

You can make assumptions about the old but not the young

Edward Wanambwa and Anna Birtwistle review three recent ECJ decisions on whether stereotypical ideas about employees' age can be used to justify direct discrimination



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'The European Court of Justice has accepted that a member state may find it necessary to set an age limit for practising a medical profession such as dentistry.'

In the aftermath of the *Heyday* challenge, the UK government is facing continued calls to scrap the national default retirement age. Against this backdrop, a handful of European Court of Justice (ECJ) judgments on the compatibility of German national law with the European Equal Treatment Framework Directive 2000/78/EC (the Directive) have shown a general acceptance of age-related assumptions that are used to objectively justify discriminatory national laws.

This article analyses the ECJ's rationale in three recent decisions and how it might inform the UK courts' future approach to arguments justifying age discrimination practices. Following the ECJ's approach could limit the practical effect of outlawing the default retirement age if this is the result of the government's review this spring.

Facts in Wolf

In *Wolf v Stadt Frankfurt am Main* [2009] the claimant, who had applied for a post in the Frankfurt Fire Service, had his application rejected without consideration because the maximum recruitment age for such posts was 30. Mr Wolf brought proceedings in the German Administrative Court claiming that the law restricting applications to join the fire service to those aged 30 and under was contrary to the general prohibition on age discrimination implemented by the German Equal Treatment Act, *Allgemeines Gleichbehandlungsgesetz* (AGG).

The German Administrative Court made a reference to the ECJ on the

compatibility of German law with the Directive. In particular, the ECJ was asked to decide:

- whether aims such as ensuring a long career for officials, setting up a balanced age structure within an occupation or ensuring a minimum period of service before retirement were legitimate within the meaning of Article 6(1) of the Directive; and
- whether setting a maximum recruitment age of 30 for an intermediate career post in the fire service was an appropriate and necessary means of achieving such aims.

Argument and judgment

In arguing that the maximum recruitment age of 30 constituted a legitimate objective, the German government sought to rely on the genuine occupational requirement exemption in Article 4(1) of the Directive. It asserted that the aim of the maximum recruitment age was to ensure 'the operational capacity and proper functioning of the professional fire service'.

The German government further attested that an intermediate career in the fire service demanded exceptionally high physical performance and that, in view of the medically proven ageing process, officials over the ages of 45 to 50 were unable to carry out the tasks required of their role effectively.

Finding in favour of the German government, the ECJ held that Article

4(1) of the Directive did not preclude national legislation from setting a maximum age of 30 for recruitment to intermediate career posts in the fire service. It found that:

- the concern to ensure the operational capacity and proper functioning of the professional fire service constituted a legitimate objective within the meaning of Article 6(1) of the Directive;
- limiting recruitment to intermediate career posts in the fire service to those aged 30 and under could be regarded as appropriate to the objective of ensuring the operational capacity and proper functioning of the fire service, and as not going beyond what was necessary to achieve that objective;

- those holding intermediate posts in the fire service performed tasks characterised by their physical nature, and therefore possession of especially high physical capabilities could be regarded as a

the fields of sport and industrial medicine that showed that respiratory capacity, musculature and endurance diminished with age and that, consequently, very few people over the ages of 45 to 50

In Wolf v Stadt Frankfurt am Main the European Court of Justice held that the European Equal Treatment Framework Directive 2000/78/EC did not preclude national legislation from setting a maximum age of 30 for recruitment to intermediate posts in the fire service.

genuine determining occupational requirement within the meaning of Article 4(1) of the Directive;

- the German government had produced scientific data from

had sufficient physical capacity to perform the fire-fighting activities required of intermediate fire officials; and

- the age at which officials are recruited determines the time during which they will be able to perform physically demanding tasks. Recruitment at an older age would mean that too many officials could not be assigned to the most physically demanding duties.

European Equal Treatment Framework Directive 2000/78/EC

Recital 25 in the preamble to the Directive reads:

'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.'

Article 2(5) of the Directive provides:

'This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.'

Article 4(1) of the Directive provides:

'Notwithstanding Article 2(1) and (2), 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.'

Article 6(1) of the Directive provides:

'Notwithstanding Article 2(2), member states may provide that differences of treatment on grounds of age shall not constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.'

Although the ECJ did not refer to the Article 6 point in *Wolf*, the Advocate General's opinion was that the maximum recruitment age was objectively justified given:

- the relationship between age and fitness;
- the special nature of the emergency services; and
- member states' broad discretion to choose the measures capable of attaining their objectives in the field of social and employment policy.

Facts in *Petersen*

Under a 1993 German law on the safeguarding and structural improvement of the statutory health insurance scheme (*Gesetz zur Sicherung und Strukturverbesserung der gesetzlichen Krankenversicherung*, or GSG), a maximum age limit of 68 was set for those practising as panel doctors and dentists in Germany. This age limit was neither abolished nor amended by the AGG.

In Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe

[2010] Ms Petersen, a dentist, was told that her authorisation to practise panel dentistry within the statutory health insurance scheme would expire shortly after her 68th birthday. She lodged a complaint at the Social

the statutory health insurance scheme based on the panel system.

The German government put forward three objectives that lay behind the maximum practising age for panel dentists:

(3) the financial balance of the German health system.

This age limit was stipulated, however, to be subject to four exceptions. It would not apply:

- (1) if the person concerned had been admitted to practise as a doctor or dentist before the legislation came into force and had practised for less than 20 years when they reached the age of 68;
- (2) if a shortage of panel doctors or dentists in Germany arose;
- (3) if doctors or dentists in certain regions were ill, on leave or participating in training events; or
- (4) to doctors and dentists employed outside the panel system.

In Petersen the European Court of Justice accepted that encouraging recruitment constituted an employment policy and that promoting young people's access to the dentistry profession should be regarded as a legitimate objective.

Court on the basis that the GSG was contrary to both the AGG and the Directive.

The Social Court referred the case to the ECJ. In particular, the referring court observed that the age limit at issue had a very punitive effect on panel dentists who wished to continue practising beyond the 68-year age limit, since 90% of the German population were covered by

(1) the protection of the health of the patients covered by the statutory health insurance scheme, since it was assumed from 'general experience' that dentists' performance would deteriorate from the age of 68 onwards;

(2) the distribution of employment opportunities among the generations; and

Protection of health

In coming to its decision, the ECJ considered the German government's first and third objectives together. The ECJ accepted that in the context of Article 2(5) of the Directive (see adjacent box), a member state may find it necessary to set an age limit for practising a medical profession such as dentistry. This was held to be the case whether the objective of protecting health was considered from the point of view of dentists' competence or the financial balance of the national healthcare system.

The ECJ considered next whether a maximum practising age was necessary to meet that objective and, in so doing, it considered whether the exceptions to the GSG's application interfered with that objective.

The court found that the first, second and third exceptions did not interfere with the objective of protecting health. It accepted that the first exception had been included for the benefit of dentists from the former German Democratic Republic who, when the legislation came into force, had not practised long enough to qualify for a pension. The ECJ noted that this was a precisely defined group and, in any event, the exception was temporary because it would end after a period of, at most, 20 years. The second and third exceptions were clearly not in conflict with the objective because they were intended to ensure that patients could still be treated if there was a lack of panel dentists.

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Assessing the fourth exception, however, the ECJ held that such a broad exception as the one for dentists practising outside the panel system was not essential for protecting public health. The measure was therefore held to run counter to the objective pursued, and to be inconsistent and incapable of justifying the discriminatory national law.

Distribution of employment opportunities

The ECJ next considered whether the objective of the distribution of employment opportunities among the generations was a legitimate aim under Article 6(1) of the Directive. It accepted that encouraging recruitment constituted an employment policy and that promoting young people's access to the dentistry profession should be regarded as a legitimate objective.

Finally, the ECJ turned to whether the measure was appropriate and necessary for achieving the aim pursued. It found that, provided there were too many panel dentists, having a maximum age of 68 with the aim of sharing out employment opportunities among the generations was objectively and reasonably justified, and the means of achieving that aim were appropriate and necessary. The ECJ held that it would be for the national court to ascertain whether such a situation existed.

Decision in *Kücükdeveci*

In contrast to *Wolf* and *Petersen*, in *Kücükdeveci v Swedex GmbH & Co KG* [2010] the ECJ was asked to rule on whether legislation based on stereotypical assumptions about younger rather than older employees was objectively justifiable. The assumption in this case was that younger people have fewer personal responsibilities, which justifies giving them less employment protection.

In this case, the claimant had been working for Swedex since she was 18 years old, and was made redundant in 2006 at the age of 28. In accordance with German law, Swedex only took account of her employment from the age of 25, giving her notice of dismissal based on just three years' service.

The ECJ was asked to rule on whether the legislation was justifiable on the grounds that:

- employers have a commercial interest in being flexible in their staffing; and

- younger people have less protection in terms of notice periods than older people because, due to 'their age and/or their lesser social, family and private obligations', they are assumed to be more flexible and mobile than older workers.

The court found that although staffing flexibility was a legitimate objective, the means were neither appropriate nor necessary, since the law

in performance as a result of age, and general assumptions would not suffice.

The ECJ's wide interpretation of the Directive was also evident in *Wolf*, in which it decided that a maximum recruitment age, as well as physical fitness, constituted a genuine occupational requirement related to age under Article 4(1) of the Directive. Since direct discrimination cannot be justified under UK law (except in relation to age) other than by establishing a

In Küçükdeveci the European Court of Justice found that although staffing flexibility was a legitimate objective, the law applied to all employees irrespective of their age at the time of dismissal.

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Comment

The ECJ's decisions in *Wolf* and *Petersen* were notable for their wide interpretation of Article 6(1) of the Directive and, in particular, the acceptance of stereotypical assumptions about age to justify treatment that would otherwise be unlawful on the grounds of discrimination.

In both *Wolf* and *Petersen* the ECJ accepted that age-related decline in performance was capable of justifying national laws that were directly age discriminatory.

Particularly worrying for more senior employees will be the ECJ's acceptance of the German government's assumption in *Petersen* that, based on 'general experience', performance declines with age.

Unlike *Wolf*, in which substantial scientific evidence was provided to support the assertion as it applied to the physically demanding requirements of intermediate fire posts, no such evidence was put forward in *Petersen*. This is in stark contrast to the UK's leading case on compulsory retirement, *Seldon v Clarkson Wright & Jakes* [2008], which is currently on adjournment from the Court of Appeal. In *Seldon*, it was held that although succession and workforce planning and collegiality are legitimate reasons for the compulsory retirement of partners at the age of 65, the partnership had an evidential burden to show a decline

genuine occupational requirement or genuine occupational qualification, some employers may seek to rely on the ECJ's wider interpretation to bolster genuine occupational requirement or qualification defences.

Kücükdeveci leaves wide open to challenge the way that statutory redundancy payments and unfair dismissal basic awards are calculated in the UK, as the statutory method for calculating these payments leads to lower payments for younger employees. Although the UK government may be able to show a legitimate aim, there is a distinct possibility that it would fail the proportionality test.

Despite the judgments in *Wolf* and *Petersen*, employers should steer clear of basing any workplace policies on stereotypical assumptions about employees' age. Where organisations are considering applying policies that discriminate directly against younger or older employees, they should think carefully about whether the treatment or provision achieves the intended legitimate aim and ensure that it is applied consistently. ■

Kücükdeveci v Swedex GmbH & Co KG [2010] EUECJ C-555/07

Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] EUECJ C-341/08

Seldon v Clarkson Wright & Jakes [2008] UKEAT 0063/08/1912

Wolf v Stadt Frankfurt am Main [2010] EUECJ C-229/08