



# University of HUDDERSFIELD

## University of Huddersfield Repository

de Gioia-Carabellese, Pierre and Myhill, Katriona

Age Discrimination: a 'too Young' Protected Characteristic in Europe?

### Original Citation

de Gioia-Carabellese, Pierre and Myhill, Katriona (2016) Age Discrimination: a 'too Young' Protected Characteristic in Europe? *Interdisciplinary Perspectives on Equality and Diversity*, 2 (2). ISSN 2396-8532

This version is available at <http://eprints.hud.ac.uk/id/eprint/32900/>

The University Repository is a digital collection of the research output of the University, available on Open Access. Copyright and Moral Rights for the items on this site are retained by the individual author and/or other copyright owners. Users may access full items free of charge; copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational or not-for-profit purposes without prior permission or charge, provided:

- The authors, title and full bibliographic details is credited in any copy;
- A hyperlink and/or URL is included for the original metadata page; and
- The content is not changed in any way.

For more information, including our policy and submission procedure, please contact the Repository Team at: [E.mailbox@hud.ac.uk](mailto:E.mailbox@hud.ac.uk).

<http://eprints.hud.ac.uk/>



## Age Discrimination: a 'too young' protected characteristic in Europe?

Pierre Sinclair de Gioia Carabellese – School of Management and Languages, Heriot Watt University, Edinburgh, Scotland [P.de\\_Gioia-Carabellese@hw.ac.uk](mailto:P.de_Gioia-Carabellese@hw.ac.uk)

Katriona Myhill School of Management and Languages, Heriot Watt University, Edinburgh, Scotland

### Abstract

Age discrimination and the other protected characteristics are legislated, in the EC Treaty, as a numerus clausus of features which, despite the differences, enjoy equal status. Yet, age discrimination, unlike its counterparts, is susceptible to being 'justified' in force of the Framework Directive. The obscure and grey waters of law to which age discrimination has been drifting aimlessly for some time, is the subject of this paper, the ultimate purpose of which is, beyond the sociological and anthropological studies, to dissect and unearth the current inconsistencies in the European Union legislation as regards this notion and its interplay with the equality corpus iuris. As a logical outcome, the paper puts forward suggestions for amendments to the current Framework Directive so that its tenor can be aligned to the Treaty where, be this construct ontologically correct or not, there is no suggestion that a ranking of protected characteristics should be adopted. Furthermore and more intriguingly, the contribution advances a more radical proposal, ergo the reform of the Framework Directive so that this protected characteristic, in so many cases unsuccessfully pursued vis-à-vis the national courts, be ultimately shaped in a binary way, therefore

Submitted 17th December 2015

Accepted 25th September 2016



‘old age discrimination’, so that its ‘promotion’ to the ‘premier league’ of protected characteristics can thereupon be realised.

## **Introduction**

There can be little doubt that age discrimination is in its infancy when viewed from two contrasting perspectives.

First and foremost, from a legislative point of view, this notion has been introduced in Europe by the Framework Directive in 2000 and, therefore, is a comparatively recent construct. In Britain, for instance, it was only in 2006, courtesy of the Employment Equality (Age) Regulations 2006, that it was unveiled, as an additional protected characteristic, within a largely fragmented array of legislation at that time, governing over discrimination. Secondly, and of utmost importance to the epistemological purposes of this paper, age discrimination, from the stand point of its normative structure, remains a ‘weak’ protected characteristic when compared with the other non-discrimination grounds, diluted by the wide range of circumstances in which age is said to provide a ‘legitimate reason’ to distinguish between groups<sup>1</sup>.

---

<sup>1</sup> See for example: Sargeant, M., ‘Distinguishing between Justifiable Treatment and prohibited Discrimination in Respect of Age’, (2013), 4, *Journal of Business Law*, 398-416 and; O’Cinneide, C., ‘Age Discrimination and the European Court



Age is firmly enshrined in the main principles of the EU. The Treaty of the Functioning of the European Union, art 19, contemplates, among the protected characteristics, racial or ethnic origin, religion or belief, disability, or sexual orientation and, last but not least, age. The same European Charter of Fundamental Rights, art 21(1), accounts for age, where it stipulates:

‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a nationality minority, property, birth, disability, age or sexual orientation shall be prohibited’ (underlining not per original text).

Nevertheless in the correspondent implementing legislation, the characteristic at stake remains an unfulfilled achievement and a fledgling concept.

Doctrinally, this alleged hierarchy of the protected characteristics and, therefore, the possibility that, legitimately or otherwise, the EU legislator has fashioned different levels (of importance) of legislated

---

of Justice: EU Equality Law Comes of Age’, (2009-10), 2, *Revue des Affaires Européennes*, 253-276.

Submitted 17th December 2015

Accepted 25th September 2016



‘physiognomies’, has already been adumbrated at an authoritative level in the past, and even justified.<sup>2</sup>

The focus of this work is not to reassess the validity of these theories, but rather to discuss, from a purely legal perspective, whether (i) there is an overlap between the concept of ‘justification’, relating to age, and the notion of an ‘occupational requirement’, applicable to all the protected characteristics, and (ii) the EC Treaty has deliberately relegated age discrimination to a ‘secondary league’. More specifically, if it was demonstrated that, from a legal point of view, the application of art 6 to only one of the protected characteristics – age - is incompatible with the aims of the Treaty, a prospective re-wording of the Framework Directive governing the area of discrimination shall be required, with an omission of what – according to this paper – is the redundant and unnecessary presence of its art 6 (ergo, the justification of direct age discrimination). Ultimately, if this work was successful in achieving this objective, doctrinally, the astute inference, adumbrated in the past, that age

---

<sup>2</sup> Among the others, E Howard, ‘The Case for a Considered Hierarchy of Discrimination Grounds in EU Law’ (2006)13 Maastricht Journal of European and Comparative Law 443.



discrimination has been relegated to a lower tier of protected characteristics, shall be further corroborated.

### **Age discrimination and EU legislation**

The principle of equal treatment is well defined at EU level with Art 2 of the Council Directive 2000/78/EC prohibiting both direct discrimination: the less favourable treatment of an individual on the basis of a protected characteristic; and indirect discrimination: where an individual having a protected characteristic is disadvantaged by an apparently neutral provision. Among the array of protected characteristics, age discrimination presents a noticeable and distinct characteristic: unlike all the other protected characteristics, direct age discrimination can be 'justified'.

In essence, according to article 6 of the Framework Directive<sup>3</sup> there might be a 'justification of differences of treatment on grounds of age'; more specifically:

'Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the

---

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L303).



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.’<sup>4</sup>

The same recital 25 of the Framework Directive states that differences on the grounds of age may be justified, although the prohibition of age discrimination still remains an ‘essential part’ of the European employment strategy.<sup>5</sup>

---

<sup>4</sup> The EU legislation (art 6(2)) goes on to further clarify the details of this possible justification:

‘Such differences of treatment may include, among others:

(a) 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;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) 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.’

<sup>5</sup> S Deakin and SG Morris, *Labour Law* (6th edn, Hart Publishing 2012) 655.



In turn, the principle of 'justification' has been encapsulated in the various domestic legislations across Europe, for instance in Britain. In the British legislation, Section 13(2) of the Equality Act 2010 stipulates as follows:

'If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.'

Despite the concept of justification being enshrined in the British legislation, Scholars are unclear as to how widely this applies vis-à-vis the courts.<sup>6</sup> A narrow interpretation is anticipated and the cases resolved thus far (relating to enhanced redundancy schemes<sup>7</sup> as well as points for long service in a redundancy selection process<sup>8</sup>) seem to justify this assumption.

Yet, article 4(1) of the Framework Directive, in legislating on the concept of 'occupational requirements', applies an element of justification to all the protected characteristics, including age. To this end, such a norm stipulates as follows:

---

<sup>6</sup> I Smith and A Baker, *Smith's & Wood's Employment Law* (11th edn, Oxford University Press 2013) 404.

<sup>7</sup> *MacCulloch v ICI* [2008] All ER (D) 81.

<sup>8</sup> *Rolls Royce v UNITE* [2008] All ER (D) 174.





‘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.’

Additionally, applicable to both the ‘justification’ and the ‘occupational requirements’, the EU legal provisions clarify the specific legitimate differences of treatment (article 6(2)) or the genuine occupational requirements (article 4) that, albeit ontologically discriminatory, do not give rise to any direct or indirect discrimination.

In both cases, the matter is devolved to the national legislator. Whilst the Framework Directive provides little insight as to what may constitute an occupational requirement outwith the requirements of a religious organisation, it provides some helpful guidelines in consideration of the ‘justifications’ of age discrimination. As to the latter, it is highlighted that they may comprise ‘the setting of age-related conditions on access to employment and vocational training



which are designed to promote vocational integration or to protect the workers concerned, the fixing of minimum conditions of age, professional experience or seniority for access to employment or employment-related benefits; and the fixing of maximum ages for recruitment where this is based on training requirements or on the need for a 'reasonable period of employment before retirement'.<sup>9</sup>

In contrast with the element of 'justification', the occupational requirements under the 'counterpart' art. 4 of the Framework Directive are somewhat vague as to what may constitute a genuine occupational requirement (GOR).<sup>10</sup> This has given rise to a narrow interpretation of what may constitute a GOR in the British courts. Current examples of what may constitute a genuine occupational requirement include; where an actor is required to be of a certain age<sup>11</sup>, for the purpose of safeguarding national security or complying with a statutory provision<sup>12</sup>, or, in limited circumstances, where measures are taken to alleviate the disadvantage of a group sharing a particular protected characteristic<sup>13</sup>. The narrow construal of the GOR concept has led to a reluctance by organisations to rely on this

---

<sup>9</sup> S Deakin and GS Morris, *Labour Law* (n 4) 656.

<sup>10</sup> In fact, art. 4(2) am 4(3) are dedicated to the specific interplay between GOR and religion, without setting out a generic list.

<sup>11</sup> Department of Trade and Industry, Equality and Diversity, 'Coming of Age' (2005).

<sup>12</sup> Sch 9. Of the EA 2010.

<sup>13</sup> S.158 of the EA 2010.



defense. However, in relation to age, this provides little benefit with the lower thresholds of ‘objective justification’ providing an unassailable defense for organisations engaging in seemingly discriminatory conduct, arguably, undermining the general principle of equal treatment.

### **Shortcomings and flaws in the way age discrimination is legislated in the European Union**

The combined reading of art 4 and art 6 engenders a number of considerations of a legal nature.

First and foremost, age discrimination seems to be subject to a double whammy. Not only can it be ‘justified’ as an “occupational requirement” (art. 4), but also it can be objectively ‘justified’ (according to art. 6). In light of this different regime (a “regular” one for all the other protected characteristics, and a ‘special’ one for that relating to age), it is insightful to delve behind the black letter of the legislation and, ultimately, understand what art. 6 (as a special “justification” for age) really adds in comparison to what art. 4 already provides by way of its wording.

Two observations are necessary in this respect, in facilitating a comprehensive analysis of the norm at stake (art. 4 of the Framework directive).



The notion of occupational requirements does not make a distinction among the protected characteristics and employers may rely on it irrespective of the discriminatory conducts (ie direct discrimination or indirect discrimination). It can be ascertained that the equal application of this defense across the protected characteristics appears consistent with the principles of equality promoted by the Framework Directive.

Secondly, from a substantive law point of view, the occupational requirement is a requirement that the employer may attach to a role despite potentially impacting on - or interfering with - a protected characteristic; the requirement shall be nonetheless legitimate for the reason that, although the outcome of it results in a discriminatory act, the objective is 'legitimate' and the requirement is 'proportionate'<sup>14</sup>.

Having clarified the concepts of both 'justification', applicable exclusively to age, and 'occupational requirement', applicable to all the protected characteristics, including age, it may be suggested that the two concepts are similar with a requirement for proof of both legitimacy and proportionality, in their application. However, it can

---

<sup>14</sup> Sch. 9 EA 2010.



be affirmed - and this is the theory that this paper seeks to demonstrate - that the 'justification' serves little function other than to weaken the protection from discrimination on the grounds of age by providing a greater range of circumstances in which such discriminatory behaviour may be justified. Whilst the defense of GOR is deliberately limited in relation to the suitability or competence of the individual to perform their role, the defense of justification is subject to no such limits instead allowing for a seemingly unbounded adoption of discriminatory practices based on the pursuit of equivocal 'employment policy or labour market objectives'<sup>15</sup>. It is this distinction which serves to relegate age to the lower echelons of the non-discrimination grounds.

### **A critical re-assessment of the main age discrimination cases**

In deliberating over the decision of the European Court of Justice relating to age discrimination, the perplexities raised in the previous section concerning the manner in which this protected characteristic is legislated upon seem to be confirmed, rather than dispelled.

---

<sup>15</sup> Art 6 of the Council Directive 2000/78/EC.



A possible terrain of analysis ripe for potentially corroborating the subtle theory of this paper is the reading of the relatively recent case of C-144/04 Mangold<sup>16</sup> where it was held by the ECJ, in a somewhat controversial decision, that age should not be treated any differently from the other protected characteristics and the prohibition of age discrimination should be applied with similar rigour as to the other forms of anti-discrimination norms. This decision appears to be in direct conflict with the framework Directive which sees a distinction between age and the remaining protected characteristics, through the restricted application of art 6.

Furthermore, in the more recent case of C-555/07 Kukudeveci<sup>17</sup>, the decision in Mangold was confirmed and the general concept of equal treatment across the protected characteristics has been further reinforced. In fact, the importance of the general principle of equal treatment has seen a divergence by the courts in their application of the Directive. Whilst traditionally Directives have deliberately not been given 'horizontal direct effect' within national law in relation to private disputes, the Kukudeveci case appears to depart from this precedent confirming that 'national

---

<sup>16</sup> [2005] ECR I-9981.

<sup>17</sup> [2010] IRLR 346.



courts must disapply domestic laws and other areas of EU law in the case of conflict with the general principle of equal treatment<sup>18</sup>. This would indicate, *prima facie*, that with regards to age discrimination, art 6 should be ‘disapplied’ due to the apparent interference with the dominant principle of equal treatment.

This apparent departure from the direct application of the Equal Treatment Directive and the separation of age from the remaining non-discrimination grounds, further ‘muddies the water’ in the determination of an age discrimination case, reinforcing the need to address the presence of the ‘rogue’ art 6.

A further case worthy of analysis in reviewing the necessity of art 6 is the case of *Prigge v Deutsche Lufthansa*<sup>19</sup>. The dispute arose from a collective agreement and its specific provision in force of which the pilots of the German flag-ship air carrier (the defendant Lufthansa) had to comply with a default automatic retirement age of 60. This conflicted with national legislation allowing pilots to work beyond the threshold of 60 and up to a limit of 65, so long as they

---

<sup>18</sup> For a discussion of the case see, O’Cinneide, C., ‘Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age’, (2009-10), 2, *Revue des Affaires Européennes*, 253-276.

<sup>19</sup> [2012] ICR 716.



were accompanied by at least a pilot, as a member of the crew, aged less than 60. The collective agreement was regarded as unjustified. However, one cannot deny that the same identical result (therefore, invalidity of the collective agreement due to conflict with national statute) could have ostensibly been achieved through the application of art 4 of the Framework Directive, relating to the occupational requirement. Ergo, although there is a difference in the treatment of pilots on the grounds of age,<sup>20</sup> this cannot fall within the concept of occupational requirement (or, to use a correspondent methodology, cannot be justified), due to the fact that the objective is not legitimate and the means of achieving this objective, through the stipulation of a maximum age in relation to the particular post, is not proportionate. Thus in re-interpreting this case through the proposed reasoning of this paper, there is no reason for doubting that the result would have been alike if the events had been interpreted in light of the sole occupational requirement concept, rather than the additional and arguable unnecessary, element of justification.

### **Age and retirement age**

---

<sup>20</sup> Pilots to retire before 60.





Under EU statute as it currently stands, age is formally a neutral protected characteristic, applicable to the full range of different age groups. In this respect, it is not a coincidence that the first ‘casualty’ of the prohibition to discriminate on the grounds of age has been the elimination of the default age limit for retirement<sup>21</sup>, entailed to which was (and still is) the purpose to stimulate and increase the participation ‘of the elderly in the labour market’.<sup>22</sup>

In reality, in reading the EU legislation, both age and retirement age should be fully disarticulated from one another, in light of the fact that, according to Recital no 14 of the Framework Directive, the EU piece of legislation ‘shall be without prejudice to national provisions laying down retirement ages’. This appears to be reinforced in the landmark ECJ case of C-411/05 Palacios de la Villa<sup>23</sup> where the court confirmed that the Framework Directive is to be ‘without prejudice to national provisions laying down retirement ages’ and that the creation of labour market opportunities provides a

---

<sup>21</sup> In Britain, this has occurred in force of the *Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011*. The compulsory retirement age has been phased out starting from April 2011.

<sup>22</sup> D Cabrelli, *Employment Law in Context. Text and Materials* (n 10) 419.

<sup>23</sup> [2007] IRLR 989.



‘legitimate aim’, in the interest of public policy, which justifies the stipulation of retirement ages where the means are proportionate.

Similarly in the case of C-45/09 Rosenblatt<sup>24</sup> where a collective agreement setting a mandatory retirement age of 65 was called into question, the court reaffirmed that retirement age ‘was a reflection of political and social consensus’ based on the notion of ‘sharing employment between the generations’. This was held to be advantageous as it removed the need to dismiss older employees on the grounds of capability which would be ‘humiliating for those which have reached an advanced age’.

Upon review of the EU legislation and the ensuing case law it can be ascertained that there may be wide range of ‘legitimate aims’ which may justify the stipulation of a compulsory retirement age and it is for the national courts to determine the equity of such measures. However, with a wide range of social and economic objectives which may be considered ‘legitimate’ and a lack of guidance as to what age may be considered proportionate in achieving these aims, there can be said to be an extensive range of circumstances which could objectively justify mandatory retirement.

---

<sup>24</sup> [2010] ECR I-9391.



Whilst the social and economic sensitivity of mandatory retirement rules, and their importance to issues such as intergenerational fairness, have been well documented<sup>25</sup>, it has been put forward that, in order to effectively achieve the aims of anti-discrimination legislation, this must be more effectively balanced against the interests of some employees to continue in employment<sup>26</sup>. In order to address this imbalance it is proposed that a more effective mechanism for measuring the legitimacy of retirement rules, at an individual level, would be the application of art 4 and the genuine occupational requirements. In this case, any age based requirements would have to be measured in accordance with the capability or suitability of the individual to continue in the role. This would narrow down the discretion of Member States, currently amplified by the unnecessary art 6, in determining the legitimacy of retirement rules in specific occupations, removing the

---

<sup>25</sup> See for example; Fredman, S., & Spencer, S, 'Age as an Equality Issue' [2003], Hart publishing, Oxford, eds.

<sup>26</sup> Schlacter, M, 'Mandatory Retirement and Age Discrimination under EU Law', [2011], *The International Journal of Comparative Labour Law and Industrial Relations*, 27 (3), p 287 – 299.



ability to rely upon 'mere assertions or generalisations'<sup>27</sup> to justify differences of treatment.

### **Age discrimination: Genuine Occupational Requirement v Justification**

In switching attention to the national decision in the matter of age discrimination and the dual concepts of justification/occupational requirement, it can be argued that the GOR defense, applicable to all protected characteristics, satisfies the requirement to afford a level of discretion to the employer to distinguish between different groups in pursuit of some legitimate social or economic objective.

The case of *Seldon*,<sup>28</sup> correctly regarded as the paradigm upon which justified age discrimination receives guidance, seems to confirm the subtle line of reasoning of this contribution. The relevant dispute originated from the practice of a law firm to require its partners to retire at 65. The Employment Appeal Tribunal upheld the decision of the ET which justified this practice, mainly on the basis that associates, usually younger, would have thus been afforded

---

<sup>27</sup> Dewhurst, E, 'Will you still need me? Will you still feed me? When im Sixty-four' [2013], *European Law Journal*, 19(4), 517-544.

<sup>28</sup> *Seldon v Clarkson, Wright & Jakes* [2009] IRLR 267.



better prospects of promotion.<sup>29</sup> In reality, in this case as in the previous one, if the facts occurred had been subsumed under art 4 of the Framework Directive, the results would have been identical: ergo, the stipulation of a retirement age of 65 as an occupational requirement, for the reason that it is legitimate and it achieves a legitimate aim. Furthermore, the successful application of the GOR defense, and the negation of art 6 in relation to mandatory retirement age, has recently been reinforced in the ECJ case of C-229/08 Wolf v Stadt Frankfurt<sup>30</sup> where it was held that a maximum retirement age of 30 set by the Frankfurt fire service, was a genuine occupational requirement and thus was not an act of age discrimination. Thus it can again be asserted that the presence of both art 4 and art 6 is superfluous with art 4 sufficient in determining justifiable age based distinctions.

### **Possible re-think of the EU legislation in the matter of age**

Age discrimination is professed to belong to a second tier of protected characteristics or, to put it even more bluntly, to the lowest

---

<sup>29</sup> S Deakin and GS Morris, *Labour Law* (n 4) 661.

<sup>30</sup> [2010] IRLR 244.



echelon of the scale.<sup>31</sup> Although this paper may adequately validate this theory as legislation stands (particularly in light of the Framework Directive), the present analysis adheres to the hypothesis that, in reality, there is no legal argument for this hierarchy to exist, in light of the main principles of the EU Treaty.

These principles contemplate, in accordance with an equal weighting of importance, the various protected characteristics, including age, and without exception.<sup>32</sup> With the controversial 'justification', the Framework Directive, de facto, downgrades and demotes the protected characteristic of age. If it is true that art 13 EC 'empowers the European Council to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion

---

<sup>31</sup> E Howard (n 1) 467. It is annotated by the Author that the 'European Court of Human Rights does not consider age to be a suspect ground and age should not become a suspect ground in EU law either' (ibid. 466). It is added that age 'is a characteristic that can affect the ability and the availability to do a job or use a good or service, and exceptions will remain necessary.' (ibid. 466,467).

<sup>32</sup> More in detail, article 13 of the Treaty on the Functioning of the European Union

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'



or belief, disability age and sexual orientation,<sup>33</sup> the attitude of the EU secondary legislation (the Directives) in differentiating between age (justified) and the other protected characteristics appears bereft of any legal grounds. In this respect, a corroboration of this assumption lies on the interpretation of the same principles of the Treaty. In empowering the European Council to take action, the array of protected characteristics are not linked to one another by way of the conjunction 'or', but rather with the alternative 'and'.<sup>34</sup>

In terms of mere exegesis, this paper has hopefully succeeded in demonstrating that art 6 of the Framework Directive does not add anything valuable to the notion of 'occupational requirement', a concept already in circulation for all the protected characteristics. Actually, its only ratio essendi would be to reinforce - not without a sense of sadism and brutality - a suggestion: ergo age discrimination must equate to the 'black sheep' of the protected characteristics.

---

<sup>33</sup> E Howard (n 1) 445.

<sup>34</sup> Because of this 'and', if action is taken for one of the protected characteristics, likewise it will happen for the other ones. The use of the conjunction 'or' would have allowed the opposite interpretation, therefore the apportioning of the action by the European Council in a different way per each protected characteristic.



This approach, in the view of this paper, does not find a conceptual bearing in the Treaty.

Admittedly, an opposing view is expressed by those<sup>35</sup> who authoritatively contend that 'maintaining a hierarchy of legal protection at EU level is justified, but that this hierarchy should be based on whether a ground for discrimination should be considered suspect or not, using the distinction made by the European Court of Human Rights. A ground should be considered suspect if it concerns a core human right which is strongly linked to human dignity or to the political process. If a ground is suspect, the EU legislation should cover a wide area and contain only limited and prescribed exceptions, thus leaving less to the discretion of the Member States. ... '

As the law should be (*de iure ferenda*), nothing prevents the EU legislature from omitting from the Framework Directive its controversial article 6. Actually, this paper prescribes a conclusion that this omission is not an option for the legislator, but rather an imperative task, given the legal principles of the Treaty. As hopefully demonstrated in this contribution, article 4 (occupational

---

<sup>35</sup> E Howard (n 1) 469.





requirements) may already suffice for purposes of a 'justification', relevant to all the protected characteristics. To such an end, the empirical re-reading of some decisa of the EU Court of Justice, viewed through the lens of article 4, has sparked off conclusions not different to those achieved through the application of the contentious article 6.

### **Is age discrimination as a binary protected characteristic the right approach?**

An even more radical endeavor of reform would be, prospectively, the departure from the traditional configuration of age as a 'binary' protected characteristic;<sup>36</sup> so long as the numerus clausus of the protected characteristics is maintained in the current EU framework, the concept of age discrimination shall be shaped, more realistically, solely and exclusively on the concept of 'old age' discrimination. The genesis itself of this protected characteristic only serves to add

---

<sup>36</sup> Emphasis on the non-binary flavour of age discrimination is placed for instance in Britain, in the case *Seldon v Clarkson, Wright & Jakes* [2012] ICR 716.

As per Baroness Hale's statements (*Seldon v Clarkson, Wright & Jakes* [2012] UKSC 16, para 4): 'Age is not a "binary" in nature... but a continuum which changes over time.'

Submitted 17th December 2015

Accepted 25th September 2016



credence to this conclusion: from the Council Decision dated 22 February 1999, and its accompanying Guidelines, where a policy based on the ageing population (our emphasis) was highlighted for the first time, to the following revision of 2005,<sup>37</sup> where a ‘new intergenerational approach’ is heralded, it would appear that the inspiration for the EU policy in this matter has been an elderly people disadvantage, as opposed to a young age advantage. Yet, the original philosophy underpinning age discrimination has not filtered through to the legislation, where conversely the protected characteristic has become - probably fallaciously - a generic concept of age, still undefined, and age groups, entirely indefinable.

In all likelihood, this, as well as the manner in which age discrimination is shaped across the Atlantic, could encourage a radically new way to legislate on age discrimination in the European Union also.

In stark contrast to the relatively recent Framework Directive and its subsequent implementation within the domestic legislation of the UK, by way firstly of the Employment Equality (Age) Regulations 2006

---

<sup>37</sup> Council Decision 2005/600 (OJ [2005] L205/21).



and later within the Equality Act 2010, the U.S. is just two years short of heralding the 50<sup>th</sup> anniversary of the prohibition of age discrimination under Federal Law.<sup>38</sup> Whilst the Framework Directive emphasised the requirement that age be protected across the board, irrespective of the age group concerned, and thus failed to account for the predictable outcome that age discrimination became fused with retirement age, the binary nature of the ADEA made no secret of the fact that its intention was to protect the more elderly members of the workforce. The U.S. Code Section 621, to that end, stated the intention of the ADEA to:

‘Promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.’

---

<sup>38</sup> The first Age Discrimination in Employment Act (ADEA) was passed by Congress in 1967. However, a succession of individual States had implemented statutes from the 1930s so that by the 1960s as many as eight had legislation prohibiting against age discrimination.



The binary characteristic of the ADEA in its original format<sup>39</sup> offered protection against age discrimination to those in the 40-65<sup>40</sup> age bracket and also prohibited acts of age discrimination within that bracket. In other words, an act of discrimination against an individual in that age range where a younger individual, also in that age range, is favoured is also prohibited. A series of amendments to the original ADEA followed<sup>41</sup> with those of particular significance being the 1978 amendments which resulted in the protected age bracket being widened to 40-70, thus increasing the mandatory retirement age to 70; the 1986 amendments removed an upper age limit entirely and thus abolished mandatory retirement.

## **Conclusion**

The Framework Directive was immediately undermined, in regard to its stated objective, by affording age discrimination the dubious distinction of being the only protected characteristic to be 'watered down' by a series of conditions under which employers

---

<sup>39</sup> The Age Discrimination in Employment Act (ADEA) 1967.

<sup>40</sup> In accordance with the Age Discrimination in Employment Act (ADEA) 1967, retirement was mandatory at the age of 65.

<sup>41</sup> Amendments were made to the Age Discrimination in Employment Act (ADEA) 1967 in 1978, 1979 and 1986.



could justify such acts. In this regard, the UK and U.S. legislations demonstrate a shared characteristic. The latter states justification to be an 'umbrella' principle covering the following four possible defences on the part of the employer: 'where age is a Bona Fide Occupational Qualification (BFOQ) reasonably necessary to the operation of the business; where the action is based on reasonable factors other than age; where the action is in observance of a bona fide employee benefit plan; where the employer has good cause to discipline or discharge the employee'.

Finally, although from a purely speculative point of view, it is worth acknowledging that the ADEA 1967 formed part of a watershed decade in U.S. Federal legislation in which the Equal Pay Act 1963 and Civil Rights Act 1964 represented further cornerstones of rights conferred on individuals. In that respect, it is perhaps surprising that age discrimination in the U.S. did not assume a place of equal standing with the other protected characteristics. However, its binary nature did at least give it an element of parity. In contrast, the European legislation and UK national statute, where the protected characteristic of age arrived on the scene 40-50 years after those related to sex and race, is palpable. Perhaps it is not entirely surprising that age discrimination has been confined to the lower

Interdisciplinary Perspectives on Equality and  
Diversity  
Volume 2, Issue 2. 2016.



leagues of EU and British legislation whilst it is equipped with the binary tools to make its presence felt in the upper echelons of U.S. legislation.

Submitted 17th December 2015  
Accepted 25th September 2016