vol. 40, No.3, September 2011.

¹² Hendrickx, Frank, “Age and European Employment Discrimination Law”, in: Hendrickx, Frank (ed.), *Active Ageing and Labour Law, Contributions in Honour of Professor Roger Blanpain*, Intersentia 2012.

2 General background

The ageing population in the EU is a general demographic trend challenging economic sustainability in terms of employment, pensions and health care systems, as well as overall social cohesion in terms of intergenerational solidarity. The 2012 Ageing Report¹³ presents, from an EU point of view, a picture of economic developments 2010–2060 that could result from an ageing population in a ‘no-policy-change’ scenario, and details the expenditure projections covering pensions, health care, long-term care, education and unemployment transfers for all Member States. By 2060, the share of young people (0–14) will remain fairly constant, while the group of those aged 15–64 will become considerably smaller (a reduction from 67% to 56%). Those aged 65 and above will represent a much larger share of the population (rising from 17% to 30%). The number of persons aged 80 and above will come close that of 0–14 year olds (rising from 5% to 12%). This will result in an economic dependency ratio (persons aged 65 or above relative to those aged 15–64) which doubles, shifting from four working-age persons for every person over 65 to only two working-age persons.

Intergenerational conflict is one of the threats that may well be an outcome of this demographic trend; economic unsustainability is another. It is only natural that a key measure is to support active ageing across all aspects of life; the EU declared 2012 ‘The Year of Active Ageing’.¹⁴ The overall purpose was to ‘promote active ageing and to better mobilize the potential of the rapidly growing population in their late 50s and above’. Active ageing means not only creating better opportunities and working conditions for the participation of older workers in the labour market, but also combating social exclusion more generally by fostering active participation in society and encouraging healthy ageing. These ambitions are also reflected in the Europe 2020 strategy¹⁵ and the Employment Guidelines of 2010.¹⁶ The Europe 2020 strategy thus focuses on meeting the challenge of promoting a healthy and active ageing population to achieve social cohesion and higher productivity. A goal is set to have an employment rate of 75% for all 20- to 64-year-olds in 2020 and at least 20 million fewer people in or at risk of poverty and social exclusion. According

¹³ The 2012 ageing report, Economic and budgetary projections for the 27 EU Member States (2010–2060), *Joint Report prepared by the European Commission (DG ECFIN) and the Economic Policy Committee (AWG)*, European Economy 2, 2012.

¹⁴ Decision No 940/2011/EU, 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012), OJ 23.09.2011, No. L 246/5.

¹⁵ COM(2010) 2020 final.

¹⁶ Council decision 2010/707/EU of October 2010, later extended to 2011, 2012, compare Council decision 2012/238/EU of 26 April 2012.

to Employment Guidelines 7 and 8, Member States are urged to increase labour market participation of individuals 50 and older by introducing policies of active ageing based on new forms of work organisation and life-long learning. Guideline 10 underlines the importance of effective social security and integration policies to empower individuals and prevent social exclusion.

There are thus considerable economic and instrumental interests behind the EU's ambitions to promote active ageing. The aspect of human rights also plays a role in this regard, however, as reflected in the Lisbon Treaty and the new emphasis on 'Social Market Economy', as well as in the EU Charter of Fundamental Rights, in its Articles 21, 25 and 34.1 on non-discrimination and the social inclusion, etc., of the elderly. This has been referred to as the *double bind* in age discrimination law,¹⁷ reflecting both a fundamental rights approach built on the equal treatment principle and the importance attached to age when organising society. The double bind is reflected in the application of the discrimination rules concerning age – there is a balance to be struck between the traditional individual approach, as opposed to a more collective approach linking age discrimination to a larger policy context concerning not only the functioning of labour markets but also pension schemes and overall social welfare in an economic and political perspective. The overall concern – also reflected in case law – is intergenerational solidarity and sustainable societies.

3 The *Hörnfeldt* case

This case concerned Mr Hörnfeldt, who had been working on a part-time basis for the Swedish Postverket since 1989. When he reached the age of 67 on 15 May 2009, Hörnfeldt's employment contract was terminated on the last day of that month, according to the 67-year rule and the collective agreement covering the contract. His monthly retirement pension then amounted to SEK 5,847 net – quite a low pension according to Swedish standards. Mr Hörnfeldt claimed that this constituted unlawful discrimination on the grounds of age.

At the centre of the *Hörnfeldt* case is the Swedish rule in Sec. 33 of the (1982:80) Employment Protection Act (EPA, *Anställningsskyddslagen*), on the right of an employer to freely terminate an employment contract at the end of the month in which the employee reaches the age of 67. In this case the employer only has to provide the employee at least one month's written notice, and the

¹⁷ See Hendrickx, Frank, "Age and European Employment Discrimination Law", in: Hendrickx, Frank (ed.), *Active Ageing and Labour Law, Contributions in Honour of Professor Roger Blanpain*, Intersentia 2012.

‘normal’ requirement for just cause, or objective grounds, does not apply.¹⁸ At the same time, according to Sec. 32a EPA, there is an unconditional right to work until the age of 67. Sections 32a and 33 EPA together form the 67-year rule.¹⁹ The Framework Directive’s provisions on age-related discrimination as such were transposed into Swedish law by the (2008:567) Discrimination Act (*Diskrimineringslagen*).

The questions referred to the CJEU were the following:

1. Can a national rule which, like the 67-year rule, gives rise to a differential treatment on grounds of age be legitimate, even if it is not possible to determine clearly the aim or purpose the rule is intended to serve, either from the context in which the rule has come into being or from other information?
2. Does a national retirement provision such as the 67-year rule – to which there is no exception, and which does not take account of factors such as the pension an individual may ultimately receive, go beyond what is appropriate and necessary in order to achieve the aim pursued?

The core question in the *Hörnfeldt* case is whether the Swedish 67-year rule is compatible with Art. 6 of the Framework Directive. It is clear that terminating an employment contract on the basis of an employee reaching retirement age amounts to differential treatment based on age.²⁰ The question is whether that difference of treatment can be regarded as objectively and reasonably justified by legitimate aims, and whether it is appropriate and necessary in order to achieve those aims.

According to the referring court – *Södertörns tingsrätt* (Södertörn District Court) – the 67-year rule was established to give individuals the right to work longer and increase the amount of their retirement pension; the rule reflects a balance between considerations relating to budgetary matters, employment policy and labour-market policy. However, no such explicit aims were expressed in the EPA itself, or in the travaux préparatoires. Not surprisingly,²¹ the CJEU

¹⁸ If the employer does not make use of this possibility to terminate the employment contract, the permanent employment relationship continues; however, it does so with limited employment protection (the employee has, for example, only one month’s notice, and is given no right of priority in accordance with the seniority rules or rules on re-employment in redundancy situations, Sec. 33 EPA). – When an employee turns 67, fixed-term contracts may be freely entered into, Sec. 5 EPA.

¹⁹ This rule was introduced as of 31 December 2002 – before that another retirement age could be introduced by collective agreement. This is thus no longer the case – the 67-year rule is unconditional.

²⁰ The judgment p. 20. Compare *Palacios de la Villa* and *Age Concern England*.

²¹ Compare cases *Fuchs and Köhler* p. 39 and the case law cited there. Compare also *Commission v. Hungary*.

stated that a lack of expressive aim is not decisive – what is important is ‘that other elements, derived from the general context of the measure concerned, should make it possible to identify the underlying aim of that measure for the purposes of review by the courts as to whether it is legitimate and as to whether the means put in place to achieve it are appropriate and necessary’ (p. 24).

The Swedish Government introduced multifaceted arguments for the 67-year rule: it seeks, firstly, to avoid situations of termination of employment contracts which are humiliating for workers by reason of their advanced age; secondly, to enable retirement pension regimes to be adjusted on the basis of the principle that income received over the full course of a career must be taken into account; thirdly, to reduce obstacles for those who wish to work beyond their 65th birthday; fourthly, to adapt to demographic developments and to anticipate the risk of labour shortages; and, lastly, to establish a right, and not an obligation, to work until the age of 67, in the sense that an employment relationship may continue beyond the age of 65. Fixing a compulsory retirement age also makes it easier for young people to enter the labour market (p. 26).

These aims were acceptable to the CJEU since ‘the automatic termination of the employment contracts for employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people’s working lives or, conversely, providing for early retirement’ (p. 28). The ‘distribution between generations’ argument has long been an accepted argument.

The CJEU also finds the 67-year rule to be appropriate for achieving the aims set out: expressly to avoid situations humiliating for elderly workers, and eventually to make it easier for young people to enter and/or remain in the labour market (p. 34).

The question of whether the means were also necessary to achieve the aims was answered in relation to the second question, referring to the importance of financial compensation in the form of payment of a ‘reasonable’ retirement pension. In the early case *Palacios de la Villa* the CJEU seemingly implied that the fact that the individual in question was provided a pension which was not unreasonable was an important part of the assessment of whether the legislation at hand met the conditions of being ‘appropriate and necessary’.²² In

²² The judgment p. 73.

the subsequent *Rosenblatt* case, however, the CJEU made no reference to the level of the retirement pension received by the person concerned, despite the very low pension amount resulting from a part-time position as a cleaner. In the *Hörnfeldt* case the CJEU, despite referring to Art. 15.1 of the EU Charter of Fundamental Rights and the right (also for the elderly) to engage in work, makes it clear, that the considerations must not be made at an individual level but rather at a systems level.²³ What is evaluated is the Swedish system as such, offering an unconditional right to work until 67 years of age, additional opportunities for work in the form of fixed-term employment, and a multifaceted pension scheme including basic coverage from the age of 65 years in terms of a guaranteed pension, housing benefits and/or old-age support.

In the *Hörnfeldt* case the CJEU thus concluded that the Framework Directive does not preclude ‘a national measure, such as the Swedish 67-year rule, which allows an employer to terminate an employee’s employment contract on the sole ground that the employee has reached the age of 67 and which does not take account of the level of the retirement pension which the person concerned will receive, as the measure is objectively and reasonably justified ... and constitutes an appropriate and necessary means by which to achieve that aim’.²⁴

4 Discussion

In many ways, the outcome of the *Hörnfeldt* case may seem evident, if we contemplate previous case law developments.²⁵ The two questions referred had already been given an answer in cases like *Palacios de la Villa*, *Age Concern England* and *Rosenblatt*.

However, it is not obvious from a Swedish law perspective or from an EU law perspective that the 67-year rule – or compulsory retirement as such – should be considered consistent with the ban on age discrimination. The acceptance of the Swedish 67-year rule may seem obvious, as it represents the practice of compulsory retirement, generally speaking. The rule could, however, be questioned from an argument related to the disproportionate scope for arbitrariness on behalf of the employer; the employer can freely choose to ‘retire’ one employee, whereas others who seem to be in the same situation are kept on.

²³ This was clear also from the *Rosenblatt* case.

²⁴ Hendrickx has commented that here, the CJEU struck a balance between the individual argument and the collective, but tilted the result in favour of the collective, Hendrickx (2012) p. 21.

²⁵ This may also be the reason why the CJEU decided – after hearing Advocate General Bot – to proceed to judgment without an opinion.

In *Rosenbladt* (p. 51) the CJEU pointed to the fact that a system of automatic termination of employment contracts does not authorise employers to terminate an employment contract unilaterally when employees reach the age at which they are eligible for payment of a pension. However, this is precisely what the Swedish 67-year rule permits. In *Hörnfeldt* the CJEU is apparently conscious of this character of the Swedish law, but makes no point of it.²⁶

Another argument could have been the compatibility with the Swedish pension system as such. In Sweden there is thus the 67-year rule. Strictly speaking, however, there is no fixed pensionable age. Pension can be collected from the age of 61. In such cases the pensionable age of any basic pension scheme – in Sweden the guaranteed pension is available as of the age of 65 – is normally taken as the ‘normal’ pensionable age. The 67-year rule thus ‘adds on’ two years to the ‘normal’ Swedish pension age, which works to make it more acceptable from a discriminatory point of view. However, the Swedish pension system is based on life-long average earnings making work beyond ‘normal’ pension age economically very advantageous. An important rationale of the system is to make people do just that! Compulsory retirement at a set age is not really compatible with such a system. In the cases of *Ole Andersen* and *Prigge*, the termination of employment contracts at pre-normal retirement age was seen as a disproportionate measure considering the individual’s economic interests. In the case *Commission v. Hungary* as well, the lowering of the age of retirement from 70 years of age to 62 for certain professionals was considered disproportionate against an argument of legitimate expectations and economic loss for the individual, whereas a gradual staggering of the amendment may have been acceptable.²⁷ However, in our opinion, there is nothing in the CJEU’s case law so far to suggest that compulsory retirement at a set (65+) age should not be seen as meeting the Framework Directive’s requirements – provided there is a reasonable system of pensions in place.²⁸ In various cases, such as *Rosenbladt* and *Hörnfeldt*, the CJEU has also referred to the fact that a rule on compulsory retirement does not necessarily mean a definite withdrawal from the labour market from the point of view of the individual – working life may continue, often in fixed-term employment.

From an EU law perspective, it is also the overall assessment of compulsory retirement in relation to the ‘collective public interest approach’ that makes one question the acceptance of compulsory retirement. In terms of active ageing,

²⁶ The judgment p. 40.

²⁷ P. 70 and 73.

²⁸ Compare here the reasoning regarding the pension as such – the answer to the second referred question – in the very *Hörnfeldt* judgment pp. 35-47, and, especially, p. 33.

increased labour market participation of people aged 55+ is thus an important part of EU employment strategies. This also makes key issues of the questions of how to make people continue to work until they reach pensionable age, how to make people work beyond their pensionable age, and how to facilitate access to employment for older workers to key issues – the second issue being our main concern in relation to compulsory retirement.²⁹

In the UK law perspective, questions related to compulsory retirement and age discrimination have also been high on the agenda in recent years, but the conclusion drawn differs from the one prevailing in both Swedish and EU law, and as reflected in the *Hörnfeldt* case. According to the traditional approach in the UK, it was possible for the employer to terminate the employment contract when the employee reached the employer's normal retirement age, or in the absence of such an age, the age of 65. This could not be challenged by unfair dismissal legislation, and in these situations the employees could not claim redundancy payments. There was no legislation on age discrimination in place.³⁰

The ban on age discrimination in the Framework Directive was originally implemented through the enactment of the Employment Equality (Age) Regulations 2006.³¹ Compulsory retirement – and a derogation from the ban on age discrimination – was maintained and regulated here through a new, complex and controversial scheme for a statutory default retirement age of 65. According to the Regulations, the employer was able to show that dismissal on grounds of retirement was fair and legally permitted, if the employer followed a procedure established by the legislation for considering requests by employees to continue to work beyond the retirement age.³² This scheme was challenged, but upheld, in the *Age Concern England* case mentioned above, where the CJEU found that the UK system was in principle compatible with the Framework Directive and its Art. 6.1³³

In 2010, non-discrimination law was generally reformed through the creation

²⁹ For a discussion along these lines of thinking, see further Numhauser-Henning, Ann, "Labour Law in a Greying Labour Market – in Need of a Reconceptualisation of Work and Pension Norms", in the General Proceedings from the 5th Annual Legal Seminar of the European Labour Law Network, The Hague, 11-12 October 2012 – http://www.labourlawnetwork.eu/publications/prm/73/size__1/index.html.

³⁰ See Sections 109 and 156 of the Employment Rights Act and C. Kilpatrick, "Age, Retirement and the Employment Contract", *Industrial Law Journal*, Vol. 36, No 1, 2007, pp. 119–135. Cf. also *Age Concern England*, p. 9, cf. Sections 109 and 156 of the Employment Rights Act.

³¹ See SI 1031/2006.

³² See Deakin and Morris 2012, p. 659 and Hepple and Neal 2012. Kilpatrick has conducted a critical analysis of this scheme, and pointed to its complexity and incoherence with the pension system, see C. Kilpatrick, "The New UK Retirement Regime, Employment Law and Pensions", *Industrial Law Journal*, Vol. 37, No 1, 2008, pp. 1–24.

³³ See Deakin and Morris 2012, pp. 659 ff. and High Court [2009] EWHC 2336.

of a comprehensive non-discrimination act, the Equality Law Act 2010, where the ban on age discrimination was incorporated.³⁴

Despite the outcome in the *Age Concern England* case the statutory compulsory retirement scheme was repealed in 2011.³⁵ As a result, UK employees can now work for as long as they are able or willing, and employers are liable for unfair dismissal and age discrimination claims if they choose to dismiss elderly employees. Employees can now be 'retired' through voluntary retirement, financial incentives to leave, performance management (followed by a possible dismissal on grounds of lack of performance etc.) or the establishment of an employer-justified retirement age, to be tried against Art. 6 of the Framework Directive.³⁶ At present – before further guidance has been provided by UK courts or the CJEU – there is great uncertainty as regards the circumstances under which an employer-justified retirement age would be justified according to the Framework Directive and EU law.³⁷

There are substantial as well as attitudinal obstacles to increased labour market participation of people aged 55+. The traditional approach concerning organisation of labour markets represents an impediment in many ways, both in terms of regulation and actual operation. Working life is thus traditionally restricted – more or less – by rules on compulsory retirement at a certain age related to public as well as occupational pension systems. However, working life practices in terms of working conditions, working time arrangements and knowledge turnover have also tended to marginalise older workers, including those who have not yet reached pensionable age, and thus creating unemployment and costly pre-retirement schemes. These practices are accompanied by

³⁴ Cf. Equality Law Act 2010, Schedule 9, para 8. See Deakin and Morris 2012, pp. 614 ff. and p. 656. Cf. also B. Hepple, *Equality. The New Legal Framework*, Hart Publishing, Oxford 2010.

³⁵ Cf. SI 2011/1069. See Deakin and Morris, p. 660. The statutory compulsory retirement scheme was repealed with effect from 1 October 2011, with transitional arrangements taking effect from 1 April 2011. Critical voices have been raised in relation to this reform. For example, Barnard and Deakin have argued that the 'uncertainty generated by the government's hasty decision to abolish the statutory DRA [default retirement age], introduced in the name of equality of older people, but in fact done to make savings on pensions, has come at the price of dignity of older people, inequality for the young and significant potential costs for employers. The only bit of the economy likely to benefit from this move are lawyers who will have to try to sort out the mess. The government should reconsider its decision and reinstate a statutory regime for retirement as EU law allows it to do', see C. Barnard and S. Deakin, "Ahead of the Game?", *New Law Journal*, Vol. 162, Issue 7499, 2012.

³⁶ Cf. Deakin and Morris 2012, pp. 660 f. and Hepple 2010, p. 93.

³⁷ See Deakin and Morris, p. 660, Hepple 2010, p. 93. – For example, Cambridge University has decided to introduce an employer justified retirement age for academics, emphasising in terms of justification *inter alia* intergenerational fairness, career progression, preservation of academic autonomy and dignity on exit and in terms of proportionality good process, duty to consider procedure, guidance published in advance and regular reviews of policy. Cf. the Keynote Address by C. Barnard at the ELLN Annual Seminar, The Hague 2012 and Barnard and Deakin 2012.

social norms that support the functioning of such a system both in terms of ‘pension norms’ and discriminatory perceptions and behaviour on behalf of, among others, employers. The hitherto prevailing ‘pension norm’ – understood as general perceptions of when to leave working life – says that there is ‘a right and a duty to retire at a certain age’. And, should a worker be laid off before reaching the ‘normal’ pensionable age, this may well be conceived as a social good. Of course, such normative conceptions are a major challenge to contemporary society. The ban on age discrimination is among the essential tools set out to counteract these realities.

In an EU context, it is true that ensuring that people work until they reach the ‘normal’ pensionable age, thus preventing early retirement and other forms of premature resignation from employment, seems to be the most important issue in making active ageing a reality. According to the 2012 Ageing Report, the average labour market exit age in the EU-27 was 61.4 years in 2009, and the predicted exit age for 2060 is still ‘only’ 64.3 years. However, this future overall scenario makes it even more important to make people today work beyond their normal pensionable age, whenever this is possible. In addition, generally speaking, there is ‘room’ for a longer working life. Service society entails different demands than industrial society, and older generations are only becoming healthier. There are good – also economic – reasons to adapt the current perception of work and of a ‘good worker’ to the human scale from a lifespan perspective, if the traditional pattern of the three clear-cut phases of life – pre-work life, work life and ‘after-life’ – is to be replaced, as is also reflected in the ILO strategy ‘decent work for all’.³⁸

From an EU law perspective it is thus not obvious that rules on compulsory retirement should be seen as consistent with the ban on age discrimination. In order to make people work beyond ‘normal’ pensionable age, they must have both the practical and the legal possibility to do so, and here, of course, the acceptance of compulsory retirement is a key issue. The CJEU has broadly accepted the concept of compulsory retirement, as reflected in the *Hörnfeldt* case – and hence an important component of the prevailing pension norm is in place. Such a practice must be legitimate in terms of employment policy, labour market and vocational training objectives or aims, and the means implemented to achieve that aim need to be appropriate and necessary. Broad discretion is granted to the Member States where such aims are concerned, and with regard to the means the ‘control standard’ varies somewhat depending

38 www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm. Compare also the Commission’s Communication “Decent work for all”, COM(2006) 249 final.

on the case at hand. Among the legitimate aims accepted so far by the CJEU are intergenerational fairness in terms of access to employment, prevention of humiliating forms of employment termination, and a reasonable balance between labour market and budgetary concerns.

In these cases, the CJEU seems to have given a lot of consideration to Member States' traditions since 'the automatic termination of the employment contracts for employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships'.³⁹ According to a 2011 report, based on the situation per 31 December 2009, 24 out of 29 Member States did have a set age of for automatic termination (compulsory retirement), concerning specific professions and/or public employees. However, 23 out of 29 Member States *did not* have a general rule on compulsory retirement that was also applicable to the private sector.⁴⁰

Another way to promote social sustainability when the dependency ratio is increasing is to successively increase the 'normal' retirement age, making people work longer, while still accepting compulsory retirement. What the 'appropriate' pensionable age is, however, is an issue which currently lies at the core of many delicate reform processes across Europe, *inter alia* in the wake of the economic crisis which has led to political strikes and upheaval. An important reason behind these reactions is that pension rights are not only perceived as social, political rights but also as property rights in the form of postponed income.⁴¹ Such perceptions are reflected in the first part of the traditional pension norm: there is *a right* and a duty to retire at a certain age.

At the core of this contribution is thus the issue whether there (still) should be a (more or less) set pensionable age, and whether this also implies the acceptance of compulsory retirement. Or, should the prevailing pension norm be modified to assert that 'you have both a right and a duty to work according to your abilities', and, that 'to retire is a personal/individual choice' rather than a social order? In such a case, at least the practice of compulsory retirement needs to be abandoned.

On the other hand, what would a ban on compulsory retirement imply?

³⁹ *Hörnfeldt*, the judgment p. 28.

⁴⁰ O'Dempsey, Declan and Beale, Anna, *Age and Employment*, Report from the Network of Legal Experts in the non-discrimination field to the European Commission, 1 July 2011.

⁴¹ Compare, for instance, Eliasson, Nils, *Protection of Accrued Pension Rights, An Inquiry into Reforms of Statutory and Occupational Pension Schemes in a German, Norwegian and Swedish Context*, Juristförlaget, Lund 2001. Compare also the case the *Commission v. Hungary* where the CJEU *obiter dictum* accepted a general increase in pensionable age from 62 to 65 years of age in Hungary meeting reasonable demands on gradual transposition rules, the judgment p. 73.

A frequent argument in favour of compulsory retirement, now also accepted by the CJEU, is that should there be no formalised ‘end’ to the employment relationship as the employee grows old, then the employee cannot avoid situations in which employment contracts are terminated in forms which are humiliating for elderly workers.⁴² Despite the long and often sufficiently appreciated working life delivered by the employee, the general rule would then imply that termination of employment would be one of disqualification – a less satisfying order. Thus, in the UK one result of the abolishment of the statutory compulsory retirement will probably be an increased use of performance management, i.e. regular reviews, consultation and documentation in order to monitor the performance of the employee, and to build up a case for either voluntary retirement or a dismissal that will hold up against the UK unfair dismissal legislation.⁴³

In addition, an abolition of the rule of compulsory retirement risks diminishing the employee’s employment protection before he or she reaches retirement age. This has been an issue of debate in a recent Swedish Government inquiry report on pensionable age (*Pensionsåldersutredningen*).⁴⁴ A pension norm which asserts that retirement reflects a personal choice on behalf of the individual thus requires the abolishment of compulsory retirement. If retirement practices are to become more diffuse or individualised, there is no possibility to uphold a practice such as the one in Sweden where, as a general rule, ‘normal ageing’ does not constitute just cause for dismissal. In addition, employer incentives for age management by way of systemic work adaptation may weaken also well before retirement age.

There is a risk that setting no upper age limit to employment will cause a decrease in the number of people aged 55+ who work, thus undermining employment protection from ‘within’.

To what extent people beyond pensionable age – and the age of compulsory retirement as such – can be deprived of employment protection altogether is not yet absolutely clear from the CJEU’s case law. In several cases concerning public servants above normal retirement age it has been obvious – and accepted – that the only available options have been (limited) fixed-term employment.⁴⁵ At the same time, the Commission has questioned the Swedish regulation, which accepts ‘open-ended’ or unlimited fixed-term work post-67 years of

⁴² Hörnfeldt. Compare also *Rosenblatt, Georgiev and Fuchs and Köbler*.

⁴³ Cf. Barnard and Deakin 2012.

⁴⁴ SOU 2012:28, Ch. 17.

⁴⁵ See *Rosenblatt, Georgiev, Fuchs and Köbler* and now also Hörnfeldt.

age⁴⁶; the LIFO principle (last-in-first-out)⁴⁷ and seniority wage-setting⁴⁸ have also been questioned from the point of view of the ban on age discrimination.

5 Concluding remarks

We can see that the abolishment of compulsory retirement is not an answer to all problems. Case law shows that age discrimination law as such is full of dilemmas – it is about weighing individual rights against public interests of a more collective character, such as intergenerational solidarity and pension systems. To balance these opposite approaches, the CJEU makes broad use of the proportionality principle. Add to this the adverse effects an abolishment of compulsory retirement might have on labour law in general, in terms of employment protection and good-quality work.

In the doctrine it has been found less likely that the CJEU should be willing in the near future to challenge the Member States' traditions regarding compulsory employment practices.⁴⁹ At the same time, we have seen that a great majority of Member States do not have a general rule on compulsory retirement in place, and, for example, in the UK the statutory compulsory retirement scheme has been repealed, despite its long-standing tradition and principal acceptance by the CJEU.

There is no doubt that economic crisis and high unemployment (especially among younger people) have made the achievement of active ageing policies increasingly difficult. The question however, is how this conflict will play out in terms of right to work, as an increased dependency ratio and unsustainable pension costs become more prevalent. There are reasons to unite with Kasneci when stating: We are in need of a completely new approach 'based on a multidimensional policy approach on 'active ageing' which can change outdated paradigms, remove a number of older workers related-myths, and convert the process of population and workforce ageing into an opportunity for society and older workers themselves'.⁵⁰

⁴⁶ Cf. MEMO/08/69, 31 January 2008 of the European Commission and the European Commission's reasoned opinion, 21 February 2013 C(2013) 822 final.

⁴⁷ Compare Alan Neal (2012) but also G.A. Bot's opinion in the case *Küçükdevici* C-555/07 [2010] ECR I-00365 p. 43. See also M. Rönnmär, "Protection of Established Position, Social Protection and the Legal Situation of the Elderly in the EU", in: A. Numhauser-Henning and M. Rönnmär (eds.), *Normative patterns and legal developments in the social dimension of the EU*, Hart Publishing, Oxford 2013.

⁴⁸ Compare the CJEU case *Sabine Hennings v. Eisenbahn-Bundesamt and Land Berlin*, C-297/10 [2012] ECR I-00000.

⁴⁹ Monica Schlachter (2011) and Claire Kilpatrick (2011).

⁵⁰ Kasneci, D., *Active Ageing: the EU Policy Response to the Challenge of Population Ageing* (Cadmus European Papers on the New Welfare, Paper No. 8, the Risk Institute, September 2007).

