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Published in:

Ageing, Ageism and the Law

DOI:

[10.4337/9781788972116.00013](https://doi.org/10.4337/9781788972116.00013)

2018

Document Version:

Early version, also known as pre-print

[Link to publication](#)

Citation for published version (APA):

Numhauser-Henning, A. (2018). Ageism, age discrimination and employment law in the EU. In I. Doron, & N. Georganzi (Eds.), *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (pp. 98-115). Edward Elgar Publishing. <https://doi.org/10.4337/9781788972116.00013>

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Ageism, Age Discrimination, Ageism, and Employment Law in the EU

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This is a draft chapter / article. The final version is available in *Ageing, Ageism and the Law*, edited by Israel Doron and Nena Georgantzi, published in 2018, Edward Elgar Publishing Ltd. The material cannot be used for any other purpose without further permission of the publisher, and is for private use only.

Chapter 4. Ageism, age discrimination and employment law in the EU

4.1 Introduction

Ageism in working life is a central concern when it comes to active ageing. This chapter aims at discussing the relation between the EU ban on age discrimination, European employment law and active ageing strategies. In doing this it draws heavily on some earlier works of mine (see especially Numhauser-Henning 2015 and 2017, chapters 4, 7 and 9, with further references).

There is a special and close connection between ageism – the overall theme of this book – and non-discrimination regulation on the grounds of age. Discrimination – or discriminatory behaviour – is thus an integral part of most definitions of ageism (Iversen et al, 2009).ⁱ

The EU ban on age discrimination was introduced into secondary law through the 2000/78/EC Directive – The Employment Equality Directive. It was preceded by the new competences bestowed on the European Council by the Amsterdam Treaty and its Article 13 (now Art. 19 of the Treaty on the Functioning of the European Union, TFEU) and later on confirmed in the EU Charter of Fundamental Rights (CFR) 2000 – since the Lisbon Treaty part of primary law. The CFR in its Article 21 contains a non-discrimination clause listing age among other grounds in an open list.

The Employment Equality Directive bans direct and indirect discrimination as well as harassment and instructions to discriminate on the grounds of age (among other grounds) in a working life context. The ban is neutral in the sense that it covers all ages – in contrast to the regulation in place in the US, acting as a model in introducing this discrimination ground.ⁱⁱ A special characteristic of the age discrimination ban as compared to those of other grounds is its weak format – it opens up for the justification of direct age discrimination. According to Article 6.1 in the Employment Equality Directive ‘differences of treatment on the grounds of

age shall not constitute discrimination, if, in 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'. The scope for justification is ultimately decided by the European Union Court of Justice (CJEU) in its case law and – as compared to other grounds – the Court has been flooded by age discrimination cases since the Directive's entering into force.

What is then European employment law? EU labour law – like equality law – is regulated by a complex mix of treaty provisions, fundamental rights and general principles of EU law, secondary law, collective agreements at EU level, case law from the CJEU and soft law measures only to be complemented by regulation at national level. Despite growing competences for the EU institutions over time, there is still a great variety between the Member States' labour law and industrial relations systems. EU labour law, so far, only aims for a partial harmonization of these systems and labour law being an area of shared competences, the principles of subsidiarity and proportionality are important. Some – also central – issues of labour law and industrial relations, such as pay, the right of association, the right to strike and right to impose lock-outs, are even principally excluded from the EU's competences to adopt Directives. Notwithstanding, there is now a considerable number of secondary law directives in place – among them the many equality directives as well as directives on restructuring of enterprises, information, consultation and worker participation, collective redundancies, flexible work and working conditions, including working time and health and safety. This is not the place to describe these existing rules into any detail. The lens here is rather the age discrimination ban and what can be deducted in relation to labour law regulations from the case law of the CJEU in this area. A central concern is age differentials in relation to working conditions including employment protection, redundancy benefits, wages, and so on. In an overall perspective, fundamental rights such as those set out in CFR

are of course important when forming an idea of not only EU labour law but also Member States' labour law traditions. Treaty regulation has since long made references to the European Convention of Human Rights (ECHR) as well as the European Social Charter, acting as common denominators of Member States' legal traditions. Another common denominator for many EU Member States are central ILO conventions.

4.2 Employment law

From the case law of the CJEU it becomes clear that employment protection law is of special concern when it comes to age discrimination. According to Article 30 in the CFR '[e]very worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices'. Despite a partly harmonized EU law framework and a 'constitutionalization' of employment protection through Article 30 of the CFR, employment protection regulation in the Member States – and the strength of the protection it offers not only to older workers, but to employees generally – still differs considerably.

The Charter applies only within the scope of Union law and there is thus yet no harmonization proper concerning employment protection. Secondary law does exist partially, however, on issues such as collective redundancies (Dir. 1998/59/EC) and the transfer of undertakings (Dir. 2001/23/EC) – with a common emphasis on information and consultation rather than substantive employment protection – and, on discriminatory dismissals. There are also directives concerning so-called flexible work: that is Dir. 97/81/EC on Part-time Work, Dir. 99/70/EC on Fixed-term Work and Dir. 2008/104/EC on Temporary Agency Work.

4.2.1 Employment Law and the Standard Employment Contract

In lack of harmonization, employment protection regulation can be said to differ quite a lot between the EU Member States. Notwithstanding, the common background – both with

regard to history, legal culture and welfare society – is reflected in Article 30 of the CFR and its declaration that workers are protected against unjustified dismissal. The centre of concern is arbitrary dismissal, whereas the employee protection in dismissal for redundancy relies mainly upon economic compensation and/or seniority rules. The right to protection from arbitrary dismissals can ultimately be related to ‘the right to work’ in welfare society and property rights, with its ‘spill over’ effects of claims to non-discriminatory employment practices and ultimately decent working conditions (Zekic, 2017). The idea of an open-ended contract that insures a degree of job stability as the pursued goal of EU law, can also be said to be indirectly reflected by the very existence of the flexible work directives.

This view on employment is ultimately a reflection of what has been labelled the standard employment contract, developed during the main part of the twentieth century and implying a long-term trade-off in wage society. Wage work became the dominant ‘distributive’ order in early industrial society and according to the logic of the market, pay equals work. At the same time, it was obvious that the individual is not always conditioned for work, be it on the grounds of illness or due to young or old age – complementary social security systems evolved. Freedland’s understanding of the standard employment contract is thus one entailing continuous full-time employment with a single employer, with accompanying expected levels of remuneration and benefits (Freedland 2013). In their book *Rethinking Workplace Regulation* Stone and Arthurs illustrate the standard employment contract – labelled one of the pillars of the post-war economic system – in the following way: ‘For four or five decades after 1945, in most industrialized countries large numbers of workers enjoyed an array of job rights that included decent wages, protections against unfair treatment at work, social insurance provided by the state or the employer and, notably, some degree of job security...’ (Stone and Arthurs, 2013 p 2). The standard employment contract was never a one-dimensional and altogether standardised concept or pattern of employment. It took on

somewhat different legal forms in different national contexts (Freedland, 2013 p 86). Bearing in mind that ‘to speak of a standard employment contract is a way of conceptualizing a body of practice and regulation that at a certain period and in a certain set of locations produced a strong convergence on rather stable or secure worker-protective patterns of employment’ (Freedland, 2013 p 91), the concept is used here as an overall starting point in order to understand the interrelations between employment law and age discrimination regulation as interpreted by the CJEU.

The standard employment contract was intrinsically related not only to employment protection devices but also to seniority-rules and retirement practices. The influential American economist Edward Lazear launched his life-cycle theory of mandatory retirement as building on an implicit contract model inherent to the standard employment contract. Employers pay employees a wage premium towards the end of their careers on the assumption that the employment relationship came to an end at a predictable, fixed point in time (Lazear, 1979). Wage thus does not fluctuate throughout a worker’s career in response to actual productivity; it tends to rise consistently until retirement. This wage arrangement is desirable for the employer because employees are less likely to shirk in mid-career, and more likely to increase their productivity to a level above wages, so they may receive deferred compensation when they are older. It is also – at least *ex ante* – desirable for the employee receiving higher wages than deserved at a higher age. In short, according to Lazear, mandatory retirement is ‘the necessary consequence of an optimal wage scheme which makes both workers and firms better off’ (Lazear, 1979 p 1274).

The implicit contract, as described by Lazear, is dependent on employment protection devices to maintain the inherent promise of a wage premium. The promise of the implicit contract is just as reliable as the employment protection provided. Indeed, the fact that wage rates, in relation to older workers according to the standard employment contract, exceed their

marginal products is evidenced by the fact that employers many times are willing to buy out employees with higher pensions if they retire early. This also means that the implicit contract, as described, in itself implies a drift towards early retirement (Lazear, 1982)!

Throughout big parts of the Twentieth century it is this logic of the standard employment contract – with its related standard pension contract solutions (Strauss, 2013) – that has typically informed labour law in European countries. No doubt, the standard employment contract was influential also in other industrialised countries. Whereas the implicit contract was taken to its extreme in Japan in the ‘life-long employment’ system with its elaborate seniority wage-setting and internal labour market practices (Araki, 2015), it never really got to characterize US labour law, though. Instead, the dismissal-at-will doctrine has dominated legal developments (Fineman, 2013) – of great importance for discrimination law developments.

4.2.2 The flexibilisation of work

The flexibilisation of work relates to labour market segmentation and the legal tension between standard employment contracts – associated with employment protection – and precarious and ‘flexible’ employment. Basically there is broad agreement that we now live in an era of work flexibilisation. Flexibilisation has thus been pictured as a new trade-off between market flexibility needs and traditional standard employment and pension contracts. Much has been written about the flexibilisation of work, including EU developments, within the flexicurity discourse (Fudge, 2013). This is not the place to go into any detail with regard to this line of research. Assessing the extent and significance of the decline of the standard employment contract and exploring changing legal conceptions of employment contracts, Stone and Arthurs state that ‘fewer and fewer workers in the advanced economies are covered by standard employment contracts’, and continue, ‘we believe it unlikely that the standard employment contract can be revived or that the regulatory regimes once intertwined with it

can be resuscitated' (Stone and Arthurs, 2013 p 3). Employers simply 'no longer hire for life with the expectation that their workers will gain experience and receive training during the course of a lengthy tenure within the firm's internal labor market'. Fudge describes this process of 'labour law decline' as provoked by neo-classical economic labour-market policies and anti-welfare state politics in the late 1970s and continues: 'in official accounts labour law, redistribution and protection have given way to competition and flexibility. Forms of work outside of the standard employment relationship have proliferated and the scope of collective bargaining has contracted in most developed economies' (Fudge, 2011 pp 122 and 124f).

An area where a certain harmonization of labour law at EU level exists is thus flexible work, i.e. part-time, fixed-term and temporary agency work. These regulations are in themselves a reflection of European employment law standards as described above, offering a certain employment protection in 'regular' employment. There is thus a close relationship between especially fixed-term work regulation and employment protection in that the *raison d'être* of such regulation is to prevent circumvention of employment protection linked to permanent employment contracts. The more developed the employment protection regulation is, the more important a restricted use of fixed-term employment becomes.

Developments have thus led to the use of new 'flexible' contract forms such as fixed-term and part-time employment, but also 'outsourcing' and temporary agency work, typically implying less protection in terms of labour law. As far as the EU is concerned, the answer has been the development of the flexicurity strategy and secondary law regulation in the form of the Part-Time Work, Fixed-Term Work and Temporary Agency Work Directives. These directives aim to increase quality in these new forms of flexible work – mainly by introducing the non-discrimination principle (as compared to more traditional forms of work) together with a few, fairly weak legal restraints – but also works to 'normalise' them. And, they come with the EU Flexicurity Strategy, a dominant strategy within EU employment policies since the beginning

of this century. The Council has adopted Common Principles of Flexicurity, which are handled within the context of the European Employment Strategy and the Europe 2020 Strategy (Communication ‘Towards common principles of flexicurity: more and better jobs through flexibility and security’, COM(2007) 359 final). The aim of flexicurity is to reduce labour-market segmentation, but also to increase economic growth and Europe’s competitiveness in a global perspective. Flexicurity at EU level includes flexible and reliable contractual arrangements, effective, active labour-market policies, reliable and adaptable systems for lifelong learning, and modern social security systems.

Freedland and Kountouris have described flexibilisation as ‘the demutualization of personal work relations – a process of transforming the individual worker into the sole bearer of risks formerly mutualized as between workers and employing enterprises and, in a different sense, between workers themselves’ (Kountouris and Freedland, 2013) and Fudge points to a shift towards individualisation in terms of contract of employment, human rights and anti-discrimination law (Fudge, 2011 p 5).

4.3 Age discrimination and employment law as reflected in the case law of the CJEU

There is thus a special relation between anti-discrimination law and labour law and, especially so, employment protection devices. Non-discrimination law developed early in the US, where it is widely recognised that it became an important substitute for poorly developed employment protection, dominated by the dismissal-at-will doctrine (Fineman, 2013). In Europe, on the other hand, with its generally speaking more developed regulation of employment protection, non-discrimination can instead be seen as a replacement mechanism in times of weakening employment protection and flexibilisation of work. Anti-discrimination law can thus – with Fudge, compare above – be seen as an expression of the general trend towards individualisation going hand in hand with the flexibilisation of work and a parallel

deregulation of traditional employment protection. With Somek, anti-discrimination regulation can even be seen as a fore-runner of flexibilization (Somek, 2011).

Non-discrimination regulation is in itself very flexible in times of change. This regulation supplies only a relative protection in terms of equal treatment, according to the circumstances at hand, and does not really question the reference norms in working life themselves. Non-discrimination regulation does thus not imply a certain quality of treatment and, generally speaking, has no distributional functions. It is only to be expected that non-discrimination law in general has been growing in importance as the standard employment contract has had to give way for more flexible and individualised work arrangements.

Where in this context do we situate the age discrimination ban? The ban on age discrimination and employment protection intersect, as reflected in case law, in fixed-term employment contracts for older workers, seniority rules in redundancy situations and compulsory retirement practices. One reason for this, as already indicated, is that age has traditionally been influential in the organization of labour markets and labour law regulation. This, in its turn, is however also a crucial reason for the weaker template of EU age discrimination law as compared to other grounds non-discrimination regulation: implying that direct age discrimination still to a considerable extent can be justified. Article 6.1 of the Employment Equality Directive reflects this ‘double bind’ of age discrimination law (Hendrickx, 2012, Numhauser-Henning 2015 and 2017). Whereas the ban on direct age discrimination fulfils the ‘classical’ purpose of being a basis for individual claims of non-discrimination – to uphold individual dignity – the opening for justification makes room for collective interests at a more societal level – in terms of age as a traditional stratifier but also (competing) active ageing strategies of a more instrumental nature.

An important bulk of the case law of the CJEU is the many cases concerning compulsory retirement. Compulsory retirement practices are maybe what best reflect the important links

between labour law, employment protection, standard employment contracts and pension systems, referred to above. Whereas retirement age as such is outside the scope of the Employment Equality Directive (preamble 14), the termination of employment in terms of retirement is not. A compulsory retirement age can be set by legislation, collective agreements or personal employment contracts. Compulsory retirement rules may provide for the automatic termination of the employment relationship when the employee reaches a certain age (for example the pensionable age) or imply a possibility for the employer to terminate the employment relationship at a specific age. Compulsory retirement is thus an important part of the 'implicit contract' in standard employment (Lazear, 1979).

Despite the fact that compulsory retirement is far from a general norm in EU Member States (Dempsey and Beale, 2011), the substantial amount of case law from the CJEU in this area reveals that such schemes still prevail in a number of EU Member States. In many cases the CJEU has accepted compulsory retirement rules and found them justifiable.

A first case was *Palacios de la Villa*, concerning a Spanish worker forced to terminate his employment at the age of 65 in accordance with the collective agreement in place (CJEU, C-411/05). The Court found the 'interests of promoting employment' to be an aim of public interest not 'unduly prejudicing the legitimate claims of workers' as '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 ... the level of which cannot be regarded as unreasonable' (the judgment, p 73). The Court has confirmed this judgement in a number of following cases (C-388/07, C-45/09, C-141/11), referring to legitimate aims such as intergenerational fairness in terms of access to employment, prevention of humiliating forms of termination of employment, and a reasonable balance between labour market and budgetary concerns. In these cases, the CJEU has given much consideration to Member States' traditions because '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' (C-141/11, p 28). The Member States and the social partners have also been given a broad margin of appreciation. From the *Hörnfeldt* case (C-141/11) it also became clear, that compulsory retirement at a set age of about 65 years is compatible with the Employment Equality Directive's requirements, provided there is a reasonable *system* of pensions in place (C-411/05, C-45/09) regardless of the pension in casu being quite low.

The CJEU has also decided a number of cases on compulsory retirement of specific professional groups (such as C-447/09 and C-341/09). The latter case – *Commission v Hungary* – concerned reduced rights for judges, prosecutors and notaries to keep on working, lowering the age of compulsory retirement from 70 to 62 years of age. Whereas the Hungarian aim of 'standardisation' as regards compulsory retirement age was acknowledged as legitimate, the regulation was deemed not to meet the requirements to be appropriate and necessary since it did not meet the 'well-founded expectations' on behalf of the employees concerned to be able to stay on until the age of 70.

Another set of cases has concerned redundancy payments and other working conditions in lay-off situations, relating them to eligibility to pension rights (C-499/08, C-152/11, C-546/11). Whereas the CJEU in the *Andersen* case (C-499/08) regarded the denial of redundancy payment to a worker eligible for employer pension at the age of 63 neither appropriate nor necessary as it neglected the individual's wish not to opt for the pension but to continue working, in *Odar* (C-151/11) reduced redundancy payments in view of pension rights was indeed accepted. Later cases such as *Toftgaard* (C-546/11) and *Tekniq* (C-515/13) reveal an equally careful scrutiny of the consequences in the individual case, also regarding

workers 65+, in relation to denied availability pay and reduced severance allowances, respectively.

For a long time the cases hitherto referred to and other case law of the CJEU related to retirement was discussed in terms of the proportionality test applied: a 'leaner' test for compulsory retirement systems in general and a stricter one in relation to specific occupational groups, retirement reforms and redundancy conditions related to pre-pension rights (Schlachter, 2011, Kilpatrick, 2011, Dewhurst, 2013). Recent case law developments point to a more nuanced test than discussed so far (C-515/13, C-546/11). Now, we have to conclude that in regard to working conditions such as redundancy and availability pay, the CJEU also applies a stricter proportionality test in relation to workers 65 years or older – or beyond the applicable default retirement age – and scrutinizes the effects for the individual employee (though occasionally accepting differential treatment of workers with reference to the right to a state pension when these effects are limited).

The CJEU's acceptance of rules on compulsory retirement harmonizes poorly with the promotion of active ageing and efforts to prolong working lives for older workers. It also contrasts with economic research on the 'lump of labour fallacy' (Dewhurst, 2013). However, the abolishment of compulsory retirement practices requires alternative ways of ending the employment relationship, such as voluntary retirement (encouraged with financial incentives) or performance management (followed by a possible dismissal on grounds of lack of performance). This entails a risk of weakening employment protection before actual retirement age (Numhauser-Henning 2015). The continued acceptance of compulsory retirement can thus be seen as a defence of the standard employment contract and traditional European employment protection. Upholding the ban would weaken employment protection further since it would lead to an increased emphasis on 'capability' as an employment

requirement, and the undermining not only of active ageing strategies but also employment protection well before retirement age.

Accepting compulsory retirement (in defence of the standard employment contract), can be said to challenge the 'general' flexibilization functions of non-discrimination law. There are thus good reasons to believe that to instead uphold the ban on age discrimination in these cases would increase flexible employment in higher ages. The dismissal of an elderly worker from a permanent employment can be expected to be a difficult process making a fixed-term contract even more attractive. However, also the acceptance of compulsory retirement paradoxically seems to purport fixed-term employment: a rule on compulsory retirement does not necessarily mean definite withdrawal from the labour market. Working life can continue, and now often in the form of fixed-term employment (compare C-250/09). It is worth noticing that otherwise restricted use of fixed-term employment is often more generous beyond 'normal' pensionable age, that is following compulsory retirement, a practice which in itself needs to be justified in accordance with article 6.1 in the Employment Equality Directive (and also the Fixed-term Work Directive!).

Seniority principles – relating to age and length of service – have traditionally been influential in European labour law and remain so in many EU Member States when it comes to wage-setting and working conditions, such as periods of notice, length of annual leave, severance pay and specific bonuses. A reference to age and length of service in this context gives rise to directly or indirectly age-related differential treatment and thus needs to be justified in terms of Article 6.1 in the Employment Equality Directive. Legitimate aims put forward in this context include the value of experience on the job and rewarding loyalty as well as the need for extra protection of older workers. Finally, a few words about age-related wage-setting. Seniority wage-setting is thus seen as a constituent of the standard employment contract. At the same time, seniority wage-setting practices tend to work to the detriment of active ageing:

they become very expensive when employees grow older. Still, these practices are common and the question is to what extent they – as compulsory retirement – are still found to be compatible with a ban on age discrimination. It is already evident from the CJEU’s case law in sex-discrimination cases that experience in terms of length of service – and thus with an indirect connection to age – is a justified criterion as far as wage-setting is concerned, without the employer having to establish the bearing this experience has on the performance of specific tasks entrusted to the employee at stake (C-109/88 and C-17/05). This does not mean that a more ‘automatic’ age-related wage-setting system is acceptable though, as demonstrated by the *Hennigs* case (C-297 and 298/10). A collective agreement, providing that the basic pay determined on appointment of the employee was based directly on the employee’s age, was found impermissible under Article 6.1 of the Employment Equality Directive, whereas there was a broad scope for the social partners providing a transitional way out of these practices also in somewhat discriminatory terms (Numhauser-Henning and Rönmar, 2016).

4.4 Managerial ageism

Case law before the CJEU has thus in the main dealt with Article 6.1 and how to balance the ban on age discrimination with the scope for justification of differential treatment on the grounds of age in view of ‘the double bind’. As issues of proof are for domestic courts to settle, these cases have dealt with the acceptance or rejection of directly age-related norms.

When it comes to ‘ageism’ at the individual employer level, alleged claims of discrimination are mainly handled by national courts and/or supervisory bodies – or not at all!

Stereotyping is a central concern when we are talking about employer ageism as played out in managerial decisions. Stereotypes have been described as beliefs about groups of people

which are then attributed to all individual members of the group in question. Like ageism itself, stereotypes may be positive, negative or ambivalent in content and they have been suggested to come in four forms: role-typing, false, statistical and prescriptive stereotypes (Timmer 2016). Role-typing stereotypes may be about the role of elderly employees in a work organisation as compared to younger ones. False stereotypes are also about the typical role or behaviour of an older worker, whereas statistical stereotypes reflect a statistical truth about a group as a whole but is not necessarily true at individual level. Prescriptive stereotypes expects a certain behaviour/characteristic of certain people – older workers are not interested/trained in new technologies, and so on. No doubt, many stereotypes can be classified under multiple forms simultaneously.

Whereas ageist behaviour is well known to exist in working life, there are relatively few cases brought to court. Empirical studies of employer behaviour and or attitudes at workplace level thus frequently reveal ageist practices (Glover and Branine, 2001, Munnell, Sass and Soto, 2006). Country reports on age discrimination do give examples of cases of age discrimination brought to domestic courts (Numhauser-Henning and Rönmar 2015, see also Dewhurst, 2016). A Swedish example is the 62-year-old woman – applying for a job as a job-coach with the Swedish Employment Office – who was not even called for an interview, nor employed, despite being better qualified than other male and younger female applicants (Swedish labour Court case AD 2010:91). The Swedish Labour Court found that she had been discriminated against both on the grounds of sex and age not being called for an interview and on the grounds of age not being employed. There are good reasons to believe that many people 70+ are simply being neglected when applying for a job! In the UK – after the abolishment of compulsory retirement in 2011 – quite many cases can be expected to surface as questioned individual applications of ‘Employer Justified Retirement Ages’, a ‘loophole’ in the new regulations (Barnard and Deakin, 2015, Dewhurst, 2016). The same is true for the

‘performance management’ regarding dismissal practices in relation to older workers following this abolition (Barnard and Deakin, 2015).

Still, it is fair to say that case law in this area is still rather scarce. One reason for this is the typical design of non-discrimination legislation as complaints-led individual claims in the liberal tradition. In a world where the ‘wrongness’ of precisely differential treatment on the grounds of age is still disputed as compared to other grounds – much in the wake of its weaker format and age as a traditional stratifier – the hurdles to climb for an individual claiming age discrimination are higher than regarding other grounds of discrimination and the difficulties to prove discrimination are as harsh as ever. Add to this the ‘elitist’ design of non-discrimination bans in general. The right to equal treatment does not imply the right to a certain quality of treatment as such – the normal ‘reference norms’ in working life apply and these are known to be basically meritocratic in character. Therefore, the non-hiring of an older applicant may well be defended by arguments about the more ‘up-to-date’ education of a younger candidate, while a dismissal may be defended by arguments about the older worker’s ability to work and availability in terms of working time. Some of these problems could possibly be avoided by requiring ‘proactive’ measures (compare reasonable accommodation) in relation to age as well, but such a development has basically yet to be seen. ‘Senior Performance Management’ is however a developing topic within labour law (Ilmarinen, 2001).

4.5 Concluding remarks

Ageism per se – according to its definition – may work both to the detriment and the advantage of old people. This is thus also true with regard to the application of the EU ban on age discrimination as it is portrayed in the case law of the CJEU. And, it is not entirely easy to

decide once and for all which interpretation of the rules of the Employment Equality Directive, and especially so Article 6.1 therein, is to the benefit and which is to the detriment of the ageing workers. It simply depends on the circumstances.

Age discrimination regulation may well be considered an anti-ageist measure. On the other hand, it has been argued – just as well as in relation to elder law as such – that the conception of ageing as a profound social challenge as the bottom line of the discrimination ban, is per se ageist. The ‘neutral’ design of the EU ban on age discrimination – covering all ages – is of course an argument against this perception. On the other hand, the weak format of the age discrimination ban provides plenty of room for precisely – at least formally – ageist applications.

The ban against age discrimination is in principle designed to counteract ageism at the individual level, as the general rationale of such bans is ‘overcoming disadvantages related to ascribed otherness’ covering the right to individuation (or to enable persons to choose beyond stereotypes imposed on them) and the aim to preserve diversity (Schiek, 2015). Taking compulsory retirement as the example, at individual level, older workers typically push for legislation to make these practices illegal. The elimination of compulsory retirement – which in itself implies immediate cessation of employment – would promote not only active ageing in terms of work beyond retirement age, but also employment protection in casu for the ageing individual.

Still, compulsory retirement practices are thus allowed under Article 6.1 of the Employment Equality Directive. The opposite would be to the detriment of the younger generations in the sense that older workers thus do not abstain from their developed employment protection and other ‘senior’ working conditions which by tradition is part of the implicit contract within standard employment. And, older workers themselves have typically benefitted from this implicit contract throughout their working lives in the form of wage premiums and

employment protection devices. Not to allow compulsory retirement would thus also imply a threat of weakening employment protection at earlier ages as well as humiliating dismissals as the 'norm' and also further the flexibilization and thus precariousness of working life – and even pensions – especially for ageing workers. Older workers may be better off upholding decent, although collective, retirement orders than striving on their own to maintain a reasonable standard in their old age

However, many ageing workers have not historically followed the normative employment pattern inherent in the standard employment contract and life course on which the prevalent notion of intergenerational solidarity is based; therefore, policy rules that seek to uphold that solidarity tend to disadvantage these workers in ways that are not only unfair but also inherently systematic. For example, age or service-related requirements or cut-offs typically fail to account for the fact that disabled workers or women will likely have work histories that do not reflect the norm, as they are more prone to have career interruptions or atypical jobs – by reason of either their disability in the first case or their engagement in provision of unpaid care work within the home. Such workers may be unable to accrue pension entitlements that are equal to those of other workers, or even sufficient to live on, or be entitled to wage increments or other employment-related benefits that are tied to seniority and years of service. For these workers, to permit compulsory retirement, may seem utterly unfair.

Worth contemplating is also the experience of countries that have already eliminated compulsory retirement: there is a continued need of age distinctions in employee benefits (also indicated by the very exception in Article 6.2 of the Employment Equality Directive). For instance, Canadian legislation and case law recognize 'the principle that even in the absence of compulsory retirement employers, employees and government policymakers cannot simply disregard the inevitable consequences of ageing when establishing employment benefits' such as long-term disability plans, and 'the need to balance the competing interests

that bargaining unit members have at different times in their lives is an inherent part of the collective bargaining process. Moreover, younger employees generally want higher wages, while older employees may prefer such benefits as life insurance, pensions or retirement allowances' (Charney and Horner, 2013).

The immediate conclusion is that there does not seem to be a one solution that fits all. To uphold the ban on age discrimination in terms of dignity and respect at the individual level may well answer to a quest for formal 'anti-ageism'. In practice it is more complicated – true well-being for the ageing individual may well also imply certain clearly more paternalistic solutions articulated at the collective interest side of the double bind in age discrimination regulation. Differential treatment on the grounds of age cannot be fought successfully only at individual level and in terms of dignity if we want to come to terms with substantive inequalities in today's societies.

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ⁱ Ageism is there defined as covering 'negative or positive stereotypes, prejudices and/or discrimination against (or to the advantage of) elderly people on the basis of their chronological age or on the basis of a perception of them as being "old" or "elderly". Ageism can be implicit or explicit and can be expressed on a micro-, meso- or macro-level.'

ⁱⁱ The US Age Discrimination in Employment Act (ADEA) of 1967 – modelled on title VII of the 1964 Civil Rights Act – contains an asymmetric ban that protect only older persons, now 40+.