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Case C-411/05, *Félix Palacios de la Villa* v. *Cortefiel Servicios SA*, Judgment of the Court (Grand Chamber) of 16 October 2007

1. Introduction

A trend is already starting to emerge regarding the preliminary references received by the European Court of Justice relating to the Employment Equality Directive.[1] The two "discrimination grounds" over which the Member States arguably expressed most concern during the negotiation of the Directive,[2] namely disability and age,[3] are also the grounds which are preoccupying the national courts. Whilst the focus of the national courts' attention with regard to disability is "who is protected from discrimination on the ground of disability?",[4] the age-related references concern the broad issue of when differences in treatment on the grounds of age can be justified.[5]

Community non-discrimination law, including that addressing gender and race discrimination, as well as the Employment Equality Directive, provide that differences in treatment directly motivated by the ground in question can

1. Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16 (henceforth: Employment Equality Directive).

2. This concern reflected itself in a number of ways, including disability and age specific articles in the Directive (Arts. 5 and 6 respectively) and, in particular, the extended period for the implementation of the Directive with regard to age and disability (Art. 18). Under this Article, Member States could opt for an additional three year period, above the standard three year implementation term, to implement the provisions related the disability and/or age. This was necessary "in order to take account of particular conditions …".

3. In addition to these two grounds, the Directive also prohibits discrimination on the grounds of sexual orientation and religion or belief.

4. See Case C-13/05, *Chacón Navas* v. *Eurest Colectividades SA*., [2006] ECR I-6467 and the case note by the present author in 44 CML Rev. (2007), 487–499, as well as the pending Case C-303/06, *Coleman* v. *Attridge Law* (see Opinion of A.G. Poiares Maduro of 31 Jan. 2008 in this case).

5. In addition to the two age-related cases raising such questions which have already been decided (Case C-144/04, *Mangold v. Helm*, [2005] ECR I-9981 and the case under discussion), the following preliminary references, all posing questions related to the justification of differences in treatment on grounds of age, have been submitted to the court: Case C-87/06, *Vicente Pascual García* v. *Confederación Hidrográfica del Duero* (case withdrawn following judgment in *Palacios de la Villa*); Case C-427/06, *Birgit Bartsch* v. *Bosch und Siemens Hausgeräte (BSH) Alterfürsorge GmbH*; and Case C-388/07, *The Incorporated Trustees of the National Council for Ageing (Age Concern England)* v. *Secretary of State for Business*, *Enterprise and Regulatory Reform* (also known as the *Heydey* case). In contrast, only one reference has been made relating to sexual orientation (Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen*) and no references relating to religion or belief (as at 31 Dec. 2007).

only be exceptionally justified on a very limited set of criteria.[6] As a consequence, direct discrimination is prohibited outright. However, a different approach is adopted in the context of age. Article 6(1) of the Employment Equality Directive provides 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, …, and if the means of achieving that aim are appropriate and necessary". At first sight it seems as if this provision extends the standard "justification" for measures that would otherwise be regarded as indirect discrimination to also cover acts otherwise amounting to "direct discrimination" in the context of age.[7] This unusual approach was justified by the need to protect the many (pre-existing) legitimate employment-related measures which made use of an age-related criteria, and the Directive lists a number of examples of such measures.[8] However, not having an earlier body of European case law in the field of gender in this context to fall back on, some national courts have struggled to establish the limits to treatment which directly differentiates on the ground of age, and have referred preliminary questions to the ECJ asking for guidance. Following *Mangold*, *Palacios de la Villa* is the second such case.

2. Factual background

From 1980 to 2001 the Spanish legislature encouraged the compulsory retirement of workers in order to reduce unemployment. In line with this policy, Law 8/1980 allowed the government to set an age limit at which the contracts of all employees would be automatically terminated. The age limit was to be set "by reference to the resources of the social security system and the labour market". In 2001, this policy was reversed and the government sought to discourage compulsory retirement on the grounds that it placed a burden on the social security system. Instead the government favoured a flexible retirement system and adopted legislation with this aim in mind. The single transitional provision of Law 14/2001 therefore provided that clauses in collective agreements which provided for the termination of contracts of employment where workers have reached the normal retirement were lawful, as long as the worker concerned had completed the minimum period of contributions to the social

6. Specifically when the relevant characteristic is a genuine and determining occupational requirement, and, in some circumstances, in the context of positive action.

7. However, see the comments at the end of the present case note on this matter, arguing that in fact this is not the case.

8. Including legitimate employment policy, labour market and vocational training objectives.

security system, and was entitled to a retirement pension. No explicit reference was made to labour market policy as a justification for such forced retirements. In 2005 the relevant law was amended once again. As a result, collective agreements which were concluded after 2 July 2005 were subject to Law 14/2005 which, in addition to requiring that the worker in question be entitled to a pension, also stated that the termination had to "be linked to objectives which are consistent with employment policy … such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment."

Mr Palacios de Villa was subject to a collective agreement which had been concluded under the terms of Law 14/2001, and which therefore allowed for the termination of employment contracts at the age of 65, as long as the sole condition of the worker having made sufficient contributions to the social security system, and therefore being entitled to a retirement pension, was met. In line with this agreement, his contract was terminated. Mr. Palacios de la Villa challenged this decision, and the relevant collective agreement, on the grounds that it amounted to age discrimination.

The national court charged with hearing the case doubted whether the relevant provision of single transitional provision of Law 14/2001 was compatible with the Directive. That court found that Law 14/2001 authorized the maintenance of collective agreements which provided for the compulsory retirement of workers on the sole ground that they had reached a specific age, and subject only to the requirement that they were entitled to a pension. Unlike those collective agreements which were negotiated after Law 14/2005 had come into force, the termination requirement did not have to be justified by reference to national employment policy. In light of these considerations, the national court referred two preliminary questions asking, in essence, whether the provisions of the single transitional provision of Law 14/2001 were compatible with the Employment Equality Directive,[9] and, if not, whether the Directive required the national court not to apply Law 14/2001.

3. The Advocate General's Opinion

Advocate General Mazák first considered whether the Directive was applicable to national provisions, such as those found in the single transitional provision of Law 14/2001, or whether, by virtue of the 14th recital of the Directive,

9. Specifically Art. 2(1) thereof, which prohibits direct and indirect discrimination on the grounds, *inter alia*, of age.

which provides that the Directive "shall be without prejudice to national provisions laying down retirement ages", the challenged legal provision fell outside the scope of the Directive. He took the view that Law 14/2001, whilst not determining the requirements for entitlement to a pension, nevertheless laid down a compulsory retirement age, and entailed the termination of employment and commencement of a pension. Whilst acknowledging that the Court had viewed such compulsory retirement ages as equivalent to dismissals under Directive 76/207,[10] the Advocate General felt that the Employment Equality Directive called for a different, and narrower, interpretation. He justified this by arguing that "the history and the wording of Article 13 EC as a legal basis of Directive 2000/78 suggest a rather restrained interpretation of that directive and the Community legislature must have been aware of the potentially far-reaching economic and financial consequences of, in particular, the prohibition of discrimination on grounds of age".[11] He continued by distinguishing the prohibition of discrimination on grounds of age from other forms of discrimination in general, and from sex discrimination in particular,[12] arguing that the former raised many particular issues and required a "complex and subtle assessment",[13] and concluded that the Directive was not applicable to national provisions, such as the one at issue in this case, which he did not regard as relating to "employment and working conditions, including dismissal and pay".[14]

The Advocate General then went on to reflect on whether, should the Court nevertheless hold that Law 14/2001 fell within the scope of the Directive, it could be justified under Article 6(1) thereof. Based on submissions by the Spanish Government and the order of reference, he found that the single transitional provision of Law 14/2001 had been adopted as part of a policy of promoting intergenerational employment.[15] He quickly concluded that it served a legitimate public interest and was capable of justifying a difference in treatment on grounds of age in accordance with Article 6(1) of the Directive. The Advocate General did not regard it as necessary that Law 14/2001 specifically refer to a legitimate labour market aim in order to fall within the scope of Article 6(1). Having found that the provision served a legitimate aim, the Advocate General went on to conclude that the measure was also appropriate and necessary. He noted Member States enjoy a broad discretion when choos-

10. The A.G. referred to Case 262/84, *Vera Mia Beets-Proper* [1986] ECR 773 and Case 153/84, *Marshall*, [1986] ECR 723.
11. Para 58.
12. Paras. 61–63.
13. Para 62.
14. Art. 3(1)(c) Employment Equality Directive.
15. Para 71.

ing measures to attain social and employment objectives, and that the Court should only intervene where "a manifestly disproportionate measure" was at issue.[16]

Finally, with regard to the first question posed by the national court, the Advocate General considered whether the ECJ's finding in *Mangold* that "the principle of non-discrimination on grounds of age must … be regarded as a general principle of Community law",[17] was of any relevance. He noted that the Court had, in any case, proceeded from the assumption in *Mangold* that the general principle of non-discrimination on the grounds of age was no different in substance from the equivalent prohibition under the Directive, and concluded that the principle did not preclude a national rule such as that at issue.[18] However, before reaching this conclusion, Advocate General Mazák critically revisited this element of the Court's judgment in *Mangold*. He questioned the Court's assumption that the source of the principle of non-discrimination on the grounds of age was to be found "in various international instruments and in the constitutional traditions common to the Member States". Indeed, he argued that whilst international instruments and national constitutions frequently refer to the general principle of equal treatment, actual references to non-discrimination on the grounds of age are scant.[19] He regarded the Court's conclusion as "actually a bold proposition and a significant move" as it inferred, "solely from the general principle of equal treatment, the existence of a specific prohibition of discrimination on grounds of age"[20] and did not "regard as particularly compelling the conclusion drawn in *Mangold* as to the existence of a general principle of non-discrimination on grounds of age."[21] As will be seen, the Court did not address any of these matters in its judgment in *Palacios de la Villa*.

The Advocate General then turned his attention to the second question posed by the national court, relating to whether the court had to disapply Law 14/2001 should it breach the prohibition of discrimination on grounds of age. He noted that the dispute arose between two private parties and, following established Community law, concluded that the Directive could not produce horizontal direct effect. The judgment in *Mangold*, where the ECJ had found there to be an obligation to set aside a national law which conflicted with the prohibition of discrimination on grounds of age, did not lead Advocate General Mazák to differ from this conclusion. He noted that the Court, in *Man-*

16. Para 74.
17. Para 75 of the *Mangold* judgment.
18. Para 98.
19. Para 88.
20. Para 89.
21. Para 97.

gold, did not accept that the Employment Equality Directive had horizontal direct effect, but rather "bypassed the lack of it by ascribing direct effect to the corresponding general principle of law"[22] and this was "a very slippery slope".[23] The Advocate General argued that general principles of law vary widely, both as to content and degree of completeness, and function,[24] but that they are given expression and effect through specific Community legislation,[25] and their role was as a tool of interpretation. He concluded that the Employment Equality Directive could not have horizontal direct effect, and therefore the national court would not be obliged to disapply any conflicting national rule, and that this finding should not "be undermined by recourse to a general principle".[26]

4. The judgment of the Court

The Court began its consideration by determining whether the situation described by the national court fell within the scope of the Employment Equality Directive. With regard to the 14th recital, the Court found that although the Directive was without prejudice to national provisions setting retirement ages, that did "not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age … has been reached".[27] Since the national legislation at issue affected the duration of the employment relationship between the parties, and prevented the future participation of the worker concerned in the labour market, the Court found that it did relate to "employment and working conditions, including dismissals and pay", therefore rendering the Directive applicable.[28]

The Court then considered the relevance of Articles 2, which prohibits, *inter alia*, direct discrimination on the grounds of age, and 6 of the Directive. The Court regarded the challenged measure as "directly imposing less favourable treatment" on workers who have reached a certain age "as compared with all other persons in the labour force" and therefore as establishing a difference in treatment directly based on age, as referred to in Article 2 of the Directive. The measure would therefore only be permitted if it fell within the exception

22. Para 132.
23. Para 133.
24. Paras. 134–135.
25. Para 136.
26. Para 138.
27. Para 44.
28. Paras. 46 and 47.

outlined in Article 6(1). In applying the latter Article, the Court largely followed the reasoning of Advocate General Mazák, noting that whilst the single transitional provision of Law 14/2001 did not specifically refer to any labour market related objective, this was not in itself decisive.[29] The Court found that, in such a situation, it was entitled to consider other elements, taken from the general context of the measure concerned, in order to identify the underlying aim of the law.[30] Doing so, it found that the provision in question aimed at regulating the national labour market, and, in particular, at checking unemployment,[31] which the Court regarded as legitimate and as objectively and reasonably justified.[32]

The Court then went on to apply the second element of the "Article 6(1) test", namely establishing whether the means used to achieve the legitimate aim were "appropriate and necessary". Like the Advocate General, the Court found that Member States had a great deal of discretion in deciding which measures to use to implement social and employment policy.[33] The Court held that it did not appear "unreasonable"[34] for a Member State to conclude that measures, such as those at issue in this case, were appropriate and necessary, and noted that the legitimate claims of workers were not unduly prejudiced, as individuals were only subject to compulsory retirement if they were entitled to a pension.[35] Furthermore, the measure allowed the social partners to make collective agreements which took account of the situation in specific sections of the labour market.[36] These findings led the Court to conclude that measures, such as that provided for by Law 14/2001 which allowed for compulsory retirement clauses in collective agreements, did not breach the prohibition on age discrimination found in the Employment Equality Directive where the measure was objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and "it is not apparent that the means put in place to achieve that aim are inappropriate and unnecessary for the purpose".[37] As a consequence of this finding, the Court did not regard it as necessary to consider the second question posed by the national court, relating to whether Law 14/2001 should be disapplied.

29. Paras. 54 and 55.
30. Para 57.
31. Para 62.
32. Paras. 64 and 66.
33. Para 68.
34. Para 72.
35. Para 73.
36. Para 74.
37. Para 77.

5. Analysis

Palacios de la Villa provided the Court with a first opportunity to clarify the exact scope of the exemption, if any, provided for under the 14th recital of the Directive. This is a question which has already exercised academics and commentators. Colm O'Cinneide, in a European Commission publication,[38] has distinguished between pensionable ages, State-imposed retirement ages, and contractual or employer-imposed retirement ages.[39] He notes that, with regard to pensionable ages, Article 3(3)[40] specifically excludes State social security schemes from the scope of the Directive, and therefore age-based pension rules remain unaffected. With regard to the second category, namely State imposed mandatory retirement ages, O'Cinneide argues that the Directive is ambiguous, but concludes that the actual text of the Directive (as opposed to the 14th recital) does not include any automatic exemption for any form of retirement age. He therefore regards such measures as exempt by virtue of Article 3(3) if they can be classed as part of a statutory social security scheme – otherwise, they require justification under Article 6(1). Lastly, O'Cinneide considers the "key issue for many member states"[41] of whether employers can set retirement ages by contract, collective bargaining or unilaterally. He concludes that a requirement that an employee retire at a specified age amounts to less favourable treatment on grounds of age, and is therefore only lawful if it can be justified under Article 6(1).[42]

The Court, in *Palacios de la Villa*, seems to have followed O'Cinneide's position by regarding the provisions of Law 14/2001 as falling within the scope of the Directive. It made short shrift of the Advocate General's argument that such provisions were exempt by virtue of the 14th recital. Whilst noting the existence of the recital, the Court felt able to distinguish between national provisions which set retirement ages, and the mandatory obligation to cease employment once that age has been reached. However, the Court did not specifically address the impact which the recital could have on the interpretation of the Directive.

Some guidance has also been provided with regard to the question of whether national legislation allowing employers to set mandatory retirement ages

38. O'Cinneide, *Age discrimination and European Law*, European Commission, 2005.

39. Ibid., at p. 41.

40. The Article provides: "This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes."

41. Op. cit.

42. This is also the conclusion of Bob Hepple QC, see "Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC" in Fredman and Spencer (Eds), *Age as an Equality Issue*, *Legal and Policy Perspective*, (Hart 2003), at p. 89.

can provide a "blanket exemption",[43] whereby all retirement requirements complying with the national legislation will be regarded as automatically justified under Article 6(1). If this is not the case, Member States will either have to demonstrate the need for such a retirement age on the basis of the national employment situation, or employers will have to demonstrate the need for retirement on a case-by-case basis. This is significant because some national legislation provides for a "default retirement age", and any employer which requires individuals to retire at this age does not have to justify objectively its decision. In some cases, as in the Netherlands, this has been done by excluding workers who have reached the statutory retirement age from the scope of the age non-discrimination legislation, or, as in Cyprus, by not allowing such workers to make claims for unfair dismissal.[44]

In *Palacios de la Villa* the Court has made it clear that, on the one hand, legislation allowing for mandatory retirement ages must meet all elements of the Article 6(1) test. Specifically, the measure must be objectively and reasonably justified by a legitimate aim, and make use of appropriate and necessary means to achieve that aim. With regard to the first element of the test, the standard requires both an objective and reasonable justification. Moon and Allen[45] have argued that "this seems to be a higher standard than normal in other cases where a justification is called for". Certainly, in the context of indirect discrimination, EC Directives only require a challenged measure be "objectively justified by a legitimate aim", and no reference is found to a reasonableness test. However, on the other hand, it seems the Court will only apply the Article 6(1) test in a rather cursory way, and will allow Member States a great deal of discretion in identifying the aim and the means to be used to achieve it. This seems to be similar to the wide margin of discretion left to the Member States in free movement non-discrimination cases which involve sensitive social / cultural issues, such as gambling,[46] or indeed, the discretion which the Community legislature generally has where it exercises its regulatory competences.[47] The relatively strict approach which the Court applies to establish

43. O'Cinneide, op. cit. *supra* note 38, at p. 42.

44. Examples referred to by O'Cinneide, ibid., at pp. 41 and 42.

45. Moon and Allen QC, "ECJ considers age discrimination", Briefing 459, 32 *Discrimination Law Association Briefings*, November 2007, 11–12.

46. See e.g. the "gambling" cases: Case C-275/92, *Schindler*, [1994] ECR I-1039, Case C-124/97, *Läärä and Others*, [1999] ECR I-6067 and Case C-67/98, *Zenatti*, [1999] ECR I-7289, in which the ECJ held that religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence of a margin of appreciation which enabled the national authorities to determine what consumer protection and the preservation of public order required.

47. Where a "manifestly inappropriate" standard of judicial review applies. I am grateful to the editorial board of the CMLRev for drawing attention to both of these comparisons.

justification in the context of indirect discrimination[48] does not seem to be followed in the context of age discrimination. Following *Palacios de la Villa*, it seems the challenged measure does not have to be appropriate and necessary to achieve the legitimate labour market related aim; instead, in the words of the Court, it must simply be apparent that the measure is not "inappropriate and unnecessary". The judgment seems to go so far as to provide for a partial reversal of the burden of proof, whereby the assumption will be that any measure will be appropriate and necessary to achieve a (broadly formulated) employment related aim, unless evidence suggests, or perhaps even proves, that this is not the case. Such a reversal of the burden of the proof cannot be found in the Directive, and will probably allow most measures to be classified as falling within the Article 6(1) exception on the basis of only a cursory justification and examination.

The Court will soon have the opportunity to clarify whether this is indeed the case. One of the series of questions referred by the English High Court in the *Heydey* case [49] is whether there are any differences between the test for justification set out in Article 2(2) of the Employment Equality Directive in the context of indirect discrimination, and the test found in Article 6(1) which applies to direct discrimination on the grounds of age. If the Court maintains the approach favoured in *Palacios de la Villa*, it seems it will hold that there are quite significant differences between the two tests.

Lastly, reading the Court's judgment in *Palacios de la Villa*, one could easily be forgiven for assuming *Mangold* was simply a figment of the imagination. Whilst the Advocate General tackled the legacy of *Mangold* head on, and, in essence, argued that the Court had been (seriously) mistaken in that judgment, the Court itself hardly mentioned the case.[50] The question of whether the

48. In a long line of case law, dating back to Case 170/84, *Bilka-Kaufhaus* v. *Weber von Hartz*, [1986] ECR 1607, the Court has developed a set of criteria to establish whether a measure, which would otherwise amount to indirect discrimination, is objectively justified. In *Bilka-Kaufhaus* the Court established a three stage test to be met by any objective justification: namely the aims pursued by the measure must correspond to a real need, and the difference in treatment must be both appropriate and necessary. Where a less discriminatory alternative is available, the measure will not be regarded as objectively justified, and will be a prohibited form of indirect discrimination. This has now been codified, and, for example, the Employment Equality Directive states that a measure which had an indirectly discriminatory impact will be permitted if it "is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" (Art. 2(2)(b)(i)).

49. Case C-388/07, *The Incorporated Trustees of the National Council for Ageing (Age Concern England)* v. *Secretary of State for Business*, *Enterprise and Regulatory Reform* (*Heydey* case), pending.

50. The Court made one reference to *Mangold* in its judgment, in para 68. In this paragraph the Court noted the broad discretion Member States have in setting aims within the field of social and employment policy and identifying the best means of achieving those aims. The Court

Spanish court could disapply the national law, either because the Directive had direct effect or as a result of the general principle of EC law which prohibits age discrimination, was not addressed, since the Court found the measure in question was compatible with the Directive. However, given the stream of cases coming before the Court with regard to the age provisions of the Employment Equality Directive, the Court will have plenty of other opportunities to revisit *Mangold*.

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was similarly reluctant to refer to *Mangold* in the staff Case C-227/04 P, *Lindorfer* v. *Council*, judgment of 11 Sept. 2007, even though the case had been reassigned to the Grand Chamber following the judgment in *Mangold*.

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