

ius laboris – Results of Age Discrimination Survey

Introduction

Since the EU anti-discrimination directive was published in 2000, debate has raged as to what UK age discrimination laws should cover. The directive obliges all member states to introduce age discrimination laws implementing the directive by December 2006. It is, therefore, illuminating to understand the approach taken by our European partners.

Expert employment lawyers at *ius laboris*, the leading alliance of specialist employment law, employee benefits and pensions law firms (represented in the UK by Lewis Silkin – employment and employee benefits – and Sacker and Partners – pensions) in 20 of the other 24 EU member states analysed the status of age discrimination laws and expressed their expert opinion on the approach their courts would take in certain hypothetical cases. The survey was originally undertaken in May 2005 but was updated in January 2006.

The 20 countries surveyed were:

Austria	Finland	Germany	Netherlands
Belgium	France	Greece	Poland
Czech Republic	Hungary	Latvia	Portugal
Denmark	Ireland	Lithuania	Spain
Estonia	Italy	Luxembourg	Sweden

Only Cyprus, Malta, Slovakia and Slovenia were omitted.

Implementation of the Directive

The answers revealed that most countries are ahead of the UK and already have domestic laws in place. They also illustrated the varied interpretation countries are giving to the same piece of legislation and reaffirmed that any vision of standardised EU employment laws is far off.

In the UK we expect final regulations to be published in the next few weeks; the draft legislation having been published last July. Luxembourg also has draft laws which are not yet in force. Sweden also expects legislation to be published very shortly. In Belgium, Czech Republic and Germany some age measures are in force (either through new or existing laws) but additional laws expanding on age discrimination rights are promised before the deadline. In Germany, for example, a draft Anti-Discrimination Act was published in December 2004 but has been delayed by the recent elections and in the Czech Republic a new Anti-Discrimination Act was passed by the Chamber of Deputies and is due to be revised shortly by the Senate.

In most countries, however, laws have been introduced specifically to implement the directive. Ireland's 1998 Employment Equality Act and the Finnish and Portuguese Constitutions all protected employees from age discrimination before the 2000 directive but in each case those countries have since introduced additional laws to revise the scope of their legislation and to conform better to the directive.

Justifying age discrimination

Article 6 of the Directive governs the justification of age discrimination. However, when one looks at the likely approach member states to different situations it is difficult to believe that it is the same measure being implemented in each country.

Cost/Profitability

For example, an important question will be the extent that cost/profitability will be a potential justification of age discrimination. Of course, employers could not use cost or the impact on profitability to justify sex or race discrimination. However, with age discrimination the position seems more contentious.

When asked whether or not it is likely to amount to unlawful age discrimination for *a wine bar to specify that its waiting/bar staff should be under 30 as it believes this will attract the youthful clientele it is aiming for*, only in France was the view that this would be lawful.

When asked whether the answer would change *if the wine bar could show objective proof that the level of business would decline if it was unable to maintain the youthful image that it wanted* in addition to the French, three other countries, namely Greece, Luxembourg and Portugal thought that the age limit would probably be lawful. In the other 15 the view remained that this would be unlawful (as the Swedes do not yet know what their laws are likely to say we generally only have substantive responses for 19 countries).

There remains a degree of uncertainty about the UK position. At present it seems that cost alone will not be able to justify discrimination but that cost could be a factor where the employer can show another justification for the discriminatory treatment.

It must be doubtful, however, that in either case such practice, notwithstanding the position taken at national level, would survive a challenge before the European Court of Justice.

Proximity to Retirement

A less contentious ground for an age limit in recruitment is proximity to retirement. This is specifically anticipated in the directive. When asked whether it would amount to unlawful discrimination *assuming a lawful retirement age of 65, for a 63 year old to be rejected for a technical post where the employer considers that it will take the best part of 12 months to train the individual to appropriate standard and thereafter would only have a year's possible service*, Belgium, Denmark, Estonia, Italy, Lithuania and Luxembourg suggested that this age limit was nonetheless likely to be unlawful. The Czech Republic is unable to answer until the revisions to their age laws

are published later this year. (As mentioned above, Belgium is also awaiting changes to its age discrimination laws.)

When the other countries were asked if their answer would change and the rejection on account of age of the 63 year old would be unlawful if *it could be shown that there was a high turnover of technical staff such that staff rarely stayed more than 2 years (including training)*, Finland, France, Greece, Hungary, Latvia, Portugal and Spain all thought that the rejection might well now be unlawful. This would likely be the position in the UK. However, Austria, Ireland, Germany, Netherlands and Poland thought that the rejection of the 63 year old would still be lawful (as mentioned above, Germany is awaiting new measures which will include age discrimination laws shortly).

Lower minimum wage level for young people

One of the UK's major concerns before signing up to the 2000 directive was any impact on the lower minimum wage level for young people. Only after assurances that this would remain permissible did the UK agree to the directive. The UK propose complex rules in which paying those under 22 at lower rates will remain lawful, subject to various conditions.

When asked whether it would be lawful to *pay under 18 part-time staff at a lower rate than part-time adult staff* only Denmark (if it was collectively agreed), France and Luxembourg said that this would be lawful. In Poland, minimum wage is lower in the first year of employment.

Fixing a maximum age requirement

When asked whether or not it would be unlawful for *a fire service to impose a maximum age of 55 for fire fighters where the fire service believes that the over 55s lack the physical stamina and strength to meet the demands of the job*, perhaps surprisingly, several countries indicated that this would not be unlawful, namely Austria, France, Germany, Ireland, Italy, Latvia, Luxembourg, Poland, Portugal and Spain. In some cases, this is because the fire service is a public service and exempt from the laws. In France, on the other hand, wherever public safety is in issue, the employer need not prove a link between age and physical capacity. As proving a correlation between 55 and a decline in strength and stamina is unlikely, any attempt to maintain any such rule in the UK is unlikely to be lawful.

Facilitation of employment planning

Faced with an example of *a law firm employing five lawyers all in their mid 50s and wanting to stipulate that its next recruit is a young lawyer for fear that the existing lawyers are all likely to retire at the same time* the countries were reasonably evenly divided with Belgium, Denmark, Estonia, Finland, Hungary, Italy, Latvia, Lithuania, Luxembourg and Poland considering that this was likely to be unlawful. Perhaps this split is not surprising as a UK employment tribunal's approach is likely to depend on how probable it is that the firm will face its lawyers retiring en masse.

Indirect discrimination

As well as direct age discrimination, employers will need to reassess job conditions to ensure that they do not unjustifiably indirectly discriminate on the grounds of age. When asked about three potential issues of indirect age discrimination, namely requiring: a minimum level of experience (*seven years for a teaching job*); a period of service for an additional benefit (*an extra week's holiday after five years service*); and proximity to graduation (*technical appointees to have graduated in last three years*) the responses again emphasised the divergent interpretation across Europe.

Belgium, Estonia, Denmark, Lithuania, Luxembourg and Portugal all feared that the experience requirement for the teacher would be unlawful with Finland, Italy, Latvia and Hungary uncertain (the UK would probably, in advance of the final legislation, join this group of 'not sures' and the outcome of such a legal challenge in a British employment tribunal would be unpredictable). Belgium, Estonia, Greece, Hungary and the Netherlands feared the extra week's holiday would fall foul of their laws. In the UK this will be lawful. A higher proportion were troubled by the requirement to have graduated in the last three years with Belgium, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg and Poland all envisaging that this requirement would be unlawful in their countries (an approach the UK tribunals would probably take) with Austria, Latvia and the Netherlands uncertain.

Harassment

Unsurprisingly all countries profess that age harassment would be unlawful under their domestic laws as this a key component of the directive. However, when faced with what the UK would regard as an obvious example of harassment, namely *workers in an office regularly making jokes about an older colleague being 'past it' and 'over the hill' and sending him a birthday card joking about his age* Estonia, Germany, Greece, Hungary, Latvia, Poland and Portugal did not regard this as likely to be unlawful under age discrimination laws.

Mandatory retirement

Debate about mandatory retirement has delayed the finalisation of the UK age laws and attracted forceful and conflicting views from interested parties, it is therefore interesting to consider the approach been taken elsewhere in Europe. This approach is different in almost each case.

Belgium, Ireland and Greece

Only in Belgium (where, as mentioned above, amendments are proposed to the existing laws) does it seem mandatory retirement will always be unlawful. At the other extreme in Ireland it does not constitute discrimination on the ground of age to fix different ages for retirement for different classes or descriptions of employees. In Greece, retirement is lawful at the age dictated by national law for that profession.

Austria, Czech Republic, Latvia, Lithuania, Portugal and Spain

In some other countries, it is only lawful for specified professions, namely Austria (e.g. judges or pilots), Czech Republic (e.g. judges), Latvia (e.g. judges and public servants), Lithuania (judges and public servants), Portugal (e.g. judges, pilots, air traffic controllers, public servants and Madeiran embroidery workers) and Spain (e.g. pilots and public servants).

Germany

At present in Germany, mandatory retirement can be agreed in a collective agreement or individual employment contract. Mandatory retirement earlier than 60 is almost unheard of and 65 is the common age. However, when the forthcoming anti-discrimination laws come into force, the impact is at present uncertain. However, as age-based treatment would need to be objectively justified, it seems quite possible that any retirement age in a collective agreement or individual agreement (even at 65 or above) would amount to age discrimination under these prospective German laws if not objectively justified.

Denmark, Estonia, France, Italy, Luxembourg, the UK and the Netherlands

In Denmark, Estonia, France, Italy (subject to having accrued a minimum level of social security contributions), Luxembourg and the Netherlands mandatory retirement at 65 or above will be lawful without the need to justify it. In Denmark mandatory retirement age below 65 set out in a collective agreement entered into before the Danish law came into force and which can be justified will also be lawful. In France mandatory retirement between 60 and 65 is lawful under certain collective bargaining agreements, provided that the employee has an entitlement to a full pension and certain additional conditions defined in the collective bargaining agreement are met by the employer (notably recruitment of new employees and training obligations). In the Netherlands mandatory retirement below 65 is lawful if justified. This matches the approach announced by the UK which promises to permit 65 + retirement age without the need for justification and pre-65 retirement ages where the employer can justify this.

Finland

In Finland, employment automatically terminates at 68, although the employee and employer can agree to continue the employment beyond this age. A mandatory retirement age between 63 and 68 agreed in an individual employment contract will generally be lawful.

Hungary

In Hungary mandatory retirement is lawful provided the employee qualifies as a pensioner (generally 62+ years old and 20 years cumulative service with all that employee's jobs).

Poland

Poland, surprisingly, maintains different mandatory retirement rules for men and women which are acknowledged to breach the EU equal treatment directive. In Poland mandatory retirement is lawful at 60 for women and 65 for men. In addition, for some groups of employees born between 1949 and 1968 minimum periods of social security contributions must also be satisfied.

Difficult issues

The respondents were asked about two issues which promise to confront employers in the UK, namely: 1) even if mandatory retirement is lawful will employees challenge the decision to dismiss as really being another particularly where some employees are allowed to work beyond the retirement age; 2) will the provision of benefits, particularly insured benefits to those working beyond traditional retirement ages prove problematic.

No country had faced challenges to retirement although the potential for this was acknowledged. Belgium, Latvia, Lithuania, Poland, Portugal and Spain acknowledged that the provision of non-discriminatory benefits to older workers was already an issue in their countries.