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THE INTERACTION BETWEEN THE RIGHT TO WORK AND THE PRINCIPLE OF EQUAL TREATMENT IRRESPECTIVE OF AGE

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1. Introduction

The purpose of this article is to determine whether the right to work, in conjunction with the principle of equal treatment irrespective of age, and even in relation to the prohibition of discrimination on the grounds of age itself, may lead to the conclusion that there is a right to work at any age. The question seems *prima facie* ridiculous, especially in light of the prohibition on children working and the right to a retirement pension upon reaching a certain age. However, in the current economic and social climate, with unemployment or even impoverishment representing indispensable elements thereof, an increasing number of claims have arisen concerning the right to work irrespective of age. This applies not only to people of retirement age but also to children.

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> In Asia, Africa and Latin America since the beginning of the nineties, national, regional and international meetings of working children's organisations were held. The claim for the recognition of children's right to work in dignity is common to several organisations of working children and they consider working in dignity as a basic human right. The Declaracion de Huampani, adopted at the gathering of NATs (Spanish: Ninos y Adolescentes Trabajadores) on 6-15 August 1997 in Lima (Peru), demanded the recognition of the right to work as a human right for all people without distinction of age[1].

Taking into account the phenomenon of increasing retirement age and the above-mentioned claims for recognition of children's right to work, the conclusion that the length of an individual's working life increases disproportionately faster in comparison to average life expectation, is inevitable. Therefore, can the scope of the right to work irrespective of age evolve in the direction of the right to work from birth until death? Working for one's whole life is not possible, not merely for physiological reasons. First of all, in accordance with international law and the legislation of developed countries, especially that of the EU Member States, the right to work irrespective of age is not absolute and is, rather, subject to restrictions. The objective of this article is to determine the scope of such possible restrictions on the right to work irrespective of age.

Given this stated purpose, it is necessary to identify the content of the right to work and the principle of work protection related thereto. It is also necessary to determine the scope of the principle of equal treatment irrespective of age, with particular reference to the prohibition of discrimination on the grounds of age. The title specified as the subject hereof suggests two issues covered by the category of human rights. However, the sources of human rights can be found primarily in the domestic law of individual states and, furthermore, in public international law. For the purposes of the subject referred to in the title, the assumption may be adopted that the system of international law consists of regional systems and a specific supranational system, namely

[1] K. Hanson, A. Vandaele, *Working children and international labour law: A critical analysis*, 'International Journal of Children's Rights' 2003, Vol. 11, No. 1, at pp. 73–74. Accessed at Legal Collection, EBSCOhost.

European Union law which has recently developed dynamically towards the protection of human rights[2].

The importance of human rights for the lives of individuals is well reflected by the evolution of EU legal provisions concerning fundamental rights. Originally, the founding treaties of the European Communities contained no references to human rights but, after some time, it transpired that economic integration may entail human rights violations resulting from the application of Community law. Consequently, the Court of Justice of the European Union began to use the category of "general principles" for the protection of human rights. The principles in questions have been derived mainly from the common constitutional traditions of the Member States and from international law, in particular the case-law of the European Court of Human Rights. Most such principles have been codified in the Charter of Fundamental Rights which, by virtue of the Lisbon Treaty, acquired legal force equivalent to the EU treaties themselves. The above-mentioned process of developing human rights has been presented in a very simplified but sufficient way to emphasise its importance for creating, interpreting and applying law in Europe.

2. The background of the right to work irrespective of age

The age of a natural person, from the legal point of view, is an event which is uniform in nature, in that sense that achievement of a specified age (number of years) remains outside the influence of the law and is not modified thereby. Nevertheless, currently both the domestic law of individual states and the systems of international law, including regional and supranational systems, attach specific consequences to age. This is due to the fact that age has become a characteristic of an individual which is protected by law. From the point of view of the subject analysed here, it is necessary to demonstrate the existence of a causal link between less favourable treatment and the protected characteristic, namely age.

[2] J. Kochanowski, *Wstęp [Introduction]* [in:] M. Zubik (ed.), 'Wybór dokumentów prawa międzynarodowego dotyczących praw człowieka' [International Law Documents concerning Human Rights], Vol. II, Biuro Rzecznika Praw Obywatelskich, Warszawa 2008, at p. 5.

The Universal Declaration [of Human Rights] recognised the right of everyone to free choice of employment, to just and favourable conditions of work and to protection against unemployment. The Universal Declaration is considered to be an undisputed contemporary philosophical foundation for the concept of human rights and it has significantly influenced other international standards protecting the rights of an individual

As far as the legal system of the United Nations is concerned, in principle human rights treaties have traditionally been open to membership only for States. This has not prevented the European Union from complying with such treaties, since all Member States of the European Union are also members of the United Nations and parties to most treaties containing anti-discrimination provisions[3]. However, as States increasingly cooperate through inter-governmental organisations, (IGOs) to which they delegate significant powers and responsibilities, a pressing need arises to ensure that IGOs also commit themselves to give effect to the human rights obligations of their Member States. A significant breakthrough in this respect was represented by the adoption of the Convention on the Rights of Persons with Disabilities (UN CRPD) at the UNITED NATIONS forum in 2006. The UN CRPD is the first UN-level human rights treaty which is open to membership by regional integration organisations. The European Union ratified the UN CRPD in December 2010[4]. The UN CRPD was ratified by the President of Poland on 6.9.2012. Consequently, the provisions of the UN CRPD are binding on EU institutions and the Member States when applying European Union law. In turn, the accession of Member States to the UN CRPD has led to the creation of obligations relating directly to those Member States[5].

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[3] The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention Against Torture, and the Convention on the Rights of the Child (CRC).

[4] Communication from the Commission, *EU ratifies UN Convention on disability rights*, IP/11/4, 5.1.2011, at p. 1.

[5] European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg 2011, at pp. 16-17.

As far as the legal system of the Council of Europe is concerned, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibits discrimination only in respect of the use of another right guaranteed by that Convention – i.e. enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground. The cited provision includes examples of the types of discriminatory treatment which are prohibited. The enjoyment of rights and freedoms defined in the Convention should be ensured without discrimination for any reason. The term applied therein namely "[...] other status" confirms that Article 14 ECHR includes an open catalogue of grounds on which discrimination in the exercise of rights and freedoms is prohibited. Consequently, this provision also prohibits discrimination on the grounds of age. However, this prohibition is of subordinate nature and is dependent on specific personal rights. A general prohibition of discrimination was introduced by virtue of Article 1 of Protocol No. 12 to the ECHR, signed in Rome on 4.11.2000. As far as the rights and freedoms relating to work are concerned, Article 4 of the ECHR provides for a prohibition of slavery and forced labour only. Since the ECHR categorically prohibits a specific type of work (i.e. forced labour), there is no question of any violation of the prohibition of discrimination on the grounds of age. Consequently, it should be considered that the ECHR does not contain norms on fundamental rights which encompass a prohibition of discrimination on the grounds of age in the field of employment.

Article 1 of Protocol No 12 to the ECHR has provided the Court of Justice in Luxembourg with an opportunity to comment on the following issue: "When there is a conflict between a provision of domestic law and the ECHR, does the reference to the ECHR in Article 6 TEU oblige the national court to apply Articles 14 ECHR and Article 1 of [Protocol No 12] directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the national constitutional court"[6]? The Court of Justice held that:

[6] Case *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, C-571/10, Judgment of the Court (Grand Chamber) of 24.4.2012, not published, point 39.

> the reference made by Article 6(3) TEU to the European Convention for the Protection of Human Rights and Fundamental Freedoms does not require the national court, in case of conflict between a provision of national law and that convention, to apply the provisions of that convention directly, disapplying the provision of domestic law incompatible with the convention[7].

This means that, at the current stage of legal development, EU law does not assume the right to regulate the effects of incompatibility of domestic legislation with the ECHR and the obligation to disapply domestic legal provisions which are incompatible with the ECHR does not result from Article 6(3) TEU.

The Lisbon Treaty obliges the European Union to accede to the ECHR as a party. To this end, Protocol 14 to the ECHR has been also changed respectively. The EU's accession to the ECHR will enable individuals to sue the European Union directly before the European Court of Human Rights for failure to comply with the ECHR, although there is no clear position in legal writings as to what effects this will cause in practice. It is only indisputable that, following the EU's accession to the ECHR, external bodies will take over supervision of the EU's compliance with the ECHR[8]. However, in case of violations of the ECHR [provisions] by the European Union, two options exist. The first is to bring a claim before a national court, which could submit a reference for a preliminary ruling to the Court of Justice. The other option is to sue the European Union indirectly by submitting an application against a Member State to the European Court of Human Rights[9].

The prohibition of discrimination on the grounds of age is a relatively recent phenomenon in the European Union legal system. In the Community treaties, discrimination on grounds of age was first mentioned in 1997 in the Treaty of Amsterdam, which entered into

[7] Case *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, C-571/10, Judgment of the Court (Grand Chamber) of 24.4.2012, not published, point 2 of the operative part of the judgment.

[8] European Union Agency for Fundamental Rights and European Court of Human Rights – Council of Europe, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg 2011, at p. 18.

[9] *Ibidem*.

force in 1999 in what was then Article 6a EC (currently Article 19 TFEU, ex Article 13 EC). The provision in question authorises the Council to take the necessary measures in order to combat discrimination *inter alia* on grounds of age. The Council has made use of this power, presenting the principle of prohibition of discrimination on the grounds of age in specific terms in Council Directive 2000/78/EC of 27.11.2000, establishing a general framework for equal treatment in employment and occupation[10]. In December 2007, the Charter of Fundamental Rights of the European Union was proclaimed in Nice. Article 21 thereof prohibited discrimination on any grounds, including age. Upon the entry into force of the Treaty of Lisbon, the entire Charter of Fundamental Rights acquired legal status equal to the founding treaties of the European Union.

Advocate General Jacobs analysed the nature of the discrimination on the grounds of age in his opinion in case C-227/04 P *Maria-Luise Lindorfer v Council of the European Union*[11], by comparing the prohibition of discrimination on the grounds of age with the prohibition of discrimination on the grounds of sex. In his opinion, sex is essentially a binary criterion, whereas age is a point on a scale. Sex discrimination based on actuarial tables is thus an extremely crude form of discrimination, involving very sweeping generalisations, whereas age discrimination may be graduated and may rely on more subtle generalisations. Moreover in law, and society in general, equality of treatment irrespective of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential. In particular, age is a criterion inherent in pension schemes, and some distinctions according to age are inevitable in that context. In Community law, the prohibition on age discrimination is set out with far more numerous provisos and limitations than is sex discrimination[12].

[10] OJ L 303, 2.12.2000, at pp. 16–22.

[11] Case *Maria-Luise Lindorfer v. Council of the European Union*, C-227/04 P, Opinion of Mr Advocate General Jacobs of 27.10.2005, ECR – staff cases 2007, p. II-B-2-00157, ECR 2007, p. I-06767; FP-I-B-2-00017.

[12] Case *Maria-Luise Lindorfer v. Council of the European Union*, C-227/04 P, Opinion of Mr Advocate General Jacobs of 27.10.2005, at paras 84–88.

3. The right to work as a fundamental right

Against the background of an analysis of the legal grounds for the right to work, a fairly consistent picture of that right as constituting a right of every human being arises. Therefore, the question arises as to how, in this context, the phrase “everyone has the right” should be interpreted. Zygmunt Ziembiński has offered a catalogue of meanings of the expression “to have the right”. For the holder of the right to work its *“right to”* may mean: permission, bilateral freedom, “legally-protected” freedom or entitlement[13]. The right to work in the form of permission would mean that legal norms may not address to every person a prohibition of work, although they could address such prohibitions to certain people. When using age as a permitting criterion, the legal norms which provide that the right to work will be permitted upon reaching certain age, are acceptable. Theoretically, in terms of permission, a solution could be also justified whereby norms provide that, after attaining a certain age it will no longer be allowed to perform some kinds of work which (for example) require special psychophysical fitness.

Conversely, the right of everyone to work in the form of a bilateral freedom (indifference) should be understood in such a way that a person (an employee) is neither ordered nor forbidden to work by virtue of norms of the system which protect him/her from taking up work. The assumption that the right to work appears in legal texts as a “legally protected” freedom would require recognition that the entities not exercising the right to work are under an obligation, given the work right (freedom) created thereby, to refrain from interfering in the exercise of this right by any person (employee) for whom, on the basis of the same norms, it is indifferent.

Most commonly, however, the right to work is considered in the context of the entitlement of an individual: “The right to...” as a category of entitlement would mean that, in the context of norms forming it, the entities different from an individual (employee) are required to behave

[13] See Z. Ziembiński, *Logiczne problemy prawoznawstwa [Logical Problems of Jurisprudence]*, Warszawa 1966, at p. 117.

in a way that will result in the exercise of work-related entitlements. Indeed, the behaviours in question aim to take an active approach by an addressee. In this case, the right to work takes the form of a three-tier relationship: firstly, there is an entitled entity or right holder, secondly an addressee of the right and, thirdly, the subject or object of the right[14]. Whereas identification of the entity and the subject in labour law cases does not give rise to any serious problems, identification of the addressee of that right could be quite complicated, especially if it would be necessary to take an active approach by the addressee. The addressee in question could be a state, particularly a legislator. In the event that age constitutes the relevant criterion for exercising the entitlement to work, the active attitude of the legislator may (for example) take the form of adopting legislation prohibiting discrimination against people on the grounds of age.

In international conventions, age appears generally in the context of legal permission. Therefore, age becomes the condition for acquiring employee status. However, it is indisputable that the restrictions introduced sought to secure the rights of children and to prevent children from performing permanent paid work, and that the effective means of achieving this goal was introduction of the above mentioned protection to the legal structure in the form of the employee's legal capacity. In the Polish legal system, Article 22 (2) of the Labour Code specifies 18 years as the minimum age to be attained by an individual in order to lawfully acquire employee status. A person under the age of 18 may be an employee only on an exceptional basis (Article 22 (2) *in fine* of the Labour Code). The exceptions referred to by the provision in question are two-fold. They introduce a minimum age of a young employee, which cannot be reduced, and allow only for certain types of work. The ability to establish an employment relationship has been provided to young people, i.e. people under the age of 18, but over the age of 16, and even to those under the age of 16 provided that they have completed basic secondary school. The provisions of the ninth chapter of the Labour Code allow such employees to work in order to acquire vocational training or to carry out non-strenuous work listed by an employer after having

[14] R. Alexy, *Teoria praw podstawowych [Fundamental Rights Theory]*, translated by B. Kwiatkowska and J. Zajadło, Wydawnictwo Sejmowe, Warszawa 2010, at pp. 149–150.

obtained the consent of a doctor discharging the duties of an occupational medicine service. The list of light work requires approval by a competent labour inspector. In order to increase the protection of young workers, the legal provisions furthermore prohibited certain jobs for young people. Therefore, the age limit determined in Article 22 (2) of the Labour Code is a condition by virtue of which the ability to acquire employee status depends on legislation[15]. The minimum statutory age is a condition of holding "legal capacity in the area of labour law"[16].

The structure of employee capacity is supplemented by Article 22 (3) of the Labour Code[17]. According to its wording, a person limited in his/her legal capacity may, without the consent of his/her statutory representative, enter into an employment relationship and perform acts in law concerning this relationship. The Labour Code does not govern the issue of legal capacity and therefore it is necessary to apply *mutatis mutandis* the provisions of the Civil Code, in conjunction with Article 300 of the Labour Code. Pursuant to Article 15 of the Civil Code, minors who have attained thirteen years of age and persons who are only partially legally incapacitated have limited capacity to perform acts in law. An adult may be partially legally incapacitated due to mental illness, mental retardation or mental disturbances of another kind, in particular alcoholism and drug addiction if his/her condition does not justify full legal incapacitation but requires assistance to manage his/her affairs (Article 16 (1) of the Civil Code). Persons with limited legal capacity have no competence to perform independently and efficiently legal acts in law as regards contractual obligations or disposing of a right (Article 17 of the Civil Code). The acts performed by them in that respect are incomplete (*negotium claudicans*) and, in order to be validated, require confirmation (subsequent consent) by their statutory representative. Article 22 (3) of the Labour Code introduces a completely different solution in relation to the group in question. As regards an act leading to a contractual obligation, namely the establishment of an employment relationship, the article in question does not require the consent of a statutory representative and

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[15] Postanowienie SN z dnia 22 listopada 1979 r., [Order of the Supreme Court of 22.11.1979] III PZ 7/79, OSN 1980, No. 4, item. 83.

[16] W. Sanetra [in:] J. Iwulski, W. Sanetra, *Kodeks pracy…[Labour Code]*, 2003, at p. 72.

[17] M. Piankowski [in:] *Kodeks pracy…*, at pp. 85–86.

a declaration of will suffices under labour law to complete the action. The limited capacity of such an individual is manifested only in the possibility to terminate the employment relationship by his/her statutory representative upon the consent of the custody court, if a continuation of the employment relationship is contrary to the interests of an employee.

Age, in the mechanism of entitlement to positive actions, primarily refers to age entitling the acquisition of retirement pension rights. Recent scholarly and judicial disputes concern whether a maximum age may be treated in a similar way to a minimum age and therefore considered as part of an employee's capacity. Such a view would entail recognition of age as the basis for loss of employee status. Firstly, it should be assessed whether the maximum age could be treated at all as an unconditional premise of employee status, as is the case in relation to the minimum age, or only as one of many necessary pre-conditions to be met. Moreover exercise of the entitlement, in the form of undertaking and performing work, requires the legislature to regulate the issue of non-discrimination on grounds of age in the field of employment.

The principle of non-discrimination on grounds of age in the area of employment has been developed most comprehensively by European Union legislation, not merely because of the number of legal bases, but also due to the interpretation of such law by the Court of Justice of the European Union. Two such decisions were of key importance in that respect. In the judgements in cases Mangold[18] and Seda Kücükdeveci[19] a general principle of non-discrimination was derived from the prohibition of discrimination based on specific criteria such as sex or citizenship. In the Mangold case, the Court of Justice formulated the revolutionary thesis according to which, in employment relations, a general prohibition of discrimination exists from which the partial specific prohibitions including [the prohibition] on grounds of age are derived[20]. In this way, the Court

[18] Case *Werner Mangold v. Rüdiger Helm,* C-144/04, Judgment of the Court (Grand Chamber) of 22.11.2005, ECR 2005, p. I-09981.

[19] Case *Seda Kücükdeveci v. Swedex GmbH & Co. KG.*, C-555/07, Judgment of the Court (Grand Chamber) of 19.1.2010, ECR 2010, p. I-00365.

20 See to this effect: A. Wróbel, *Komentarz do art. 21 Karty Praw Podstawowych [Commentary to Article 21 of Charter of Fundamental Rights]* [in:] A. Wróbel (ed.), 'Karta Praw Podstawowych – Komentarz' [Charter of Fundamental Rights. A Commentary], C.H. Beck, Warszawa 2013, at pp. 704-705.

of Justice transformed the enumerated list of prohibited differentiations contained in Article 19 TFEU, together with the directives that issued on the basis thereof, into an open list. The transformation of the closed catalogue into an open list was based on the fundamental right of Article 21 of the Charter of Fundamental Rights, which contains an open list of criteria on which basis it is prohibited to discriminate individuals. The provision in question, following the expression "such as", explicitly lists age as a personal characteristic protected by law.

Once the Charter of Fundamental Rights of the EU acquired force equal to that of the EU treaties, it is the Charter itself and not the directives that constitutes the legal act on which basis the right to non-discriminatory treatment in the field of employment, irrespective of age, is formulated. In turn, the provisions of the EU treaties, together with the anti-discrimination directives issued on the basis thereof, give specific expression to the scope of application of the non-discrimination principle in the field of employment. The above mentioned relationship between EU primary law and the directives was established by the Court of Justice in its judgement in the joined cases C-297/10 and C 298/10 Hennings[21], where it held that the principle of non-discrimination on grounds of age, enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, was given specific expression by Directive 2000/78. The provisions of the directives do not lay down the aforementioned law, but merely confirm it and, furthermore, provide more detailed criteria for possible limitations imposed by domestic legislation, which in turn affects the exercise of an individual's entitlements in the scope of their right to work.

4. The scope of the prohibition of discrimination on grounds of age in the field of employment

An analysis of the scope of application in EU law of the individual criteria of prohibited discrimination in the field of employment leads

[21] Joined *Cases Sabine Hennigs (C-297/10) v. Eisenbahn-Bundesamt, Land Berlin (C-298/10) v. Alexander Mai*, Judgment of the Court (Second Chamber) of 8.9.2011 (references for a preliminary ruling from the Bundesarbeitsgericht (Germany)), OJ C 311, 22.10.2011, at pp. 12–13.

to the conclusion that the scope covered by the various prohibitions is not identical. By way of comparison, the widest provisions of the TFEU and the directives in respect of employment cover sex and citizenship conditions, together with the conditions of running business, training and advanced training, social protection, including social security, access to goods and services and to each aspect of the European Union's activities. The scope of application of the prohibition of discrimination in the field of employment on account of age and disability is manifestly different. Taking into account the provisions of the directive, these prohibitions apply to employment, running business, training and additional training.

Numerous modifications to the prohibition of discrimination affect the relationship between an individual's various entitlements. Advocate General L.A. Geelhoed expressed such a relationship in his opinion in case C-13/05 *Chacon Navas*[22]. Namely, he finds that: "the implementation of the prohibitions of discrimination [on the grounds of age and disability] [...] always requires that the legislature make painful, if not tragic, choices when weighing up the interests in question, such as the rights of disabled or older workers versus the flexible operation of the labour market or an increase in the level of participation of older workers". Therefore, the aims and objectives of social policy may affect the exercise of an individual's entitlements in terms of their right to work. No infringement of the principle of equal treatment (non-discrimination) occurs if the measures chosen, including legislation, reflect a legitimate aim of social policy and the selected national measures are appropriate and necessary to achieve such an objective. These assumptions are consistently referred to in the case-law of the Court of Justice: in relation to the prohibition of discrimination on the grounds of sex[23], in relation to the right to a pension from an occupational pension scheme[24], in

[22] Case *Sonia Chacón Navas v. Eurest Colectividades SA*, C-13/05, Judgment of the Court (Grand Chamber) of 11.7.2006, ECR 2006, p. I-06467.

[23] Case *Katarina Abrahamsson and Leif Anderson v. Elisabet Fogelqvist*, C-407/98, Judgment of the Court (Fifth Chamber) of 6.7.2000, ECR 2000, p. I-05539.

[24] Case *Birgit Bartsch v. Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, C-427/06, Judgment of the Court (Grand Chamber) of 23.9.2008, ECR 2008, p. I-07245.

relation to the prohibition of discrimination on the grounds of disability[25], or in relation to the prohibition of discrimination on the grounds of age[26].

Therefore, an assessment of compliance with the principle of non-discrimination depends on an assessment of the legal environment and above all on the answer to the following question: What constitutes "appropriate measures" in reference to employment policy, labour market and vocational training? The next problem is associated with identifying an entity authorized to formulate employment (social) policy objectives and determining the correct meaning of this concept. It is, first of all, about the possibility to identify the term in question with the objectives of an individual employer, entitled to conduct its own staff policy dependent on the situation on the labour market. In this context, another aspect of the principle of non-discrimination related to objective [conditions] prevailing in the labour market should be discussed. Since working conditions are dependent on market supply, does an employer have the right to hire an employee for lower remuneration than workers already employed in the same post? This problem often applies to groups experiencing the most serious problems in finding work, namely very young people or people approaching retirement age. Therefore, age can be considered not only in the context of the potential loss of employee capacity, but also as a criterion for differentiating remuneration conditions.

Subsequently the nature (and, actually, the form) in which the legislature implements the derogation from Article 6 (1) of directive 2000/78, allowing personal and substantive limitations to the discrimination prohibition, should be analysed. These conditions have a direct impact on the exercise of entitlements in the area of the right to work. Identification of the nature of permitted national measures seeks to determine whether or not the objectives of social policy should be expressed in the form of legislation. If this option was accepted as valid, understanding of the notion of labour law legislation would be not an easy

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[25] Case *Sonia Chacón Navas v. Eurest Colectividades SA*, C-13/05, Judgment of the Court (Grand Chamber) of 11.7.2006, ECR 2006, p. I-06467.

[26] Case *Werner Mangold v. Rüdiger Helm,* C-144/04, Judgment of the Court (Grand Chamber) of 22.11.2005, ECR 2005 p. I-09981; Case *Félix Palacios de la Villa v. Cortefiel Servicios SA*, C-411/05, Judgment of the Court (Grand Chamber) of 16.10.2007, ECR 2007, p. I-08531.

task. Pursuant to Article 9 of the Labour Code in the Polish legal system, the sources of labour law include not only the sources of universally binding law, but also collective agreements, and a special type thereof, namely collective labour agreements. The same legal force is enjoyed by statutory-based unilateral acts in the form of common rules applied by an employer employing more than 20 employees. Whilst referring to the specific scheme of Polish sources of law, the issue of the scope of Article 6 (1) of the directive 2000/78 should also be raised, regarding whether or not agreements and rules (unilateral acts) may qualify as equal to statutes (bills).

When opting solely for statutory relevant measures, introducing personal and substantive limitations on the prohibition of discrimination, Article 52 (1) of the Charter of Fundamental Rights should be referred to. This provides as follows:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

However, trade unions and employers and their associations shall have the right to conduct collective negotiations, in particular in order to resolve disputes, and to conclude collective labour agreements and other agreements. Such rights cannot be completely disregarded when considering the issue of permissible limits. When contrasting the obligation to formulate the objectives of social policy in statutory provisions with the freedom of trade unions and the right to conduct collective negotiations, it should be considered that the solution involving precise statutory delegation complies with the conditions set out in Article 1 (6) of Directive 2000/78. In accordance with a precise delegation, the social partners would have the right to establish working conditions taking into account (for instance) the criterion of age. Furthermore, the extensive practical application of the precise statutory delegation, for example in relation to agreements on collective redundancies or rules of collective redundancies, in which the social partners use age and

retirement pension rights as one of the selection criteria for dismissing workers, should be also be noted.

5. Age as the reason for terminating the employment relationship

In the Polish legal system, age has become a legal event relevant to both labour law - for example the provision restricting the permissibility of terminating an employment contract of those in pre-retirement age (Article 39 of the Labour Code) could be cited here – and to the social security system, since it is considered a category of risk insurance, which involves the right to acquire certain benefits (such as retirement pensions)[27].

However, most discrepancies (both within the judiciary and legal academic writings) are caused by an impact assessment of retirement age as a social insurance event within labour law, especially in the context of Article 30 (4) of the Labour Code and Article 45 of the Labour Code. Pursuant to these articles, a termination notice issued in respect of an employment contract concluded for an indefinite period of time must be justified. This means that an employer is obliged to provide, in the statement of termination, the reason (cause) of such termination. Therefore, since the provisions are formulated in this manner, it is recognised that the cause of cessation of the employment relationship determines whether or not such termination is justified[28]. The burden of recognising a unilateral termination act as defect-free and effective essentially focuses on characterization of the causes recognised by labour law as the reason for an employer having terminated the employment relationship. Furthermore, legal academics and commentators quite consistently qualify the issue of the merits of a termination notice issued in respect of an employment contract as being amongst the key

[27] B. Wagner, *Wiek emerytalny jako zdarzenie prawa pracy [Pension Age as an Labour Law Event]*, 'PiZS' 2001, No. 3, at p. 20 and subsequent.

[28] A. Wypych-Żywicka, *Zasadność wypowiedzenia umowy o pracę [Justification of Termination of an Employment Contract]*, Gdańsk 1996, at p. 47 and subsequent; *ibidem, Glosa do wyroku SN z dnia 12 stycznia 1999 r., I PKN 528/98 [A Comment to the Judgment of the Supreme Court]*, 'OSP' 2000, No. 7-8, at p. 106.

issues related to the common protection of stability in an employment relationship[29] covered by one of the basic functions of labour law, namely the protective function of labour law[30].

In this context, it should be noted that, for years now, the view has dominated that acquiring attaining retirement age or acquiring retirement pension rights itself justifies termination of an employment relationship. A different view may be found in certain decisions of the Polish Supreme Court and certain academic writings, although these have been in the minority. However, the latter view is gaining increasing numbers of supporters, due to *inter alia* the impact of EU standards on the Polish legal system.

The next aspect that should be raised concerns the relationship between Article 21 of the Charter of Fundamental Rights and Article 6 of Directive 2000/78 with Article 65 of the Constitution of the Republic of Poland, which states the right to work and Article 24 of the Constitution of the Republic of Poland, which provides that work is protected by the State. The structure of the right to work consists of the freedom [to choose and to pursue] occupation (i.e. it imposes an obligation). Pursuant to Article 65 of the Constitution of the Republic of Poland, policies aim at full, productive employment by implementing programmes to combat unemployment, including the organization of, and support for, occupational advice and training, as well as public works and economic intervention. This provision is also obligatory in nature. In turn, Article 24 of the Constitution provides the legislative basis for diverse protective instruments, depending on the legal status of a worker (an employee and a party to a civil law contract).

Article 24 of the Constitution provides for the protection of work. In Poland, work can be undertaken on the basis of various legal grounds

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[29] A. Wypych-Żywicka, *Zasadność*..., at p. 8, and also A. Dral, *Powszechna ochrona trwałości stosunku pracy: tendencje zmian [Universal Protection of Duration of Employment: Tendencies of Change]*, Warszawa 2009, at p. 171.

[30] M. Skąpski, *Ochronna funkcja prawa pracy w gospodarce rynkowej [Protective Function of Labour Law in Market Economy]*, Kraków 2006; T. Zieliński, *Podstawy rozwoju prawa pracy [Basis of Development of Labour Law]*, 'Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace Prawnicze' 1988, No. 120, p. 112; M. Borucka-Arctowa (ed.), *Społeczne poglądy na funkcje prawa [Public Opinion on the Function of the Law]*, Wrocław 1982, at p. 64.

– i.e. on the basis of civil law contracts or contracts of employment. Depending on the legal basis pursuant to which the work is undertaken, the nature of the protection of work performed on the grounds of a specific legal basis varies. Such differentiation is a natural consequence of the different nature of the legal bases of undertaking the work. It is also assumed that contracts are concluded in accordance with their function and the purpose thereof. Although, pursuant to Article 24 of the Constitution of the Republic of Poland, work is protected regardless of the legal basis on which it is undertaken, there are differences in the manner in which such protection is regulated in (non-constitutional) statutory legislation which is subordinate to the Constitution itself. Consequently, the diversity of work protection measures itself violates neither the Constitution, nor European Union law, the latter of which does not regulate the specific forms of employment permissible in the domestic laws of individual Member States.

Labour law introduces common and specific protection instruments. A common instrument for the protection of work is the requirement to provide grounds justifying the termination of an employment contract, in accordance with Article 30 of the Labour Code. Assuming the obligation nature of the employment relationship, it should be considered that the reasons for termination [notice] should essentially result from the obligation link between the parties[31]. The model of an individual approach to an employment relationship is a bond connecting an individual employee to an employer. This model implies considering overall circumstances in each case of the contract termination. The problem is how far reasons which are completely external to the employment relationship may affect termination. A special instrument of work protection due to age is the mechanism of protecting people approaching retirement age against termination of their employment relationship. Such protection applies to persons during a period beginning 4 years from the date on which they will attain retirement age, if the period of employment permits acquisition of the right to a retirement pension. Upon attaining retirement age, such special protection (i.e. prohibition of the termination notice) ceases, which could be understood as the right to terminate the employment

[31] This is considered by the operative part of IV resolution by the Polish Supreme Court of 27.6.1985.

relationship by virtue of the employee having attained retirement age and having acquired the right to a retirement pension. However, three trends concerning the effects of attaining the retirement age upon termination of the employment relationship are visible in the case-law.

According to the first trend, an employee's having attained retirement age itself constitutes a sufficient justification for terminating a contract of employment, which does not require individualisation or specification in the context of the usefulness of the person concerned for work. According to the Court of Justice, Article 6 (1) of Council Directive 2000/78 does not preclude domestic provisions which provide for the automatic termination of employment contracts on the ground that an employee has reached the age of retirement. Naturally, such a provision must comply with the terms and conditions imposed by the directive, meaning that they must be objectively and reasonably justified by a legitimate aim relating to employment policy and the labour market and, secondly, that the means of achieving that aim are appropriate and necessary[32]. Accordingly the Court of Justice has held, under certain conditions, that domestic provisions which provide for the automatic termination of employment contracts when an employee has attained retirement age (determined as 65 years old), are compatible with European Union law[33].

According to the second trend, attaining a certain age is an insufficient rationale and it should be supplemented by an additional condition in the form of acquiring the right to a retirement pension, considered as a guarantee of subsistence means in lieu of lost salary. It is worth noting that this trend also covers decisions that take into account (in addition to the conditions listed) other elements such as the current social and economic situation, negative social events on the labour market, namely growing unemployment, a large number of people lacking means of subsistence, etc. By way of example, a large number of legal provisions forming part of the employment law of many EU Member States for a long time now may be indicated. This applies in particular to civil servants, officers of the state government, local governments, judges, prosecutors and academics. In Poland an example of such a provision is

[32] A. Wróbel, *Komentarz do art. 21 Karty Praw Podstawowych...*, at p. 715.

[33] Case *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges.mbH*, C-45/09, Judgment of the Court (Grand Chamber) of 12.10.2010, OJ C 346, 18.12.2010, at p. 9.

Article 55 of the Act of 21.11.2008 on self-government officers[34], pursuant to which termination of the employment relationship with a nominated employee upon a three month notice may take place when the employee attains 65 years of age, provided that the period of employment entitles an employee to obtain the right to a retirement pension or to acquire the right to a pension due to unfitness for work. By analogy, Article 71 (2) of the Act of 21.11.2008 on the civil service[35], provides that the termination of an employment relationship with a civil servant can take place, with a three month notice, when the employee attains 65 years of age if the period of employment entitles an employee to obtain the right to a retirement pension.

Another example of the second trend is Article 71 of the Act of 27.7.2005 - Law on higher education[36], according to which the employment relationship of a nominated university teacher employed at a public university institution expires at the end of an academic year, in which he/she attains 65 years of age and the employment relationship of a nominated university teacher holding the title of professor and employed at the position of *profesor nadzwyczajny* (professor extraordinary) or *profesor zwyczajny* (professor ordinary) at a public university institution expires at the end of the academic year in which he/she attains 70 years of age.

The latter of the aforementioned trends also includes Article 69 of the Law on organisation of the common courts. A judge in principle retires upon attaining 65 years of age. However, there is a possibility for a derogation when, no later than six months prior to attaining

[34] [*Ustawa z dnia 21 listopada 2008 r. o pracownikach samorządowych]* Dziennik Ustaw z 2008 r. Nr 223, poz. 1458, z 2009 r. Nr 157, poz. 1241, z 2010 r. Nr 229, poz. 1494, z 2011 r. Nr 134, poz. 777, Nr 201, poz. 1183. [Act of 21.11.2008 on self- government officers, Polish OJ of 2008 No. 223, item 1458, of 2009 No. 157, item 1241, of 2010 No. 229, item 1494, of 2011, No. 134, item. 777, No. 201, item 1183].

[35] *[Ustawa z dnia 21 listopada 2008 r. o służbie cywilnej]* Dziennik Ustaw z 2008 r. Nr 227, poz. 1505, z 2009 r. Nr 157, poz.1241, Nr 219, poz.1706, z 2011 r. Nr 82, poz. 451, Nr 185, poz. 1092, Nr 201, poz. 1183. [Act of 21.11.2008 on the civil service, Polish OJ of 2008 No. 227, item 1505, of 2009 No. 157, item 1241, No. 219, item 1706, of 2011, No. 82, item 451, No. 185, item 1092, No. 201, item 1183].

[36] [*Ustawa z dnia 27 lipca 2005 r. o szkolnictwie wyższym]* Dziennik Ustaw z 2012 Nr 572, poz. 742. [Act of 27.7.2005 – Law on higher education, Polish OJ of 2012 No. 572, item 742].

65 years of age, a judge declares to the Minister of Justice that he/she will continue to hold the post and submits a certificate that he/she is able, from a health perspective, to perform the duties of a judge[37]. In addition, a judge retires at his/her own request, retaining the right to retirement pay, upon attaining 55 years of age in the case of a woman, provided that she has worked at the post of judge or public prosecutor for at least 25 years previously, and upon attaining 60 years of age in the case of a man, provided he has worked at the post of judge or public prosecutor for at least 30 years previously[38]. The condition of examining a judge's ability to perform his/her duties is not a necessary condition each time the employee wishes to perform work upon having reached retirement age, but it can be introduced by an expressive provision such as the aforementioned provision of Polish Law on Organisation of the Common Courts.

European Union law does not preclude such regulations. The Court of Justice has stated, for example, that Council Directive 2000/78 does not preclude a law which provides for the compulsory retirement of permanent civil servants, in this instance prosecutors, at the age of 65, while allowing them to continue to work, if this is in the interests of the service, until the maximum age of 68, provided that that law has the aim of establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means[39].

Finally, the third trend considers termination of the employment relationship solely on the grounds of having reached retirement age (and acquired retirement pension rights) as violating the principle of non-discrimination on grounds of age and/or on the grounds of the age and sex together. The judgment in case C-447/09 *Reinhard Prigge and Others*

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[37] *Artykuł 69 § 1 ustawy o ustroju sądów powszechnych* Dziennik Ustaw z 2001 r. Nr 98, poz. 1070, ze zmianami. [Article 69 (1) of the Polish Law on Organisation of the Common Courts, Polish OJ of 2001, No. 98, item 1070, as amended.

[38] Art. 69 (2) of the Polish Law on Organisation of the Common Courts.

[39] Joined cases *Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen*, Judgment of the Court (Second Chamber) of 21.7.2011, operative part point 1, not published.

v. Deutsche Lufthansa AG[40] could serve as an example in that respect. In that case, a Collective Agreement provided that the employment relationship of a Deutsche Lufthansa pilot that falls under the Collective Agreement automatically terminates when the pilot attains 60 years of age. The Court of Justice held that: "[...] such a pilot is in a comparable situation to that of a younger pilot performing the same activity for the benefit of the same airline company and/or falling under the same collective agreement. The first pilot whose employment contract terminates automatically when he attains 60 years of age is treated in a less favourable manner, on grounds of his age, than the second[41]. In the opinion of the Court of Justice the first paragraph of Article 6(1) of Directive 2000/78 must be interpreted to the effect that air traffic safety does not constitute a legitimate aim within the meaning of that provision"[42]. At the same time, it should be noted that the Court of Justice considers it compliant with Article 6(1) of Directive 2000/78 for a measure such as the automatic termination of employment contracts of employees who have reached retirement age, set at 65, to be contained in a framework collective agreement for employees in the commercial cleaning sector[43]. Therefore, the essence of the various settlements in the cases cited above was that the Court of Justice carried out a test comparing situations of all employees covered by the respective collective agreements.

Apart from the three trends presented above, it should be added that a very specific example is represented by the case of termination of an employment relationship by virtue of an administrative decision issued by an administrative authority automatically in respect of employees who have attained a certain age. In Poland, an example of this situation is the solution adopted in relation to maritime pilots. Article 228 (2) (5) of the Maritime Code constitutes the basis for deleting an

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[40] Case *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, C-447/09, Judgment of the Court (Grand Chamber) of 13.9.2011, not published.

[41] Case *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, C-447/09, Judgment of the Court (Grand Chamber) of 13.9.2011, point 43-44.

[42] Case *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, C-447/09, Judgment of the Court (Grand Chamber) of 13.9.2011, operative part *in fine*.

[43] Case *Gisela Rosenbladt v. Oellerking Gebäudereinigungsges.mbH*, C-45/09, Judgment of the Court (Grand Chamber) of 12.10.2010, operative part point 2, OJ C 346, 18.12.2010, at p. 9.

individual from the list of pilots in the event of one of the circumstances listed therein, one of which is that the maritime pilot employee has attained 65 years of age. This condition may serve as the sole basis for removing an individual from the list of maritime pilots, which in turn results in depriving such a person of the possibility to practice the occupation of maritime pilot. The removal in question is performed by the director of the Maritime Office by way of administrative decision. The challenged provision of the Maritime Code certainly falls within the scope of application of Directive 2000/78, since it introduces differences of treatment on the grounds of age[44].

Directive 2000/78 is applicable to maritime pilots both in their capacity as public officers and as employees within the private sector. The application of Directive 2000/78 requires it to be demonstrated that the maritime pilot is, in light of the aforementioned Directive, a victim of discrimination as a result of the application of the challenged provision of the Maritime Code. To this end, it is necessary to make an in-depth analysis of the legal situation of maritime pilots vis-à-vis other entities whose legal situation is comparable thereto. Therefore, the issue is not only the comparability of their actual situation but also the comparability of their legal situation. Certainly, another category of employees responsible for the safety of property and life at sea, other than pilots, is the master of a vessel. Neither international law nor EU law or Polish law has introduced a maximum age limit for practicing the occupation of master. The Polish legislature often compares maritime pilots to people performing work on-board ships, in terms of health requirements, but fails to explain why it has introduced a maximum age limit for maritime pilots whilst not introduced such a limitation in relation to any other profession performing work on-board maritime vessels, including master mariners. This is even more amazing given that in Poland a maritime pilot is obliged to hold the licence of a master mariner and, equally, a master mariner holding a pilot licence for the given water area may be exempted from compulsory pilot services and may be older than 65 at that time. As regards reasons of liability, a maritime pilot as an assistant of a master mariner gives him advice, shares his experience and knowledge of the

[44] Article 6 of Directive 2000/78 is entitled *Justification of differences of treatment on grounds of age*.

port waters but it is still the master mariner who remains responsible for management of the piloted vessel. Accordingly, the liability of a captain is incomparably greater than the respective liability of a maritime pilot. Despite this, Polish administrative courts of both instances have interpreted the maximum age limit for marine pilots by analogy to the German Federal Labour Court in case C-447/09 *Prigge*, suggesting that the authority which established the challenged provision of the Maritime Code for security reasons, whereas no such reference is contained in the provision itself[45].

In addition to the aforementioned substantive regulations in matters concerning discrimination on the grounds of age, procedural aspects may also be identified. Directive 2000/78 has primarily been implemented into the Polish legal order by means of the Labour Code and amongst the national measures implementing this Directive, Poland has not notified to the European Commission, for example, the Maritime Code. The failure to thus notify does not automatically amount an absence of implementation but an individual, in this example a maritime pilot, may rely before a national court on the fact of such failure to notify in order to prevent any adverse effects arising from domestic legal which contravenes the European Union law, in this case Directive 2000/78. In such a case, the national court is obliged to refuse to apply a national provision which has not been notified in accordance with the Directive[46]. Consequently, Member States should attach particular importance to proper notification of domestic provisions introducing restrictions concerning the principle of prohibition of discrimination on grounds of age in the field of employment.

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[45] Wyrok WSA w Warszawie z 12.10.2006 r., sygn. VI SA/Wa 1463/06; [Judgment of Regional Administrative Court in Warsaw of 12.10.2006, VI SA/Wa 1463/06]; wyrok NSA z 1.1.2007, sygn. I OSK 85/07, [Judgement of Supreme Administrative Court of 1.6.2007, I OSK 85/07.] S. Majkowska-Szulc, *Dyskryminacja ze względu na wiek w zakresie dostępu do wykonywania zawodu pilota morskiego – rozważania na tle wyroku Trybunału Konstytucyjnego z dnia 19 stycznia 2010 r., sygn. akt SK 35/08 [Discrimination on Grounds of Age in Regard of Employment of Pilots]*, 'Gdańskie Studia Prawnicze – Przegląd Orzecznictwa' 2012, No. 4, Gdańsk 2012, in the process of publication.

[46] For ex ample: Case *CIA Security International SA v. Signalson SA i Securitel SPRL*, C-194/94, Judgement of the Court of Justice of 30.4.1996, ECR 1996, p. I-02201.

6. Conclusions

In public international law, the traditional sources of human rights clearly evolve from declarations towards the formation of guarantees and protective mechanisms for the rights of individuals[47]. This process affects the legislation of individual states. The rights of individuals which result from having attained a certain age have evolved, as has the assessment of age as a factor constituting possible discrimination against individuals. As regards EU Member States, the regulation of fundamental rights has already transferred from the level of Member States to the European Union level. This phenomenon is very well reflected by the example of regulating the right to equal treatment, irrespective of age, in the field of employment.

Both EU secondary legislation and the case law of the Court of Justice provide that the right to equal treatment, irrespective of age, in the field of employment may be limited only on the basis of legitimate objectives and that the measures adopted to achieve such aims must be both appropriate and necessary[48]. These requirements are of the general *sine qua non* condition nature which must be met by the objective and measures adopted to ensure its implementation. Besides, the Court of Justice conducts a specific assessment of individual objectives and measures. Among the purposes allowed by EU law to justify restrictions on equal treatment, irrespective of age, in the field of employment, the Court of Justice has mentioned *inter alia* [...] establishing a balanced age structure in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, and that it allows that aim to be achieved by appropriate and necessary means"; generation balance considerations in case of university professors; "the delivery of quality teaching and the best possible allocation of posts for professors between the generations". The Court of Justice has described *inter alia* the following as constituting appropriate

[47] J. Kochanowski, *Wstęp*..., at p. 6.

[48] Article 2 (2) of Directive 2000/78.

and necessary measures to implement the purposes permitted by law the European Union: measures which are reasonable, based upon information the evidential value of which shall be evaluated by the national court. Consequently, the right to work irrespective of age is not an absolute right, in particular because it is subject to many restrictions introduced at the level of international law, EU law and the domestic law of its Member States.