Age Discrimination in European Employment Law: Problems and Potential Reforms

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Introduction

Irish employment equality law is driven by European Union policy. However, the law on age discrimination in employment is currently in a deeply worrying state. In this essay, I will make two arguments in relation to the case law of the Court of Justice of the European Union on the lawfulness of mandatory retirement ages. First, I will argue that the case law of the Court is, in the main, inconsistent insofar as it is overly deferential and incoherent. Second, I will contest the Court’s assessment of the two key objective justifications confirmed by the Court, namely intergenerational justice and human dignity. I will argue that while both of these are legitimate, the Court’s consideration of them causes injustice for older workers, and I attempt to provide an alternative account. In Parts I and II, I provide a brief background and a descriptive account of the most significant case law to date. In Part III, I detail the arguments I have outlined here, before making some concluding observations.

I. Background: The Framework Directive

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is one of the key pieces of legislation setting down the principles for European employment equality law. Before considering the key provisions of the Framework Directive in relation to age discrimination, it is helpful to consider the context in which it came into being. The drafting of the Framework Directive coincided with the European Commission’s review of the European employment market in 2000 which indicated that policies to promote the inclusion of women and older workers into the labour force were ‘urgently required’ and that ‘considerable employment potential [could] be gained in the Union from increasing the

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employment potential of older workers of 55 and over’. The first proposals for the Framework Directive further indicated that the rationale for its introduction was to ensure that ‘as high a percentage as possible of people of working age are in jobs’. Thus, Elaine Dewhurst concludes, ‘the justification for a European wide measure in relation to age discrimination appeared to stem from economic and social foundations relating to the need to combat unemployment and exclusion in the European workforce’.

According to the recitals of the Framework Directive, employment and occupation are ‘key elements in guaranteeing equal opportunities for all and contribute strongly to [citizens] realising their full potential’ and therefore every form of discrimination should be tackled, in particular so as to encourage the social and economic integration of elderly and disabled people. However, the Directive is without prejudice to national provisions laying down certain retirement ages. Article 2 prohibits direct and indirect discrimination generally, although indirect discrimination can be excused where the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Article 6 derogates from Article 2, providing that differences of treatment on grounds of age shall not be discriminatory if they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

II. The Case Law of the CJEU on Mandatory Retirement Ages

The CJEU has adopted a four-stage analysis in respect of age discrimination: first, the Court considers whether the measure establishes a difference in treatment based on age; second, the Court assesses whether there has been a difference in treatment; third, the Court considers whether the measure is objectively and reasonably justified by a legitimate aim; and fourth, the Court evaluates whether the means of achieving that aim are appropriate and necessary. In the landmark case of Case C-411/05 Palacios de la Villa, the CJEU confirmed that the purpose of the Framework Directive was to implement the principle of equal treatment. The Court held that the lack of precision in

3 ibid 47.
7 Framework Directive, recitals 6, 8.
national legislation as regards the aim pursued could not be taken to mean that
the provision lacked justification: the national measure would need to be
contextualised.\textsuperscript{10} The Court confirmed that Member States and social partners
‘enjoy broad discretion in their choice, not only to pursue a particular aim in the
field of social and employment policy, but also in the definition of measures
capable of achieving it’.\textsuperscript{11} The Court confirmed that while the Directive is to be
without prejudice to national provisions laying down retirement ages, the
recitals do ‘not in any way preclude the application of [the] directive to national
measures governing the conditions for termination of employment contracts
where the retirement age, thus established, has been reached’.\textsuperscript{12} The Court held
that the national measure at issue, which provided that collective agreements
may stipulate a retirement age (in this case 65), could be justified because it had
been introduced specifically to create opportunities in the labour market for
persons seeking employment. As the Court observed, the ‘legitimacy of such an
aim of public interest cannot reasonably be called into question’.\textsuperscript{13} The Court
noted further that the measure took into account the fact that persons who are
due to retire will be entitled to financial compensation by way of a retirement
pension.\textsuperscript{14} The retirement age was therefore objectively justified by a legitimate
aim and the means were appropriate and necessary. In Case C-388/07 Age
Concern England, the Court considered the Employment Equality (Age)
Regulations 2006 in the United Kingdom which provided that dismissing a
person over 65 years of age was not unlawful if the reason for dismissal is
retirement.\textsuperscript{15} The regulations also provided that the dismissal of a person under
65 would be regarded as discriminatory unless the employer could show that the
dismissal was ‘a proportionate means of achieving a legitimate aim’. The Court
confirmed that while Member States enjoy broad discretion in choosing the
means capable of achieving their social policy objectives,

Mere generalisations concerning the capacity of a specific measure to
contribute to employment policy, labour market or vocational training
objectives are not enough to show that the aim of that measure is capable
of justifying derogation from that principle and do not constitute
evidence on the basis of which it could reasonably be considered that the
means chosen are suitable for achieving that aim.\textsuperscript{16}

\textsuperscript{10} [2007] ECR I-8531 paras 56-57.
\textsuperscript{11} [2007] ECR I-8531 para 68.
\textsuperscript{12} [2007] ECR I-8531 para 44.
\textsuperscript{13} [2007] ECR I-8531 para 64.
\textsuperscript{14} [2007] ECR I-8531 para 73.
\textsuperscript{15} [2009] ECR I-1569.
The Court thus distinguished potential legitimate aims - social policy objectives, such as those relating to employment policy, the labour market or vocational training - from ‘individual reasons particular to the employer’s situation’, such as cost reduction or improving competitiveness. The final assessment was for the national court to make. Significantly, the Court suggested that the use of the phrase ‘objective and reasonable’ in Article 6(1) of the Directive, which can be contrasted with the reference in Article 2(2)(b) solely to ‘objective’ justification, was of no significance and did not require a higher standard of justification.

Case C-341/08 Petersen concerned a retirement age of 68 for panel dentists. The justification offered by the referring court under Article 6(1) was the distribution of employment opportunities among the generations. The Court accepted the validity of this justification, provided that there was a situation in which there was an excessive number of panel dentists or a latent risk that such a situation will occur. In Case C-45/09 Rosenbladt, a collective agreement for employees in the commercial cleaning sector which provided for automatic termination when employees became entitled to a retirement pension when they reached 65 years was at issue. The Court noted that the retirement age was a ‘reflection of a political and social consensus which has endured for many years’, such consensus being found on the ‘notion of sharing employment between the generations’. Automatic termination of older workers’ contracts was beneficial because it did not require employers to dismiss employees on the ground that they are no longer capable of working, ‘which may be humiliating for those who have reached an advanced age’. The Court held that the fact that the retirement scheme had been reached by agreement, either by individual employers and employees or by collective agreement, provided significant flexibility in the context of an ever-changing labour market. The Court took into account the fact that the sector in question involved low-paid work where the statutory old-age pension would be insufficient to meet workers’ needs on retirement, and thus the measure must be ‘viewed against its legislative background and account must be taken both of the hardship it may cause to the persons concerned and of the benefits derived from it by society in general and the individuals who make up society’. However, on balance, the fact that the

workers could seek employment after retirement meant that the measure was appropriate and necessary in the circumstances. Finally, Case C-268/09 Georgiev concerned a retirement scheme in a university which allowed university lecturers to work until they reached the age of 68 on fixed term contracts after the standard retirement age of 65. The Court accepted the submissions of the Bulgarian Government, the University and the Slovak and German Governments, to the effect that the ‘training and employment of teaching staff (...) may be consonant with the intention of allocating the posts for professors in the best possible way between the generations, in particular by appointing young professors’, were capable of justifying the retirement policy.

III. Analysis and Critical Reflection

A. Consistency and Coherence: General Observations

There are numerous ways in which the case law of the CJEU is inconsistent and incoherent. First, Dewhurst suggests that the four-step nature of the Court’s approach means that the case law is relatively predictable. Dewhurst is certainly correct with regards to the first three steps in the Court’s approach as the analysis of those issues tends to remain constant. However, there is a considerable amount uncertainty in respect of the third step due to the incredible vague and highly generalised nature of the Court’s approach. The CJEU has accorded such a significant degree of deference to national authorities that there is no need for the national measure in question to make any express reference to the legitimate aim it pursues. This deferential attitude is illustrated in Palacios de la Villa where the CJEU accepted that the legitimate justification of intergenerational fairness evinced by the national measure ‘cannot reasonably be called into question’. Furthermore, while the Court in Age Concern England urged that ‘mere generalisations’ are insufficient to justify a particular measure, the Court seemed more than willing to infer or even impute a legitimate aim from domestic measures. As Dewhurst observes, this inconsistency contributes to the fact that the approach taken in relation to mandatory retirement cases and age discrimination in general is out of line with the Court’s jurisprudence in other areas of equality law. To illustrate this point, Dewhurst notes that while 45% of claimants are usually successful in establishing that a measure is disproportionate, at the time of writing in 2013, 0% of claimants had been

27 ECLI:EU:C:2009:549.
28 ECLI:EU:C:2009:549 para 45.
30 ibid 533.
successful in relation to retirement measures.\textsuperscript{31} Dagmar Schiek thus concludes that the ban on age discrimination is ‘conceptually weaker’ than other prohibitions on discrimination\textsuperscript{32} and, indeed, this is evident from the differential treatment of age in the Framework Directive itself. Therefore, through the significant degree of deference given to national authorities, the CJEU essentially washes its hands of age discrimination in employment notwithstanding its seriousness and pervasiveness in European societies.

Second, the Court has not engaged in the balancing of competing interests it suggests is necessary. For example, in relation to the cases where a retirement age was set by collective agreement - \textit{Palacios de la Villa} and \textit{Rosenbladt} in particular - the Court failed to adequately balance the rights at stake, viz the right to bargain, the right not to be discriminated against,\textsuperscript{33} or the right to earn a livelihood.\textsuperscript{34} The Court has therefore not been faithful to its own standards, which gives rise to internal inconsistency and confusion. Third, and perhaps most significantly, the Court has departed from the text of the Framework Directive, or failed to take it seriously. As noted above, in \textit{Age Concern England} the Court considered that the different wording used in Articles 2 and Article 6 was not intended to create a difference in the standards applied. However, with respect, the question must be asked, what else could the difference have meant? On a teleological interpretation of the Framework Directive, the Court ought to have found that because direct age discrimination was permissible, such discrimination requires a higher standard of justification. Furthermore, as will be demonstrated below, the CJEU has failed to truly consider whether the means chosen to fulfil the legitimate aim, i.e. the fourth step, are really ‘appropriate and necessary’. This again illustrates the high degree of deference the Court has given to national authorities because the Court has failed to interrogate the legitimate justifications offered. It is therefore submitted that while the case law itself appears internally consistent, the approach of the Court throughout a stream of cases creates doctrinal incoherence and comparative inconsistency in European equality law. In the analysis that follows, further incoherence and inconsistencies will be illustrated.

\textsuperscript{31} \textit{ibid} 534.
\textsuperscript{32} Dagmar Schiek, ‘Age Discrimination before the Court of Justice - Conceptual and Theoretical Issues’ (2011) 48(3) CMLR 777, 796.
\textsuperscript{33} Monika Schlachter, ‘Mandatory Retirement and Age Discrimination under EU Law’ (2011) 27(3) IJCCILR 287, 297.
\textsuperscript{34} Charter of Fundamental Rights of the European Union, art 15(1): see Case C-356/09 \textit{Kleist} [2010] I-11939 para 51 (AG Kokott).
B. Intergenerational Fairness

One of the key objective justifications accepted by the CJEU in its case law on mandatory retirement is the idea that to secure ‘intergenerational justice’ - the fair spread of work between the generations - older workers should give up their jobs so that young people can access the labour market. There are numerous problems with this measure. First, the idea that young workers will replace old workers in the labour market involves a fallacious assumption known as the ‘lump of labour’ fallacy which assumes that the labour market is static. However, it is obvious even to the uninitiated that the labour market is not static but is rather dynamic and thus in a constant state of flux. Some commentators suggest that while this argument is viable on a macro level, it is inapplicable on an individual or sector level. Thus Simonetta Manfredi and Lucy Vickers suggest that the intergenerational justice argument may be justified in certain sectors, such as higher education. However, even this assumes, as they concede, that workers have had a ‘fair innings’ and thus a long career, an assumption that is based on male-oriented stereotypes which are generally not applicable to women and workers from poorer socio-economic backgrounds. Indeed, as Manfredi suggests, many workers in the ‘secondary labour market’ in jobs which are generally unskilled and ill-paid have not had the opportunity of a ‘fair innings’ and need to continue working. Second, the assumption that younger workers will neatly fill in the gap left by retired older workers has been described as a ‘spatial mismatch’ between the jobs left and the jobs available which actually involves shifting ‘unemployment from one group to another’. Thus, even if we were to ignore the labour lump fallacy and justify mandatory retirement on the basis of the sectoral industrial considerations raised by

37 ibid 303-304.
Manfredi and Vickers above, in practice mandatory retirement would not actually help younger workers access jobs and this has been borne out in empirical studies which show that as the number of elderly people participating in the workforce rose, so to did youth worker participation.\textsuperscript{41} To this extent, the notion that mandatory retirement constituted a measure which was ‘appropriate and necessary’ to achieve intergenerational fairness in \textit{Palacios de la Villa, Age Concern England}, and \textit{Rosenbladt} is deeply suspect and creates unnecessary injustice for older workers. However, it is conceded that the results in \textit{Petersen} and \textit{Georgiev} may be acceptable, although not absolutely necessary, given the degree of saturation in the sectoral labour markets in question in those cases.

As noted above, many older people need to continue working because they are simply unable to retire for economic reasons. While in \textit{Palacios de la Villa}, the Court accepted that the measure was justified on the basis that the applicant would receive a statutory pension on retirement, it seems clear from \textit{Rosenbladt} that the cleaning industry is one where many workers are likely to need to keep working because they do not have a pension pot, something the Court specifically took account of, and research shows that older people face ‘a higher risk of poverty than the general population, reaching a rate of around 19\% of those aged 65 years and over in 2008 in the EU-27’, with women being at a higher risk of poverty than men.\textsuperscript{42} Mandatory retirement perpetuates socio-economic injustice insofar as it requires older workers to stop working, and the notion that retired employees could simply regain their old job, or seek new employment is, with respect, weak. Empirical research conducted in the Netherlands showed that employers were less likely to rehire retired employees unless they took a significant pay cut,\textsuperscript{43} and, as Monica Schlachter notes, ‘referring pensioners to the States’ welfare assistance system is not a viable option as this leaves older persons in a condition of dependency even though they are willing and able to work’.\textsuperscript{44} It is therefore respectfully submitted that the CJEU was wrong to accept that mandatory retirement was an appropriate and necessary measure in \textit{Rosenbladt}.

In light of the above analysis, it is appropriate to consider whether abolishing mandatory retirement altogether may be more beneficial. As Schiek observes, age has traditionally been used as a stratifier in economic and social


\textsuperscript{44} Schlachter (n 33) 296.
policy but given the increased demand for flexibility in the labour market, this is no longer appropriate.\textsuperscript{45} She suggests that age-related distinctions are important in the short term, but in the long term will need to be abandoned.\textsuperscript{46} While some age-related distinctions may need to be maintained in the short term, it is submitted that mandatory retirement should not be retained. In addition to the data presented above illustrating the lump of labour fallacy, it is possible to demonstrate how we might move beyond mandatory retirement towards a model that is far more economically flexible and coherent. Generally, workers salaries are initially less than their marginal productivity and increase over time more than their marginal productivity,\textsuperscript{47} and mandatory retirement served as a way of terminating this benefit to older workers. Clearly, bringing an end to such an irrational measure would be fairer to younger and older workers overall. This would probably mean greater performance management for all workers, a prediction that is borne out in research which suggests that it is not only older workers who are subject to greater scrutiny after the abolition of mandatory retirement.\textsuperscript{48} Manfredi and Vickers note that, in the context of the higher education sector, under-performance by older workers had simply been tolerated in the past.\textsuperscript{49} While this might appear controversial, there is significant research to suggest that performance or ability does not decrease at any particular fixed age, but rather on an individual, case-by case basis\textsuperscript{50} and some research suggests that older workers produce higher quality work in lower quantities than younger workers.\textsuperscript{51} It is therefore submitted that the CJEU should interrogate with greater rigour the means used to achieve the objective justification of intergenerational fairness and recognise the potential merit of alternatives to mandatory retirement which are consistent with the economic foundations of the Framework Directive.

\textsuperscript{45} Schiek (n 32) 783.
\textsuperscript{46} ibid 783-784.
\textsuperscript{48} Manfredi and Vickers (n 36).
\textsuperscript{49} ibid 297.
C. Human Dignity and Equality

As Pnina Alon-Shenker rightly observed, ‘since all human beings are of equal moral worth, each individual should be treated with equal concern and respect’ and thus recognising the equal dignity and worth of human beings must be our starting point in analysing the Court’s consideration of human dignity. In Rosenbladt, the CJEU referred to the potential humiliation of having to fire a worker who is no longer capable of doing their job. The Court has also suggested throughout its case law on mandatory retirement ages that collective agreements suffice to secure the interests of all parties, and individuals can opt out if not. These suggestions are both problematic. In respect of Rosenbladt, I have illustrated above that more robust performance management in the absence of mandatory retirement does not necessarily focus on older employees alone, and serves to create a more competitive workplace. Moreover, research suggests that mandatory retirement can lead to a decreased satisfaction with life. Although dignity is inherent to all men and women, ‘a subjective sense of self-worth is an empirical psychological and emotional state that has enormous implications for the quality of life [a]nd a person’s subjective sense of self as someone of worth is crucially tied to how she is treated by others’. Thus mandatory retirement can cause a loss of dignity. Collective agreements and the ability to opt out of same also fail to sufficiently secure a worker’s dignity. To take an extreme example, if a collective agreement provided that slave contracts could be made by employers, or that other fundamental rights could be significantly encroached, we would not tolerate such gross infringements on the dignity of workers. Furthermore, the suggestion that employees could simply ‘opt out’ of collective agreements misunderstands the imbalance of power in employer-employee contractual negotiation and the unlikeness of workers being able to negotiate a contract of employment beyond conventional retirement ages. Once again, the reasoning of the CJEU is flawed in attempting to protect the dignity of older workers, creating further unnecessary injustice.

Alon-Shenker provides an alternative approach in the Canadian context. Canadian federal law prohibits mandatory retirement, except where there is a bona fide occupational requirement, requiring an employer to establish that (a) the age requirement was adopted for a purpose rationally connected to the performance of the job, (b) in good faith that it was necessary to the fulfilment of that legitimate work-related purpose, and (c) it is reasonably necessary for

the accomplishment of that legitimate work-related purpose. Alon-Shenker would revise this test, incorporating a step requiring an employer to show that ‘no other less intrusive ways are available to achieve the legitimate purpose’, thus requiring a higher standard of scrutiny. The similarities between the Canadian and European tests are quite clear. It is submitted that Alon-Shenker’s test should be adopted by the CJEU so as to engage in a more rigorous analysis of the appropriateness and necessity of mandatory retirement. How can we justify this shift in approach? As a preliminary point, it might be suggested that this is not a significant shift from the current approach, given the similarity of the tests. If anything, it would require the CJEU to apply the test it already purports to with greater rigour. Aside from this point, as noted in Part I, while the justifications for the Framework Directive do appear to be primarily economic, reference is also made to Article 6 TEU, the principle of equal treatment, the right of all persons to equality before the law and protection against discrimination, and the importance of combatting every form of discrimination under the Community Charter of the Fundamental Social Rights of Workers. Indeed, in Palacios de la Villa the CJEU held that the purpose of the Framework Directive was to implement the principle of equal treatment. This reform would not therefore necessarily require the abolition of mandatory retirement, but would require far greater scrutiny of restrictive measures to be provided by the CJEU, something that is evidently lacking in its current case law.

Concluding Observations

The case law of the CJEU on the legality of mandatory retirement ages is demonstrably inconsistent and generally unjust. I have illustrated some of the inconsistencies and criticisms levelled against the Court’s position, which are, in the main, made out. This essay suggests that the legitimate justifications of intergenerational justice and human dignity have not been sufficiently interrogated by the Court, requiring further consideration, and the Court has given far too much discretion to national courts in this respect. I suggested that mandatory retirement can only be justified in exceptional circumstances, such as those in Petersen and Georgiev, and even then, it may not be a measure that is actually necessary to achieve the aims pursued. I have suggested two alternative approaches: first, the general abolition of mandatory retirement; and second, a more robust analysis on behalf of the CJEU in applying the test that it already purports to.

55 Canadian Human Rights Act, RSC 1985 c H-6, as amended by Keeping Canada’s Economy and Jobs Growing Act, SC 2011, c 24 discussed by Alon-Shenker (n 52) 29.
56 ibid 50.
57 Framework Directive, recitals 1, 2, 4, 6.