

EQUALITY AND NON-DISCRIMINATION

Class #6

SCHEDULLE

Discrimination based on age and disability

- Legal framework
- Retrospective overview and current issues
- Case-law

LEGAL FRAMEWORK - UN

Art. 2 (1)

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.*

Art. 26

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.*

International Covenant on Civil and Political Rights

LEGAL FRAMEWORK - UN

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

Art. 2 Convention on the Rights of Persons with Disabilities

LEGAL FRAMEWORK - CoE

Art. 14

*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or **other status**.”*

European Convention for the Protection of Human Rights and Fundamental Freedoms

LEGAL FRAMEWORK - EU

Art. 21 (1)

*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, **disability**, **age** or sexual orientation shall be prohibited.*

Art. 26

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Charter Of Fundamental Rights Of The European Union

LEGAL FRAMEWORK - EU

Art. 1

*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, **disability, age** or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.*

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive)

LEGAL FRAMEWORK - EU

The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. (...) It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

CJEU judgement of 22 November 2005, Mangold, C-144/04

LEGAL FRAMEWORK - EU

Exceptions (Employment Equality Directive)

Art. 6 (1) Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;*
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;*
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.*

LEGAL FRAMEWORK – DEFINITIONS

Disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment.

International Classification of Functioning, Disability and Health, 2002 (WHO)

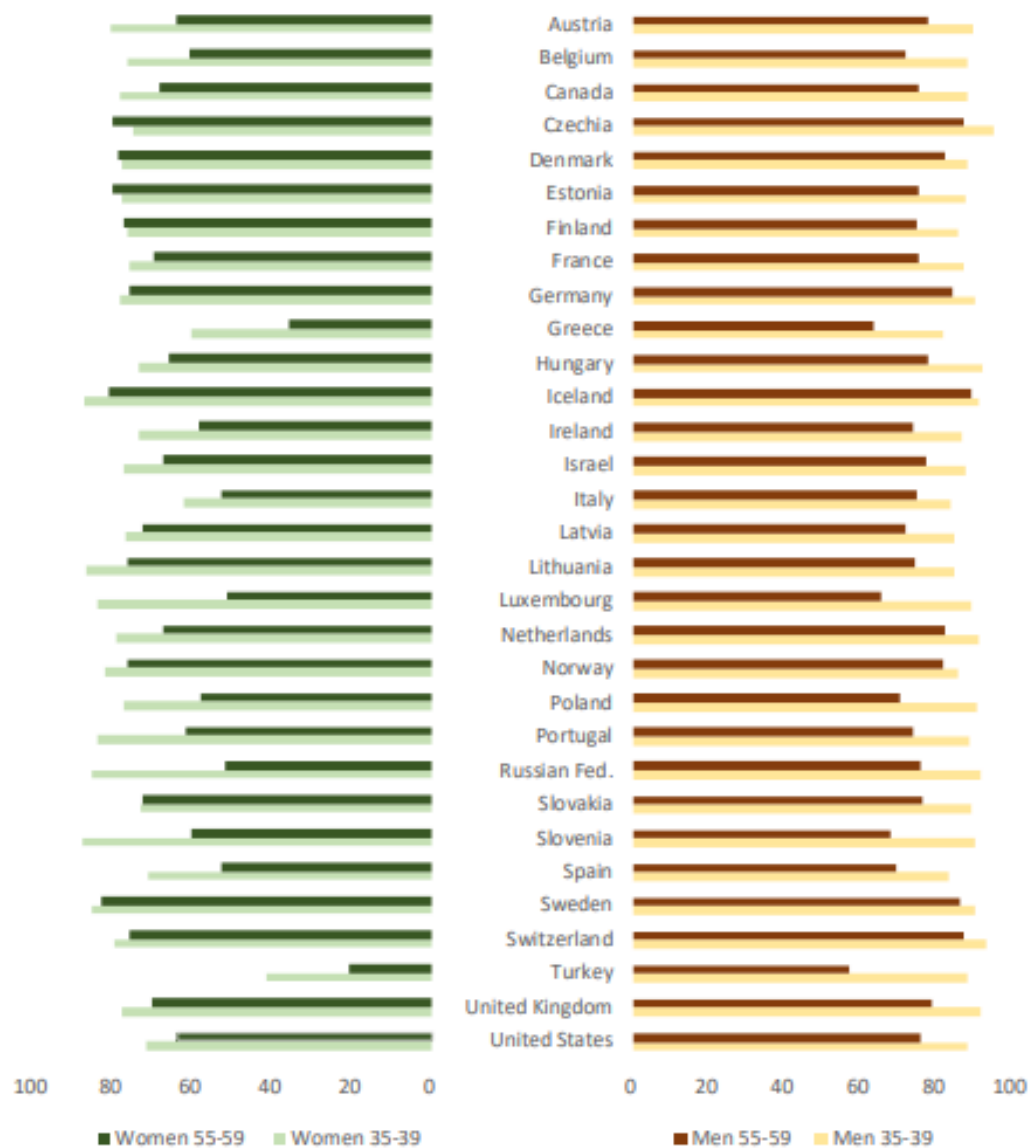
Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Art. 1 Convention on the Rights of Persons with Disabilities (CRPD)

CURRENT ISSUES

- Right to education of persons with disabilities
- Right to vote for persons with disabilities
- Forced sterilisation
- Digital divide
- Ageism in the workplace

Figure 1
Age gap in employment rate in 35–39 and 55–59 age groups* (percentage of the age group)



Source: OECD Stat, data for 2017, selected countries.

CURRENT ISSUES

Box 1: A catalogue of stereotypes about older workers

Negative stereotypes about older workers:

- have lower ability, are less motivated and are less productive than younger workers;
- are resistant to change, harder to train, less adaptable and less flexible;
- have a lower ability to learn and therefore have less potential for development;
- have shorter job tenure and therefore will provide fewer years in which the employer can reap the benefits of training investments;
- cost more because they have higher wages, use benefits more, and are closer to retirement;
- have deteriorating health and/or cognitive ability and take more sick days.

Positive stereotypes about older workers:

- have higher retention rates and lower absenteeism;
- are reliable, committed and dedicated;
- have people-oriented and people-development skills, make good mentors;
- are good leaders;
- are able to deal with change and have generic knowledge of other industries or sectors.

Source: Smeaton, Parry 2018; Age positive 2001.

S. COLEMAN V. ATTRIDGE LAW AND STEVE LAW

S. Coleman v. Attridge Law and Steve Law

- CJEU judgement of 17 July 2008, C-303/06, ECLI:EU:C:2008:415
- Reference for a preliminary ruling – interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).
- **Applicant in the main proceeding:** Ms Coleman
- **Defendant in the main proceeding:** Attridge Law (a firm of solicitors) and Mr Law (a partner in that firm) - former employer
- **National court:** Employment Tribunal, London South
- **Subject matter:** Dismissal of an employee who is not himself disabled but whose child is disabled

S. COLEMAN V. ATTRIDGE LAW AND STEVE LAW

Questions

1. In the context of the prohibition of discrimination on grounds of disability, does [Directive 2000/78] only protect from direct discrimination and harassment persons who are themselves disabled?
2. If the answer to Question (1) is in the negative, does [Directive 2000/78] protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?

S. COLEMAN V. ATTRIDGE LAW AND STEVE LAW

Questions

3. Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by [Directive 2000/78]?

4. Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by [Directive 2000/78]?’

S. COLEMAN V. ATTRIDGE LAW AND STEVE LAW

Discrimination by association

The situation where the victim of the discrimination is not themselves the person with the protected characteristic but is associated with another person who has the protected characteristic (e.g. parent, child, partner, friend).

RUIZ CONEJERO

Ruiz Conejero

- CJEU judgement of 18 January 2018, C-270/16, ECLI:EU:C:2018:17
- Reference for a preliminary ruling – interpretation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- **Applicant in the main proceeding:** Mr Carlos Enrique Ruiz Conejero
- **Defendant in the main proceeding:** Ferroser Servicios Auxiliares SA and the Ministerio Fiscal (Public Prosecution Service, Spain)
- **National court:** Juzgado de lo Social No 1 de Cuenca (Social Court No 1, Cuenca)
- **Subject matter:** The lawfulness of employee dismissal following legitimate absences from work

RUIZ CONEJERO

Article 52 of the Workers' Statute

„The contract may be terminated:

...

(d) for absences from work, albeit justified but intermittent, that amount to 20% of working hours in two consecutive months provided that total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-continuous months within a 12-month period.

The following shall not be counted as absences from work for the purposes of the previous paragraph: absences due to industrial action for the duration of that action, acting as a workers' representative, industrial accident, maternity, pregnancy and breastfeeding, illnesses caused by pregnancy, birth or breastfeeding, paternity, leave and holidays, non-industrial illness or accident where absence has been agreed by the official health services and is for more than 20 consecutive days or where absence is caused by the physical or psychological situation resulting from gender-based violence, certified by the social care services or health services, as appropriate.

Nor shall absences for medical treatment for cancer or serious illness be counted.”

Question

Does Directive 2000/78 preclude the application of a provision of national law under which an employer is entitled to dismiss an employee on objective grounds for intermittent absences from work, even if justified, which amount to 20% of the employee's working hours in two consecutive months, provided that the total absences in the previous 12 months amount to 5% of working hours or 25% of working hours in four non-consecutive months within a 12-month period, in the case of an employee who must be treated as disabled within the meaning of the directive when his absence from work was caused by his disability?

SCHWIZGEBEL V. SWITZERLAND

Schwizgebel v. Switzerland

- ECHR judgement of 10 June 2010, application no. 25762/07
- **Submitted by:** Ms Ariane Schwizgebel, a Swiss national
- **State party:** Swiss Confederation
- **Subject matter:** Refusal of child adoption application on account of age