

ANNEX

EXAMPLES OF NATIONAL PRACTICE OF EQUALITY BODIES AND LEGAL CASES CONCERNING AGE DISCRIMINATION



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EMPLOYMENT

Albania

Commissioner for the Protection from Discrimination

Age limit for a position as flight assistant

Conclusion: Discrimination

This case concerns the criteria announced by an Albanian airline company for a position as a flight assistant. Among the criteria announced was: *'female, age 21-30 years old'*. The case was initiated ex-officio by the Commissioner for the Protection from Discrimination based on the information from a non-governmental organisation. According to the Commissioner, putting the age limit of 30 years old on the employment notice was discriminatory against the applicants of the position. The established criteria were based on prejudices and stereotypes about job availability more on the part of the younger age, going further with prejudice to persons due to family responsibilities or parental responsibilities. The Commissioner also found that the restriction was disproportionate since the physical ability of applicants can be proven through a physical test. The Commissioner issued a recommendation including the removal of the age criterion and the design of physical tests according to the specific needs of the job position.

Austria

Ombud for Equal Treatment

Generation x and y are welcome

Conclusion: Discrimination

Years ago, Mr. A worked for a private company and changed position after some time. After a couple of years, he heard from a former colleague that his erstwhile employer, a well-known project manager, was looking for additional employees and recommended that Mr. A should contact him about the new position. Mr. A contacted the project manager, who asked a few questions concerning Mr. A's wishes about labour conditions. He informed Mr. A that he could expect an answer about a job soon, however, this never happened. Mr. A contacted the project manager by himself, who told him that the company prefers a relaunch with people from generation x and y. As Mr. A did not correspond with this group because of his age, he felt discriminated and consulted the Ombud for Equal Treatment. The Ombud filed a complaint to the Equal Treatment Commission, who

decided that Mr. A had been discriminated on the ground of his age at the establishment of an employment relationship.¹

Repetitive extensions of the employment contract

Conclusion: Settlement

Just before her 60th birthday, a woman faced the termination of her employment with reference to soon reaching the statutory retirement age for women. As Mrs. B wanted to continue working until the retirement age for men of 65 years old, she negotiated with her employer, but still only got a temporary extension of her contract. After the expiration of this contract Mrs. B got another temporary extension with the information that it would be the last temporary extension and that her employment will be terminated afterwards. Mrs. B told her employer that she felt discriminated because of her age and gender and contacted the Ombud for Equal Treatment who filed a complaint to the Equal Treatment Commission. Mrs. B also brought the case to court and argued that her employment contract was still valid. The Ombud for Equal Treatment referred to the ECJ's ruling in the Kleist² case, where the reference to the different statutory retirement age for women and men as a justification for terminating an employment was found incompatible with European law. Through the repetitive extension of Mrs. B's contract after reaching the statutory retirement age for women, the Ombud for Equal Treatment concluded that she was discriminated in relation to her male colleagues. Both proceedings ended with a settlement agreement and a financial compensation for Ms. B.

Belgium

Unia (Interfederal Centre for Equal Opportunities)

Age limit air traffic control recruits (2016)

Conclusion: Direct discrimination - legal procedure - still pending

In July 2016, Belgocontrol launched a recruitment procedure for air traffic control recruits. Candidates had to be between 18 and 25 years old. Unia received thirty complaints of individuals who estimated they were discriminated against. To justify the age limits, Belgocontrol used the following arguments: 1) Genuine and determining occupational requirement: the function of air traffic-leader requires specific cognitive skills, in particular situational awareness that allows air traffic controllers to follow complex situations at the same time on multiple screens. These cognitive skills would decrease rapidly from the age of 25 years old and then can be partly compensated through experience. Hence, the importance to recruit air traffic-leaders as young as possible; 2) Other companies also use age limits in their recruitment procedure (for example Eurocontrol) and;

¹ The Supreme Court of Justice has held, that the entire application process should be non-discriminatory (OGH 29.01.2013, 9ObA154/12f).

² CJEU 18.11.2010, C-356/09.

3) the need to normalize the age pyramid at Belgocontrol, with many older air traffic controllers. Belgocontrol claimed that the age limit will disappear the moment the age pyramid is normalized.

Unia responded to Belgocontrol as follows: 1) The information that Belgocontrol gave Unia, shows that in the previous recruitments (that did not use an age limit), the selected candidates under the age of 26 years old did not have a higher success rate for access to the training than the candidates older than 25; 2) Unia referred to other companies that do not use age limits: for example Federal Aviation Administration (USA), or ENAIRE (Spain), the National Air Traffic Services (UK) or the Irish Aviation Authority (Ireland) and; 3) Belgocontrol does not demonstrate that this measure was appropriate and necessary to deal with the problem of the ageing of the staff.

No solution has been found for the victims and Belgocontrol was not willing to formalize any made commitment. Unia therefore decided to go to court and started a legal procedure.

Automatic termination employment contract (2017)

Conclusion: Direct discrimination - legal procedure - still pending

The employment contract of an independent doctor was terminated due to the application of a provision of the General regulations of the hospital stating that the contract will be terminated as soon as the doctor reached the age of 67. No reasons were given at the time of the dismissal, only that extending the agreement would have no use for the hospital. An exception can be asked to the Executive Council. In this exception procedure, an opinion can be requested from a consulting physician.

The exception that the doctor asked for was not granted. The doctor argued that the clause is contrary to the anti-discrimination legislation and is therefore an act of direct discrimination on the ground of age. This was also concluded by Unia. The justification ground of the genuine and determining occupational requirement can, according to Unia, not be applied in this case since it is a general age restriction that the hospital applies to all employees. The age restriction is too general to consider the different functions in the hospital and their nature or the context in which they are exercised.

A legal procedure has been started by the doctor. Unia is not a party in this procedure but issued a legal advice to the counsel of the doctor.

Refusal candidate seller for kitchen manufacturer (2017)

Conclusion: Direct discrimination

The Labour Court of Ghent, Department Bruges, confirmed the previous conviction of a kitchen manufacturer because of age discrimination. The company had rejected a candidate seller via mail with this message: "*Let us say that you have indeed the perfect profile except for your age*".

The reason of this refusal is because of recent bad experiences the company had with older workers who did not give further cooperation with the employer a chance, because they could have difficulty with the software programs. The Court concluded that this explanation is not of that nature to objectively justify this distinction. The Court ratified the previous conviction to stop refusing

applicants purely because of prejudice about older employees. Candidates must be judged individually on the base of their skills and not their age. The company had to pay a non-compliance penalty of €1000 per new offense. The €25,000 that the Labour Tribunal awarded as a compensation for the rejected candidate was confirmed.

To inform employees, board members and customers of this sentence and letting applicants know that they can report new violations, the company also had to post the ruling during one month on a good visible place where job interviews were held.

Bulgaria

Commission for Protection Against Discrimination

Early Retirement (case 1)

Conclusion: Discrimination

In the complaint submitted to the Commission for Protection against Discrimination (CPD), N. P. M. A. indicated that she received a notice of retirement from the secretary of the Academic High School in Varna because she had reached the required age of retirement. She considered that only objective reasons may require a teacher to be replaced by another teacher at the end of the first term, which was not the situation in this particular case. The complainant noted that students need to get used to a new teacher for a period of three months in order to prepare for the exams. The CPD found that the practice of the Director of the High School was discriminatory and imposed a fine of the minimum amount of 250 BGN (approx. 125 EUR).³

Early Retirement (case 2)

Conclusion: Discrimination

The CPD examined a complaint of a former police officer (41 years old) against a provision in the Ministry of Interior Act.⁴ The employment of the police officer was terminated due to reaching the retirement age of 41. The CPD established indirect discrimination arguing that the complainant and a particular age group of employees in the Ministry of Interior, namely those over 41 years old were disadvantaged compared to younger employees.⁵

³ Decision №6/20 1 7 on case file №33/2016.

⁴ Art 245, para1. p.13.

⁵ Commission for Protection against Discrimination, decision 474/2014 in case file 126/2012.

Hiring above a certain age

Conclusion: Discrimination

An advertisement for a vacancy for the position of "Web Designer" was published online in which the employer among other professional requirements and criteria had set the requirement "age of 29". Since the restriction did not constitute a professional requirement for a post, the CPD concluded that the advertisement constituted direct discrimination on the ground of age in access to employment.⁶

Age limits

Conclusion: Discrimination

A complaint was filed by Trade Union X concerning harassment and discrimination on the ground of age against an employer. The employer had allegedly announced in accordance with the requirements of the Labour Code to the representatives of the Trade Union his intention to carry out a collective redundancy. The total number of all dismissed employees amounted to 927 people, but for about 60 workers the Labour Code notification procedure was not observed. 60 of the fired sales associates were over 30 years old and most of them were around 40 years and older. The latter group were invited to a meeting with the regional managers and lawyers of the company, all of them receiving an explanation that the employer wanted to replace his staff with younger employees, regardless of the professional and personal qualities of his long-time employees. According to the CPD, the employees suffered discrimination. The highest fine was imposed on the employer, amounting to a total of 22,000 BGN (approx. 11,250 EUR).⁷

Croatia

Office of the Ombudsman

Discrimination on the ground of age in the restructuring process of large companies

Conclusion: Discrimination

During the restructuring process of one large company, a number of its employees turned to the Ombudswoman claiming that they had been discriminated against on the ground of their age. Namely, older employees have more often been given collective redundancy regardless of their age, the length of their service or their supporting obligations towards family members. In its response the company claimed that, due to the decline in business and the lack of competitiveness on the service market, it found itself in financial problems. Therefore, in order to stay in business, there

⁶ Decision № 216/2013 in case file№ 24/2013.

⁷ Decision No. 15/2011 on Case File No 206/2009.

was no other choice but to carry out the company's restructuring with the reduction in the number of employees as one of its measures.

In a three years period, a total of 1,057 employees were proclaimed as potential collective redundancy, with employees in their 40s and above among the highest percentage. Thus, out of 331 employees who left the company through collective redundancy, 4% of them were in the age group from 20 to 40 years old, while as many as 96% were older than 40 years old. In addition, out of 254 employees who received work-related termination of employment contracts, less than 3% of them were from 20 to 40 years old and as many as 97% of them were older than 40. Out of 80 employees who were in the process of resolving their status regarding the work-related termination of employment contract, 12 % of them belonged to the age group from 20 to 40 years old while 88% of them were older than 40 years old. Among 105 employees who had signed an agreement to terminate the employment contract at the employer's proposal, less than 5% of them were between the ages of 20 and 40, while over 95% were older than 40 years old. The company did not provide objective justification or legitimate aim for such a high percentage of employees, belonging to a certain age group, to be negatively affected by the restructuring process. Some of the complainants had long-term service, good business results as well as obligation to support minor children.

The Ombudswoman took into consideration the fact that the company's poor business results required certain measures to be taken, with restructuring being one of them, which often implies a reduction in the number of employees. However, it should be taken into account that the systematic reduction in the number of workers should not have particularly adverse effects on certain categories of employees without objective justification or legitimate aim. Given that the employer did not provide justification for these adverse effects of restructuring on employees older than 40 years old, the Ombudswoman established discrimination on the ground of age. The Ombudswoman also recommended the revision of the lists of employees proclaimed as collective redundancy along with measures for a more transparent process of establishing such a list of employees.

Discrimination on the ground of age in the recruiting process

Conclusion: Discrimination

The complainant, at the age of 37, referred to the Ombudswoman claiming discrimination on the ground of age which he endured during the recruiting process in a company engaged in the sale of sports equipment. The complainant applied for a sports merchant position and he met all the conditions set out in the recruitment notice and, in his opinion, successfully passed the first selection round. However, he was informed of his elimination from the further selection due to his age, explaining that the employer applies the policy of providing younger candidates with job opportunities.

In its response, the company denied that the preference had been given to the younger candidates during the recruitment process and explained that the candidate for a sport salesman's workplace was expected to be actively and regularly engaged in sport, regardless of his/her age. However, based on the received information concerning the age of the candidates for a sporting merchant's workplace, it was established that as many as 68% of the employees were under the age of 30, while

the remaining 32% of the employees were between the ages of 30 and 35 years old. At that time the company had no sports merchant who was more than 35 years old, while most of them were under the age of 30. Moreover, the company's employee who was in charge for the recruiting process did highlight the employer's policy of providing younger candidates with job opportunities.

The Ombudswoman established discrimination on the ground of age and required the employer to provide information concerning the upcoming recruiting procedures in order to determine whether it continues to apply discriminatory employment policies. The information submitted by the employer indicated the termination of such employment policy. Another interesting aspect of this case is the fact that, following the proceeding before the Ombudswoman, the complainant initiated legal proceedings seeking compensation for such company's discriminatory recruitment policy. The Court established discrimination on the ground of age and the complainant was granted non-monetary compensation.

Discrimination on the ground of age at workplace

Conclusion: Discrimination

A claimant initiated legal proceedings against his employer for discrimination on the ground of, inter alia, age as well as marital and family status, claiming that he has been a victim of multiple and prolonged discrimination at his workplace. He also informed the Ombudswoman about such court proceeding, highlighting the necessity to terminate the company's discriminatory policy towards its employees.

The claimant argued that despite his work result, his employer offered him an employment contract for a less favourable workplace with lower salary, requiring lower qualifications than his and for which a collective redundancy was regularly determined. After the claimant rejected the employer's offer he had to deliver all of his assignments to another, younger employee and was not assigned with new ones. The claimant was told by his superior that the reason for such treatment is their need for "*fresh blood*" and an employee without private obligations, which the claimant interpreted as discrimination on the ground of age as well as marital and family status. At that time, the claimant was 31 and married.

The Court upheld the lawsuit claiming that the employer had unilaterally altered the nature and type of work for which the claimant had a valid employment contract, deploying him to a job with a lower professional qualification and lower pay grade. It also found that the claimant's superior director decided to replace him since the company needed "*fresh blood*" and younger people with less obligations regarding private life.

Since the respondent failed to provide the justified reasons for such treatment, the Court concluded that the employer considered the claimant to be old and established discrimination on the ground of age and marital and family status. Three other employees of the same employer were found in the same situation and two of them have initiated the same court proceedings against the employer. The Ombudswoman has intervened on the side of the claimant in one of these proceedings that is still ongoing.

Cyprus

Office of the Commissioner for Administration and Human Rights (Ombudsman)

Age discrimination in advertisement for job vacancy by a local authority for officers on temporary employment based (2016)

Conclusion: Discrimination – settlement

A posting for a job vacancy by a Municipality hiring officers on temporary employment included a provision with the following criteria to be taken into account in the event of a tie of candidates: 'academic qualifications, length of experience in related tasks and date of birth, giving priority to younger candidates'.

The Commissioner for Administration and Protection of Human Rights (Ombudsman) concluded direct discrimination on the basis of age in employment. The Municipality was required to abstain from establishing age criteria in any vacancy filling process and to address equality between candidates, which should be addressed in other ways. The Municipality complied with the Commissioner's suggestions and all officers were informed not to repeat the same issue in the future.

Scheme for the provision of equal opportunities for unemployed Law graduates (Age limit 29 years old) (2018)

Conclusion: No discrimination

In a scheme for the provision of equal opportunities for unemployed law graduates there was a restriction of participation only for those who were up to 29 years old. The complainant exceeded this age limit and, therefore, he could not participate in the project.

The Equal Treatment in Employment and Labour Law provides for exceptions of age discrimination and, specifically, it provides that age limit is not discriminatory in situations when: (a) it is objectively justified by a legitimate objective, in particular in relation to employment, labour market and vocational training policy and; (b) the means of achieving the objective is appropriate and necessary.

After investigating the case, it was found that the age criterion set out in the scheme did not constitute age discrimination since it was objectively justified by an employment policy to provide opportunities to young lawyers, within the framework of tackling youth unemployment.

Age discrimination in access to the profession of private guard/guard at the airport (2015)

Conclusion: Discrimination – settlement

A 59 year old persons' application was rejected by a private company because the candidate exceeded the age limit of 55 years old. According to the contract signed with the Civil Aviation Department at the guard posts at the airport, they would employ persons whose age did not exceed 55.

The Commissioner concluded that there was direct discrimination on the ground of age, since the age limit of 55 years old, which was set in the contract, was not in accordance with the requirements of national and European legislation and case law on the matter. More specifically, it was neither appropriate nor necessary to set an age limit in order to achieve the legitimate purpose of performance as the guard at the airport. Therefore, the different treatment due to age is not justified. The Civil Aviation Department complied with the Commissioners' recommendations and omitted the age limit from the contracts.

Czech Republic

Public Defender of Rights

Severance pay for employees eligible for old-age pension (2016)

Conclusion: Discrimination

The complainant was dismissed after 36 years of work. By that time, she was already eligible for the old-age pension. She claimed age discrimination because her severance pay was lower (statutory – three times the average monthly salary) than the severance pays stipulated in the collective bargaining agreement (fourteen times the average monthly salary). According to the agreement, those employees who have become eligible for old-age pension are not entitled to the extra severance pay.

The Czech Public Defender of Rights concluded that if a collective bargaining agreement awards contractual severance pay only to those employees who have not become eligible for the old-age pension and this different treatment lacks an objective ground given by the character of the work performed, it constitutes direct discrimination on the ground of age. The Supreme Court adopted the view of the Public Defender of Rights and adjudicated that the collective bargaining agreement directly discriminated against the complainant. The complainant was awarded the amount of 22,250 EUR as severance pay.⁸

Elderly employees vs. female employees with minor children (2016)

Conclusion: Discrimination (still pending)

The complainants worked as judicial officers at a court. In 2014, the Court did not receive enough money for remunerations. Thus, the Court decided to lay off all working pensioners arguing that it is better than dismissing working mothers with minor children due to their vulnerable position in the labour market. However, the Czech Anti-Discrimination Act does not allow employers to make the decision to lay off employees based on the fact that they receive the old-age pension, even if

⁸ Opinion of the ombudswoman, 9 May 2016, 7077/2015/VOP, available in English at: https://www.ochrance.cz/fileadmin/user_upload/ESO/7077-2015-VOP-VB_en.pdf.

such procedure would favour female employees with minor children. The Public Defender of Rights concluded that the Court discriminated against the complainants on the ground of age.

One of the complainants brought the case before the Court (different from the Court-employer). The Court of the first instance agreed with the Public Defender of Rights and decided that the dismissal of the pensioner was void. The employer appealed the judgment.⁹

Bullying of an employee over 50 (2015)

Conclusion: Discrimination

The complainant was employed as an assistant professor at the university. The complainant's superior treated her worse than the other employees (additional unpaid work, humiliating environment, extension of the employment contract only by one year, even though other employees' contracts were prolonged for longer periods). The complainant stated she felt treated unfavourably due to her age.

The Public Defender of Rights assessed the case and found discrimination. Furthermore, the equality body acknowledged that the complainant would successfully be able to invoke sharing of the burden of proof in a potential court proceeding.

The complainant brought action before the Court. The Court ruled in her favour and assigned the employer to apologise and to pay 50,000 CZK (approx. 1,900 EUR) as a remedy. Neither one of the parties appealed the judgment.¹⁰

Finland

Non-Discrimination Ombudsman

Recruitment into Finnish Defence special forces

Conclusion: Discrimination

The Finnish Defence Forces recruited personnel to their special forces. The applicant, who had successfully served in the same special troops earlier, was denied recruitment because of his age (33 years). The applicant brought his case before the District Court, which denied his appeal basing its decision inter alia on the ECJ fire fighter case (C-229/08, Wolf) and stated that the Finnish Defence forces had not discriminated against the applicant.

The applicant appealed his case to the Helsinki Court of Appeal which asked the Non-Discrimination Ombudsman (in accordance with the Finnish Non-Discrimination Act 27 §) for a reasoned opinion.

⁹ Report on inquiry in a case of discrimination on grounds of age upon termination of employment by notice (laying off employees), 26 January 2016, 8024/2014/VOP, available in English at:

https://www.ochrance.cz/fileadmin/user_upload/ESO/8024_2014_VOP_eng.pdf.

¹⁰ Report on inquiry concerning workplace bullying motivated by age and sex, 14 December 2015, 134/2013/DIS, available in English at: https://www.ochrance.cz/fileadmin/user_upload/ESO/134_2013_DIS_eng.pdf.

The Ombudsman stated that the Court of Appeal should reconsider if the ECJ Wolf-case was well suited as a precedent for this case. The Ombudsman pointed out that the current Finnish case was different from the Wolf-case in some relevant respects. For example, as the employment contract was not permanent but a fixed term for 5 years. The Ombudsman further stated that age limits should be used with caution and in a consistent and transparent matter, which had not been the case.

The Helsinki Court of Appeal found that the recruitment process into the special forces had been discriminatory. Although the employer had a legitimate aim, its means for achieving the aim weren't appropriate and necessary as there were less restrictive means at hand than using this low and strict age limit. The decision is final and has entered into force.

France

Defender of Rights

[Decision on the age limit of 57 for air navigation control engineers leading to their automatic retirement without possibility of postponement \(2014\)](#)

Conclusion: No discrimination

In France, a rule determining an age limit of 57 for air navigation control engineers led to an automatic retirement without possibility of postponement. Importantly, this contrasts with the rules for airline pilots who can perform their duties until 65 years of age. The French equality body considered that the age limit went beyond what was necessary to achieve the objective of aviation safety and submitted their observations to the *Conseil d'Etat* (highest court in administrative legal system in France). The *Conseil d'Etat* however, rejected the complaint by stating that the age limit was proportionate (appropriate and necessary) to achieve the objective of aviation safety. The *Conseil d'Etat* notably considered that ageing affects physical capacities and that the challenged age limit was proportionate to achieve aviation safety. In this context, the *Conseil d'Etat* also stated that the medical examinations to which claimants are subject to every two years are insufficient.¹¹

[Deliberation on setting an age limit of 45 years old for a job application \(2007\)](#)

Conclusion: Discrimination

A claimant, aged 50, complained about the rejection of her candidacy for a nurse position in a public hospital on the ground that she does not meet the maximum age requirement of 45. For the Minister of Health, the legislator has provided for derogations from the principle of non-discrimination on grounds of age, especially when the job is classified in the active category.¹² However, age limits for nurses are not justified since derogations are not provided for in other

¹¹ Defender of rights, n° MLD-2014-02, 18 March 14:

https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=10256.

¹² Professions presenting a particular risk or generating exceptional states of fatigue.

professions also classified as active and involving direct contact with the patient. Therefore, the maximum age limit for access to the profession of nurses is not based on an objective and reasonable justification. It constitutes a discrimination. The Defender of Rights recommended the Minister of Health to remove the age limit for access to classified professions or jobs classified as active, including the profession of nurses. In accordance with this recommendation, the age was repealed by Decree No. 2008-1150 of 6 November 2008 for the profession of nurses.¹³

[Decision regarding the discriminatory nature of the age limit of 50 years old for access to the French Polynesian public hospital practitioner competitive examination \(2015\)](#)

Conclusion: Discrimination

The Defender of Rights recommended the Ministry of Health, Social Welfare and Public Service of French Polynesia to remove the age requirement for access to the public service hospital practitioner competition in French Polynesia. The justifications provided by the Polynesian administration, based on the guarantee granted to civil servants to benefit from a retirement pension and a sufficient career development, do not seem compatible with the non-discrimination principle related to the ground of age. Moreover, this is the reason why the age limits for access to competitions of the public service in mainland France have been removed. Following this recommendation, the Government of French Polynesia informed the Defender of Rights that, by a law adopted on July 8, 2016, the age requirement for the access to the public service competitions of French Polynesia was removed.¹⁴

[Refusal to hire in the context of an "industrial research training agreement" \(CIFRE thesis\) on the ground that the claimant has exceeded an age limit \(26 years old\) corresponding to an internal rule \(2017\)](#)

Conclusion: Discrimination

The claimant was not hired because of the employers age limit of 26 years old. During the investigation, the employer explained, that such a rule did not exist and that it was a mistake of an employee in charge of recruitment within its training department. He indicated that he wanted to offer the claimant the opportunity to re-apply and added that he had made a reminder of the rules applicable to the hiring of candidates with an industrial research training agreement (CIFRE). However, the Defender of Rights noted that the involved employer made a recruitment selection based on age, that was unlawful because it was not justified by a specific policy on the employment of young workers, which would be considered a justified exception to the prohibition of discrimination on the ground of age. The Defender of Rights also reminded the employer that the provisions regulating CIFRE are exclusive of any age limit. As a result, the Defender of Rights noted that the claimant was the subject of a discriminatory refusal of employment because of his age. The Defender of Rights recognised the employer's commitment to repair the prejudice and

¹³ Defender of rights, n° MLD-2014-02, 18 March 14:

https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=10256.

¹⁴ Defender of rights, n° MLD-2015-36, 20 February 2015:

https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=1185.

recommended the modification of the recruitment practices in order to guarantee the respect of the principle of non-discrimination.¹⁵

Decision on the discriminatory nature of an offer of employment under a professionalisation contract and the recruitment procedure set up because of an illegal age limit (2016)

Conclusion: Discrimination

The attention of the Defender of Rights was drawn by a claimant concerning job offers published by a company wishing to recruit people aged 18 to 26 under professionalisation contract.¹⁶ A company made an employment offer under a professionalisation contract subject to an illegal age limit. The employer age requirement misled the recruiters who opposed refusals to candidates because of their age. The Defender of Rights recalled that the goal of the professionalisation contract is to promote both integration and reintegration into the workplace and, as such, is not only open to people aged 16 to 26, but also to job seekers over 26 years old of age and to specific social income recipients. The Defender of Rights decided to recall the terms of the contract and recommended the company to modify the wording of the job offers under the professionalisation contract. Following these recommendations, the defendant company informed the Defender of Rights that the wording of its job offers was modified in accordance with the recommendations and an internal note aimed at clarifying the conditions of non-discriminatory recruitment under professionalisation contract was disseminated internally but also to their recruitment partners.¹⁷

Decision on a refusal to hire because of the claimant's age, 26 (2014)

Conclusion: Discrimination

The claimant was 26 years old when she applied for an Educational Assistant position in a school. Having received no response to her application, she contacted the Principal Education Advisor of the school by telephone who told her that, listening to her voice, she was young and may not have been selected for this reason, because he was trying to recruit someone between the ages of 35 and 40. When questioned by the Defender of Rights, the Principal confirmed that he favoured the recruitment of an older person (40 years old). In view of the documents collected during the investigation, the Defender of Rights considered that there was a presumption of discrimination on the ground of age. The evidence put forward by the school in question did not show that the rejection of the complainant's application was based on objective criteria unrelated to any discrimination on the grounds of age. In response to the Defender of Rights, the Principal made a commitment to propose a position to the claimant during the next recruitment campaign. The Defender of Rights took note of this decision.¹⁸

¹⁵ Defender of rights, n° 2017-186, 1st June 2017.

¹⁶ The professionalisation contract is an altering training contract, combining practical training in relation to the qualification sought, and theoretical training in an external training organisation or internal to the company.

¹⁷ Defender of rights, n° MLD-2016-065, 23 February 2016:
https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=14505.

¹⁸ Defender of rights, n° MLD-2014-12, 24 February 2014.

Complaint of a person who felt that he was a victim of harassment because of his age, as well as a victim of a dismissal that was discriminatory because of his state of health and family status (2014)

Conclusion: Discrimination

The investigation revealed that discriminatory harassment was manifested by disparaging remarks about his age, as well as by instructions given by the employer affecting his working conditions. Namely, drastic reduction of his breaks, prohibition to communicate with colleagues and to access the kitchen and toilets. The investigation also revealed that the claimant had been dismissed for serious misconduct, in particular because of absences, some of which were justified by work stoppages for reasons of health and others due to his family status. However, it was made clear from the settled case-law of the Court of Cassation that once one of the grounds stated in support of a dismissal proves to be discriminatory, the dismissal must be declared void without the need to examine other grievances (which in the present case were mentioned in the dismissal letter). At the end of his investigation, the Defender of Rights considered that harassment and discrimination were established. As a result, he decided to make a submission before the Labour Court seized by the Claimant. By judgment of 1 December 2014, the Labour Court followed the position of the Defender of Rights, acknowledging the complainant's harassment and declaring his dismissal null and void.¹⁹

Consulting firm refusal to hire a candidate considered as "too senior" (2018)

Conclusion: Discrimination

When questioned by the Defender of Rights, the respondent company argued that the claimant was overqualified. However, in a 2009-199 deliberation, the former Halde²⁰ recalled that this ground was not valid, as the company in question did not explain how the multiple competences of the claimant would have prevented him from carrying out the tasks requested. Thus, the Defender of Rights recommended that the defendant company approach the claimant in order to carry out a fair compensation and to train all his employees on non-discrimination practices. Following this recommendation, the defendant company proposed a transactional indemnity²¹ to the claimant which he refused because he considered it too weak. The claimant decided to bring the case before the competent court by using the decision of the Defender of Rights.²²

Decision on the non-renewal of a public official's contract because of his age, 56 years old (2016)

Conclusion: Discrimination

The claimant's contract was not renewed because of his age. He suggested that the newly arrived Service Manager wanted to renew the workforce by younger employees while the claimant was 56 years old. In the investigation of this case, the Defender of Rights noted that the person recruited

¹⁹ Defender of rights, n° MLD-2014-20, 11 February: 2014 https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=8108.

²⁰ The legal predecessor of the Defender of Rights

²¹ The transactional indemnity is a sum paid by an employer to his employee following or on the occasion of a breach of the employment contract.

²² Defender of rights, n°2018-009, 21 February 2018.

to perform the duties previously occupied by the claimant was 33 years old. The Defender of Rights also noted that, for one year, in order to fill seven vacant positions, six staff members under 33 had been recruited. The administration argued that the measures taken against the claimant were not motivated by his age, but by the best interest of the service since he had an inappropriate professional behaviour. The Defender of Rights noted that the accusations made against the claimant were not supported by any document justifying the allegations. Therefore, the Defender of Rights considered that the claimant was discriminated on the basis of his age. Consequently, the Defender of Rights recommended to the administration to compensate the claimant for damages suffered as a result of the non-renewal of his employment contract. Following this recommendation, the claimant and the representative of the administration signed a transaction protocol providing for compensation up to € 17,000.²³

Decision on a university lecturer whose appointment to a university professorship was not offered because of his age, 55 (2014)

Conclusion: Discrimination

The investigation conducted by the Defender of Rights led to the conclusion that the claimant was the victim of discrimination because of his age. The *Conseil d'Etat* issued a decision in this case and stated that the motivation contained in the decision of the board of directors of the university did not provide clear reasons to why the profile of the claimant did not correspond to the needs sought for the position open to the competition.²⁴ However, despite the decision of *Conseil d'Etat* and the injunction made to the administration to reconsider the candidatures retained by the selection committee, the claimant's application was not accepted by the university and a new appeal was lodged by the claimant. The Defender of Rights decided to recommend to the Chair of the university to reconsider the application of the claimant with a view to his appointment on the already covered position or on an equivalent position. By decree of 19 March 2015 of the President of the Republic, the claimant was appointed to the rank of Professor of Universities and by order of 3 May 2015 of the President of the University the claimant was assigned as Professor of Universities.²⁵

²³ Defender of rights, n° MLD-2016-317, 16 December 2016.

²⁴ November 14, 2013 (n° 364007).

²⁵ Defender of rights, n° MLD-2014-102, 29 July 2014:

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=11902.

Germany

Federal Anti-Discrimination Agency

Indicators of Age Discrimination - Fictitious Application Testing Procedure (2014)

Conclusion: No discrimination

A 50-year-old applicant had filed in a fictitious application of a supposedly 32-year-old man in addition to his own application documents when applying for a job. Only the fictional younger candidate was invited to the job interview. The fictitious applicant immediately rejected the invitation on the grounds that he already found a job.

The Court ruled that the results of such a "testing procedure" could be one of the possible indications of inadmissible motivation on the part of the employer, as well as, for example, the text of a job advertisement. However, the Court stated that the production of certificates for a fictitious person could possibly be a forgery of a document and thus a punishable offense.

The effect of the results of a testing procedure depends on the comparability of the fictitious person with the real candidate. In order to achieve the greatest possible comparability of the test, circumstances in the fictitious application must be comparable to the initial case, and the selection decision should not depend on interpersonal aspects or on chance.

The age difference between two candidates is not in itself evidence that shows less favourable treatment because of a prohibited characteristic. If, apart from the discriminatory feature, there is room for another subjective selection decision of the employer on the basis of concrete facts, it cannot be assumed without further evidence that the general life experience gives rise to an overwhelming probability of discrimination. The admissibility of testing as evidence has been confirmed by the State Labour Court.²⁶

Maximum Age Limit for Examiners for Testing of Technical Installations and Facilities (2016)

Conclusion: Justified discrimination

Building safety is a legitimate aim within the meaning of Article 2 (5) of Directive 2000/78 / EC, which can justify the setting of a general maximum age limit of 68 for investigators for testing installations and equipment.²⁷

Age limits in company agreements (2013)

Conclusion: Justified discrimination

In company agreements, age limits can be agreed according to which the employment relationship ends when the standard retirement age is reached.²⁸

²⁶ LAG Schleswig-Holstein, Urteil vom 09.04.2014 - 3 Sa 401/13. Or ECLI:DE:LARBGSH:2014:0409.3SA401.13.0A.

²⁷ BVerwG, Urteil vom 11.05.2016 - 10 C 2/15 or ECLI:DE: BVerwG :2016:110516.U.10C2.15.0.

²⁸ BAG, Urteil vom 05.03.2013 – 1 AZR 417/12 or ECLI:DE:BAG:2013:050313.U.1AZR417.12.0.

Temporary employment continuation after reaching retirement age (2015)

Conclusion: Possible justified discrimination

An agreement made when or after reaching the retirement age for the continuation of the employment relationship, may be objectively justified. This presupposes that the employee can claim a retirement pension from the statutory pension insurance and that the temporary continuation of the employment relationship serves a concrete personnel planning need of the employer, existing at the time of the agreement of the time limit. Such a limitation does not discriminate the worker on the ground of age.²⁹

Age-dependent days off after shift work days (2017)

Conclusion: Discrimination

The protection of older workers is a legitimate aim for differential treatment on grounds of age. However, if an age-based scheme is not proven to actually give greater protection to older workers, such a provision would violate the principle of non-discrimination. The Federal Labour Court had to decide on a provision in a collective agreement, by which employees working in shifts were entitled to a different number of days of additional annual leave (above 30 years of age: 2 days, 35 years of age: 4 days, 40 years of age: 6 days, 50 years of age: 8 days, from 51 years of age: 9 days). This regulation was justified by the increased need for recovery of older employees. The Federal Labour Court could not accept this justification, because it was not foreseen to further increase the number of days off for older workers above the age of 51 years old. The difference of treatment was therefore not justified.

According to the Labour Court, granting additional days of leave as a function of age may be a protective measure for older people. What is necessary, however, is a substantiated presentation by the employer about an increased need for recuperation with increasing age, which is promoted by the specific holiday scheme.

If there is an age-discriminatory effect of a regulation based exclusively on age grading, the principle of equal treatment can only be respected by providing the same benefits to the members of the disadvantaged group as the members of the privileged group. The more favourable regulation remains the only valid reference as long as no measures have been taken to ensure the equal treatment of both groups of persons as a “*downward adjustment*” is not acceptable.³⁰

Staggering the days of annual leave based on age – discrimination against younger employees (2016)

Conclusion: Discrimination

The Federal Labour Court ruled that it is inadmissible to calculate the number of days of annual leave in proportion to the age. According to the Federal Labour Court, a vacation regulation violates the prohibition of discrimination if it gives employees who are under 50 years of age three days

²⁹ BAG, Urteil vom 11.02.2015 – 7 AZR 17/13 or ECLI:DE: BAG :2015:110215.U.7AZR17.13.0.

³⁰ BAG Urteil vom 27.04.17- 6 AZR 119/16.

shorter vacation than those who have already reached the age of 50. The empirical premise that employees who have reached the age of 50 can be generally assumed to have an increased need for recovery and a longer recovery time is not substantiated by evidence.

If an employer wishes to justify an age-related difference in treatment, they must demonstrate that this difference in treatment serves a legitimate aim and that the means of achieving it are appropriate and necessary. The unsubstantiated claim that older people have an increased need for recreation is not enough to explain.³¹

Reduction in weekly working hours depending on age (2014)

Conclusion: Discrimination

According to the Federal Labour Court, a reduction of the regular weekly working hours according to the age limit provided for in a company agreement penalizes the respectively younger employees vis-à-vis the respective older employees directly because of their age.

The adjustment of the ratio of regular weekly working hours and remuneration for part-time employees between the 40th and the 50th year, who had agreed a fixed weekly working time, had to be adjusted upwards.³²

Compensation - Unequal treatment in a social plan due to age (2014)

Conclusion: Justified discrimination

In a social plan, employees can be excluded from severance payments that are entitled to a pension after receiving unemployment benefits and have previously declined to continue employment at another company location.³³

Age-related notice period (2014)

Conclusion: Justified discrimination

This is a case concerning the admissibility of different lengths of notice periods of an employment relationship, which may lead to an indirect discrimination on the basis of age.

An employee who was 28 years old at the time of her dismissal and who was fired after 3 years of employment, sued her employer. The employee did not doubt the principle effectiveness of the termination, but challenged the short notice period, which is based on the law regulating the length of employment. Such legislation penalizes younger workers and violates the prohibition of age discrimination.

The Court ruled that the statutory notice period regulated in the law does not violate the prohibition on indirect age discrimination. This law was adopted during a time of high unemployment and the legislator assumed that older workers are more affected by unemployment than younger workers.

³¹ BAG, Urteil vom 12.04.2016 - 9 AZR 659/14.

³² BAG, Urteil vom 22.10.2015 - 8 AZR 168/14.

³³ BAG, Urteil vom 09.12.2014 – 1 AZR 102/13.

The longer notice period is therefore intended to give older workers better protection against dismissal and give them more time to find a new job.³⁴

Great Britain

Equality and Human Rights Commission

Age Concern England v Secretary of State for Business, Enterprise and Regulatory Reform (2009)

Conclusion: No discrimination in principle - the Court clarifies the conditions under which members may authorise dismissal of workers by reason of retirement and the default retirement age was ultimately abolished

The charity Age Concern and Help the Aged (Age UK) sought a judicial review of the Act which transposes Directive 2000/78. The case argued that the Age Regulations had improperly implemented the Directive by including a national default retirement age applicable to all UK workers. The High Court referred five questions to the CJEU. The CJEU clarified that the Directive allows differences of treatment on the grounds of age when they are objectively and reasonably justified, in particular by legitimate employment policy, labour market and vocational training objectives. The means of achieving that aim must be appropriate and necessary. The list of authorised derogations in Article 6 (1) is not limitative so states can rely on other aims as long as they are social policy aims of a public interest nature, as opposed to the individual business interests such as cost reduction. The case returned to the High Court and the Equality and Human Rights Commission (Equality Body) intervened. The judge decided that the Default Retirement Age was lawful when it was first introduced. The Government brought forward a review and the Default Retirement Age was abolished in 2011.³⁵

Seldon v Clarkson Wright and Jakes (2008 – 2014) Appellant funded by EHRC

Conclusion: No discrimination

The claimant (S) had been a partner in a legal firm who had signed a partnership agreement with a compulsory retirement age of 65. He wanted to work on until he was 68 and claimed direct age discrimination. He was unsuccessful and his appeals went as far as the Supreme Court. The Supreme Court remitted the case S was ultimately unsuccessful. However, the Court made observations on the scope of justification of direct age discrimination in relation to mandatory contractual retirement age.

Lady Hale rejected the argument that the class of legitimate aims was limited to state level social policy aims. She noted that the UK has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with

³⁴ BAG, Urteil vom 18.09.2014 – 6 AZR 636/13.

³⁵ CJEU, Case C- 388/07 - <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-388/07>.

the social policy aims of the state and (iii) the means used are proportionate. The CJEU has set out two categories of legitimate aim; inter-generational fairness and dignity of older workers. She noted that *“Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. E.g. avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.”*³⁶

Pension schemes - Lord Chancellor and Secretary of State for Justice v McLeod (2018) and Sargeant v London Fire and Emergency Planning Authority (2018) Conjoined cases before the Court of Appeal

Conclusion: Unlawful direct age discrimination upheld – case may be appealed

The background to this case was that the Government conducted a review of public sector pensions. This case concerned changes made to separate pension schemes for Judges and Fire Fighters which had a disproportionately negative effect on younger Judges and Fire Fighters. The transitional provisions resulted in some tapering of impact for some people but those with a longer time to go until their retirement were the worst affected.

The case turned on justification. The Government put forward several aims but relied mainly on the aim of protecting those closest to retirement from the worst effects of the reform. Once a social justice aim is established however, the Tribunal, having regard to the margin of discretion, has to decide if it is legitimate in the circumstances of the case. This requires rigorous evidence of the underlying aims, which had not been provided. Broad generalisations are not sufficient.³⁷

Promotion - Essop v Secretary of State for the Home Department (2017)

Conclusion: Remitted to Employment Tribunal (EHRC funded)

The Commission joint-funded this case in the Supreme Court with PCS Union, where Mr Essop, who was the lead appellant in a group of 49, brought their cases against the Home Office UK Border Agency (UKBA). Mr Essop, an Immigration Officer, claimed indirect discrimination on grounds of race and age. The Home Office required employees to pass an exam for promotion. It was discovered that BME candidates and older candidates had lower pass rates than white candidates and younger candidates. The Supreme Court decided that where there is a provision that might be indirectly discriminatory (such as this exam), there is no need for a claimant with a protected characteristic to show why he or she is at a disadvantage. It is enough that he or she is at a disadvantage. So, in this case, Mr Essop and others did not need to work out why BME candidates and older candidates had lower pass rates. The appeal was allowed, and the case remitted to the Employment Tribunal.³⁸

³⁶ Supreme Court decision from 2012 available here: <https://www.supremecourt.uk/cases/uksc-2010-0201.html>. commentary on the final EAT decision is available here: <https://www.blackstonechambers.com/news/case-seldon-v-clarkson-3/>.

³⁷ [2018] EWCA Civ 2844 decision available here: <https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-judgment.pdf>.

³⁸ [2017] UKSC 27 <https://www.supremecourt.uk/cases/docs/uksc-2015-0161-judgment.pdf>.

Redundancy - Lockwood v Department for Work and Pensions (2017)

Conclusion: No discrimination

The claimant was made redundant at the age of 26. If she had been over 35 at the time, with the same length of service, she would have been entitled to 70% more redundancy payment. This was on the basis that statistically under 35s have fewer family and financial commitments and adapted easier to redundancy and were more likely to move into other employment than over 35s. L argued this was discriminatory as she was about to marry and had bought her own home. The Court of Appeal held that it was clear that L had suffered less favourable treatment on the ground of age. However, the overall redundancy scheme had a limited pot of money and had applied a banding scheme based on statistical evidence, so the disparate treatment was found to be proportionate.³⁹

Greece

The Greek Ombudsman

Mandatory retirement of members of the diplomatic branch of the Ministry of Foreign Affairs (2015)

Conclusion: Discrimination, amendment of the law

According to a provision of the Organisation of the Hellenic Ministry of Foreign Affairs (Law 3566/2007, article 98), all members of the diplomatic branch had to leave their service at the age of 65, irrespective of whether they had completed 35 years of actual pensionable public service, whereas staff of all other branches had the option to remain at service until completing 35 years, but not beyond the 67th year of age. Such a requirement had been found compatible with Article 6 of Directive 200/78 by the Supreme Administrative Court (Symvoulío tis Epikratias-StE)⁴⁰ but it had also triggered a reasoned opinion by the European Commission pursuant to Article 258 of the TEU. Despite this jurisprudence of the StE, the Greek Ombudsman stated that this specific provision was contrary to the principle of equal treatment on grounds of age as regards the implementation of the Employment Directive, insofar that it was not justified by any special conditions faced by diplomatic officials vis-à-vis other categories of the Ministry of Foreign Affairs staff.

Finally, under a new law (L. 4451/2017, article 9), the Ministry of Foreign Affairs allowed officials of the diplomatic branch to remain in service beyond the 65th year, but in any case, not beyond the 67th year by analogy with employees in other branches of the Ministry in accordance with the Ombudsman's positions and recommendations.⁴¹

³⁹ Court of Appeal: [2013] EWCA Civ 1195.

⁴⁰ StE Judgment 1706/2016, available at the electronic legal data base NOMOTELIA and at the journal NOMIKO VHMA 2013 p. 1666.

⁴¹ See <https://www.synigoros.gr/?i=equality.el.nea.409375>.

Maximum age limit for recruitment fixed in notices of competition where practical tests are also required (2016 and 2017)

Conclusion: Pending case

An age limit of 35 years had been set in three notices of competition of ASEP (Supreme Council for Civil Personnel Selection), intended to fill posts of various specialisations like Restorers of Works of Art, Money Counters, Lithographers at the Central Bank of Greece. Practical tests were also included in the selection proceedings in order to assess the capacity of the applicants to perform the duties assigned to the posts. Since there was no specific justification for the age limit in the notices, the Greek Ombudsman, making reference to CJEU jurisprudence⁴², noted that the setting of the maximum age limit imposes a disproportionate requirement because the ability of the candidates to perform their tasks can be ensured by means of their participation in practical tests and, therefore, the use of the age criterion is not appropriate nor necessary. On that basis, the Greek Ombudsman asked the Central Bank of Greece (CBG) to provide the documents and the arguments proving the necessity of such limit.

Maximum age limit in notices of competition for judges and magistrates (2010)

Conclusion: No violation

A candidate for the National School of Judges was excluded from the relevant competition of 2010 on the basis, inter alia, that he had exceeded the 40th year of age, which was fixed as a maximum limit for participation. The candidate sought annulment of the Joint Ministerial Decision regulating the terms and conditions for participation to the competition, as being discriminatory on the ground of age and not justifiable under Directive 2000/78. The Administrative Supreme Court (Symvoulio tis Epikratias-StE) dismissed the argument, stating that the disputed age limit fits with the provisions of the Code of Organisation of Courts and the situation of Judges, which lay down minimum period of service in each stage of judicial hierarchy in order to be promoted. Therefore, according to the Court, the age limit serves a legitimate objective and does not go beyond what is appropriate and necessary to achieve that objective.⁴³

The same decision was repeated by the Symvouliotis Epikratias following a case file challenging the upper age limit of 35 years old fixed in a notice of competition for magistrates.

Maximum age limit in notice of competition for military judges (2018)

Conclusion: Pending case

In 2018, the Ministry of Defence issued a notice of competition intended to fill 10 posts of military judges, requiring candidates to be of Greek origin and not older than 35 years of age. With regard to the latter requirement, the Greek Ombudsman, acting ex officio, noted to the Ministry of Defence

⁴² Judgment of the CJEU of 13.11.14 in case C-416/13, Mario Vital Pérez v Ayuntamiento de Oviedo.

⁴³ StE Judgment 3762/2010 available at the electronic legal data base NOMOTELIA and at journal "Theoria & Praxi Dioikitikou Dikaiou" 2011 p. 344, 521.

that, although armed forces are exempted from the ambit of Directive 2000/78 as to disability and age-related discrimination, this exemption is linked to the nature of duties assigned to the members of the armed forces. Therefore, in order for an age-related requirement for the recruitment of military judges to be justifiable, there has to be a specific correlation of that requirement with the duties corresponding to the post in question. Following a subsequent request made by the Ministry of Defence, the Legal Council of the State issued opinion n. 127/2018, in which it found the age limit legitimate, on the ground that military judges maintain both the status of judges and members of the armed forces and, therefore, they have to possess operational capacity. The acceptance of the opinion by the Ministry of Defence is still pending.

Hungary

Equal Treatment Authority

She was not hired for the advertised position because of her age (2016)

Conclusion: Discrimination

The complainant turned to the Equal Treatment Authority with the complaint that one of the selection criteria specified in the vacancy notice posted on an online job search engine was that the applicant should be between the ages of 20-35. The complainant was 44 years of age, had applied for the position and was in her assessment not hired because of her age. The company invoked that the age requirement in the vacancy notice had been specified because of the physical difficulty of the work involved. The company had viewed this as a suggestion rather than as automatic grounds for rejection and stated that during the selection process they had also considered other criteria when evaluating the applicants. However, the complainant fell into the category of applicants whose CV was not considered good enough to merit an interview invitation. The person hired for the job was 21 years old.

The Authority did not accept the defence presented by the company because there was no reasonable justification why a person older than the age specified in the vacancy notice would be unsuitable for filling the position involving moving and lifting of fruit crates. The Authority also failed to accept that the age range specified in the vacancy notice was only a recommendation because it was listed among the preconditions for filling the position. Finally, the Authority determined that using the above selection criteria was discriminatory. As a sanction, it barred the company from future manifestations of the infringing conduct and ordered the public display of the decision on the website of the Authority and of the company for a period of 45 days.⁴⁴

⁴⁴ Equal Treatment Authority, 3 June 2016:

https://onedrive.live.com/?authkey=%21AKRC_WvdKBMoe4s&cid=1CD1C03C0330D55A&id=1CD1C03C0330D55A%21104&parId=root&o=OneUp, p 17-18.

We accept applications from persons under 40! (2015)

Conclusion: Discrimination

In this case the Authority launched *ex officio* proceedings based on a report it had received. The person who filed the report complained about a vacancy notice for a position of office administrator at a government agency, that stipulated that potential applicants may not be older than 40. The complaint was filed against an organisation that discharges public authority functions, and the Hungarian Anti-discrimination Act authorises the Authority to launch *ex officio* proceedings against such institutions. The agency invoked that the reference to a maximum age had only been included in the vacancy notice as a result of an administrative error, but in actuality not a single applicant had been rejected because of their age. It stated that 87 curriculum vitae had been submitted in response to the notice, and 18 applicants were over the age of 40. Of these, 10 had the requisite qualification, and they were all interviewed. As a result of the selection process, they hired four employees, one of whom turned 44 that year.

The Authority did not accept the agency's reference to an administrative mistake. The vacancy notice was published and had likely discouraged several potential applicants over 40 from applying for this position, although others might not have been deterred by the clause when they were weighing whether to apply. Considering the above, the Authority also failed to accept the argument that the range of persons who participated in the selection procedure, as well as the group of individuals selected for the jobs, included persons over 40. As a sanction, the Authority ordered the publication of its decision for a duration of 30 days and barred the government agency from future manifestations of the infringing conduct.⁴⁵

⁴⁵ Equal Treatment Authority, 16 October 2015, <https://onedrive.live.com/?authkey=%21ABdpgAVi3qs5G-U&cid=8A68B504D59AD38A&id=8A68B504D59AD38A%21166782&parId=8A68B504D59AD38A%2175669&o=OneUp>, p 35-36.

Lithuania

Office of the Equal Opportunities Ombudsperson

Job advertisement, 2018

Conclusion: Discrimination

A person complained about a discriminatory job advertisement that was published online. The employer was seeking candidates from 18 up to 35 years old for the position as an independent sales consultant. The explanation of the employer was based on specific working activities of the consultant, and the fact that the work would not only be carried out in Lithuania, but also in different shops abroad. In addition, the employer pointed out that the living conditions of future consultants are not in favour of older people, i.e. they will be accommodated with 2-3 persons in hostels. The employer was convinced, that those working and living conditions are not favourable to older people, as only the younger generation can accept this style of life.

The Authority established discrimination based upon age in the sphere of employment as the real opportunities of people aged more than 35 years old had been restricted to access this position without any reasonable justification.⁴⁶

Harassment based on age in the sphere of employment, 2015

Conclusion: Discrimination

A woman, previous nurse of a kindergarten, complained to the Office of Equal Opportunities Ombudsperson about harassment based on her pensionable age. She was subjected to unlawful treatment by the director of the kindergarten and was constantly humiliated and called inadequate, including by the director of the kindergarten, who used non-censored words that offended her dignity. She was forced to resign due to her retirement status. After investigating the case, the Ombudsperson established harassment on the ground of age in the working environment.

Vilnius Supreme Administrative Court rejected the decision of the Ombudsperson by declining the arguments of harassment due to person's age. The Court stated that it was clear from the whole set of evidence in the case that abusive words (separate phrases) had been used during a verbal conflict between the director of the kindergarten and the nurse. The Court found out that there was an inappropriate relationship between the colleagues, which should not be accepted and tolerated at work. After the complaints received from parents, the director suggested the nurse to resign because of her retirement age. According to the Court, harassment cannot be established in this case, as the conflict between the director of kindergarten and the nurse was based on long lasting disagreements and conflicts, and not on the complainant's age.⁴⁷

⁴⁶ <http://www.lygybe.lt/data/public/uploads/2018/05/18sn-74sp-49.pdf>.

⁴⁷ Case A-1543-143/2015 of Vilnius Supreme Administrative Court.

Malta

National Commission for the Promotion of Equality

Alleged unfair dismissal on the basis of age (2013)

Conclusion: No discrimination

This case concerns allegations of unfair dismissal due to the person's age. The complainant alleged that she was asked to disclose her age during a job interview. The complainant was hired for the post but was subsequently dismissed from employment during the probationary period.

Apart from the statements made to the National Commission for the Promotion of Equality (NCPE) by means of her complaint form and during the meeting held with the Commission, the complainant exhibited a copy of e-mails exchanged after she had attended the interview for the vacancy. In the email she had stated that *"I hope you realise that my age will not affect my ability both to do the job and to get along with colleagues/customers of all ages and backgrounds."*

Based on the collected evidence, the Commissioner noted that the complainant provided a more coherent explanation as to whether her age was asked during the interview or not. Moreover, the Commissioner outlined that an employer should not ask for an interviewee's age during the interview process as this may lead to direct or indirect discrimination on the grounds of age. The Commissioner noted that in this specific case the complainant had in fact been offered the job and therefore there was no evidence supporting her claim that she was discriminated against.

As regards the other allegations put forward by the complainant, alleging unfair dismissal due to age and that her working conditions and/or terms of employment were arranged in a discriminatory manner, the Commissioner noted that the complainant did not manage to substantiate the claim made by means of evidence supporting her allegations. On the other hand, the employer supplied the Commission with the complainant's performance statistics for the period she was recruited as compared with another employee's statistics, who was recruited and trained together with the complainant. This information supported the employer's argument that the complainant was dismissed because of the inability to make sales for the company and not because of her age.

Alleged discrimination in employment on the basis of age (2014)

Conclusion: No discrimination

The Commissioner investigated a case concerning an allegation that the complainant was unfairly excluded from employment on the basis of his age. The complainant inter alia stated that following an interview, he contacted the entity to follow up on the interview results and was informed that although the Selection Board awarded him with the post in view of his qualifications and successful experience, the selection board's recommendations could not be approved since he had reached retirement age.

From the evidence submitted and the sittings held with the respective parties, the Commissioner noted that the entities in question adhered to the provisions regulating recruitment, and in line with government regulations that persons who have reached retirement are not to be engaged on contracts of service.

The Commissioner stated that the relevant regulations in the public sector prohibiting the engagement on contracts of service of persons who have reached retirement age constitutes a legitimate aim in terms of EU directives as transposed into Maltese legislation. Based on this assessment, the complaint could not be upheld.

The Netherlands

Netherlands Institute for Human Rights

Criteria 'years of service' (case 1)

Conclusion: No discrimination

A 62-year-old man was employed at the Academic medical centre of Maastricht. He wanted to benefit from the so-called 80-90-100 percent arrangement that would make it possible to work eighty percent of the original hours and get ninety percent of the last salary with hundred percent pension accrual. The man was not eligible for the arrangement because he did not meet the ten years of employment standard, which is one of the admission requirements. The Netherlands Institute for Human Rights (NIHR) concluded that a criterion 'years of service' could establish indirect discrimination based on age, but not in this case. The man cannot compare himself with younger employees since they cannot meet the minimum age requirement. He can only compare himself with elderly employees between the age of 62 and 67 years old. This group is too small to establish a reasonable assumption that there is indirect discrimination on the basis of age. The man was not eligible for the arrangement because of his career choice and there was no connection between the criterion 'years of service' and his age.⁴⁸

Criteria 'years of service' (case 2)

Conclusion: Discrimination

In 2016, McGregor Fashion Group and Adam Menswear went bankrupt. Doniger took over some of the business activities and offered part of the staff a contract applying the seniority criterion. People with seven years of service or more would not get a contract. Nine staff members between the age of 46 and 64 years old had more than seven years of service and argued it was discrimination on the basis of age. According to the NIHR, there was an assumption that mostly elderly people would not

⁴⁸ College voor de Rechten van de Mens, 30 oktober 2017, oordeel 2017-124:
<https://www.mensenrechten.nl/nl/oordeel/2017-124>.

get a contract, because elderly employees usually have more years of employment than younger employees. Doniger provided information about the workforce and the bankrupt companies, which proved no disadvantage for a 46-year-old employee. The group of employees between the age of 45 and 55 years old became bigger. However, there was discrimination on the basis of age with regard to the other eight employees between the age of 57 and 64 years old. This group had the smallest chance to get a contract and decreased the most. A statistical test showed that the way the seniority criterion was applied mostly affected this group. Doniger claimed they had a good reason for applying the seniority criterion, because of the amount of transition fee connected to the number of years of service. The NIHR concluded that this financial argument would only apply in exceptional cases, but Doniger did not prove this. The NIHR therefore concluded that there was discrimination on the basis of age.⁴⁹

Age limits and the use of certain terms - 'young' and 'maximum one year working experience'

Conclusion: Discrimination

A man applied for a traineeship at a postal company and was declined. In the rejection the company stated that the traineeship is meant for young higher professional education and university graduates with maximum one year of working experience. The man argued that this was discrimination on the basis of age. According to the company, the man had little affinity with financial issues. Moreover, it was a junior position where it was important to educate an own pool of recently graduated trainees for the continuity of the company and corporate culture. According to the NIHR, the postal company discriminated the man on the ground of his age. The company did not prove that they declined the man based on substantial reasons and there was no objective justification. Maintaining the continuity of the company and corporate culture is a legitimate aim according to the NIHR, but the means was not appropriate. The company looked for young professionals because they are 'mouldable'. Also, being in the same life phase would create a united feeling within the group. With this line of reasoning the company assigned competences and characteristics to a certain age. This generalisation is based on biases about age and expectations about interaction between people who are not of the same age or in another life phase. The postal company excluded candidates in advance based on their age while they would be able to contribute very well to the continuity of the company and corporate culture.⁵⁰

Age limits and the use of certain terms - 'Younger than thirty years old'

Conclusion: Discrimination

In a vacancy of the municipality of Rotterdam, it was mentioned that they were searching for trainees under the age of 30. A 31-year-old man did not apply for the job because of the age limit and lodged a complaint at the NIHR about age discrimination. The NIHR concluded that he had an interest to file a complaint even though he did not apply for the job. Because of the age limit in the vacancy, the man could assume that he would not qualify for the job. According to the NIHR, the

⁴⁹ College voor de Rechten van de Mens, 9 februari 2017, oordeel 2017-11:

<https://www.mensenrechten.nl/nl/oordeel/2017-11>.

⁵⁰ College voor de Rechten van de Mens, 17 april 2018, oordeel 2018-36:

<https://www.mensenrechten.nl/nl/oordeel/2018-36>.

municipality discriminated the man on the ground of age. This limitation can only be allowed if there is an objective justification. The municipality stated that they wanted to establish a well-balanced age structure of the staff. The average age of employees was high while employees under the age of thirty were underrepresented. Younger people would be more flexible and have knowledge about social media. The NIHR concluded that establishing a proper division between younger and older employees within an organisation would not qualify as a legitimate aim and is based on stereotyping. An employer should prove that there is a real need for it. Candidates older than 30 old could also be flexible or have knowledge of social media.⁵¹

Minimum of two to five years of working experience

Conclusion: Discrimination

An organisation asked for a minimum of two to five years of working experience in a vacancy. A 60-year-old man complained to the NIHR about age discrimination. He interpreted the requirement as a maximum of five years of working experience. According to the NIHR, asking for a maximum of working experience could discourage older candidates to apply for the job. In general, older candidates would have more working experience. The organisation did not give a good reason for applying the maximum working experience requirement.⁵²

Use of tabs on a website and ‘preferably pupil’ and ‘preferably student’

Conclusion: No discrimination

A Dutch supermarket published vacancies on their website with different tabs visible on the website with the terms: ‘all vacancies’, ‘pupil’, ‘student’ and ‘starter/professional’. Visitors of the website would use the tabs to browse for vacancies. An anti-discrimination agency asked the NIHR if the practice of the supermarket was discriminatory on the ground of age by using the tabs and using the terms ‘preferably pupil’ and ‘preferably student’ in the job description. The NIHR concluded that the use of the tabs on the website did not lead to discrimination on the ground of age, because visitors can search under the tab ‘all vacancies. However, the supermarket discriminated on the ground of age by using terms like ‘preferably pupil’ and ‘preferably student’ in the job description. Most pupils and students are young (between the age of twelve and thirty years) and older people are therefore excluded. The supermarket had no objective justification for it.⁵³

Rejection based on ‘life stage’

Conclusion: Discrimination

A 58-year-old woman applied for a function as a HR advisor at a healthcare institution and was rejected. The financial director had a conversation with her to explain the reasons why they did not select her for the position. He talked about the relation between the life stage of a candidate and

⁵¹ College voor de Rechten van de Mens, 1 februari 2017, oordeel 2017-6:
<https://www.mensenrechten.nl/nl/oordeel/2017-6>.

⁵² College voor de Rechten van de Mens, 10 juli 2017, oordeel 2017-88:
<https://www.mensenrechten.nl/nl/oordeel/2017-88>.

⁵³ College voor de Rechten van de Mens, 9 juli 2017, oordeel 2017-59:
<https://www.mensenrechten.nl/nl/oordeel/2017-59>.

the ability to change as one of the reasons for the rejection. According to the NIHR, this established age discrimination because the life stage of the woman is inextricably linked with her age. The NIHR argued that there were more important reasons to reject the woman and concluded age discrimination even if age partly plays a role. There also was no objective justification for it.⁵⁴

Age limit of 70 years old

Conclusion: Discrimination

A taxi company had an age limit of 70 years old for drivers of student transport to ensure safety. The company argued that the transport of children with a disability requires extra attention which is a considerable burden for drivers. A seventy-year-old man was not offered a contract because of this reason. He complained and argued that the taxi company could maintain safety with a medical check. The NIHR decided that the taxi company did not provide sufficient information showing that they could maintain the safety of students in another way. An individual check by a medical examiner is an appropriate alternative to ensure the safety of student transport. The taxi company should also give the business operation a structure in which she can supervise drivers. In view of these circumstances, the NIHR concluded that there was age discrimination in this case.⁵⁵

Age limit for doctors

Conclusion: Discrimination

A 56-year-old woman applied for a job as a doctor in training and got rejected because of an age limit of 50 years old. The government pays the training expenses. The NIHR decided that the woman was being directly discriminated against. According to the organisation, doctors in training of 50 years and older drop out more. However, they did not provide any proof of this statement. The organisation also did not prove that 50-year-old doctors in training would not recoup their training expenses or that it would lead to a waste of public money. The NIHR therefore concluded there was no objective justification for the age limit.⁵⁶

Asking for healthy VUT (early retired) and AOW (legal retirement age) pensioners

Conclusion: Discrimination

A wholesaler in vegetables and fruit asked for 'preferably healthy VUT and AOW pensioners' in a job advertisement for sorters. An anti-discrimination agency asked the NIHR for their opinion. The NIHR came to the conclusion that the wholesaler directly discriminated younger people. The terms that were used by the wholesaler show they are mainly looking for people around the age of 65 years old and older. Younger people could assume that they would not qualify for the job. The NIHR was of the opinion that the company did not motivate in the job advertisement why they were looking

⁵⁴ College voor de Rechten van de Mens, 11 november 2013, oordeel 2017-141: <https://www.mensenrechten.nl/publicaties/oordelen/2013-141>.

⁵⁵ College voor de Rechten van de Mens, 2 juni 2015, oordeel 2017-59: <https://www.mensenrechten.nl/nl/oordeel/2015-59>.

⁵⁶ College voor de Rechten van de Mens, 20 november 2014, oordeel 2017-144: <https://www.mensenrechten.nl/nl/oordeel/2014-144>.

for VUT and AOW pensioners and also could not show that there was an objective justification. The NIHR concluded that there was age discrimination.⁵⁷

Retirement age

Conclusion: Discrimination

A man, above 65, worked as a fireguard at a shipyard with the help of an employment agency. He was already entitled to an AOW pension. After two years, the HR manager of the shipyard notified the man by e-mail that they would end his temporary placement, because they did not want to keep employees which were older than the AOW-age. An antidiscrimination agency wrote to the shipyard that the man felt discriminated against on the basis of age and asked the company for their side of the story. A conversation took place between the man, the HR manager and the head of production. The report of the meeting shows that the head of production stated they are ending the temporary placement of the man because of his physical impairments, possibly because of his age. The man started proceedings at the NIHR, arguing that he had been discriminated against on the ground of age. According to the NIHR, the e-mail that was sent to the man led to the assumption that the shipyard ended his temporary placement because he was older than the AOW-age. The company had to present an objective justification for this action. The shipyard established a general link between suitability for the function and age with preserves certain biases about people of a certain age. The company should assess the physical suitability of fire guards instead of using assumptions based on age.⁵⁸

Age benefits: stair climbing test for fire fighters - request to take age into consideration

Conclusion: No discrimination

Every year fire fighters of an aid organisation undergo a medical examination. They must take a stair climbing test in which they climb a hundred stairs within two minutes with a weight of 42 kilos. A 53-year-old woman, working as a volunteer fire fighter, did not pass the test. She stated that the organisation discriminated older people by maintaining one norm for everybody. The organisation argued that the test is challenging but could be completed by older people. Maintaining a minimum norm is necessary to guarantee the safety of victims, colleagues and the environment. The NIHR noticed that research data showed how younger people passed the test more often than older people. The organisation had to pose an objective justification for it in which they did. The use of the norm for everybody was used to guarantee safety, which could be considered a legitimate aim according to the NIHR. The measure was appropriate because the stair climbing test fits well for the

⁵⁷ College voor de Rechten van de Mens, 8 juli 2014, oordeel 2014-83, <https://www.mensenrechten.nl/nl/oordeel/2014-83>.

⁵⁸ College voor de Rechten van de Mens, 29 maart 2018, oordeel 2018-29, <https://www.mensenrechten.nl/publicaties/oordelen/2018-29>.

function. It was also necessary because fire fighters have to rely completely on each other, and a lower norm would harm the safety of colleagues.⁵⁹

Age benefits: measures to spare older employees

Conclusion: No discrimination/discrimination in some aspect

An organisation asked the NIHR to give an opinion about special provisions for older employees and extra annual leave based on age and seniority. Based on the collective agreement overtime, consignment and working shifts were not mandatory for employees of 55 years old and older. They also received additional financial protection and employees of 57 years old and older was granted senior leave. Additional annual leave would be granted based on age. The duration of leave could vary from eight hours for employees of 40 years old and older, up to forty hours for employees of 60 years old and older. Annual leave could also be granted to employees with twenty years of continuous employment. According to the company, these provisions were outdated and did not fit an age-aware personnel policy. The NIHR concluded that the organisation made a distinction based on age by assigning special provisions and leave entitlements to older employees. However, the organisation succeeded to present an objective justification for the measures of no mandatory overtime, consignment and working shifts. There was a legitimate aim, namely making it possible for employees to work longer, and the measures could contribute to achieving this aim taking into account that there were no other good alternatives. There was no objective justification for the extra leave measures because they were not evaluated against other possible measures to make it possible for employees to work longer in a healthy way. In this respect, the NIHR concluded there was age discrimination.⁶⁰

Norway

Equality and Anti-Discrimination Ombud

Norway: Helicopter pilots – age requirements for licence (2012)

Conclusion: Discrimination

A collective agreement contained a provision stating that helicopter pilots over the age of 60 years-old could not hold commercial pilot licences.

The Court referred specifically to the Prigge case (ECJ judgment, case C-447/09) and decided that a retirement age of 60 years old for helicopter pilots laid down in a collective agreement was invalid. In Norway, as well as in the international licencing requirements developed by the Joint Aviation Authorities, licence holders up to 65 years of age could act as pilots. Thus, a termination date earlier

⁵⁹ College voor de Rechten van de Mens, 28 juli 2017, oordeel 2017-97: <https://www.mensenrechten.nl/nl/oordeel/2017-97>.

⁶⁰ College voor de Rechten van de Mens, 23 juli 2015, oordeel 2015-86: <https://www.mensenrechten.nl/nl/oordeel/2015-86>.

than 65 years old could not be considered objectively and reasonably justified, even if the objective of the age limit was to secure health and security. Also, the arguments that the pilots had a very good pension scheme and that a retirement age of 60 years would make better access for younger pilots into the profession, were not sufficient to make the differential treatment necessary and proportionate.⁶¹

Romania

National Council for Combating Discrimination

Termination of contract

Conclusion: Discrimination

The National Council for Combating Discrimination (NCCD) received a complaint from an employee of Heineken Romania, claiming the unlawful termination of her work contract. The complainant considered the termination of her employment unjustifiable and/or excessive, especially after taking into account the circumstances arising following her discharge.

Aged 49, at the time of the events, the female employee showed that she had been working within the company since 2000. Prior to 2014, she had worked as a Regional Trade Coordinator, in charge of the Dobrogea region, comprising of seven counties. In 2014, the Dobrogea region was divided and three counties were allocated to the Bucharest region and the other four to another sales region. In the time between the division of Dobrogea region and the dismissal of the complainant, the new expanded Bucharest region was managed by two employees, both occupying the position of Regional Trade Coordinator. The complainant continued to coordinate the three counties which were transferred over from the former Dobrogea region, while her colleague, a younger, male employee, who coordinated the Bucharest region prior to the integration of the three new counties, continued to manage the same region. These two employees occupied the same position and had the same responsibilities but were coordinating two different geographical regions within the newly expanded Bucharest region.

The complainant also mentioned that she had not been informed in any way that her new position held additional responsibilities or was temporary, until the successful integration in the Bucharest region, of the three counties in question. Furthermore, from the Dobrogea region, only two employees were displaced, the complainant and a colleague. While the colleague in question was moved to another position within the company, no such efforts have been made for the complainant and no objective reason was given for choosing one Regional Trade coordinator over the other.

⁶¹ <https://lovdata.no/pro/#document/HRSIV/avgjorelse/hr-2012-325-a?searchResultContext=28828478>.

Considering all the circumstances of the case, the Directors' College of the NCCD, decided that the complainant was discriminated against and imposed a 3.000 RON (approx. 700 Euros) fine for the employer.

Retirement age limit of female employees

Conclusion: Discrimination

Several female employees in the healthcare system were dismissed when they reached the age limit for retirement. Romanian legislation poses a 63 years old limit for retirement of female employees while the limit for male employees is 65 years of age. This practice is considered discriminatory and the NCCD based their decision on jurisprudence established by the European Union Court of Justice.

According to the NCCD, the legal interpretation of the legislation concerning women's retirement age should follow the principle that female employees have the option of retiring at age 63 but may also continue working until the legal retirement age applicable to male employees. The decision should be solely the option of the individual female employee and must be respected by the employer.

In its' communique, the NCCD warned that non-compliance with jurisprudence established by the European Union Court of Justice, as well as with EU and national anti-discrimination legislation, perpetrators of these acts may be fined between 2.000 RON and 10.000 RON (approx. 500 to 2.500 Euros), as national legislation stipulates.⁶²

Serbia

Commissioner for Protection of Equality

Discriminatory conditions based on age of the competition for specialization published by an healthcare institution (2016)

Conclusion: Discrimination

The amendments to the Rulebook on the professional development of employees replaced the criterion '*working characteristic in the institution*' with '*age*'. The Commissioner for Protection of Equality determined, in terms of the scoring method, that persons older than 36 years old were apparently placed in an unequal position in relation to younger candidates. The Commissioner found that age is not the real and decisive condition for referring candidates to concrete specialization.

The Commissioner issued a recommendation to the healthcare institution to remove the criterion '*age*' and to publish the opinion with the recommendation issued by the Commissioner in a visible place of the hospital. They should also take into account the principle of equality and non-discrimination in accordance with the Law on Prohibition discrimination.

⁶² Case no. 67/2016.

Sweden

Equality Ombudsman

Bus drivers' right to work after retirement age (2015)

Conclusion: Direct discrimination

Under Swedish law, an employer may lawfully dismiss a person from permanent employment without due cause at the time when the person turns 67. This so-called 67-year rule has been deemed a legitimate exception from the prohibition against discrimination on grounds of age by the CJEU⁶³. Because of the rule, and as a matter of consistency, Swedish employers considered it lawful to uphold upper age limits for employment. A major bus operator thus practiced a 70-year age limit for bus drivers applying for fixed term (one year) employment. Even though drivers could show through rigorous annual health checks that they were fit to drive, they were excluded from fixed term employment possibilities after having turned 70. The Equality Ombudsman brought a case to the Swedish Labour Court (a court of last instance) for three drivers. The Labour Court held that the exception to age discrimination provided for in the 67-year rule did not apply to fixed term employment and that the age limit prescribed by the bus operator was discriminatory on the ground of age and could not be justified by occupational demands.⁶⁴

The case has had significant impact in Sweden by providing fixed term employment possibilities to persons above the age of 67.

⁶³ The abovementioned case, Hörnfeldt vs. Posten meddelande AB, C-141/11, EU:C:2012:421.

⁶⁴ Equality Ombudsman v Keolis Sverige AB, (Swedish Labour Court, A 73/15, A 75/15 and A 76/15), <http://www.do.se/globalassets/diskrimineringsarenanden/arbetsdomstol/dom-arbetsdomstol-keolis-anm-2014-592-600-6012.pdf>.

GOODS & SERVICES

Albania

Commissioner for the Protection from Discrimination

Different treatment in retirement home

Conclusion: Discrimination

The Commissioner for the Protection from Discrimination (CPD) learned that the older persons who were accommodated in a retirement home did not receive economic assistance from the State Social Service during a period of seven months. The CPD initiated an ex officio administrative investigation and according to the provided information, 72 elderly people were accommodated in this institution, 41 of whom were treated with pension while the rest did not receive pension. In total 31 persons which based on a Council of Minister Decision should receive 6,000 leke per month for personal needs. Based on this Council of Minister Decision, the Ministry of Labour, Social Affairs and Equal Opportunities was responsible for managing and covering the financial effects. The CPD ruled that based on the Law on Protection from Discrimination, the persons who were accommodated in the retirement home were discriminated against because they had not received the economic assistance according to the provisions of the Social Protection Scheme.

The responsible institution was the Ministry of Labour, Social Affairs and Equal Opportunities. The lack of funds and their inadequate management did not constitute a justified and reasonable justification for not providing the economic assistance fund for this category of elderly people. The fact that they were accommodated in shelter was directly linked to their age.

Belgium

Unia (Interfederal Centre for Equal Opportunities)

Too old for a car insurance (2017)

Conclusion: Direct discrimination - still pending- recommendation

A man was (verbally) denied a fully omnium insurance because of his age (70 years old). Unia asked the insurance company for more explanation. The insurance company confirmed that his age played a role in the refusal, because research shows that the risk of damages increases with age. The insurance company also argued that the age of the man was not used as a unique criterion: the fact that the plaintiff could not foresee a “no damage free certificate” for the last years, also played a role. However, he could give this certificate, but was refused at a second contact-practice test at

another office of the same insurer again. Studies have shown that bad health increases the risk for damages and accidents, rather than age. Unia is still waiting for a response from the insurance company and formulated a recommendation for the competent Minister.

Too old to rent a car (2017)

Conclusion: Discrimination - settlement

A man wanted to rent a car to go on vacation. His request was rejected by a car rental company because he is older than 65. Persons older than 65 are automatically excluded due to their age. Unia contacted the company. The company argued that the age group above 65 causes more damages and accidents and refers to negative experiences in the past with this age group.

Based on the most recent studies of a professional Association of Insurance Companies, Unia showed that the age category of 51 until 75 years old have the lowest damage frequency. Other elements, such as the number of years driving experience, having a private car, etc. can also be considered and are a better alternative. Setting a maximum age limit from 65 years is therefore contrary to the anti-discrimination legislation because this limit is not necessarily proportional to achieve the aim (less damage cases). The car rental company agreed and withdrew the maximum age limit.⁶⁵

Bulgaria

Commission for Protection Against Discrimination

Denied access to restaurant

Conclusion: Discrimination

The CPD received a complaint concerning a person who was not allowed to visit the restaurant in a hotel where he was on holiday with his family because he was with his six-month-old baby in a pushchair.⁶⁶ The CPD found that there was direct discrimination on the grounds of "age" and "personal status" and a violation of the anti-discrimination Act⁶⁷. A pecuniary sanction of 250 BGN was imposed by the CPD.

Finland

Non-Discrimination Ombudsman

Algorithm case

Conclusion: Discrimination

⁶⁵ <http://unia.be/nl/rechtspraak-alternatieven/onderhandelde-oplossingen/autoverhuurbedrijf-schaft-leeftijdsgrens-af>.

⁶⁶ Decision No370/2017 in case file 10/2014.

⁶⁷ Art. 37 of PfDA.

The Non-Discrimination Ombudsman requested the National Non-Discrimination and Equality Tribunal to investigate whether a credit institution company was guilty of discrimination having refused to grant credit to a client when the person was making online purchases, based on matters classified as grounds of discrimination, such as gender, age, language and their combined effect. The credit company based its refusal on a statistical scoring algorithm and had not assessed the client's individual incomes and debts. The Ombudsman requested that the Tribunal prohibit the credit institution company from continuing such discrimination and repeating its discriminatory practices in its service operations, as well as imposing a conditional fine to enforce the prohibitive decision, of an amount the Tribunal considers sufficiently effective, proportionate and cautionary.

The Tribunal found that treatment of the client was a case of direct multiple discrimination as prohibited in the Non-Discrimination Act and Act on Equality between Women and Men, based on the reasons related to the gender, first language, age and place of residence of the client. The decision is now final.⁶⁸

Student discount for students over 30 years old in local municipal traffic

Conclusion: Discrimination (not final-appealed)

A regional transportation authority did not allow student discount for students over 30 years old unless they received financial aid for their studies. The National Non-Discrimination and Equality Tribunal concluded that this was direct age discrimination and indirect discrimination based on other personal characteristics (full-time student without right to financial aid for studies).

Germany

Federal Anti-Discrimination Agency

Hotel Booking - Limitation due to age requirement (2013)

Conclusion: Justified discrimination

In a case concerning a travel brochure that stated: "*The hotel concept is designed for adults, bookings with children under the age of 16 are not allowed ...*", the Hanover District Court ruled that the hotel owner may limit the use of his hotel to a certain group of people or clientele because of his housing right, for example only for children older than 16 years. Such a determination is an expression of the private autonomy of the hotel owner.

The Court further stated that if the hotel owner does not specify the clientele beforehand, he indicates his willingness to allow access to anyone who moves within the scope of normal behaviour. In this situation, the hotel owner can not prohibit access to a single person for a material reason because of his age.⁶⁹

⁶⁸ <http://yvlttk.fi/material/attachments/yvlttk/tapausselosteet/45LI2c6dD/YVlttk-tapausseloste-21.3.2018-luotto-moniperusteinen-syrjinta-S-en-2.pdf>.

⁶⁹ LG Hanover, Urteil vom 23.01.2013 - 6 O 115/12. ECLI:DE:LGHANNO:2013:0123.6O115.12.0A.

Higher fare for train tickets at ticket sales

Conclusion: no discrimination

The tickets sold in person-operated ticket sales were higher than at the time of purchase at the vending machine or on the Internet. The Hessian Administrative Court ruled that the higher ticket price for personal sales did not constitute an indirect disadvantage for older railway customers.⁷⁰

Different tariffs for student and senior tickets in public transport (2008)

Conclusion: justified discrimination

The different tariffs of student tickets and for passengers over 60 years old is objectively justified in accordance with Section 20 General Equal Treatment Act if the local transport operator pursues the social and economic policy favourable effect of better utilization of local traffic in the off hours.⁷¹

Great Britain

Equality and Human Rights Commission

Hunter v Student Awards Agency for Scotland and others (2016)

Conclusion: Discrimination upheld in terms of Article 14 and Article 2 protocol 1 as an aspect of the right to education

Elizabeth Hunter challenged the policy of the Student Awards Agency for Scotland not to award loans to people aged over 55. The Court of Session judgement found this policy was incompatible with Article 14 and Protocol 1 Article 2 ECHR because it unfairly restricted the benefits of finance for higher education to people under the age of 55. The Court also found that Scottish Ministers had breached their duty under the Equality Act to review its equality implications when other changes were made. The Court found that the policy had a 'stark age cut-off' which was clearly discriminatory. The new regulations were laid on 9th September 2006 and raised the age limit for a maintenance loan from 55 to 60.⁷²

Greece

Greek Ombudsman

Maximum age limit in state aid to farmers (2018)

Conclusion: Pending case

⁷⁰ VGH Hessen, Urteil vom 14.09.2010 – 2 A 1337/10. ECLI:DE:VGHHE:2010:0914.2A1337.10.OA.

⁷¹ AG Mannheim, j Urteil vom 06.06.2008 - 10 C 34/08. ECLI:DE:AGMANNH:2008:0606.10C34.08.OA.

⁷² [2016] CSOH 71 <http://www.scotcourts.gov.uk/search-judgments/judgment?id=25d714a7-8980-69d2-b500-ff0000d74aa7>.

Farmers filed complaints to the Greek Ombudsman, claiming that their applications for compensation for loss of production were declined by the competent authority (ELGA) on the ground that they were older than 70 years of age. In its investigation, the Ombudsman noticed that such age limits were provided for by the Joint Ministerial Decision laying down the terms and conditions under which state aid is granted to farmers for reconstitution of plant stock, or for compensation for production loss or fixed assets due to natural disasters. Following a request for a specific justification of the age limit made by the Ombudsman, ELGA responded that this is necessary since all beneficiaries are bound to maintain their agricultural holdings for a period, ranging from 3 to 10 years, depending on the damage sustained. Nevertheless, the Ombudsman noticed that, according to the scheme approved by the European Commission, the age limit does not apply to aids granted for the loss of production and, therefore, ELGA should revise its practice on the matter.

Maximum age limit fixed for scholarships offered by private entities for post-graduate studies (2017)

Conclusion: No violation

Based on a wide interpretation of the term “*vocational training*” adopted by the CJEU⁷³, the Greek Ombudsman investigated a complaint concerning a maximum age limit of 30 and 28 years old fixed by the foundations KARELIA and LATSI respectively in scholarships offered by them to post-graduate students as falling within the scope of the Framework Directive. On this ground, both entities were requested to justify their practice. According to their response, they aim to support persons who have completed their graduate studies to obtain additional qualification in order to enter the labour market, whereas persons older than 35 years old of age usually have gained professional experience and are able to finance their studies by their own income.

The Greek Ombudsman upheld the argument under Article 6 of the Directive, mentioning however that, due to the current economic crisis and the high rates of unemployment, immediate access to the labour market after the completion of graduate studies cannot be taken for granted, nor can the economic status of each person be considered in principle to be necessarily in proportion to his/her age.

Hungary

Equal Treatment Authority

An old man in court (2015)

Conclusion: No discrimination

A man (aged 45-50) filed a complaint against a manufacturer and distributor of furniture. The man had already started a litigation procedure against the company when they expressed negative

⁷³ See CJEU decision of 13.02.85 in case Gravier v. City of Liege C-293/1983, paragraph 30.

comments regarding the complainant's age in the documents it submitted to the Court (the appeal). In its appeal, the furniture manufacturer made the following statement regarding the set of furniture that the complainant had found unsatisfactory: it was "*made for [clients in] a younger generation, in their 30s or 40s [...] the furniture is youthful in style and dynamic in its design [...] his honour and the plaintiff represent [a different] generation [...] incidentally, this furniture is generally bought by customers in the target generation, just as the [...] designer intended.*" The complainant complained about the expressions used and therefore the Equal Treatment Authority investigated whether this could constitute harassment.

The Authority explained in its decision that the principle of equal treatment does not imply a ban on all comments connected with protected characteristics. In contrast with the complainant's claim, there was no degrading content discernible in the statement cited above. It did not constitute a personal assessment of the complainant, and it was also impossible that court documents, which would only be used in court, and which were only accessible to the parties of the lawsuit and to court officials, were intended to generate an intimidating, hostile, degrading, humiliating or offensive environment around the complainant. In addition to the above, though as a seller of goods the company is obliged to comply with the principle of equal treatment with respect to the complainant in the context of the services it extends to the latter, this obligation does not extend to the conduct of the lawsuit filed in connection with the allegedly faulty performance of an order. The lawsuit is not part of the service the company provides. Thus, the Authority rejected the petition.⁷⁴

Lithuania

Office of the Equal Opportunities Ombudsperson

Access to services-travel insurance, 2017

Conclusion: No discrimination

A person of 75 years old was refused to obtain travel insurance. The claimant informed the Office of the Equal Opportunities Ombudsperson that the refusal was based on his age. The investigation revealed that not necessarily the age, but rather the health status of elderly people causes higher risk of insurance terms.⁷⁵

Access to goods, 2017

Conclusion: Discrimination

The Equal Opportunities Ombudsperson initiated an investigation on his own initiative regarding possible discrimination on the ground of age in the field of consumer protection. An optician's shop

⁷⁴ Equal Treatment Authority, 17 August 2015, <https://onedrive.live.com/?authkey=%21ABdpgAVi3qs5G-U&cid=8A68B504D59AD38A&id=8A68B504D59AD38A%21166782&parId=8A68B504D59AD38A%2175669&o=OneUp>, p 24-26.

⁷⁵ <http://www.lygybe.lt/data/public/uploads/2017/07/sprendimas-nr.-17sn-131sp-64.pdf>.

“Optikos Pasaulis” announced a discount for spectacle frames and applied it for younger customers. The amount of the discount was calculated applying the formula “100% - age = percentage of the discount”, which provides younger people more favourable conditions.

According to the Law on Equal Treatment (Article 8, part 1), seller or producer of goods or a service provider, without regard to age is obliged to provide consumers with equal access to the same products, goods and services, as well as apply equal conditions of payment and guarantees for the same products, goods and services or for products, goods and services of equal value. Any non-compliance or improper compliance with the duties or non-compliance with the prohibitions set by this Law shall constitute a violation of equal treatment (Article 10 of the Law on Equal Treatment).

The investigation showed that person’s age directly makes an impact on the price of goods. Therefore, older people are being disadvantaged as against younger people when the suggested formula for a discount is applicable.

Upon completion of the investigation, direct discrimination on the ground of age was established. The decision addressed the seller with the proposal to stop using and displaying the discount formula violating equal rights. The decision was implemented by the shop.⁷⁶

Access to goods and services

Conclusion: Discrimination

A man filed a complaint about discrimination based on age and sex concerning his access to dating services. The advert on Facebook has been advertised with text: ‘Quick Dating - Meet In 4 Minutes’. The persons aged from 18 until 26 are welcome to make registration and to participate in quick dating, the price for women is 3 euro, for men-5 euro. The service provider cancelled restrictions due to person’s age and sex immediately once they received the request from the Ombudsperson to provide explanation concerning discriminatory terms of participation in quick dating program. The Ombudsperson stopped the investigation since the discriminatory term was abolished.⁷⁷

Romania

National Council for Combating Discrimination

Refusal to restructure loan because of age

Conclusion: Discrimination

The case concerns the defendant’s refusal to restructure the plaintiffs’ loan based on their age. Following the plaintiff’s request to restructure a loan with two major banks operating in Romania, he discovered that the denial of his requests was based on his age. The two banks in question, ING

⁷⁶ <http://www.lygybe.lt/data/public/uploads/2017/10/17si-17sp-74.pdf>.

⁷⁷ <http://www.lygybe.lt/data/public/uploads/2017/12/17sn-257sp-105.pdf>.

Bank Romania and S.C. Bancpost. S.A., both had internal provisions regulating the eligibility conditions for loan applicants, restricting access to loans to individuals aged minimum 18 (23, in the case of S.C. Bancpost S.A.), with the upper limit set at 63 for women and 65 for men.

In this case, the Directors College of the NCCD retained that the provision instituting both the lower and the upper age limit is discriminatory. While the objective is legitimately justified by the banks, to manage the risk of borrowers defaulting on their payments, this provision restricts access to loans based solely on the criterion of age, without further analysis of income, financial situation or other warranties which the applicant could provide.

The Directors College of the NCCS decided to fine both defendants, 5.000 RON (approx. 1100 Euros) for ING Bank Romania and 8.000 RON (approx. 1900 Euros) for S.C. Bancpost S.A. In addition to this, both defendants were required to remove the discriminatory conditions for granting loans and post a summary of the NCCD Decision on their respective websites and in the national media.

Serbia

Commissioner for Protection of Equality

[Discrimination based on age in the use of banking services \(2015\)](#)

Conclusion: Discrimination, recommendation

Based on complaints regarding services provided by banks, the Commissioner noticed that most commercial banks in Serbia conditioned providing services such as current account, credit, etc. by the age of clients. Banks often prescribe that certain banking service can be used by, for example, "persons up to 70 years old" or "not older than 67 at the time of repayment credit". By determining the conditions such as upper age limit, the bank directly discriminates citizens on the ground of age and restricts the right of a certain group of people to use banking services. The violation of the principle of equal treatment was also reflected in additional conditions required by the older users, according to which banks did not assess their credit ability based on comparable and objective criteria.

The Commissioner recommended measures for achieving equality which obliged banks to take all necessary measures to eliminate discriminatory condition of the upper age limit prescribed by their general acts.

Sweden

Equality Ombudsman

[Bank loan after the age of 60 \(2018\)](#)

Conclusion: Direct discrimination

The Equality Ombudsman investigated a case concerning a bank's method when assessing clients' applications for loans after the age of 60. The Bank had dismissed a client's application for an additional mortgage loan, referring to the client's age having turned 60. The Bank calculated the client's income according to a standardised mortgage calculation, which was based on an assumption that the client would have a 30 % lower income because he had turned 60. According to the Bank, the client would therefore not be able to pay back his loan.

After investigating the circumstances, the Equality Ombudsman issued a decision.⁷⁸ The Equality Ombudsman held that clients being denied additional loans after the age of 60 were put at a disadvantage when the Bank applied standard calculations instead of conducting individual calculations for them. Under the terms of the Discrimination Act, the prohibition of discrimination associated with age does not prevent differential treatment on grounds of age, if the differential treatment serves a legitimate purpose and the means that are used are appropriate and necessary to achieve that purpose. The Bank claimed that the purpose of the standardised calculations was to avoid clients having difficulties paying back on their mortgages after retiring. The Equality Ombudsman concluded that the purpose of the bank's standard calculations, namely, to predict clients' possibilities to pay back on their loans, had a legitimate aim. The Equality Ombudsman considered the means of reaching that legitimate aim appropriate. However, the bank's standardised calculation was not necessary, as an individual assessment of the client's financial situation would have the same effect and be a less far-reaching and a non-discriminatory alternative. In this connection the Equality Ombudsman noted that following its decision to investigate the matter, the Bank had in fact changed its practices to include such an individual assessment. The Equality Ombudsman concluded that the bank's routine assessment amounted to direct discrimination.⁷⁹

⁷⁸ The Equality Ombudsman's decisions are not legally binding.

⁷⁹ <http://www.do.se/globalassets/stallningstaganden/varor-och-tjanster/tillsynsbeslut-bank-gra-2018-80.pdf>.

HOUSING

Belgium

Unia (Interfederal Centre for Equal Opportunities)

Apartments for younger residents (2017)

Conclusion: Direct discrimination- settlement

The city of Hasselt was building in public-private partnership a fairly expensive tower with apartments, studios and duplexes. Since the tower would be built in a student quarter, the city and project developer wanted to avoid older residents immediately complaining about noise, which is inevitable in a student quarter. In addition, the city of Hasselt and the project developer wanted to give the opportunity to young graduates to continue to live and work in the city centre. That is why they applied an age limit for residents: maximum 31 years old. Owners/buyers may be older but would not be able to live there. According to Unia, the age limit was discriminatory and not necessary to reach the young target audience for the Tower. After negotiation with Unia, the City and private developer withdrew the age limit.

Great Britain

Equality and Human Rights Commission

R (on the application of H) v Ealing London Borough Council (2017)

Conclusion: Indirect discrimination against elderly people upheld but question of justification unclear and not remitted to lower Court as the Council is to review its policy (EHRC intervening)

The Council decided that 20% of all available lettings would be removed from the general pool and would be reserved for working households and model tenants. The aim was to incentivise tenants to work and encourage good tenant behaviour. The scheme was challenged by a number of claimants one of whom was a family comprising two grandparents, their daughter and her baby none of whom were able to work. The equality impact assessment to the new rules said the proposed change would have no impact on protected groups. The High Court held that the new rules indirectly discriminated against disabled persons, the elderly and women.

Before the Court of Appeal, the local authority accepted that women, disabled people and the elderly were less likely to be in work than others. The Court found that there was indirect discrimination but that the High Court had not approached justification correctly. However, as the scheme is under review by the Council, the Court of Appeal declined to remit the case back for further consideration of the issue of justification. The Court of Appeal (CA) found there was a breach

of the Public Sector Equality Duty on the part of the Council and gave a declaration that the scheme was unlawful due to this PSED breach. However, as the Council are to review their housing allocation criteria, the Court of Appeal did not quash the scheme.⁸⁰

Serbia

Commissioner for Protection of Equality

Achieving equality of homes for adults and elderly people (2016)

Conclusion: discrimination, recommendation

Some elderly people living in Retirement homes established by private funds are placed in a home against their will and are not signatories of the service contract with home administration. Although they have full business ability, their relatives (mostly children) concluded a contract with the home administration. According to a recommendation issued by the Commissioner, decisions, actions and services of homes for older persons in Serbia should not be based on stereotypes and prejudices about the abilities of older person.

The Commissioner pointed out the obligation of respecting international and domestic anti-discrimination regulations by all service providers in the social protection system including the accommodation procedure and the stay beneficiaries in social welfare institutions. The Commissioner recommended that social welfare institutions are obliged to provide services without discrimination in accordance with the principles prescribed by the Law on Social Protection.

⁸⁰ [2017] EWCA Civ 1127 <http://www.bailii.org/ew/cases/EWCA/Civ/2017/1127.html>.

HEALTH & FAMILY ISSUES

Belgium

Unia (Interfederal Centre for Equal Opportunities)

Disability insurance (2017)

Conclusion: Possible discrimination - still pending

A lawyer has disability coverage through his employer. The extent of the basic cover is only possible up to 55 years old. The Insurer tried to justify this by referring to data published in France about disability insurances. However, the data referred to chronic diseases (including tooth problems, obesity...), diabetes, short hospitalizations for cardiovascular diseases, heart insufficiency, etc. The data was not specifically linked to age and there was no connection between the data and disability as such. Unia asked the insurer to review the age limit but has not received a reaction yet.

Insurance for cancer (2017)

Conclusion: No discrimination

The Femina insurance of an insurer, pays a lump sum to insured persons who are affected by a female cancer. This amount can be spent freely, it aims to offer more comfort for those recovering from a cancer (the insurer gives the example of money for domestic help, a beauty treatment, etc.). As a condition for an endorsement, the insurer stipules that: candidates must never have had cancer (initially, now this criterion is reduced to being 10 years cancer free) and must not have reached the age of 50 years old. Once subscribed, the candidates remain insured for a lifetime.

When examining the reasons set out for the distinction made, it is important that the segmentation criteria, which are foreseen by the insurance law, are lawful. This means that if an insurer uses a sole precondition, she must be able to demonstrate that the risk is so high that she is not able to ensure this (the implementation of a risk-acceptance policy is allowed).

Unia asked the insurer to provide material from which this risk can be proven. Scientific literature and statistical material showed that there is a strongly increased risk above the age limit of 50 years old. With the current insights, Unia could not conclude a discrimination, but agreed with the insurer to periodically evaluate this.

Bulgaria

Commission for Protection Against Discrimination

Discrimination in healthcare

Conclusion: Discrimination

The CPD asked the Ministry of Health to repeal a discriminatory provision with an upper limit of 45 years old for women who intend to undergo an insemination with processed spermatozoa by their spouse. The CPD also instructed the Public Council on Patient's Rights to analyse the norms and application of the medical standard with a view to protecting the right of women to equal treatment and the exercise of reproductive rights without discrimination.

The case addressed allegations of discriminatory treatment of women over 45 years of age. The legislation in force at the time did not make it possible for women aged 45 years old or older to carry out insemination with processed spermatozoa. The CPD established that the Ministry of Health, with the issue of Ordinance No 28 of 2007 and the Medical Standard Assisted Reproduction, introduced a derogation from the principle of prohibition of age discrimination and obliged the Ministry to repeal the discriminatory provisions within one month from the decision. The Public Council on Patient's Rights was instructed to analyse the norms and the application of the medical standard with a view to protecting the right of women to equal treatment and the exercise of reproductive rights without discrimination.⁸¹

Discrimination in social care

Conclusion: Discrimination

The CPD found that a national provision regulating the terms and conditions for the protection of gifted children represents a form of indirect discrimination on the ground of "age". The CPD considered that developing skills and abilities to become an athlete begins much earlier than the age of 14 years old. In fact, one of the main objectives of the state policy in the field of sport is to raise the sporting prestige of the nation. The CPD made a recommendation to the Council of Ministers of the Republic of Bulgaria to amend the national law and as raise the age "from class VIII to XII".⁸²

Discrimination in social care

Conclusion: Discrimination

Proceedings were initiated by the CPD based on a complaint concerning an adoptive mother and her child. The complaint was submitted against the provisions of the Labour Code and the Social Security Code, which regulate the right to annual leave when adopting a child aged 2 to 5-years old and the right to compensation for the use of such leave. According to the mother, these provisions disadvantaged adoptive parents of a child under the age of 2 and over the age of 5. The CPD upheld the allegations submitted by the adoptive mother and argued that the provisions regulating the right to leave and compensation for adoptive parents of a child under the age of 2 constituted indirect discrimination on the ground of age. On the other hand, it was concluded that the upper age limit of 5 years-old did not constitute discrimination. As a result of this decision, legislative amendments have been introduced so the situation of all adopters of children under 5 years of age are equalised.⁸³

⁸¹ Decision 225/2010.

⁸² Decision № 260/2015 under case file 286/2014.

⁸³ Decision No. 305/28.07.2017 on Case File No 350/2016.

Greece

Greek Ombudsman

Age limit fixed for women who intend to proceed to medically assisted reproduction through surrogacy arrangement (2016)

Conclusion: The age limit was disregarded.

A 52 year old women and her husband applied for permission to enter into a surrogacy contract to the competent court, as it is prescribed in Law 3305/2004 which enforces the medically assisted reproduction in Greece. The applicants must meet certain qualifications laid down in Article 4 of the Law, one of which is that the intended parents must not exceed the age of natural ability for reproduction, which, as for women, is fixed at 50 years old. Nevertheless, the Court noticed that the risks which age limit is supposed to avoid in relation to the health status of the pregnant woman and of the child are not relevant for the commissioning mother. Moreover, the Court noticed that, in this case, the egg was taken by the commissioning mother at the age of 42. Following these considerations and considering that the right to reproduction makes an integral part of the right of free development of personality protected under Article 5 (1) of the Greek Constitution, the Court granted permission for the surrogacy arrangement to proceed.⁸⁴

Age limit for women who intend to proceed to medically assisted reproduction through in vitro fertilization & sex discrimination (2016)

Conclusion: No discrimination

A woman was denied permission to proceed to medically assisted reproduction through in vitro fertilization because she was older than 50 years old. According to Article 4 (1) of Law 3305/2005, intended parents must not exceed the age of natural ability for reproduction, which, as for women, is fixed at 50 years old. The Court of Appeal of Pireus found both the age limit justifiable and the difference of treatment between men and women compatible with the principle of gender equality, on the ground that the duration of natural ability for reproduction differs between men and women.⁸⁵

Maximum age difference between the adopter and the child & maximum age limit for adopters prescribed by law (2014).

Conclusion: The age-related requirements were disregarded.

In 2011, a married couple older than 50 years of age were denied adoption by the competent court, on the ground that, according to Article 1544 of the Civil Code, the age difference between the adopters and the child must not be greater than 50 years old, unless in exceptional circumstances. The adoption was finally granted by the Supreme Court (Arios Pagos-AP), which noticed that the

⁸⁴ Court of First Instance of Patra, Judgment 248/2016, available at the electronic legal data base NOMOS

⁸⁵ Court of Appeal of Pireus Judgment 275/2016, available at the electronic legal data base NOMOS.

European Convention on the adoption of Children stipulates that the best interests of the child shall always be the paramount consideration and, furthermore, lays down only minimum age difference between the adopter and the child. On that basis, the AP ruled that the maximum age difference laid down in the civil code should be interpreted as a factor to be taken into consideration and not as an excluding requirement.⁸⁶

Following the same reasoning, the Court of Appeal of Athens granted adoption to a women 63 years of age, despite the maximum age limit of 60 years old, laid down in Article 1543 of the Civil Code.⁸⁷

⁸⁶ AP Judgment 1632/2014, available at the electronic legal data base NOMOS.

⁸⁷ Athens Court of Appeal Judgment 7138/2014, available at the electronic legal data base NOMOS.