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Distinguishing between justifiable treatment and prohibited discrimination in respect of age

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***398** The Framework Directive

The EU Directive establishing a general framework for equal treatment in employment and occupation is concerned with tackling discrimination on the grounds of age, disability, religion or belief and sexual orientation.¹ It is confined to the field of employment² but nevertheless, when adopted in 2000, it marked a significant step forward in widening the scope of EU equality law. Member States were required to transpose the Directive into national law within three years. There was the possibility for states to extend the implementation period for a further three years, making six in all, in respect of age and disability in order to "take account of particular conditions".³ Among those who took advantage of the extra time-limit in respect of age was the United Kingdom.⁴

The purpose of the Directive is set out in art.1 as laying down a general framework for combating discrimination and putting into effect the principle of equal treatment. The principle of equal treatment means, according to art.2, that there should be no direct or indirect discrimination on the grounds of age. There are, however, opportunities to justify age discrimination. Recital 25 of the Directive's Preamble states that:

"The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, 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."

Articles **4** and 6 specify the exceptions to the principle of equal treatment as they apply to age. Article **4.1** states that Member States may provide that a difference ***399** of treatment which is based on a characteristic related to age shall not

constitute discrimination where such a characteristic "constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate". An exception for an occupational requirement such as this is quite common in equality law, but art.6 then takes this further. It actually provides for specific exceptions to the principle of equal treatment. First, it again states that differences of treatment on grounds of age shall not constitute discrimination under certain circumstances. They must be "objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives". In addition the means of achieving the aim must be "appropriate and necessary". It is not clear what "legitimate employment policy" means, but the result is that the ultimate boundaries of age discrimination legislation are effectively left to the courts. Age discrimination is the only ground of discrimination in the Framework Directive that receives this special attention of having its own specified lists of areas where discrimination is to be justified.⁵

The Directive, in its Preamble, reveals a dual justification for taking action on age. It begins in Recital 1 of the Preamble with a general justification that:

"The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

It then also cites (in Recital 6) the Community Charter of the Fundamental Social Rights of Workers, which recognises the importance of combating every form of discrimination, including "the need to take appropriate action for the social and economic integration of elderly and disabled people". After this, however, further justification seems to be linked to the need to increase the employment rate of older people.⁶ Thus, on the one hand, there is a human rights approach to justification and, on the other hand, an economic one linked to protecting the position of older people in the workforce.⁷ Of course this dual approach can merely *400 be a cumulative approach to the protection of older workers and others in the workforce, but there is a potential dilemma when they clash. When one has an economic justification, rather than a principled human rights stand for a measure, then it is perhaps more probable that one can have an economic justification for exceptions such as those contained in art.6. Thus when the principle of non-discrimination on the grounds of age produces unwanted economic effects, e.g. an employer's ability to create an age diverse workforce in order to assist in long-term succession planning, then it is more possible to justify having "economic" exceptions.

This somewhat diffident approach to age did manifest itself in the debate that took place at the European Court of Justice about whether the principle of non-discrimination in respect to age could amount to a fundamental principle of Community law. This was held to be the situation in *Mangold v Helm*,⁸ which was one of the first age cases to be considered by the court. The CJEU considered a situation where German law allowed for the employer to conclude, without restriction, fixed-term contracts of employment with employees over the age of 52 years.⁹ There were issues connected to the Fixed-Term Workers Directive, but also with regard to the age aspects of the Framework Directive on Equal Treatment. The purpose of the German legislation, according to the national government, was to encourage the vocational integration of unemployed workers. The court agreed that such a purpose could be "objectively and reasonably" justified. The question then was whether this legitimate objective was "appropriate and necessary". The problem was that the national legislation applied to all people over the age of 52 years and not just to those who were unemployed. The court concluded that "observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued".¹⁰ Thus it was on the grounds of proportionality that the court held the measure to be not in accord

with Community law. Taking away the employment protection rights from all older workers was not appropriate and necessary when introducing a measure to help unemployed older workers.

The court also held that the principle of non-discrimination on grounds of age was to be regarded as a general principle of Community law.¹¹ The court relied upon the third and fourth Recitals in the Preamble to the Directive to show that the principle derived from various international instruments and in the constitutional traditions of the Member States of the EU. Recital 3 concerns the aim of eliminating inequalities between men and women and Recital 4 refers to the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and other international agreements on this subject. This statement resulted in some controversy, especially among the Advocates General. In Lindorfer¹² A.G. Sharpston critically referred to the Mangold decision as "identifying a hitherto unacknowledged fundamental principle of Community *401 law"¹³ and said that this had caused concern in academic circles. She contrasted the situation with that of sex discrimination and stated:

"Moreover, in law and in society in general, equality of treatment irrespective of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential."¹⁴

In Bartsch,¹⁵ A.G. Sharpston continued the debate and considered the critical views of a colleague in Palacios:

"In Palacios de la Villa AG Mazák offered an extended criticism of Mangold. He stated that a general principle of equality potentially implies a prohibition of discrimination on any grounds deemed unacceptable; however, it is quite a different matter to infer from the general principle of equality the existence of a prohibition of discrimination on a specific ground."

Despite the debate among the Advocates General, A.G. Sharpston pointed out that the court had delivered judgments in a number of cases without reviewing or even mentioning the views of its Advocates General. This was the situation until the case of Küçükdeveci,¹⁶ when the court repeated the assertion that age was such a fundamental principle. It referred to the Mangold judgment and again "acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law".¹⁷ It also referred to art.6(1) of the TFEU¹⁸ which provided that the Charter of Fundamental Rights is to have the same legal value as the Treaties and that art.21(1) of the Charter provided for the prohibition of age discrimination. Directive 2000/78 gives expression to, but does not lay down, the principle of equal treatment and states that "the principle of non-discrimination on grounds of age is a general principle of European law in that it constitutes a specific application of the general principle of equal treatment".

The ultimate boundaries of the test for whether an exception to the principle of equality can be justified by having a legitimate aim and whether it is appropriate and necessary (proportionate) have been left to the courts, and especially the European Court of Justice, to define. The difficulties that this might cause to those who believe that age discrimination should be treated in the same way as all the other unlawful grounds of discrimination, such as sex and race, is exemplified in some of the comments that have been put forward by Advocates General in relation to specific cases that have been referred to the CJEU. The indication is that age is to be treated differently and perhaps more negatively. A.G. Mazák stated in the *402 Age UK case,¹⁹ for example, that "the possibilities of justifying differences of treatment based on age are more extensive". In Palacios²⁰ the same Advocate General stated that:

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"So far as non-discrimination on grounds of age, especially, is concerned, it should be borne in mind that that prohibition is of a specific nature in that age as a criterion is a point on a scale and that, therefore, age discrimination may be graduated. It is therefore a much more difficult task to determine the existence of discrimination on grounds of age than for example in the case of discrimination on grounds of sex, where the comparators involved are more clearly defined."

In *Sonia Chacon Navas*²¹ (a disability discrimination case) A.G. Geelhoed stated that:

"The implementation of the prohibitions of discrimination of relevance here [disability and age] always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market or an increase in the participation level of older workers."

The rest of this article is therefore concerned with testing the hypothesis that the law on age discrimination results in there being a greater possibility of less equal treatment than other protected grounds of discrimination. First, we propose to take as an example the implementation of the Directive in the United Kingdom and consider how the British courts have dealt with age cases. We then propose to consider the issues that have been referred to the European Court of Justice by the courts of Member States and examine how the CJEU deals with exceptions to the general principle of equality with regard to age.

Age regulation in the United Kingdom

The employment provisions of the Equality Act came into effect in October 2010. This included measures to prevent discrimination for reasons connected with the protected characteristic of age in the employment context. The Act also contained the possibility of extending this to include age discrimination with regard to facilities, goods and services which, it was planned, would come into effect in 2012. The Equality Act 2010 replaced a substantial part of the Employment Equality (Age) Regulations 2006.²² The Act defines the conduct that is prohibited in relation to the protected characteristic of age. These are direct and indirect discrimination,²³ victimisation and harassment.²⁴

One of the issues that considerably weakens the impact of the age provisions is the wide scope for objectively justifying exceptions to the principle of equal treatment contained in the Act. The tests for objective justification are, first, that the discrimination has a legitimate aim and, secondly, that the means for achieving that aim are proportionate.²⁵ Importantly it is possible to use this formula to justify direct discrimination as well as indirect discrimination. Age is the only protected characteristic in the Directive where this is possible. For all the other protected characteristics²⁶ it is not possible to justify direct discrimination, only indirect discrimination. It is not easy, however, under the adopted legislative regime to show that indirect discrimination has taken place. *Homer v Chief Constable of West Yorkshire*²⁷ concerned an older worker who was too old to undertake study for a newly introduced qualification threshold. Mr Homer worked for the Police National Legal Database. Essentially he had been spared the necessity for formal qualifications because the experience gained from his 30 years' active police service had been held to compensate for this. After a reorganisation, the top level of grading to which he aspired now required a law degree, which he did not have. Mr Homer was in the 60–65 year age category and thought that he would not have time to obtain a law degree before his chosen retirement date.²⁸ He brought proceedings for age discrimination on the grounds that persons in his age range would not be able to obtain the degree and therefore the requirement for one excluded older workers from the top grade and amounted to indirect age discrimination. Practically, of course, what he claimed was correct. Older workers without a law degree would have a problem in obtaining one because there would not be time to complete their studies before retiring. The Court of Appeal, however, stated that the "object of the 2006 Regulations (and the Equality Directive 2000/78/EC which

they implement) is not to legislate against the general unfairness of age, whether juvenile or geriatric. The targets of anti-discrimination law are more precise".²⁹ Thus, in this case, the court held that the cause of the disadvantage was not related to Mr Homer's age, but to the fact of stopping work (for retirement) before being able to obtain the necessary qualification for appointment to the desired grade; the argument being that if someone stopped work in the comparator group before qualifying then the result would be the same. This is a particularly unsympathetic approach to a claim of age discrimination. It is difficult to see how it is possible to separate the issue of the retirement date from issues of age. Any *404 comparator group was unlikely to have this particular cut-off date before them. The age of retirement, and Mr Homer's age in general, were the reasons that he could not meet the requirements of the new structure and gain appointment to the top grade.

Apart from the exception allowing justification for direct discrimination, there are a number of other exceptions to the principle of non-discrimination contained in the regulation of age in the United Kingdom. First, there are those that are common to all the protected characteristics and therefore apply equally to all unlawful grounds of discrimination. These exceptions concern occupational requirements providing that the requirements are a proportionate means of achieving a legitimate aim.³⁰ The example given in a 2005 consultation is that of an actor who might need to be of a certain age, although the consultation did state that this was unlikely to be a major issue for age discrimination.³¹ A second common exception is for statutory authority,³² providing that nothing in the Act shall make unlawful any act done in order to comply with a statutory provision or for the purpose of safeguarding national security. Finally s.158 of the Equality Act 2010 allows generally for the taking of positive action measures to alleviate disadvantage suffered by people who share one of the protected characteristics. This can only be done if the participation of persons who share a particular protected characteristic is "disproportionately low".³³ The application of any positive discrimination in favour of an under represented group is, of course, severely curtailed by decisions of the European Court of Justice, such as in Marschall³⁴ and Abrahamsson,³⁵ where automatic rules favouring women in the selection process, when they are an under-represented group, were curtailed by the need for objective judgment and decision-making in the selection process. An example, given in the 2005 consultation,³⁶ was that of placing advertisements in media read by the under-represented group, in order to encourage greater numbers of applications from that group. There would still need to be objective judgments in the final decision-making when deciding whether to employ a particular individual.

In addition to these exceptions, there are then a number which are peculiar to age as a protected characteristic. These are lower rates for the national minimum wage, the provision of benefits linked to length of service, the provision of enhanced redundancy payments, life assurance for older workers and the possibility of employer justified retirement ages.³⁷ These are the national minimum wage, length of service and seniority issues, matters linked to compensation for redundancy and the issue of being able to justify a mandatory retirement age. *405

The provisions concerning the national minimum wage provide for differential rates of pay related to age.³⁸ This is, in relation to the hourly rate, set by the Secretary of State.³⁹ There are two lower bands for young people: one for those aged 16 and 17 years; the other for those aged between 18 and 20 inclusive. This measure only applies to the age bands and pay levels established by the statutory measures on the national minimum wage. Objective justification would be needed to pay a 16-year-old at a different rate from a 17-year-old. Similarly, if an employer were paying rates which were above the levels of the national minimum wage, they would need to justify this, even if the same age bands were used. There is also a lower band payable to apprentices. The justification for this by the Government is to help make younger workers more attractive to employers and also, conversely, not to provide too great an incentive for young people to leave education and enter the labour force.⁴⁰

Length of service and seniority are particular issues for age equality. It is not uncommon for employees to be given extra benefits related to length of service with an organisation. Holiday entitlement is one example of a benefit that might be linked to length of service. Without further provisions such benefits might constitute unlawful age discrimination, because it will tend to mean that older (and longer serving) employees receive greater benefits than less-experienced (and often younger) employees. The Equality Act 2010⁴¹ provides that:

"It is not a contravention for a person (A) to put a person (B) at a disadvantage, when compared to another (C), in relation to the provision of a benefit, facility or service in so far as the disadvantage is because B has a shorter period of service than C."

There is a further proviso relating to service that is longer than five years. In this case it must reasonably appear to A that the way in which the criterion of length of service is used "fulfils a business need".⁴² This does not appear to be a requirement for a high burden of proof. Obvious benefits that are linked to service include pay scales and entry into health and employee discount schemes. It is for the employer to decide which formula to use to calculate length of service. It may be either the length of time a worker has been working at or above a particular level or it can be the length of time the worker has been working for the employer in total. This distinction is important because it means that the five-year rule can be used again and again. Thus if a worker is employed as a shop-floor operative for a few years, doing work of a like nature, and is then promoted to being supervisor, then the five-year period can start all over again while they do work of a like nature which is different from that done previously.

The statutory payments for redundancy are calculated using a combination of the length of service and age. The older the redundant employee then the higher the rate of payment made.⁴³ Employers are allowed to pay more so long as they follow the same formula. There is an apparent contradiction between the ability to take length of service into account as a criterion in selection for redundancy and a desire to end discrimination upon the basis of age.⁴⁴ Use of this criterion will tend to favour longer-serving employees and, therefore, older employees at the expense of younger ones. The same can be said of redundancy payments schemes which provide extra money to those with longer service.

A number of cases have dealt with the issues arising from this apparent contradiction. These cases concerned redundancy schemes which were all much more generous than the state scheme but which were claimed to discriminate against individuals, on the grounds of age, in particular circumstances. The main point in all the cases is whether redundancy schemes which are related to length of service can be objectively justified as having a legitimate aim with proportionate means of achieving that aim. An example of this can be seen in *Rolls Royce v Unite the Union*⁴⁵ which considered two collective agreements that had an agreed matrix to be used to choose who should be selected for redundancy. There were agreed criteria against which an individual could score between 4 and 24 points, including a length of service criterion which awarded one point for each year of continuous service. Thus older employees would have an important advantage over younger ones, as those with the lowest number of points were selected for redundancy. The aim of the case was to obtain guidance from the court prior to the redundancy process and so no industrial dispute was in existence at the time. The Court of Appeal reluctantly agreed to hear the case, even though it was not normally the case that academic appeals between private parties would be heard unless there was an issue of public importance. In this case the court accepted that it was an issue that could affect many people both employed by the company and by others, so it was a point of some importance. The main issue in the proceedings was whether the retention of length of service as a criterion, with other criteria, for redundancy as contained in a collective agreement, a proportionate means of achieving a legitimate aim within reg.3(1) of the Age Regulations 2006?⁴⁶ If not it would amount to indirect discrimination against younger workers.

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The employers had argued that the rules were discriminatory. It could not be argued that awarding points for service was a means of achieving a legitimate aim. It was not necessary to meet reasonable needs of the business. These could be achieved by other means. If length of service recognises and rewards loyalty, even if it were true, it is not related to the purpose of the exercise which is to fulfil a business need; loyalty is reflected in the other measured criteria.

In the event the Court of Appeal concluded that the length of service criterion was a proportionate means of achieving a legitimate aim. It stated that:

"The legitimate aim is the reward of loyalty, and the overall desirability of achieving a stable workforce. The proportionate means is ... amply *407 demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative." ⁴⁷

Thus the fact that it was only one of a number of factors, rather than the overarching reason for redundancy selection, made it acceptable. Indeed the court also stated that part of the evidence for the fairness of the measure was that it was accepted as a policy by younger employees. ⁴⁸ Other relevant cases here include *MacCulloch v ICI Plc* ⁴⁹ and *Loxley v BAE Systems*. ⁵⁰

An express mandatory retirement age, at the employers' discretion, was also introduced in 2006 as part of the Age Regulations then adopted. This "default retirement age" allowed employees to ask to continue working after the retirement age of, normally, 65 years. The employer, provided that they followed certain procedures, was able to agree or not to this request without any possible claims for unfair dismissal or age discrimination. This provision was removed by the Coalition Government in 2011. It is still possible, however, for employers to introduce a mandatory retirement age if they can objectively justify it by showing that it had a legitimate aim and that retirement was a proportionate means of achieving that aim. An example of the use of objective justification with regards to the retirement age can be found in *Seldon v Clarkson Wright*, ⁵¹ where a solicitor had been compulsorily retired from the partnership of his firm when he reached the age of 65 years. The firm identified three aims justifying its compulsory retirement policy which were held to be legitimate. These were ensuring associates were given the opportunity of partnership after a reasonable period; facilitating the planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies will arise; and limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm. The first two of these were described as provisions relating to "dead men's shoes". The third was defined as one of "collegiality". The court's acceptance of these aims as legitimate exceptions to the principle of equality is an example of the weakness of the legislation. The court stated that:

"It seems to me that an aim intended to produce a happy work place has to be within or consistent with the Government's social policy justification for the regulations. It is not just within partnerships that it may be thought better to have a cut-off age rather than force an assessment of a person's falling off in performance as they get older. *408

I have not read all the evidence put in by the Government in the Age UK litigation but my experience would tell me that it is a justification for having a cut-off age that people will be allowed to retire with dignity. To have such a policy requires a cut-off age which some when they reach it will think too low but it does not follow that it is not justified to have a cut off age." ⁵²

That a happy workplace can be justification for continued discrimination is surprising. There is also a failure to recognise that older people are not a homogenous group and that the application of uniform ages for stopping work may be viewed as entirely inappropriate.

The Court of Justice

Although the "default retirement age" has been removed in the United Kingdom,⁵³ there is still the possibility of having an employer-justified retirement age. It is a matter of some concern about how the CJEU is willing to accept compulsory retirement as both an exception to the principle of non-discrimination and justifiable by reference to being a proportionate means of achieving a legitimate aim.

In the Age Concern⁵⁴ case⁵⁵ the essence of Age Concern's argument was that the UK Regulations, by providing that the dismissal of an employee aged 65 years or over for reasons of retirement, infringed art.6(1) of the Directive and the principle of proportionality. A.G. Mazák stated in his Opinion that⁵⁶:

"Retirement rules can be justified under 6(1) if it is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose."

The UK Government pointed out that Recital 14 of the Directive provided that it should be without prejudice to national provisions laying down retirement ages; and that the provisions at issue did not fall within the scope of the Directive. Alternatively, it argued, the provisions of the Age Regulations were consistent with the Directive.⁵⁷ The Court of Justice stated that the:

"Recital merely stated that the directive does not affect the competence of the Member States to determine retirement age and it does 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 (Palacios de la Villa, paragraph 44)."⁵⁸

With reference to the underlying complaint the court stated that with respect to workers under 65, any dismissal by reason of retirement must be regarded as discriminatory unless the employer shows that it is a proportionate means of *409 achieving a legitimate aim and, ultimately, it was up to the national court to decide whether the provisions were justified by legitimate aims.

The Court of Justice has shown a somewhat alarming readiness to accept that the compulsory retirement policies of employers can be justified as being a "legitimate aim" in the context of creating job opportunities for other workers and especially in the context of creating job opportunities for young workers. Palacios⁵⁹ was a Spanish case concerning a collective agreement which contained an agreed retirement age. Mr Palacios was born in February 1940 and had worked for his employer since 1981. In accordance with the collective agreement he was dismissed when he reached the age of 65, after which he made a complaint of age discrimination. The collective agreement stated that "in the interests of promoting employment", there would be a retirement age of 65 "unless the worker concerned has not completed the qualifying period required for drawing the retirement pension, in which case the worker may continue in his employment until the completion of that period". So there was a caveat that the employee would be entitled to a full pension before being compulsorily retired. The Court of Justice accepted, as it has done in all cases concerned mandatory retirement, that the policy amounted to less favourable treatment on the grounds of age and, therefore needed to have a legitimate aim and

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show that retirement was an appropriate and necessary means of achieving that aim. The retirement policy seems to have been adopted in Spain, according to the court, at the instigation of the social partners, as part of a policy of promoting intergenerational employment. The court stated that this was a legitimate aim. The court concluded by stating that:

"It does not appear unreasonable for the authorities of a Member State to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market." ⁶⁰

Thus the court accepted that an exception could be made to the general principle of equality, with regard to age, in order to facilitate the employment of younger workers. This was to be done by a process of mandatory retirement of older workers. The problem with this approach, as discussed above, is that there is absolutely no evidence that intergenerational employment results from removing older workers from the workforce, as will be discussed below. Subsequently the CJEU has taken a similar approach to the justification of mandatory retirement, especially in cases concerning professions. These include dentists,⁶¹ university professors⁶² and public prosecutors.⁶³

Petersen⁶⁴ was a German case which concerned a complainant who was admitted to the practice of panel dentists in 1974 and reached the age of 68 in 2007, when she was retired. There were a number of legitimate aims put forward, including the problem of older dentists not being as good as younger ones. One aim concerned *410 the sharing out of opportunities among the generations, so that "a measure intended to promote the access of young people to the profession of dentist ... may be regarded as an employment policy measure".⁶⁵ The Court of Justice concluded that:

"It does not appear unreasonable for the authorities of a member state to consider that the application of an age limit, leading to the withdrawal from the labour market of older practitioners, may make it possible to promote the employment of younger ones." ⁶⁶

In Georgiev, the complainant began work as a lecturer in 1985 and his employment contract was terminated in 2006 when he reached the age of 65. He was given, in accordance with Bulgarian law, a one-year contract extension which was then extended for a further year. In 2007 he was appointed professor. Subsequently his contract was extended for one more year. In 2009, at the age of 68 years, his employment was finally terminated. National legislation precluded entering into contracts of indefinite duration after the age of 65 and those that reach the age of 68 are compulsory retired.

The aims of the legislation put forward by the Bulgarian Government and the university were, first, the need to allocate the posts for professors "in the best possible way between the generations"⁶⁷ and that the mix of different generations promotes an exchange of experience and innovation and thereby the "development of the quality of teaching and research at universities".⁶⁸ Mr Georgiev argued that the evidence was that the Bulgarian legislation did not encourage the recruitment of young people. Indeed he claimed that the average age for professors was 58 years and there were only 1,000 of them. The Court of Justice recognised the arguments but stated that it was for "the national court to examine the facts and determine whether the aims asserted correspond to the facts".⁶⁹ Despite this the Court of Justice repeated its conclusion in Petersen that "it does not appear unreasonable" to consider that the application of an age limit "leading to the withdrawal from the labour market of older practitioners may make it possible to promote younger ones".⁷⁰

It is very tempting to link the employment opportunities of young people with the need to retire older people. Youth unemployment is at near record levels in the EU as a whole, with a current unemployment rate of 21 per cent. The EU figures mask a wide range from an unemployment rate of 45 per cent in Spain and 21 per cent in the United Kingdom,

to 7 per cent in the Netherlands.⁷¹ The unemployment rate for young people has been consistently high and for the last decade has been around twice the unemployment rate for the total population. *411⁷²

It is really interesting to consider the issues with regard to the so-called "lump of labour fallacy", because it reveals how the European Court of Justice appears willingly to have accepted the assumptions that underlie it, even when there is evidence indicated to the contrary. The lump of labour fallacy is essentially a belief that the number of jobs available in an economy is fixed. The phrase is said to have originated in the 19th century in an article by a UK economist, David F. Schloss (1891).⁷³ One result of this assumption is that employment opportunities can be created for young people by removing older workers from the labour force. This can result in such policy measures as mandatory retirement or early retirement schemes; putting a ceiling on the number of working hours per week; or measures to reduce the number of women working. In the United Kingdom, an example of the state undertaking policies based on the lump of labour idea was the "Job Release Scheme", introduced in 1977, to encourage the early retirement of older workers in order to bring younger ones into the workforce. The belief in the efficacy of such schemes continued into the 1980s. The Labour Party election manifesto in 1987, for example, called for an extension of the scheme to "men over 60 so that those who want to retire early vacate jobs for those who are currently unemployed".⁷⁴ An example of how this debate has changed can be seen in the government publication *Winning the Generation Game*, published in 2000⁷⁵ and other publications⁷⁶ leading up to the introduction of regulations tackling age discrimination in 2006.⁷⁷ The 2000 report dismissed the lump of labour fallacy as:

"A misplaced belief that there are a fixed number of jobs in the economy — a 'lump of labour' — has led in the past to government policies which wrote off large numbers of people and unintentionally reduced employment. One reason this fallacy is pervasive, especially among people over 50, is that it feels, at an individual level, as if there is indeed a lump of labour ...

Increasing the number of people effectively competing for jobs actually increases the number of jobs in the economy.

The lump of labour fallacy ignores the fact that, in a flexible labour market, wages can and do adjust. More people competing for jobs means that people are less keen to demand wage increases. This reduces inflationary pressures and allows lower interest rates (and higher non-inflationary growth) than would otherwise be the case."

There is plenty of evidence for this, according to the report, and showed that countries with a high net immigration actually can see employment levels rise. Israel, for example, had a substantial net immigration in the mid- and late 1980s after the Soviet Union opened its border. Employment rose sharply, while the proportion of the population in work changed barely at all. If the lump of labour fallacy were true, total employment would have been unchanged and the proportion *412 would have fallen sharply. Similarly the United Kingdom has a much higher population than in 1900. Employment has risen considerably to follow it.

The 1977 Job Release Scheme was designed to pay an allowance to those nearing retirement to encourage them to leave the labour market and be replaced by the young unemployed. One study concluded that "we do not find conclusive evidence of at least some substitution between young and older workers".⁷⁸ The idea that encouraging older workers to leave the workforce in order to create opportunities for the young requires an assumption that a substitution can take place. The older worker leaves and is substituted by a young worker. There is little evidence for this proposition. Indeed the evidence may be to the contrary. A study of 22 OECD countries, which consisted of an empirical examination of the extent to which the employment of people aged 55–64 years affected the employment of those aged 16–24 years,

concluded that "our empirical analysis does not support the hypothesis that employment of the young and old are substitutes and finds some minor complementarities of employment in the different age groups".⁷⁹

Further evidence that there is the employment rates of older and younger workers can be complementary, rather than be substitutes for each other, is provided by an extensive series of papers edited by Gruber and Wise.⁸⁰ The US paper,⁸¹ for example, concluded that "We find no consistent evidence of an impact of the employment of the elderly on the young or prime-aged in our sample". A positive correlation between older and youth employment was suggested in reports from Canada,⁸² Germany⁸³ and elsewhere. This last paper stated:

"Higher employment of older individuals is positively correlated with higher employment of the young ... It is a fallacy to believe that there is a fixed lump of labor to be distributed among the young and the old: jobs for the old do not have to be taken away from the young."

Fuchs⁸⁴ concerned state prosecutors in the Land Hessen in Germany. The applicants were both born in 1944 and worked as state prosecutors until the retirement age of 65; both were given a one-year extension and then made to retire. The actual retirement age for civil servants is left to the Land, although the retirement age for federal civil servants has been raised to 67.

The national court explained that the retirement provisions were originally introduced at a time when the prevailing view was that fitness for work declined after that age, although it also stated that current research showed that such fitness varied from one person to another. The law was originally introduced in 1962 and amended by the Law of December 14, 2009 (HGB). It was said that the aim was *413 to promote the employment of younger people and thus to ensure an appropriate age structure.

First, the Court of Justice dealt with the fact that the HGB did not state what the aim of measure of having a retirement age of 65 was. The court stated that the lack of precision did not lead to an inference that the measure cannot be justified. More interestingly it stated that the altering of the aim over a period of time did not necessarily preclude the law from pursuing a legitimate aim. The Land Hessen and the German Government had submitted that the obligation to retire at the age of 65 was designed to establish a balance between the generations, in addition to which the national court referred to three further aims: efficient planning of the departure and recruitment of staff; encouraging the recruitment and promotion of young people; and avoiding disputes relating to employees' ability to perform their duties beyond the age of 65. It was also claimed that the presence within the relevant civil service of staff of different ages also helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge, thus contributing to the provision of a high-quality public justice service.⁸⁵

In apparent contrast to this the court also noted art.15(1) of the European Charter of Fundamental Rights⁸⁶ which states that "everyone has the right to engage in work and to pursue a freely chosen or accepted occupation". As a result the court noted that:

"It follows that particular attention must be paid to the participation of older workers in the labour force and thus in economic, cultural and social life. Keeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in recital 25 in Directive 2000/78; moreover, it contributes to the realising of their potential and to the quality of life of the workers concerned, in accordance with the concerns of the European Union legislature set out in recitals 8, 9 and 11 in that directive."⁸⁷

However, according to the court, there was also a need to respect also other divergent interests. Those who reach retirement age and have an entitlement to a pension could "in the interests of sharing work among the generations" aid the entry of young workers into the labour force.⁸⁸ Despite the evidence to the contrary in this case and a recognised obligation to help keep older workers in the workforce, the CJEU recited all the reasons why mandatory retirement was a legitimate means to achieving various ways of helping younger people into the workforce. These included:

"encouragement of recruitment is a legitimate aim especially when the promotion of access of young people to a profession is involved (citing Georgiev at [45])." *414⁸⁹

"the mix of different generations of employees can also contribute to the quality of the activities carried out by promoting the exchange of experience (citing Georgiev at [46])."⁹⁰

"establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service."⁹¹

While accepting these as legitimate aims, the Court of Justice did recognise that there were some doubts about the applicability in this case and that the national court was clearly unsure of whether an aim which was to promote the employment of younger people and thus to ensure an appropriate age structure constituted objective justification. There was evidence that a "significant proportion" of the ministry's staff already consisted of young people⁹² and that recent studies had shown that there was no correlation between the compulsory retirement of persons having reached retirement age and young persons entering the profession. The CJEU stated that "it is for the national court to assess, according to the rules of national law, the probative value of the evidence adduced, which may, inter alia, include statistical evidence".⁹³

Maximum ages

There have also been some interesting cases on the maximum age at which a person ought to be employed in particular types of work. These are the cases of Petersen (discussed briefly above), which concerned the occupation of dentistry, and Wolf,⁹⁴ which concerned fire fighters. In the first of these cases Ms Petersen's authorisation to operate as a dentist expired when she reached the age of 68 years. The question was whether this maximum age limit was an objective and reasonable measure to achieve a legitimate aim. The legitimate aim, it was argued, was the health of patients as, "based on general experience", "a general drop in performance occurs from a certain age". The court concluded that the Framework Directive precluded a national measure setting a maximum age for practising as a panel dentist where the aim was the protection of patients from the effects of the decline in performance of dentists after the age of 68. The primary reason for this decision was the fact that there was no mandatory maximum age for dentists in private practice and so the application of this criterion to those on the public panel of dentists could not be accepted. One of the other arguments put forward was, however, deemed acceptable, namely that where the aim was "to share out employment opportunities among the generations"⁹⁵ the measure might not be precluded, with the result that it would be justifiable in certain circumstances to discriminate against older *415 members of the profession in order to facilitate new members of the profession entering.

In Wolf there is a case concerning a much lower maximum age limit. Mr Wolf had his application for a fire fighting position with the Frankfurt fire service turned down because he was over the maximum age limit of 30 years. The employer argued that the job activities, such as fighting fires and rescuing people, imposed high physical demands. Most people in this activity were between the ages of 30 and 50, although in practice there were few over the age of 45 years.⁹⁶ In addition there was a two-year training period, so a recruit of 30 years would be able to give a maximum

of 18 years' service. The aim, according to the German Government, of the 30-year rule was "to ensure the operational capacity and proper functioning of the professional fire service"⁹⁷ and to ensure that fire fighters can perform these physically demanding tasks for a comparatively long period in their careers.⁹⁸ The wish for a proper functioning of the fire service was a legitimate aim and the "possession of especially high physical capacities was a genuine and determining occupational requirement" for carrying out these activities.⁹⁹ Here evidence was produced to show that "respiratory capacity musculature and endurance" does diminish with age.¹⁰⁰ Finally it was the length of possible service that could be obtained which seemed decisive. The older the worker, the lesser number of years available at the peak of physical capacities would happen and this would not be helpful in the functioning of the fire service.

It is difficult to argue with this conclusion, but the court did not appear to question whether the rule applied a generalised characteristic associated with age, but rather to accept that it was enough that most people would not be able to sustain the physical demands of being a fire fighter.

Conclusion

Despite the early conclusion of the CJEU that the principle of non-discrimination in respect of age represented a fundamental principle of Community law, the reality is that age discrimination is permitted to continue and is even expressly allowed by the Framework Directive. Rather than have a specific and closed list of exceptions to non-discrimination with regard to age, there is the opportunity for widespread exceptions in the "legitimate" aims included in art.6. This lack of specificity essentially hands the boundaries of where legitimate treatment ends and discrimination begins to the judiciary. This might be satisfactory but for the fact that there is a confusion between the human rights and the economic justification for non-discrimination and age. The acceptance of economic aims as legitimate ones by the CJEU has the effect of permitting a wide range of exceptions which might not be possible if one had a purely human rights justification. This is amply illustrated by the court's acceptance of arguments that relate to *416 inter-generational transfer. Mandatory retirement is a legitimate aim and can be objectively justified if the purpose is to create opportunities for younger workers. The wishes of the person being removed from the labour force do not seem to be a factor and there is a willingness to rely upon unproven assumptions that mandatory retirement can be for some economic or social good. This outcome is disappointing, but it may be that the Directive reflects a political compromise among Member States which weakens its effect and makes the provisions preventing age discrimination less effective than those provisions with regard to other protected characteristics.

Malcolm Sargeant

Footnotes

- 1 Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
- 2 The European Commission has proposed a further Directive on discrimination outside the labour market: "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation" COM(2008) 426.
- 3 Directive 2000/78 art.18.
- 4 In the UK, the Directive was therefore transposed in 2006 by the Employment Equality (Age) Regulations SI 2006/1031, now substantially replaced by the Equality Act 2010.
- 5 The list consists of the setting of special conditions on access to employment and vocational training, employment and occupation (including dismissal and remuneration conditions) for young people, older workers and persons with caring responsibilities in order to promote their vocational

integration or ensure their protection; the fixing of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment; and the fixing of a minimum age for recruitment which takes into account the training period and the need for a reasonable period of work before the individual retires.

6 Recital 8 of the Preamble provides that "the Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force"; and Recital 25 provides that the prohibition of age discrimination "is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce". In addition, Recital 11 states how discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection and Recital 25 provides that the prohibition of age discrimination "is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce".

7 Directive 2000/78 Recital 14 provides, however, that the Directive "shall be without prejudice to national provisions laying down retirement ages".

8 Mangold v Helm (C-144/04) [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43.

9 This is, of course, a simplification, but the purpose here is to concentrate on the aspects of the decision concerning age discrimination.

10 Mangold [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43 at [65].

11 Mangold [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43 at [75].

12 Lindorfer v Council (C-227/04 P) [2007] E.C.R. I-6767; [2008] Pens. L.R. 15.

13 Lindorfer [2007] E.C.R. I-6767; [2008] Pens. L.R. 15 at [57].

14 Lindorfer [2007] E.C.R. I-6767; [2008] Pens. L.R. 15 at [85].

15 Bartsch v Bosch und Siemens Hauseräte (BSH) Alterfürsorge GmbH (C-427/06) [2008] E.C.R. I-7245; [2009] 1 C.M.L.R. 5 at [AG35].

16 Seda Küçükdeveci v Swedex GmbH & Co KG (C-555/07) [2010] 2 C.M.L.R. 33.

17 Küçükdeveci [2010] 2 C.M.L.R. 33 at [21].

18 Treaty on the Functioning of the EU.

19 Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform (C-388/07) [2009] E.C.R. I-1569; [2009] 3 C.M.L.R. 4 at [AG71].

20 Félix Palacios de la Villa v Cortefiel Servicios SA (C-411/05) [2007] E.C.R. I-8531; [2008] 1 C.M.L.R. 16 at [AG61].

21 Sonia Chacon Navas v Eurest Colectividades SA (C-13/05) [2006] E.C.R. I-6467; [2006] 3 C.M.L.R. 40 at [AG55].

22 SI 2006/1031.

23 Equality Act 2010 s.13(1) on direct discrimination states that "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others"; and s.19(1) on indirect discrimination states that "A person (A) discriminates against another (B) if (A) applies to (B) a provision, criterion or practice which is discriminatory in relation to a relevant characteristic of (B)'s".

24 Equality Act 2010 s.27(1) on victimisation provides that "a person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act or (b) A believes that B has done, or may do, a protected act"; s.26(1) provides that "a person (A) harasses another if — (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) The conduct has the purpose or effect of — (i)violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

25 Although Directive 2000/78 uses the words "appropriate and necessary", the UK implementing legislation uses the word "proportionate"; in practice there appears to be no difference in their application.

- 26 These are listed in s.4 of the Equality Act 2010 and are, apart from age: disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 27 Homer v Chief Constable of West Yorkshire [2010] EWCA Civ 419; [2010] I.R.L.R. 619.
- 28 The employer had offered to pay for the studies on a part-time basis.
- 29 Homer [2010] EWCA Civ 419; [2010] I.R.L.R. 619 at [48].
- 30 Equality Act 2010 Sch.9.
- 31 *Department of Trade and Industry, Equality and Diversity: Coming of Age (2005)*.
- 32 Equality Act 2010 Sch.9.
- 33 Equality Act 2010 s.158(1)(c).
- 34 Marschall v Land Nordrhein-Westfalen (C-409/95) [1997] E.C.R. I-6363; [1998] 1 C.M.L.R. 547.
- 35 Abrahamsson and Anderson v Fogelqvist (C-407/98) [2000] E.C.R. I-5539; [2002] I.C.R. 932.
- 36 *Department of Trade and Industry, Equality and Diversity (2005)*.
- 37 Not dealt with here are the provision of life assurance cover for retired workers: Equality Act 2010 para.14 Sch.9 Pt 2 provides that where a person arranges for workers to be provided with life assurance cover after their early retirement for ill health, it will be permissible to end that cover when they reach normal retirement age or, if none, then 65 years. Equality Act 2010 para.15 of Sch.9 Pt 2, of the Act creates an exception for benefits which relate to the provision of child care where the benefit is limited to children of a particular age group.
- 38 For a more detailed discussion of this point see Malcolm Sargeant, "Age Discrimination and the National Minimum Wage" (2010) 31 Policy Studies 351.
- 39 National Minimum Wage Act 1998 s.1(3).
- 40 The Government stated, in its evidence to the Low Pay Commission (November 2007), that the "Government's aim is to afford very young workers some protection from poverty pay, while maintaining the incentives for 16-17 year olds to remain in education or job related training and build up their knowledge and future earnings potential".
- 41 Equality Act 2010 para.10(1) Sch.9 Pt 2.
- 42 Equality Act 2010 para.10(2) Sch.9 Pt 2.
- 43 The formula, contained in s.162 Employment Rights Act 1996, is one and a half week's pay for each year of employment in which the employee was not below the age of 41 years; one week's pay for each year of employment in which the employee was not below the age of 22 years; and half a week's pay for any other age of employment; there is a statutory maximum to what constitutes a week's pay.
- 44 See Malcolm Sargeant, "Age discrimination, redundancy payments and length of service" (2009) 72 Modern Law Review 628.
- 45 Rolls Royce v Unite the Union [2009] EWCA Civ 387; [2009] I.R.L.R. 576.
- 46 The provisions are now contained in the Equality Act 2010.
- 47 Rolls Royce [2009] EWCA Civ 387; [2009] I.R.L.R. 576 at [100].
- 48 Rolls Royce [2009] EWCA Civ 387; [2009] I.R.L.R. 576 at [100].
- 49 MacCulloch v ICI Plc [2008] I.R.L.R. 846 EAT, which concerned a redundancy scheme which had been in existence since 1971. The amount of payment was linked to service up to a maximum of 10 years, and the size of the redundancy payment increased with age. The claimant was 37 years old and received 55 per cent of her salary as a payment, but she claimed that someone aged between 50 and 57 years would have received 175 per cent of salary under the scheme.
- 50 Loxley v BAE Systems (Munitions and Ordnance) Ltd [2008] I.R.L.R. 853 EAT, which concerned a long-term contractual redundancy scheme where each employee would receive two weeks' pay for each of the first five years pensionable service; three weeks' pay for each of the next five years; four weeks' pay for each year after 10 years; two weeks' pay for each year after the age of 40; subject to a max of two years' pay. In addition there was a tapering provision after the age of 57 and but no enhanced redundancy payments for those over the age of 60, because would have given them a windfall prior to retirement.
- 51 Seldon v Clarkson Wright & Jakes [2010] I.R.L.R. 865 CA (Civ Div).
- 52 Seldon [2010] I.R.L.R. 865 at [22]-[23].
- 53 The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069), which took effect in April 2011.

- 54 An age NGO; now part of Age UK.
- 55 Age Concern England [2009] E.C.R. I-1569; [2009] 3 C.M.L.R. 4.
- 56 Age Concern England [2009] E.C.R. I-1569; [2009] 3 C.M.L.R. 4, Opinion at [AG88].
- 57 Age Concern England [2009] E.C.R. I-1569; [2009] 3 C.M.L.R. 4 at [19].
- 58 Age Concern England [2009] E.C.R. I-1569; [2009] 3 C.M.L.R. 4 at [25].
- 59 Palacios [2007] E.C.R. I-8531; [2008] 1 C.M.L.R. 16.
- 60 Palacios [2007] E.C.R. I-8531; [2008] 1 C.M.L.R. 16 at [72].
- 61 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe (C-341/08) [2010] 2 C.M.L.R. 31.
- 62 Vasil Ivanov Georgiev v Tehniceski Universitet (C-250/09 and C-268/09) [2011] 2 C.M.L.R. 7.
- 63 Fuchs, Köhler v Land Hessen (C-159/10 and 160/10) [2011] 3 C.M.L.R. 47.
- 64 Petersen [2010] 2 C.M.L.R. 31.
- 65 Petersen [2010] 2 C.M.L.R. 31 at [68].
- 66 Petersen [2010] 2 C.M.L.R. 31 at [70].
- 67 Georgiev [2011] 2 C.M.L.R. 7 at [45].
- 68 Georgiev [2011] 2 C.M.L.R. 7 at [46].
- 69 Georgiev [2011] 2 C.M.L.R. 7 at [48].
- 70 Georgiev [2011] 2 C.M.L.R. 7 at [51].
- 71 These figures are for the second quarter of 2011 and include the age group 15–24 years; the figures come from the Eurostat website, (accessed October 12 2011): http://epp.eurostat.ec.europa.eu/statistics_explained/index.php?title=File:Table_youth_unemployment_MS.png&filetimestamp=20110930132346 [Accessed April 4, 2013].
- 72 Eurostat, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Unemployment_statistics [Accessed April 4, 2013].
- 73 T. Walker, "Why Economists Dislike a Lump of Labor" (2007) 65 *Review of Social Economy* 279, cited in *James Banks, Richard Blundell, Antoine Bozio and Carl Emmerson, "Releasing Jobs for the Young? Early Retirement and Youth Unemployment in the United Kingdom", IFS Working Paper W10/02 (Institute for Fiscal Studies, 2008)*.
- 74 *Banks et al., "Releasing Jobs for the Young?", IFS Working Paper W10/02 (2008), p.8.*
- 75 *Cabinet Office Performance and Innovation Unit, Winning the Generation Game (April 2000)*, <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/generation.pdf> [Accessed April 4, 2013].
- 76 *Towards Equality and Diversity: Implementing the Employment and Race Directives (2001); Equality and Diversity: Age Matters (2003)*.
- 77 *The Employment Equality (Age) Regulations 2006 (SI 2006/2408)*.
- 78 *Banks et al., "Releasing Jobs for the Young?", IFS Working Paper W10/02 (2008), p.21.*
- 79 *Adrian Kalwij, Arie Kapteyn and Klass de Vos, Early Retirement and Employment of the Young, Working Paper WR-679 (Rand Labor and Population, 2009)*.
- 80 *Jonathan Gruber and David Wise, David (eds), Social Security Programs and Retirement Around the World (National Bureau of Economic Research, University of Chicago Press, 2010)*; although individual papers are acknowledged in the following notes, these summaries were taken from a Briefing by Age UK called *Older Workers and Job Blocking (June 2011)*.
- 81 *J. Gruber and K. Milligan, "Do elderly workers substitute for younger workers in the United States?" in Social Security Programs and Retirement Around the World (2010)*.
- 82 *M. Baker, J. Gruber and K. Milligan, "The Interaction of Youth and elderly Labor Markets in Canada" in Social Security Programs and Retirement Around the World (2010)*.
- 83 *A. Borsch-Supan and R. Schnabel, "Early Retirement and Employment of the Young in Germany" in Social Security Programs and Retirement Around the World (2010)*.
- 84 Fuchs [2011] 3 C.M.L.R. 47.
- 85 Fuchs [2011] 3 C.M.L.R. 47 at [48].
- 86 The European Charter of Fundamental Rights was adopted in 2000 and became mandatory within the EU after its incorporation into the Treaty of Lisbon in 2009. There is some doubt as to its applicability to the UK and Poland. It can be found at http://www.europarl.europa.eu/charter/pdf/text_en.pdf [Accessed April 4, 2013].

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- 87 Fuchs [2011] 3 C.M.L.R. 47 at [63].
88 Fuchs [2011] 3 C.M.L.R. 47 at [64].
89 Fuchs [2011] 3 C.M.L.R. 47 at [49].
90 Fuchs [2011] 3 C.M.L.R. 47 at [49].
91 Fuchs [2011] 3 C.M.L.R. 47 at [59].
92 Fuchs [2011] 3 C.M.L.R. 47 at [25].
93 Fuchs [2011] 3 C.M.L.R. 47 at [82].
94 Colin Wolf v Stadt Frankfurt am Main (C-229/08) [2010] 2 C.M.L.R. 32.
95 Petersen [2010] 2 C.M.L.R. 31 at [65].
96 Wolf [2010] 2 C.M.L.R. 32 at [34].
97 Wolf [2010] 2 C.M.L.R. 32 at [33].
98 Wolf [2010] 2 C.M.L.R. 32 at [34].
99 Directive 2000/78 art.4(1) states that "Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate".
100 Wolf [2010] 2 C.M.L.R. 32 at [41].

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