

Fourth Study Commission of the IAJ
2009 Marrakech

General Report

“Age Discrimination”

Introduction:

This general report intends to summarize the main impressions obtained by studying the national reports. The questionnaire deals with different topics of labour law where age discrimination may have serious impacts. The main objective of the questionnaire is to get some impressions on the approach of national labour law systems to some aspects of age discrimination. An other intention was to learn, if countries have different provisions for different groups of employees, for example civil servants, officials or public authorities, members of the armed forces and the police, persons working for government or public authorities under ordinary contracts of employment, employees of public-sector corporations, domestic servants, farm labourers, members of religious communities.

1.a. Are there rules against age discrimination which have constitutional status? What do these rules say precisely, and how do they work at lower levels of law making?

1.b. Which international agreements and conventions dealing with age discrimination has your country ratified ?

1. c. What are the main sources of law against age discrimination ?

1. d. Are collective agreements bound by this provisions ?

Most countries have a **constitutional** principle of equality -similar situations have to be treated similar and different situations differently- but no explicit provisions against age discrimination (Australia, Austria, Belgium, Estonia, Finland, Germany, Iceland, Ireland, Japan, Lithuania, Slovenia, USA). In some countries also age is mentioned as one of the grounds, which are no reason to be treated differently (Armenia, Brazil, Canada, Finland, Georgia, Portugal, South Africa, Sweden, Switzerland).

EC countries mostly have Employment Equality Acts, which do not enjoy the status of a constitutional protection but since the Act transposes the State's obligations under Directive 2000/78/EC it must be applied and interpreted in light of the general principles of European law. This status is higher than that of a constitutional provision. The doctrine of supremacy of Community law is well established there..

There are also some conventions and recommendations of the **International** Labour Organization referring to the subject (Conv 111 on Discrimination in respect of Employment and Occupation, 1958, Recommendation No. 111 under the same title, 1958, Convention No. 138 of the International Labour Organization on the minimum age for admission to employment, 1973; Recommendation No. 222 on the employment policy, 1964, Recommendation No. 150 on Human Resources Development, 1975, Recommendation of the International Labour Organization No. 162 on older employees, 1982) and the European Social Charter (Art 7 -the right of children and minors to protection), Article 12 (right to social security), Article 15 (rights of disabled persons), Article 20 (right to equal opportunities and equal treatment; Art 23 -right of older persons to social security) and the International Pact of Civil and Political Rights, which regulates the prohibition of discrimination (Art 2). The human rights

convention and the International Convention on Economic, Social and Cultural Rights were mentioned as well.

In these countries we often find Equal Opportunity or Human Rights Acts, which include age discrimination provisions (Australia, Austria, Belgium, Canada, Estonia, Germany, Ireland, Sweden). Usually the Acts prohibit discrimination on age grounds in relations to access to and the termination of employment, conditions of employment, including pay, and access to vocational education or training (Austria, Ireland, Israel, Lithuania, Slovenia, Sweden). In the USA a separate Age Discrimination in Employment Act exists. In Israel it is forbidden for Employment agencies to discriminate, but age is not mentioned in these provisions, but in the provision, which forbids discrimination by employers. In Switzerland only provisions for especially vulnerable groups of employees exist.

In most countries **collective agreements** are void, if they contain discriminatory provisions (Armenia, Austria, Belgium, Canada, Estonia, Finland, Germany, Iceland, Ireland, Israel, Japan, Portugal, Slovenia, South Africa).

1e. Which groups are protected by these provisions, young employees, older employees or is it just forbidden to consider age as a decisive factor for working conditions?

In most countries it is forbidden to consider age as a decisive factor for working conditions. Apart from those provisions that provide protection for a certain age group, discrimination based on age is not permitted, whether old or young employees are affected. (Armenia, Australia, Austria, Finland, Germany, Ireland, Israel, Lithuania, Portugal, Slovenia, South Africa Sweden, Switzerland). In Canada “Age” is defined as 18 years and older. In the USA individuals who are at least 40 years of age are protected.

2. Please specify, what are the criteria according to which it is determined that it is an unlawful age discrimination (i.e. relevancy of the age to the nature of the job)?

In most countries an unlawful age discrimination is the less favourable treatment of a person directly or indirectly based on age (reason), if this is not necessary and justified for professional requirements (Armenia, Australia, Austria, Belgium, Canada, Estonia, Germany, Ireland, Sweden, Switzerland). The person compared will be someone without the relevant characteristic of the complainant, whose circumstances are similar to the complainants. If no comparator exists, it is necessary for to identify a hypothetical one (Australia, Austria, Sweden).

Positive actions are allowed to provide a bona fide benefit to a person of a particular age, if they are intended to meet a need that arises out of the age or is intended to reduce a disadvantage experienced by persons of a particular age (Australia, Austria, Belgium, Germany, Canada, Sweden). There are also exemptions for religious purposes or in order to increase the likelihood of persons of a particular age group finding employment (eg Australia).

3. Do you have provisions stating minimum or maximum age for hiring employees?

Minimum age:

In all countries there are provisions in order to protect children. They have provisions stating minimum ages for full time work or work during school hours. There are some exceptions for special kind of work (training....)

Age limits are:

14 years - Canada, Georgia.

15 years - Australia, Austria, Belgium, Brazil, Estonia, Finland, Israel, Slovenia, South Africa, Switzerland

16 years- Ireland (employer may set higher, but not exceeding 18 years), Portugal, Sweden, Lithuania, USA.

In some countries there is a special minimum age for civil servants – 18 years (Austria, Estonia, Finland, Iceland)

Maximum age:

In most countries there are no provisions stating a maximum age.

In Lithuania a maximum age for hiring (60 for women and 62,5 for men) was reported. It exists for certain groups of civil servants (Switzerland, Israel).

4. Do you have provisions stating minimum or maximum age for entering pension funds systems?

In several countries the prohibition on age discrimination does not apply to pension schemes. The age for entry to a scheme may be fixed by the rules of the scheme (Armenia, Austria, Germany, Ireland, Switzerland). In Israel employees hired for the public service above the age of 50 have no right to a civil service pension but they will be paid funds to a non-government pension fund. In Iceland a mandatory supplementary pension fund system from 16 to 70 years exists, similar systems can be found in Switzerland (18/35 to 64/65).

5. Are there collective regulations or statutory provisions which give certain protections or certain allowances only if the employee has reached a certain age? Please describe them.

In some countries specific provisions rendering more protection against dismissals for elder employees (Austria-50 Slovenia –55; Sweden 45- extra month of notice period for each month of service after the age of 45 and special damages until 60) or granting them termination pay exist (Switzerland 50 years). There are also systems of “prepensions” (Belgium – 58/60 years-former employer has to give additional allowances to payment - unemployment insurance; three different forms).

In Slovenia protection against overtime work and a right to part-time work exist.

In Ireland there are measures for persons elder than 50 years in order to eliminate effects of discrimination and facilitate their integration into employment, similar in Canada. In Iceland some collective agreements grant the right for a reduction of working hours to employees elder than 55 years. In the case of bankruptcy of the employer Japan provides amounts of payment due to age categories. Finland grants a part-time-pension to employees between 58 and 67 years who have transferred to part-time work.

6. Does the computation of wages depend on the age of the employee? Describe this.

In many countries pay is based on service (seniority). This usually takes the form of incremental salary scales whereby pay is increased on an annual basis up to a maximum level. These arrangements are strictly related to length of service and are not directly age related (Austria, Belgium, Brazil, Canada, Finland – mainly civil servants, Germany, Iceland, Ireland, Portugal, Slovenia). Sometimes you can find in collective agreement provisions on minimum pay for young workers under the age of 18 or 19 or with small or no experience (Sweden; similar Israel). Such arrangements are allowed for the purpose of determining whom to offer work (youth wages – Australia).

7. Does the duration of holiday or sick leave pay depend on the age of the employee, or on seniority, or both?

In some countries the duration of holiday or sick leave pay depends on seniority (Austria, Canada, Estonia- civil service, Iceland, Israel, Lithuania in public sector extra 3 days per 3 years of service; Slovenia; USA) or age (Switzerland – holiday, Slovenia – additional 3 days over 55 years; Portugal – civil servants). Some collective agreements give longer holiday to employees who have reached a certain age (Sweden – 40 years; similar Germany, Finland-seniority)

8. Are there any provisions for elder employees which entitle them to a reduction in working hours? Describe them.

In some countries elder employees are entitled to demand a reduction of working hours (Iceland) or part-time work (Slovenia). There are also systems, where employees can use credits of working hours to be entitled to part-time work (Belgium – 50 years, 20 years employment, 3 years working for this employer)

In Lithuania this is restricted to certain professions like teachers or pilots, similar in Israel and Portugal (teachers).

In Finland employees between 58 and 67 can transfer to a part-time employment.

In Austria the employees are usually not entitled to such measures, but there is a frame work especially of social insurance regulations to promote such agreements between older employees and employers (part time pensions, allowance to reduce reduction of wages- 50%; Germany- part time- full net wages – 10 years).

9a. Is it allowed to terminate an employment relationship (dismissal), because the employee has reached a certain age? If yes, which age?

9b. Is it allowed to terminate an employment relationship (dismissal) because the employee is entitled to get an old-age pension? If yes, which age?

In several countries, there are remedies against dismissals on discriminatory grounds, including a person's age even if employees reach retirement age (Australia, Austria, Finland, Slovenia). In some countries there are also provisions, which specify that it is even unlawful for a person to engage in conduct with a view to causing an employee to retire from employment, on the ground of the employee's age (Australia).

In some countries the protection against unfair dismissal does not apply or are reduced when a worker reaches the normal retirement age in the employment concerned (Israel, South Africa - 60, Sweden – 67) and is entitled to full old age pension (Lithuania) or at least 44.000\$ (USA). In other countries it is allowed to terminate an employment relationship (dismissal), because the employee has reached a certain age (Armenia – woman 63; man 65; Belgium -65; Iceland 70).

In Finland the employment relationship is terminated without notice at the end of the month the employees becomes 68 years unless they agree to continue. In Germany it is allowed to have similar provisions in collective agreements (age 63/65). In Ireland compulsory retirement can be stipulated. In Portugal after the 70 th year the employment contract changes to short duration (six month) and may be terminated by the employer with a 60 days notice period.

In several countries all or some groups of civil servants have to retire, usually after they reach retirement age (65 and 70 years; Australia, Austria, Belgium, Georgia).

10. Have you got provisions in your labour law system, which have the purpose to promote the vocational integration of unemployed older employees or young employees and in order to do so weaken their statutory protection? For instance are there provisions which authorize the conclusion of fixed-term contracts of employment once the worker has reached a certain age? Do such provisions exist for certain groups of employees?

Some countries have got provisions, that are not discrimination on the age ground to offer a fixed term contract to a person over a certain age (compulsory retirement age- Ireland; Germany - maximum duration of 5 years if an employee has been at least 4 months without work and is older than 52 years; Japan 60 years or older)

In Austria the possibility of challenging the termination of a working contract is improved for elder employees. But this is reduced if the employee was hired due to a program against unemployment. In some countries the employer has to be paid less contributions social insurance (Austria, Belgium) or even less remunerations (Belgium) for certain older employees or young employees.

11. Have You got provisions which give special statutory protection in order to prevent the termination of employment contracts of older or young employees?

In Slovenia for older employees (55 years) dismissal is only possible if the employee is already entitled to pension benefits or the employee agrees. Similar provisions exist in Lithuania, in collective agreements in Finland and for civil service in Austria.

In some countries there are provisions that dismissal is not allowed on ground of age before a certain age (Norway 70). Employees chances to find a new job, which are also determined by age, are taken into account for determining re-installment due to social reason (Austria; similar Germany).

12. What are the rules governing the burden of proof?

In many countries, especially EC-countries (EC burden of proof directive) the claimant must first prove the primary facts from which it may be presumed, that there has been discrimination. Then the burden shifts to the employer to prove that there has been no breach of the principle of equal treatment (Austria, Belgium, Finland, Germany, Ireland, Israel, Lithuania, Portugal, Slovenia, South Africa, Sweden). In Australia also statistical figures can be used to indicate discrimination.

13. Are there any administrative or criminal penalties? Please give details

Beside claims for compensation some countries also have administrative or criminal sanctions (Brazil, Estonia, Iceland, Lithuania; Portugal, Finland – fine or imprisonment up to 6 Month, Japan – up to 1 year for hiring minors, similar South Africa; Slovenia also imprisonment up to one year).

14. What are the most common cases at court regarding age discrimination

Cases at court regarding age discrimination are often related to dismissal (Armenia, Austria; Canada, Estonia, Finland, Germany, Israel, Japan, Lithuania, Portugal, Slovenia, Switzerland), recruitment (Austria, Israel, Canada, Germany -“AGG-hoppers”, Ireland, South Africa), promotion (Canada) retirement age (Ireland) or school admission (South Africa).

Conclusions:

1. Due to the fact, that the population in most countries is ageing at an increasing rate, the topic of „Age Discrimination“ has become more important.
2. Very often stereotypes about the limitations of older workers for instance their resistance to change or a declining ability to learn new skills exist. Positive images commonly associated with older workers like reliability, teamwork skills and lower turnover are declining. Employers often appreciate more highly the attributes associated with younger employees, such as creativity, entrepreneurialism, innovativeness and trainability than those associated with older employees.
3. On the one hand In many countries the age at which one qualifies for an old age pension is rising and on the other, due to rapid changes in new technologies, employers prefer younger employees. Also in many countries there are population projections that demonstrate a shortage of workers.

4. Currently it is one of the most important tasks of the labour-law and social insurance systems to give incentives to reduce these negative stereotypes and offer a proper protection to older employees but also safeguarding the entrance of younger employees into the labour market.

Proposed topic 2010: **Aspects of data protection in employment relationship**