Come Fly with Me: Age Discrimination and Objective Justification

Written for the Matrix blog, EUtopia Law, by Andrew Smith

matrix chambers

Prigge & Others v Deutsche Lufthansa AG (Case C-447/09)

Prigge is the latest in a line of CJEU cases dealing with the question of whether the application of a default retirement age ("DRA") constitutes unlawful age discrimination, contrary to the Directive on Equal Treatment in Employment and Occupation (2000/78/EC). In the domestic context, the national DRA was abolished with effect from 6 April 2011 (see The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 for details of the transitional provisions). Under UK law, direct discrimination "because of" age is the only form of prohibited direct discrimination which may be justified by an employer. Section 13 (2) of the Equality Act 2010 provides that "If the protected characteristic is age, A does not [directly] discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim". Accordingly, the approach adopted by the CJEU in cases such as *Prigge* is of particular relevance to workers, employers and advisers grappling with the issue of "objective justification" in the context of direct age discrimination.

The Facts of *Prigge v Lufthansa*

The claimants were employed for many years by Lufthansa as commercial pilots and then flight captains. A collective agreement which applied to the crew of Lufthansa, and which was recognised by German law, prohibited pilots from continuing to work as pilots after the age of 60.

When the claimants reached the age of 60, their contracts of employment terminated automatically in accordance with the collective agreement. The claimants objected to the application of this blanket provision and sought a declaration from the German federal courts that it amounted to unlawful age discrimination and, as a consequence, their contracts of employment had not been terminated but rather continued in force.

The German Federal Labour Court referred the matter to the CJEU, asking whether a collective agreement which provides for an age-limit of 60 for commercial airline pilots, for the purposes of air safety, is compatible with EU law.

The CJEU held that it did not.

The CJEU's Reasoning

The CJEU reiterated well-established principles that collective agreements entered into with the "social partners" must, as with the national laws of Member States, respect the principle of non-discrimination on grounds of age.

With regard to whether application of the DRA was in pursuit of a legitimate aim, the CJEU unsurprisingly accepted that measures which aim to stop human failure causing aeronautical accidents constitute measures aiming to ensure public security and protection of health, and are therefore legitimate.

Prigge & Others v Deutsche Lufthansa AG (Case C-447/09)

The CJEU further accepted that possessing particular physical capabilities may be a "genuine and determining occupational requirement" for acting as a commercial airline pilot, and that it was "undeniable that those capabilities diminish with age". Accordingly, applying a maximum age for commercial air pilots, in order to promote the health and safety of crew, passengers and persons in areas over which aircraft fly, could in principle constitute lawful direct age discrimination.

On the facts, however, the CJEU held that the DRA, set at 60, was disproportionate and constituted unlawful age discrimination. The CJEU reiterated that it is only in very limited circumstances that a difference in treatment, on grounds of age, may be justified. In reaching its conclusion that the DRA was contrary to EU law, the CJEU was persuaded by the fact that international and indeed German national legislation provided that, between the ages of 60 and 64, an airline pilot may not continue to act as a pilot unless he is a member of a multi-pilot crew and the other pilots are under the age of 60. That legislation applied a blanket ban on pilots continuing in employment beyond the age of 65.

Against this legislative backdrop, the CJEU was not persuaded that the prohibition contained in the collective agreement constituted a necessary and proportionate measure for the protection of public health and security.

Discussion

The decision in *Prigge* highlights the importance of identifying very clearly the objective(s) which are being pursued by the application of a DRA. Where the objective is one solely related to health and safety, the Tribunal/Court is likely to require cogent evidence that the 'cut-off point' which has been selected has a clear justification, based on some form of empirical evidence; for example, medical evidence relating to workers' physical capacity to undertake certain tasks (see *Wolf v Stadt Frankfurt am Main* C-229/08 [2010] IRLR 244), or statistics demonstrating a higher rate of accidents amongst older workers.

The outcome in *Prigge* may well have been different if the 'dead man's shoes' justification had also been relied upon by Lufthansa and advanced before the CJEU. In *Felix Palacios de la Villa v Cortefiel Servicios SA* (C-411/05) [2007] IRLR 989, the CJEU held that a Spanish national law which allowed DRAs to be included in collective agreements was justified, on the basis that it was a proportionate means of achieving the legitimate aim of creating employment opportunities for younger workers.

Similarly, in *Rosenbladt v Gebaudereinigungsges mbH* (C-45/09) [2010] EqLR 365, the CJEU accepted that a collectively negotiated DRA, which provided that employment terminated at the point at which the employee could claim a retirement pension or at the latest when the employee reached 65, was lawful. Importantly, the DRA was intended (*inter alia*) to "facilitate employment for young people, planning recruitment and allowing good management of a business's personnel, in a balanced manner according to age", which the CJEU again accepted was a legitimate aim.

Prigge & Others v Deutsche Lufthansa AG (Case C-447/09)

Another example of the 'dead man's shoes' argument being deployed at European level is *Georgiev v Technicheski universitet Sofia* (C-250/09) [2011] 2 CMLR 179. In this case, the CJEU held that Directive 2000/78/EC did not preclude national legislation, under which university professors were compulsorily retired when they reached the age of 68 and could continue working beyond the age of 65 only by means of renewable fixed term contracts, provided that that legislation pursued a legitimate aim linked *inter alia* to employment and labour market policy; relevant considerations included the delivery of quality teaching and the best possible allocation of posts for professors between the generations. The CJEU held that it was for the national court to determine whether those conditions were in fact satisfied.

Perhaps the clearest example of how the lawfulness of a DRA may turn on the particular objective being pursued by the Member State/social partner in question is *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* (C-341/08) [2010] IRLR 254. Here, the claimants challenged the lawfulness of a DRA set at 68, which was applied to dentists working in the equivalent of the German NHS. The CJEU observed that if the aim being pursued was the protection of the health of patients, it would be disproportionate, on the basis that there was no equivalent prohibition on dentists practising privately (the CJEU did not, however, specify what the position would be if the national court concluded that the protection of health and safety of patients was *one* of the aims being pursued by the legislation, alongside others). On the other hand, if the national court were to conclude that the aim of the DRA was in fact "to preserve the financial balance of the healthcare system", or to promote the distribution of employment opportunities among the generations, then in the CJEU's view it may (depending on the state of affairs in existence at the material time - including whether there was in fact a shortage of younger dentists working in the public sector) be regarded as a proportionate means of achieving a legitimate aim.

The decision in *Prigge* provides further useful guidance from the CJEU on the difficult issues regarding DRAs and their compatibility with Directive 2000/78/EC. The CJEU has stressed that the defence of objective justification should be construed narrowly; and employers seeking to implement or retain DRAs should do so with caution. In particular, where the DRA is predicated on health and safety grounds, employers must ensure that they have credible evidence to justify their selection of a blanket cut-off point. In the absence of compelling medical or statistical evidence, the approach adopted by other employers within the relevant industry is likely to be a highly relevant and important consideration when assessing the necessity and proportionality of such measures.