The Growing Importance of Age Equality

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Introduction

It is now common for age discrimination to be prohibited by law. This reflects a growing recognition that discrimination based on a person's age can violate their dignity and be economically wasteful. However, there are times when the use of age distinctions is necessary. Therefore, age discrimination law can be complex. This paper explores some of the issues that arise in this context, and explores how the battle for age equality is assuming ever greater importance in international and European human rights law.

The Prevalence of Age Discrimination

Age is often used unfairly as an arbitrary, irrational and stereotyping tool for making distinctions between individuals. Differences of treatment between different individuals or groups on the grounds of age are often based on generalised assumptions or casual stereotypes, with age used as a "proxy" for other personal characteristics such as maturity, health or vulnerability. For example, younger persons are often assumed to lack maturity, judgment and any commitment to family responsibilities; older persons are often assumed to lack flexibility, motivation, reliable health, and the ability to absorb new ideas.[2]

These assumptions are often the basis for discriminatory decisions in the field of employment and occupation, such as when employers refuse to hire older or younger workers, or refuse to recruit or promote workers of a certain age.[3] Age discrimination based on unfair stereotyping also takes place in other contexts, as when younger persons are subjected to harassment by police or security personnel solely on the basis of their age, or when older persons are assumed to lack decision-making capacity when it comes to medical treatment or the provision of social care. Such age-based stereotyping denies individuals the opportunity to be judged on their own merits. It also violates their dignity by reducing them to the status of a caricature, which ignores their specific attributes, needs and qualities.[4]

Furthermore, age stereotyping can produce negative social consequences. For example, certain age groups often face formidable obstacles when it comes to gaining equal access to the labour market. As a consequence, these groups often suffer social exclusion and high levels of poverty, which in turn imposes substantial economic and social welfare costs upon society at large.[5] In particular, older workers who have lost their jobs, or younger jobseekers that have not been able to gain experience in full-time employment, often struggle to find decent employment. This can have a negative impact on the dignity and self-esteem of the individuals concerned, and can cause the groups affected to suffer serious levels of social exclusion.

Age discrimination can also be viewed as economically wasteful, in that older and younger workers with valuable skills are often excluded from the labour market for irrational reasons.[6] Many of the most common assumptions about different age groups have come under sustained challenge in recent years. For example, using age as an automatic proxy for health, ability to absorb new information or competency is often very questionable,[7] while evidence suggests that, except in a very limited range of jobs, work performance does not deteriorate with age.[8] Even where such assumptions may have some broad statistical validity across a particular age group, they are often based upon stereotyping that does not reflect the diversity of individuals within the relevant age groups, or the individual qualities and abilities of the particular individuals affected.[9]

Employers and service-providers may at times be justified in using age-based distinctions to differentiate between different groups of people – for example, age limits (usually 65) are used to determine who should become entitled to pension benefits, because no other practical or fair way exists of deciding who should qualify. As discussed further below, this distinguishes age discrimination from other forms of unequal treatment, such as race or gender discrimination, where differences in treatment based on the protected characteristic in question will usually only be acceptable where they are necessary by virtue of the nature of the job or mode of service provision in question. However, strong arguments nevertheless exist that employers and service-providers should only be able to differentiate between people based on their age when they can show an objective justification for their actions, in order to combat stereotyping and to ensure adequate respect for the dignity and equality of status of all persons irrespective of age.

The Development of Age Discrimination Law

Law therefore has an important role to play in deterring age-based stereotyping and protecting human dignity.[10] Age discrimination is increasingly viewed as analogous to other forms of prohibited status-based discrimination, albeit one with special characteristics.

As yet, international human rights law does not contain many provisions which specifically address the problem of age discrimination.[11] It can nevertheless be viewed as a form of "other status" discrimination as prohibited by Article 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Social, Economic and Cultural Rights (ICSECR), Article 14 and Protocol 12 of the European Convention on Human Rights (ECHR), and a range of other international and regional human rights instruments.

As a result, the UN Human Rights Committee has recognised that age discrimination could constitute a violation of Article 26 ICCPR.[12] Similarly, in *Schwizgebel v Switzerland*, the Strasbourg Court recognised that discrimination on the grounds of age could constitute a violation of Article 14 of the ECHR taken together with Article 8, even though it concluded that a refusal to authorise the adoption of a second child by the applicant on the grounds of her age did not constitute a violation of the Convention.[13] The European Committee on Social Rights has also interpreted the provisions of Article 23 of the revised European Social Charter, which protects the specific rights of older persons, as requiring states to have comprehensive age discrimination legislation in place to protect older persons against discrimination in a range of areas outside of employment, such as access to goods, facilities and services in the fields

of health care, education, housing, social services, insurance and banking.[14]

Many states have now also introduced age discrimination legislation, which prohibits age discrimination in employment and increasingly in other contexts such as the provision of goods and services, education, and health care. In the United States, the Age Discrimination in Employment Act (ADEA) has prohibited discrimination against older workers since 1967. However, most forms of age discrimination legislation prohibit discrimination against younger and older workers – provisions to this effect can be found in federal and provincial human rights legislation in Canada, the Equality Act 2010 and associated secondary legislation in the UK, the Employment Equality Act 1998 and the Equal Status Act 2000 in Ireland, and the Age Discrimination Act 2004 in Australia.

All member states of the EU have now prohibited all forms of age discrimination in employment, as a result of the provisions of Directive 2000/78/EC (the "Framework Equality Directive") which require all EU states to prohibit direct and indirect discrimination, victimisation and harassment on the grounds of age in the spheres of employment and occupation; some states such as Ireland, the UK and the Netherlands have gone further and prohibited age discrimination in access to goods and services and other contexts.

Indeed, the Court of Justice of the EU (CJEU) in *Mangold* confirmed that age discrimination should be treated as broadly analogous to other prohibited forms of discrimination within European law, and recognised that it was encompassed within the general principle of non-discrimination that constituted one of the underlying fundamental norms of EU law.[15] This decision was initially controversial, as some commentators argued that there was no pan-European consensus that age discrimination should be viewed as contrary to the principle of equal treatment.[16] However, the CJEU confirmed in its subsequent decision in the case of *Kücükdeveci*[17] that age discrimination comes within both the general principle of non-discrimination and also in the prohibition on discrimination set out in Article 21 of the EU Charter of Fundamental Rights.

The Legitimate Use of Age Distinctions

Age discrimination is therefore increasingly acknowledged to be a form of unequal treatment which should be prohibited in law. However, as noted above, there are certain circumstances where the use of age distinctions can be objectively justified. Employers may at times have to make use of age limits for the purpose of workforce planning – for example, it might be legitimate for an employer to refuse to send an older worker who was due to retire in a year on an intensive, time-consuming and expensive training course, on the basis they would not receive an adequate return for their training investment. Similarly, public authorities may need to use age limits to define who is entitled to benefit from specific types of pension arrangements or other social welfare benefits.

Treating different age groups differently may also be necessary to adjust to changing socio-economic conditions and to ensure what the CJEU in the case of *Petersen* has described as "inter-generational solidarity", i.e. to strike a fair balance between the opportunities available to different age groups.[18] Particular complexities arise in respect of the use of mandatory retirement ages by employers: they are often used by employers to ensure a regular turnover of employees and to open up promotion opportunities for younger workers, despite the fact that they terminate

the employment contracts of older employees solely on the basis of their age.

All of this distinguishes age discrimination from other forms of discrimination. In general, differences of treatment which are directly linked to a person being of a particular gender, ethnic group, religion, etc. will be unlawful, unless having one of these "protected characteristics" is a Genuine Occupational Requirement (GOR) for the job in question, for example when being female is a necessary requirement to perform a particular acting job. However, when it comes to age discrimination, employers, service providers and public authorities may have to be given greater leeway to differentiate between individuals on age grounds, if they can show that it is necessary and proportionate for them to do so in order to achieve a legitimate aim. In other words, age discrimination legislation must make it possible for both direct and indirect discrimination to be objectively justified, unlike other forms of anti-discrimination legislation.

Thus, for example, Article 6(1) of the EU Framework Equality Directive provides that:

> "[D]ifferences 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."

In other words, a rule or a policy which subjects employees to less favourable treatment on the ground of age will not constitute discrimination if it is a) designed to achieve a "legitimate aim", and b) "appropriate" and "necessary" to achieve that particular aim.[19]

Similar provisions exist in age discrimination legislation in the US, Canada and other states. So, for example, when applying the age discrimination provisions of the Ontario Human Rights Code, the Canadian Supreme Court in *Ontario Human Rights Commission v Etobicoke*[20] confirmed that an employer had to show that the application of an age requirement was reasonably necessary, although the Court recognised that the employer need not show that this standard was justified in respect of each and every employee affected where this was "impractical".[21]

Article 6(1) of the Framework Equality Directive proceeds to give a number of examples of such justified differences in treatment, which include the "setting of special conditions on access to employment and vocational training" in order to promote the vocational integration of particular age categories of worker or to "ensure their protection"; the "fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment"; and "the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement". [22]

Age Discrimination Law in Action: The Case-Law of the Court of Justice of the EU

The expanding case-law of the CJEU in this field also offers many examples of when the use of age-based distinctions will or will not be objectively justified. It has also set out a detailed analytical framework that serves as a comprehensive guide as to how the objective justification test should be applied in this context, which is serving as the basis for the development of age discrimination law across the EU.

The Court has acknowledged that age discrimination constitutes a specific form of discrimination: differences of treatment on grounds of age may be justified in a wider range of circumstances than is the case for the other non-discrimination grounds. The Court has also given national legislatures and private employers a degree of leeway in choosing how to design employment and vocational training policies, especially when it comes to setting retirement ages. However, the Court has also made it clear that the provisions of Article 6(1) of the Directive constitute a very specific derogation from the general principle of equal treatment.[23] As a result, the objective justification test set out in Article 6(1) has to be applied in a rigorous and demanding manner. Age distinctions which are not rationally linked to achieving a legitimate aim, or which are clearly incoherent, unreasonable, or excessive, will not satisfy the requirements of EU law.[24]

Furthermore, the Court in its judgment in *Age Concern* has emphasised that "Article 6(1) imposes on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification": while member states enjoy broad discretion in "choosing the means capable of achieving their social policy objectives", "that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age".[25] Furthermore, in the same judgment, the Court stated that:

> "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 a 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."[26]

In *Fuchs*, the Court also made clear that arguments in support of the use of age distinctions had to be supported by "evidence of probative value".[27]

The case-law of the Court has thus given a clear interpretation to the provisions of Article 6(1) and ensured that strong protection now exists in EU law against age discrimination in employment and occupation. However, the Court has also taken account of the specific nature of the age ground, and the manner in which the use of age-based distinctions may be appropriate and necessary to achieve a legitimate aim. In so doing, it has tried to strike a delicate balance between enforcing the prohibition on age discrimination and ensuring that member states and employers enjoy some room for manoeuvre in this context.

The first reference concerning the age provisions of the 2000 Directives that reached the Court was the already mentioned case of *Mangold v Helm*, which concerned German legislation which had limited the employment rights of older workers by giving employers greater freedom to conclude fixed-term contracts with workers over the age of 52. When considering whether the German legislation at issue satisfied the first leg of the objective justification test, i.e. whether it was directed towards achieving a legitimate aim, the Court in *Mangold* considered that the purpose of the legislation was "plainly to promote the vocational integration of unemployed older workers" by giving employers an incentive to hire them in preference to younger workers who enjoyed greater employment rights. It took the view that "the legitimacy of such a public-interest objective cannot reasonably be thrown in doubt"

and therefore concluded that objectives of this kind would "as a rule" constitute a legitimate aim under Article 6(1). The Court also accepted that member states "unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy". However, the Court went on to note that the legislation limited the employment rights of all workers who were older than 52, irrespective of their previous employment history. It concluded that the manner in which age had been used as the "only criterion" for defining the disadvantaged group of workers, "regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned", went beyond what was objectively necessary to attain the objective of promoting the vocational integration of older workers.[28]

In *Mangold*, the Court thus held that states enjoy broad discretion in setting the national employment policy, but the use of age as a criterion has to be clearly shown to be proportionate and necessary to achieve the policy objectives at issue. Similarly, in the case of *Kücükdeveci*, the Court concluded that the exclusion of periods of work undertaken by employees under the age of 25 from the calculation of redundancy notice periods furthered the legitimate aim of encouraging employers to hire younger workers but was disproportionate as it applied to all employees, regardless of their age or experience.[29]

A similar approach was adopted in the case of *Hütter v Technische Universität Graz,* which raised the question of the compatibility with the Directive of Austrian legislation which provided that periods of work under the age of 18 were excluded when calculating an employee's grading for salary purposes.[30] The Austrian Government asserted that the law in question was designed to achieve two legitimate aims, namely encouraging those under 18 to stay in secondary education while simultaneously promoting the integration of young people who have pursued vocational training into the labour market. However, the Court questioned whether the law could be said to rationally advance either of these two legitimate aims: the age limit applied irrespective of whether students had stayed in secondary education or had undergone vocational training, while it also could "lead to a difference in treatment between two persons who have pursued the same studies and acquired the same professional experience, exclusively on the basis of their respective ages".[31] As a result, the national law could not be said to be objectively justified under Article 6(1).

In *Andersen*,[32] the CJEU developed its case-law further by drawing a distinction between the requirements set out in Article 6(1) that an age distinction had to be both "appropriate" and "necessary". This reference concerned Danish legislation which provided that workers employed in the same undertaking for at least 12 years were entitled to a severance allowance unless, on termination of the employment relationship, they had reached the age at which they were entitled to receive a pension. This legislation was challenged by the applicant, who was dismissed by his employer at the age of 63 but wished to remain in the job market rather than retiring and collecting his pension. The Court accepted the Danish government's argument that this age-linked restriction was intended to achieve the legitimate aim of ensuring that employers did not pay double compensation to dismissed employees (in the form of the severance allowance and the pension), and concluded that the legislation was not "manifestly inappropriate" when viewed as a means of giving effect to this

objective. However, the legislation did not allow older workers who wished to remain in the labour market to temporarily waive their pension entitlement in favour of obtaining a severance allowance, as Mr Andersen wished to do in this case. This meant that an entire category of employees defined by their age were denied the opportunity of benefiting from the extra income protection provided by the allowance. In the Court's view, this was "unnecessary" and therefore the legislation was incompatible with the requirements of Article 6(1).

The CJEU again differentiated between "appropriate" and "necessary" measures in the case of *Prigge*,[33] which concerned the provisions of a collective agreement which required Lufthansa pilots to retire at the age of 60. This mandatory retirement age had been agreed by the social partners to ensure the safety of airline passengers. However, the Court noted that national and international legislation set an upper age limit of 65 for pilots, and no evidence has been presented to justify why a lower age limit had been set in the collective agreement. The Court therefore concluded that the measure was not "necessary".[34]

In the case of *Petersen*,[35] the Court again concluded that retirement age requirements which were not applied consistently across a profession could not be objectively justified. This reference from the German labour courts concerned an age limit of 68, after which dentists providing public care under the German public insurance system lost their authorisation to continue this work. The German government attempted to justify the age limit on two separate grounds. Firstly, it argued the time limit was justified in order to protect the health of patients obtaining dental care, as "general experience" indicated that dentists suffered a decline in performance after the relevant date. Secondly, the government also argued that the measure was also justified on the basis that it helped to share out employment opportunities across the different generations: the age limit served to open up new career opportunities for younger dentists. In its judgment, the CJEU noted that the age limit did not apply to dentists in private practice. As a result, the Court held that it was inconsistent to argue that an age limit was necessary to protect patients against possible decline in the skills of dentists but not to apply this protection to patients receiving care from private practitioners. It therefore concluded that the age limit was not "necessary" and therefore was not objectively justified. However, the Court also indicated that retirement ages which were designed to open up job opportunities for younger workers and thus to advance "inter-generational solidarity" might in other circumstances be justified.

This recognition that "inter-generational solidarity" may provide an objective justification for the use of age distinctions was applied in the subsequent case of *Georgiev*,[36] where the Court held that restrictions laid down by national legislation on the employment of a university lecturer after the age of 65 could be objectively justified under Article 6(1). The Court considered that these age limits were capable of opening up employment and promotion opportunities for younger academics: it also took the view that these age limits could help to ensure that a mix of generations would exist among academic staff which could enhance the quality of teaching and research.[37] As in *Petersen*, the Court was thus willing to grant states a reasonably wide margin of discretion when age limits are justified on the basis that they promote inter-generational fairness. However, in *Georgiev*, the Court

nevertheless made it clear that the national courts were still required to assess whether the age limits were necessary in light of the current labour market conditions and were applied consistently across the different categories of academic staff.[38]

In the case of *Fuchs,*[39] the CJEU adopted a similar analysis. The legislation at issue in this case provided that state prosecutors should retire at 65, subject to a possibility of continuing to work until 68 if it was in the interests of the state. The Court considered once again that such an age limit could be justified on the basis that it established a "favourable age structure" that opened up posts for younger employees.[40] In general, it concluded that the age limit struck a fair balance between the right to work of older employees and the aim of establishing a balanced age structure in the workplace.

In general, the Court has given states a relatively wide margin of discretion when it comes to setting retirement ages. In the case of *Palacios de la Villa*, an age discrimination challenge was launched against the provisions of a Spanish national collective agreement which established that employees in workplaces covered by the agreement would cease to be employed at the fixed retirement age of 65, subject to a condition that the employees affected had made sufficient contributions under the national social security scheme to become entitled to a full retirement pension. The Court took the view that considered that the retirement age provisions in question could be regarded as objectively justified under Article 6(1) of the Directive, on the basis that they were objectively and reasonably justified by a legitimate aim relating to employment policy and the effective functioning of the Spanish labour market. The Court also went on to note that the measure took into account both the age of employees and also their pension entitlements, as well as allowing collective agreements to modify the operation of the retirement age scheme. Therefore, it concluded that the national legislation in question could be regarded as coming within the "broad discretion" accorded to member states in setting and implementing employment policy.

Subsequently, the Court adopted a similar analysis in *Age Concern*.[41] This case involved a challenge brought by a civil society organisation against the provisions of the UK Employment Equality (Age Discrimination) Regulations 2006 that had transposed the age provisions of Directive 2000/78/EC into UK law. These Regulations permitted employers to terminate the employment contracts of employees who are older than 65: employees who wished to continue to work after this "mandatory retirement age" can request to stay on, and if they continue to work are protected against unfair dismissal, but employers needed only to "consider" this request. The applicants claimed that these provisions were not compatible with the Directive. However, the Court concluded that the UK legislation could be objectively justified, and reiterated that member states enjoyed a broad discretion in the area of national employment policy.

Similarly, in the case of *Rosenbladt*, the CJEU confirmed that national legislation which permitted employers to terminate employment contracts at the age of 65 was compatible with the provisions of Article 6(1). In this case, the applicant, Ms Rosenbladt, had worked as a cleaner for 39 years at a barracks in Hamburg; when she reached 65, her employment contract was terminated, leaving her only in receipt of a statutory old-age pension of EUR 253.19 per month. However, the Court held that the relevant provisions of the German legislation in question struck

a defensible balance between the needs of older workers and the interests of employers in workforce planning and distributing employment opportunities between different generations. It also reiterated that states enjoyed a wide discretion in this area of employment policy.

Some criticism has been directed against the Court's case-law on retirement ages, on the basis that it gives states an excessive degree of discretion.[42] The Court has certainly applied the objective justification in a less exacting manner in this context than it has in others. However, in so doing, it has consistently emphasised that states have a legitimate interest in ensuring that an appropriate balance is struck between the interests of older and younger workers. In other contexts, the CJEU has applied the objective justification test with considerable rigour, as illustrated by its judgments in *Petersen*, *Mangold*, *Kücükdeveci* and *Hütter*.

Its judgments have also influenced the national courts' application of the objective justification test, as evidenced by the approach of the UK Supreme Court in the leading British age discrimination case of *Seldon v Clarkson Wright and Jakes*.[43] The age discrimination provisions of EU law have also encouraged national authorities to revise national legislation which makes provision for the use of age-based distinctions. For example, in the UK, the statutory provisions allowing employers to dismiss employees once they had reached 65 were repealed by the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011.

Conclusion: Age Equality and the Expanded Recognition of the Rights of Older Persons

In general, all across the EU as elsewhere across the globe, the use of age distinctions is increasingly coming under legal and political pressure. This reflects the existence of a global trend in favour of age equality. Age discrimination legislation is becoming commonplace, and is increasingly viewed as a necessary element of the "equality spectrum".

Other related developments should also be noted. There is a move underway in international human rights law to secure greater recognition for the specific human rights of older persons. UN legal standards on the treatment of older persons are in general not well developed.[44] However, the UN Committee on Economic, Social and Cultural Rights has issued a General Comment on the economic, social and cultural rights of older persons which sets out in detail the scope of their rights and entitlements under the ICESCR.[45] Other UN monitoring bodies and mandate holders have recognised that older persons may be particularly vulnerable to multiple forms of discrimination and the denial of social protection.[46] Furthermore, a number of international policy documents setting out recommendations and principles in this field have also been endorsed by the UN General Assembly. These include the Vienna International Plan of Action on Ageing, the United Nations Principles for Older Persons of 1991 (which include 18 recommendations organised on the basis of five underlying principles of dignity, independence, participation, care and self-fulfilment), and the Madrid International Plan of Action on Ageing.

Furthermore, in January 2010, the Advisory Committee to the Human Rights Council released a report on the human rights of older persons.[47] This "Chung Report", named after the Committee's rapporteur, concluded that there was a need for a new UN treaty on the human rights of older persons which would close gaps in the existing international standards and ensure that rights of elders re-

ceived more visibility. A report issued by the UN High Commissioner for Human Rights reached similar conclusions,[48] and an open-ended Working Group on Ageing had been established by the General Assembly Resolution 65/182 in December 2010 to explore *inter alia* whether such a treaty is required.[49] Therefore, while UN standards in this area are currently underdeveloped, there is a real possibility that this situation may change in the future.

In addition, the rights of older persons have received recognition in European human rights standards. In *Farbthus v Latvia*, the European Court of Human Rights held that a failure to take into account the age and health of an elderly person (in this case a 86-year old) in imposing a prison sentence upon him for participating in Stalin's purges in 1940-41 could constitute a violation of Article 3 ECHR.[50] Similarly, Article 23 of the revised European Social Charter requires states to establish a comprehensive floor of protection for the rights of older persons to social protection, which in turn serves to protect their privacy, dignity and independence, as well as their ability to participate in social and cultural life. Article 25 of the EU Charter of Fundamental Rights contains similar provisions.

As a result, it is clear that a growing consensus is developing in international and European human rights law that states are subject to special obligations to take action to vindicate the rights of older people and to address their specific needs and requirements. As yet, a similar momentum does not exist in respect of the rights of younger persons who do not fall within the scope of the UN Convention on the Right of the Child and other children's rights instruments. However, when taken together with the move towards greater recognition of the importance of combating age discrimination, it is clear that issues related to age equality are assuming greater importance.

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2 See Fredman, S., "The Age of Equality", in Fredman, S. and Spencer, S. (eds.), *Age as an Equality Issue: Legal and Policy Perspectives*, Oxford: Hart, 2003, pp. 21-70, especially pp. 22-35.

3 See Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario*, Toronto, Ontario Human Rights Commission, 2000.

4 See above, note 2; see also O'Cinneide, C., "Comparative European Perspectives on Age Discrimination", in Fredman, S. and Spencer, S. (eds.), *Age as an Equality Issue*, pp. 195-218, especially pp. 214-215.

5 See Meenan, H., "Age Discrimination in the UK", *International Journal of Discrimination and the Law,* Vol. 4, No. 3, September 2000, pp. 247-292.

6 See Australian Human Rights and Equal Opportunity Commission, *Age Matters: A Report on Age Discrimination*, Canberra, HREOC, May 2000.

7 See Grimley-Evans, J., "Age Discrimination: Implications of the Ageing Process", in Fredman, S. and Spencer, S. (eds.), *Age as an Equality Issue: Legal and Policy Perspectives*, Hart, Oxford, 2003, pp. 11-20. See also, in the same book, Schuller, T., "Age Equality in Access to Education", pp. 117-144.

8 See Meadows, P., *Retirement Ages in the UK: A Review of the Literature*, London: Department of Trade and Industry, 2003, pp. 28-29.

9 The Irish case of *Byrne v FAS*, DEC-E2002-045 is a good example of a case involving discriminatory and unfair assumptions. A 48-year old woman was refused a vocational training place, and was told at interview that older students were less successful at technical drawing and had more problems reconciling work with family commitments. The Equality Officer found for the claimant, finding that no objective evidence to support these comments had been produced.

10 See above, note 2.

11 For an exception, see the ILO Older Workers Recommendation 1980 (No. 150).

12 *Love et al v Australia*, Communication No/983/2001; *Schmitzde-Jong v The Netherlands*, Communication No. 855/1999; *Solís v Peru*, Communication No. 1016/2001; and *Althammer et al. v Austria*, Communication No. 998/2001.

13 Application no. 25762/07, Judgment of 10 June 2010.

14 See European Committee on Social Rights Conclusions 2009, Finland, p. 273.

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

16 O'Cinneide, C., "Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age", *Revue des Affaires Européennes*, Vol. 2, 2010, pp. 253-276.

17 Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

18 Case C-341/09 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47.

19 Advocate General Sharpston in her opinion in the CJEU case of *Bartsch* suggests that this test allows employers some flexibility in the interests of accommodating changing attitudes towards age discrimination in the EU. (See Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I 7245.)

20 *Ontario Human Rights Commission v Etobicoke* [1982] 1 S.C.R. 202; See also *Saskatchewan (Human Rights Commission) v Saskatoon (City)* [1989] 2 S.C.R. 1297.

21 In *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 S.C.R. 3, the Supreme Court applied a more rigorous version of this standard, ruling that age-based distinctions would generally be unlawful, except where individualised assessment of employees would impose an undue burden on the employer.

22 Article 6(2) also provides that states may exempt age-limits that govern admission to occupational social security schemes or entitlement to the benefits they provide from the prohibition on age discrimination.

23 Case C-388/07 *Age Concern England (Incorporated Trustees of the National Council for Ageing)* [2009] ECR I-1569, Paras 60-67.

24 The wording of the objective justification test set out in Article 6(1) differs from that set out in respect of indirect discrimination in Article 2(2)(b) of the same Directive, in that the wording of Article 6(1) requires that a difference in treatment be "objectively *and reasonably* justified" [emphasis added]. However, in *Age Concern*, the Court made it clear that this difference in wording was not significant. (*Ibid.*, Paras 53-67.)

25 *Ibid.*, Para 67.

26 *Ibid*., Para 51. The Court here cross-referred to its case-law on the application of the objective justification test in the context of equal pay, citing in particular "by way of analogy" its judgment in Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, Paras 75-76.

27 Joined Cases C-159/10 and C-160/10, *Fuchs and Köhler v Land Hessen*, Judgment of the Court (Second Chamber) 21 July 2011, Paras 76-83.

28 See above, note 15, Paras 63-65.

29 See above, note 17.

30 Case C-88/08 *Hütter v Technische Universität Graz* [2009] ECR I-5325.

31 *Ibid*., Para 39.

32 Case C-499/08 *Ingeniørforeningen i Danmark (acting on behalf of Ole Andersen) v Region Syddanmark*, Judgment of the Court (Grand Chamber) 12 October 2010.

33 C-447/09 *Prigge v Deutsche Lufthansa AG*, Judgment of the Court (Grand Chamber) 13 September 2011.

34 The Court also made it clear that the provisions of Article 2(5) as a derogation to the principle of equal treatment had to be interpreted narrowly, again in line with its overall interpretative approach. (*Ibid*., Para, 56.)

35 See above, note 18.

36 Joined Cases C-250/09 and C-268/09, *Georgiev v Technicheski universitet – Sofia, filial Plovdiv* [2010] ECR I-11869.

37 *Ibid*., Para 46.

38 *Ibid*., Paras 67-68.

39 See above, note 27.

40 The Court also made clear that the limited number of individuals affected did not prevent the measure from being justified on the basis that it pursued a legitimate goal of public policy. (*Ibid*., Para 51.)

41 See above, note 23.

42 See O'Dempsey, D. and Beale, A., "Thematic Report of the European Network of Legal Experts in the Non-discrimination Field", *Age and Employment,* Brussels, European Commission/MPG, 2011, pp. 13-14.

43 *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16.

44 Hert, P. and Eugenio, M., "Specific Human Rights for Older Persons", *EHRLR*, 2011, pp.398-418, in particular pp. 400-404.

45 Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 12 August 1995.

46 See, for example, Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 27*, CEDAW/C/2010/47/GC.1; Report of the Special Rapporteur on the question of human rights and extreme poverty, Carmona, M., *Social Protection and Old Age Poverty*, A/HRC/14/31, 31 March 2010.

47 Human Rights Council, Advisory Committee, The Necessity of a Human Rights Approach and Effective United Nations Mechanism for the Human Rights of the Older Person, A/HRC/AC/4/CRP.1, 2010.

48 E/2012/51, 20 April 2012.

49 A/RES/65/182, Para 28.

50 Application no. 4672/02, Judgment 2 December 2004.