

SUMMARY

2021/5 Upper age limit for entrance to police force found discriminatory (IR)

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Facts

Mr Fitzpatrick, the claimant, had been a sworn member of the Garda Reserve since 2006. In 2007, he applied to become a full-time member of An Garda Síochána. The claimant received a response stating that he was ineligible for consideration as he was over 35 years of age, being the age statutorily prescribed by the Minister for Justice as the upper age limit.

The claimant submitted a claim to the Equality Tribunal (now the Workplace Relations Commission (the 'WRC')). His case was put on hold pending the resolution of judicial review proceedings, which ultimately saw the Supreme Court (the highest court in Ireland) refer the issue of whether the WRC or the courts had the power to disapply legislation considered to be incompatible with EU law to the European Court of Justice (ECJ). In 2018, the Grand Chamber ruled that bodies such as the WRC did hold such power and cleared the way for the claimant's case to proceed (Case C-378/17, *Minister for Justice & Equality – v – Workplace Relations Commission*).

Judgment

At the hearing of this case, counsel for the respondent submitted that the age limit for admission as a trainee to An Garda Síochána was justified on the following basis:

A high level of physical capacities is a genuine and determining occupational requirement for carrying out the role of a member of An Garda Síochána.

Financial considerations were necessary and a member of An Garda Síochána must be capable of serving for long enough to justify the costs associated with training.

The choice of age limit (35 years), strikes an appropriate balance between ensuring a wide window for admission to An Garda Síochána, with admission possible over a 17-year period, and ensuring that all members are able to pursue their career over a sufficiently long period to ensure that they can retire with full, or near-to-full, pension entitlements and at an age that is appropriate having regard to the demanding nature of the work.

Counsel for the claimant submitted that:

The respondent had not produced cogent evidence in support of its arguments.

The respondent had failed to discharge the requirement that the measure applied is proportionate.

The professional medical evidence adduced during the hearing stated that the effects of aging can be delayed by engaging in physical and lifestyle changes and that the objective can be assessed by regular post-attestation fitness testing during a Garda's career instead of the operation of an upper recruitment age limit of 35 years.

That the measure applied by the respondent is not appropriate and necessary. It goes beyond what is necessary to achieve the legitimate aim and that aim could be achieved by other means.

Taking the above into account, the adjudication officer found that the operation of the upper age limit of 35 years was not proportionate. He decided that this age limit went beyond what was appropriate and necessary and that the objective pursued could be achieved by other means, such as post-attestation fitness testing.

The adjudication officer decided that the claimant had established a *prima facie* case of discrimination on grounds of age when his application for selection as a trainee Garda was rejected at the initial stages of the competition because he was over 35 years of age. The adjudication officer found that both the Minister and

the Garda Commissioner had failed to discharge the burden of proof required to demonstrate that an upper age limit of 35 years for eligibility for recruitment was objectively justified and that the claimant was entitled to succeed. He was awarded €12,700 in compensation. The decision has been appealed to the Labour Court.

Commentary

This decision, if upheld on appeal, significantly strengthens the application of EU law and may facilitate an increase in challenges to national law that operates contrary to EU law.

This case is also interesting as it considered some of the previous ECJ case law regarding maximum recruitment ages including *Wolf – v – Stadt Frankfurt am Main* (C-229/08) and *Sorondo – v – Academia Vasca de Policía y Emergencias* (C-258/15). In *Wolf*, the ECJ set out a test for determining whether a difference based on age in national legislation is justified as an occupational requirement under Article 4(1) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation as follows:

the objective pursued must be a legitimate aim,
the characteristic required must constitute a genuine and determining occupational requirement for the occupation activities in question,
the characteristic must be age related,
the requirement must be proportionate.

The adjudication officer decided that, although the respondent had satisfied the first three limbs of the above test, no sufficient evidence had been submitted to demonstrate that the age limit was appropriate and necessary to achieve the legitimate objective of ensuring the ongoing and proper functioning and operation of the national police force. It is expected that the appeal will focus on the financial, logistical and industrial relations issues associated with regular post-attestation fitness testing.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Melina Peer): As far as can be seen no Austrian Supreme Court case law dealing with age discrimination regarding upper age limits for hiring exists. According to Austrian law, age discrimination is not established if the different treatment is objective and reasonable, is justified with a legitimate aim and the means to achieve this aim are appropriate and necessary. In line with

the ECJ's case law, an upper age limit may therefore not be discriminatory if there is a legitimate objective such as ensuring the proper functioning of the police and if the upper age limit is appropriate and necessary to achieve this objective.

Thus, an upper age limit for hiring may constitute a justified age discrimination under Austrian law. This has to be assessed in every individual case based on the respective circumstances.

Germany (Andre Schüttauf, Luther Rechtsanwaltsgesellschaft mbH): In Germany, too, age limits are of particular importance as a condition of engagement in the civil service (i.e. entrance to the police force). Various regulations under federal state law make recruitment and admission to the civil service dependent on whether a maximum age is exceeded. The Federal Constitutional Court (*Bundesverfassungsgericht*, 'BVerfG') has ruled that in principle such maximum hiring limits are permissible. They may be justified for certain professions in which a civil servant who exceeds a certain age limit typically no longer meets the requirements of the profession. With reference to the decisions of the ECJ, a maximum age limit of 30 years for appointment to the post of firefighting officer is accordingly permissible because the activities performed in this service are often associated with greater physical strain. On the other hand, a maximum age limit of 30 years for appointment as a local police officer is not permissible, since the aptitude that police officers must possess in order to perform their duties is not always comparable with the exceptionally high aptitude that is regularly required of firefighters in firefighting. If the age limit serves to ensure a balanced time relationship between life service and pension time, this is covered by the constitution in the opinion of the BVerfG and can – depending on the individual case – suffice as justification for the maximum age limit.

Romania (Andreea Suciú and Andreea Serban, Suciú | The Employment Law Firm): Discrimination in the workplace has always been a topic of interest in Romania considering that the pieces of Romanian legislation on such discrimination have always been subject to debate. Also, the tendency of Romanian employees to file discrimination claims and not to tolerate abuses from their employers or potential employers has increased in recent years. However, in our legal practice, we have not identified at the present moment Romanian cases which involve discrimination claims in what regards the maximum age limit established for admission to the police service or any other profession which has such an admission requirement.

Nevertheless, the two reference solutions given by the Court of Justice in *Wolf – v – Stadt Frankfurt am Main* (C-229/08) and *Sorondo – v – Academia Vasca de Policía y Emergencias* (C-258/15) have been analysed by Romanian

employment experts (including judges and lawyers). It is worth mentioning that it appears that both judges and lawyers have reached a mutual opinion: in order to establish whether the requirement of a maximum age upon employment does not represent a discriminatory measure, it is necessary to be decided on a case by case assessment whether the concerned characteristic is a crucial professional requirement, based on the nature of the professional activity or the conditions of its exercise, so that the objective be legitimate and the requirement be proportional. We also appreciate that in order to reach an objective decision regarding such age discrimination claims, it has to be first clarified (i) whether the physical aptitude required to carry out certain professions is an age-related requirement, or (ii) it is an essential and decisive professional requirement for the professional activity in question or for its exercise.

However, it remains to be seen if such concordant opinion of judges and lawyers will remain strictly at a theoretical level or will be applied in the event such cases are subject to the Romanian jurisdiction.

Subject: Age Discrimination

Parties: Fitzpatrick – v – Commissioner of An Garda Síochána and the Minister for Justice, Equality and Law Reform

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