

YOUNG PEOPLE AND WORKPLACE DISCRIMINATION

JEAN-PAUL DE LUCCA

Introduction: Who is the (Potential) Young Worker?

One is likely to encounter a slight variation in the definition of a ‘young person’ from one country to another. The National Youth Policy of Malta defines a young person as someone aged between 14 and 30.¹ The policy document was drafted by a team of researchers and youth-workers² together with representatives of the National Youth Council, as the officially recognised representative body of young people, following consultation with various youth organisations. The document states that in the field of employment, the State should follow a policy that, inter alia:-

[8.2] safeguards young people from the threats of exploitation, such as employment below the legally-consented age, wages and benefits which do not ensure a decent standard of living, harassment, and disregard for the Health and Safety Act;

[8.6] ensures that employers do not discriminate in any manner in their methods of recruitment and job advancement.

Within the broad definition of ‘young people’, one can identify three distinct sub-categories which correspond to the 14-16, 16-18 and 18+ age brackets respectively. For the purposes of employment, Maltese law defines a ‘young person’ as any person who is under eighteen years of age³ and within this definition it distinguishes between a ‘child’, who is a person under sixteen years of age or the age established as the school leaving age by virtue of the Education Act, and an ‘adolescent’, defined as a person who is between sixteen and eighteen years of age.⁴ The Young Persons (Employment) Regulations lay down the conditions under which young people under the age of eighteen can be employed with the view of regulating such work and ensuring that employers guarantee that young people have working conditions that suit their age and that they are protected against economic

¹ The National Youth Policy of Malta (NYP). *Youth Information Handbook* (Ministry of Youth and the Arts: 2004).

² The term “youth-workers” should not be confused with young workers. In Malta, a youth-worker is generally a person who has followed a course of studies within the Youth and Community Studies Programme at the University of Malta and who is professionally engaged in work with young people.

³ Legal Notice (L.N.) 440 of 2003. Young Persons (Employment) Regulations, 2(1).

⁴ These definitions are in line with the EU directive (94/33/EC) on the protection of young people at work.

exploitation and against any work which is likely to harm their safety, health or physical, mental, moral or social development or to jeopardise their education.⁵

Even though the Employment and Industrial Relations Act does not apply the term ‘young people’ to those between the age of eighteen and thirty, one should take into consideration the definition of a young person according to the National Youth Policy and the specific reference it makes to the safeguarding of all young people against discriminatory measures. Notwithstanding the difference between the use of the term in the law and the definition of a young person in the National Youth Policy, this paper seeks to highlight some issues related to workplace discrimination against young people in general. There is not much to discuss with regard to discrimination against young people under eighteen insofar as both Maltese and European law safeguard them against exploitation and overtly discriminatory practices. It is indeed far more problematic to delineate and exemplify instances of discrimination against young workers who, according to our laws, do not fall within the category of ‘young people’ but who are subjected to discriminatory acts primarily because of their age. A substantial part of this discussion, therefore, concerns discrimination on the grounds of age. Moreover, at times, some young people suffer double discrimination when they are discriminated against not only on the basis of their age but also because of their gender, disability, ethnicity or other causes. There are instances where young women and young disabled persons are defended against acts of discrimination not because they are young but because they are women or disabled. One must therefore try to articulate what is meant by age discrimination and what challenges this presents to lawmakers, policy and decision-makers as well as young people themselves, the organisations that represent them and/or work with them, and civil society as a whole.

Before moving on to discuss why young people can be at a disadvantage because of their age, and therefore be subject to unjustified discrimination, let us have a quick (and limited) look at the wider picture of recent developments in EU policy and legislation which are relevant to the subject under discussion.

Framing Anti-Discrimination Within the Wider Context of European Policy

It is worth noting that Malta’s National Youth Policy calls upon the State to ensure that young people are not discriminated against because of their age. Malta’s Youth Policy shares many characteristics with similar policies around the world and with the European Commission’s White Paper entitled “A New Impetus for European Youth” (2001). When dealing with discrimination against young people, youth policies, due to their very nature, tend to highlight forms of discrimination against specific categories of disadvantaged young people (e.g. young females, disabled, homosexuals and members of ethnic minorities) and propose positive action to remedy the vulnerability of these groups. Indeed, the Commission’s White Paper clearly shows that in the consultations that led to its publication, young people themselves demanded that the anti-discrimination clause in the Amsterdam Treaty (Article 13) be applied rigorously and that European institutions take the necessary measures to fight discrimination based on sex, racial or ethnic origin, religion or belief,

⁵ *ibid.*, 1(2)(d)

disability, age or sexual orientation. The White Paper calls for action plans aimed at mobilising people so as to change practices and attitudes.⁶

This emphasis on discrimination against certain categories of young people, which is all too good, should in no way overshadow the fact that all young people can be victims of discrimination because of their age. The implications of such discrimination would go against the wide-ranging objectives of the European Union, especially social cohesion. Both the Maltese Youth Policy and the Commission's White Paper promote a cross-sectoral youth policy which takes into account the needs of young people in other areas, including employment. Both documents conclude that employment is a means for the better integration of young people and views work as a prerequisite for social inclusion. It is clear, therefore, that discrimination against young people at their workplace is detrimental to their social integration and to their general well-being based on autonomy, justice and non-discrimination, which is another point the White Paper seeks to highlight. The White Paper also tries to frame the needs and expectations of young people within the wider framework of the objectives of the Lisbon Strategy. In its communication to the Spring European Council 2005 regarding the Lisbon Strategy, the European Commission called for urgent action because, it said, "we still need a vision for society which can integrate both the ageing and the young".⁷ During the same European Council held in March 2005, member states adopted the proposal put forward by France, Germany, Spain and Sweden in October 2005, which suggested that a European Youth Pact should be drawn up and included in the context of the Lisbon Strategy. The proposal calls for action in various policy areas to ensure that young people are given the tools to succeed, since this success is pivotal for the economic growth resulting in Europe becoming the leading knowledge-based economy. The European Youth Pact gives special attention to youth unemployment and social and professional integration. In the light of these special considerations, the safeguarding of young people against discrimination on the basis of age in job selection and progression acquires even greater significance.

The Lisbon Strategy itself, together with the development of other strategies and action programmes (e.g. the EU's Social Agenda and the programme for social inclusion) were boosted by the introduction into the Treaties (and later into the draft European Constitution) of titles on employment and social issues. This inevitably led to increased Community action in the field of employment and social inclusion.

The EU Council Directive 2000/78/EC aimed at creating a general framework for equal treatment in employment & vocational training and guidance. It was specifically designed as an instrument to combat discrimination at workplaces on grounds of age, sexual orientation, disability and religion or belief. The framework outlined in the directive tries to guarantee minimum standards for fighting discrimination in all member states. The preamble shows how important this measure is for the attainment of "a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons"⁸ in line

⁶ White Paper on European Youth, 53.

⁷ Communication to the Spring European Council "Working together for growth and jobs. A new start for the Lisbon Strategy" (2005), 5.

⁸ Directive 2000/78/EC.

with the objectives of the EC Treaty. The Directive encouraged governments to introduce anti-discrimination legislation and policy in two phases. 2003 was set as the deadline for enacting legislation against discrimination based on sexual orientation and religion. Since age discrimination was seen as a more complex issue, the Directive set 2006 as the deadline for the enactment of anti-discrimination laws and policies with the view of implementing the directive's provisions on age.

Besides the Employment Directive and other directives aimed at outlawing discrimination, the European Union established an action programme with the precise aim of dealing with discrimination over the period 2001-2006. This action programme is designed to provide financial support for activities intended to fight discrimination on the grounds mentioned in the Directive, which include age discrimination.

Focusing on Age Discrimination

The complexity of the question of age discrimination, which, as we have seen, is felt to such an extent as to lead to the prescription of a longer period for the implementation of the age provision in the Employment Directive, contrasts with the simple answer to the question "why are young people at a disadvantage?" The answer, which I hope is simple but not simplistic, is that young people can be at a disadvantage because of the very fact that they are young. One should not mistake this *ex definitione* answer for lack of potential or ability, since that would risk sounding unnecessarily patronising; a characteristic which does very little to ensure that young people exploit their potential and develop their capabilities to the full and to make sure that they are not discriminated against. The implication of the above statement is that notwithstanding the widely held views (whether real or perceived) that young people have many opportunities in front of them and that modern social and educational systems offer, at least in general, adequate means for the realisation of young people's potential, young age can still put people at a disadvantage in particular situations, such as employment. The reality of this disadvantage and the possibility of its negative effects are evidenced in the very fact that age is generally included as a form of discrimination.

My earlier remark that discrimination against young people tends to be sidelined when compared to more publicised, and perhaps more common, forms of discrimination such as those against women and disabled people also applies in the specific case of age discrimination. Age discrimination, especially in employment, is often seen as an issue for older people. There remains a general perception that discrimination on the basis of age happens only in the case of older people who are closer to retirement. This narrow perception and bias is usually reflected in policies. One can generally observe that in the field of employment the main issue regarding young people is unemployment, which is indeed a pressing problem for young people in Malta and across Europe.⁹ However, everyday experience also shows that age counts against young people seeking jobs or promotion or the way they are treated at work. Age discrimination at the younger end, which refers to unfair treatment because one is too young, not only contributes to the problem of unemployment but clearly emerges as a separate problem altogether.

⁹ It is statistically proven that the recurrent trend in unemployment figures sees the highest levels of unemployment in the 16-25 age bracket. The second highest rate of unemployment is registered in the 25-34 age bracket.

One of the reasons why age discrimination is not as forcefully advocated as discrimination on the grounds of gender or disability may well be the fact that while the latter forms of discrimination are always unacceptable, there are instances where discrimination on the grounds of age is justifiable. This is confirmed in Article 6(1)(a) of Directive 2000/78/EC, where it is recognised that differences of treatment based on age can sometimes be justified, and where Member States are allowed to make provisions for differences of treatment on grounds of age which “shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.” Such instances, therefore, are to be applied in exceptional circumstances and only if they are proved to be justifiable. The rule remains, as the Directive asserts, that any direct or indirect discrimination based on age should be prohibited. The Directive, in fact, clearly states that “the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce.” It is therefore important to distinguish between differences in treatment which are justified, and discrimination, which is never justifiable and should always be prohibited. This prohibition is based on the ethical principle that an employer cannot treat employees in an improper manner. Age discrimination can be seen as unethical and, therefore, as being in conflict with this principle.

Age Discrimination in Malta

In Malta, two key legal instruments do not make any explicit reference to age discrimination in their provisions on discrimination. Article 45 of the Constitution of Malta defines ‘discriminatory’ as:

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”¹⁰

Likewise, under the Employment and Industrial Relations Act¹¹, ‘discriminatory treatment’ means “any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association”.¹²

The picture that emerges shows that there are a number of laws which set out at what age one can do something and which protect younger people (under 18) and their rights. The regulations mentioned in the introductions set a minimum age for entry into employment and impose restrictions on the kind of work people under the age of eighteen can perform. These uncontroversial measures are actually a justified form of different treatment on the

¹⁰ Article 45(3)

¹¹ Cap. 452 of the Laws of Malta

¹² Article 2(2)

grounds of age. Discrimination on such grounds, on the other hand, is in violation of the universally-recognised right to work.

Even though there are no laws which protect young people from discrimination because of their age, there might be other provisions that can be applied to prevent age discrimination in certain sectors, including employment. For example, there is a widely upheld principle that a person should be appointed to any given post on the grounds of objective criteria, such as competence and merit. Age is normally not considered to be an objective criterion and it should not determine a person's chances of employment. However, it is indeed a shortcoming that in the Constitution and in the Employment and Industrial Relations Act, Maltese law falls short of including age in its definitions of the expressions 'discriminatory' and 'discriminatory treatment'.

Possible Instances of Workplace Discrimination

Advertising

It is unlawful, under Article 26 of the Employment and Industrial Relations Act, for an employer to advertise or offer employment or when advertising opportunities of work, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment. While the Equality for Men and Women Act¹³ and Equal Opportunities (Persons with Disability) Act¹⁴ rightly strengthen this provision in the case of discrimination on the grounds of sex and disability respectively, the fact that the Employment and Industrial Relations Act falls short of including age as a form of discriminatory treatment renders it difficult to determine if and when an employer advertising a post is acting discriminately against young job seekers.

One often comes across job advertisements carrying the phrase "experience required". Even though there are cases where it is justifiable to require experience as a precondition for employment, this justification has to be objective and necessary for the proper fulfilment of the post being advertised. The experience of many young people shows that it sometimes happens that experience is listed as a prerequisite simply because the employer is unwilling to offer training to prospective employees. In some other cases, the experience requirement is deliberately included because the employer would not want to employ a young person. Other young people report that during interviews, some employers dismiss their application simply on the grounds of their age. Such an approach is manifestly discriminatory unless the employer shows that the difference in treatment of young job seekers is based on objective criteria.

Moreover, just as it is good practice for employers not to require different qualifications from males and females, it should be equally standard practice that calls for applications are to be open to people of any age provided that they satisfy the required qualifications. A person should be assessed according to his/her personal capability and not on grounds of age, and it should not normally be assumed that young people cannot perform certain kinds of work because of their age.

¹³ Chapter 456 of the Laws of Malta

¹⁴ Chapter 413 of the Laws of Malta

Wages and Working Hours

There may be instances where a young person is paid so-called “junior-rates” for performing exactly the same work as an older employee at exactly the same level. This obviously excludes differences in pay scale on the basis of seniority, years of service and other conditions of employment which are usually included in collective agreements. “Junior-rates” can be seen as outright discriminatory and in direct conflict with the principle of equal pay for equal work, which is enshrined in the United Nations Universal Declaration of Human Rights¹⁵ and in Maltese law and European directives. Article 27 of the Employment and Industrial Relation Act, for instance, states that “[E]mployees in the same class of employment are entitled to the same rate of remuneration for work of equal value.”

Besides equal pay, young workers should enjoy the same working conditions and benefits as well as social security rights. Other practices and working conditions such as long and irregular hours for less pay are also problems young people tend to face. Legal Notice 440/2003 regulates to some extent the cumulative number of hours and time when young people under the age of sixteen and eighteen respectively can work. In more general terms, the Employment Act specifies the parameters for working hours in relation to employees over 18. Notwithstanding existing legislation, this kind of discrimination appears quite often, more notably in certain industries.

In the professional sector, too, it is quite common for employers to expect their younger employees to work longer hours without receiving over-time benefits. Young people often lack the self-confidence to speak to their employers regarding their legal rights (provided they are sufficiently aware of them in the first place) especially if their contract of employment provides for probationary period. .

Even if the aforementioned legal instruments protect the employment conditions of young people under the age of eighteen, one ought to address the disastrous working conditions of those who, for instance, work long hours on beaches in the scorching sun during the summer months and other types of seasonal employment. The total disregard of the sections relative to working hours in the abovementioned Young Persons (Employment) Regulations is sometimes rampant and damaging to the well-being of young employees. Experience shows that at times some of these young people do not mind working extra hours in order to earn some extra money. However, they should be made aware of the risks they are running and of the legal obligations of their employers.

Casual and Part-Time Employment

Young workers in casual employment often complain that they receive a lower rate of pay and that they are not entitled to certain or all employment benefits. Even though recent Maltese legislation sought to address abuses of casual employment, the trend of offering employment on a casual basis has persisted among certain employers (especially small enterprises). Casual employment is dangerous as it does not offer any job security, which may in turn lead to other forms of discrimination such as blackmailing. Furthermore, this

¹⁵ Article 23(2)

kind of employment limits the freedom of the young employee to file a charge of discrimination or oppose discriminatory practices.

Discrimination of part-time workers can take various forms. Here again, the law states that part-time employees should normally expect to be granted the same rates and working conditions as full-time employees. One must also distinguish between people who wish to work on a part-time basis and others who work according to this arrangement in the absence of full-time opportunities or the willingness of the employer to create full-time posts. The problems faced by the latter category are often similar to those of casual employees.

Trial Work

Some employers offer jobs to young people subject to a trial or probationary period, during which the employer “tests” the young employee without compensation. While probationary periods are in some cases justifiable, expecting someone to work without giving him/her adequate compensation, for whichever period of time, is outrightly discriminatory. All work performed should be paid for. Although there are cases where employers eventually employ these people (after having received a few weeks of work for free) there are cases of blatant abuse where the employer does not employ the young person. This practice should be looked at closely and any malpractice should be curbed.

Bullying

Harassment on the grounds of age tends to be very widespread and can take the form of verbal abuse by insult, threats, intimidation, and unfair criticism. The offenders in this case can be older colleagues or, worse still, the employer/s or direct superior/s themselves. It is very hard for young people to speak up in such cases, many times because of the realistic fear of losing their job or being stopped from advancing in their careers. Bullying can also take the form of blaming young workers when things go wrong out of no fault of their own and when they are made to bear the brunt of their employer/s, direct superior/s or older co-workers. It is interesting to note that the first Irish decision on age-based harassment concerned a young female manager who was consistently ridiculed in front of other staff by an older (male) colleague as a “young, fooling girl”.¹⁶

Traineeships and Apprenticeships

Traineeships can be a double-edged solution to the problems of unemployment and the lack of experience of young job seekers. On the one hand, they help young people gain the much needed and called-for experience and they are therefore highly desirable practices. Employers are often encouraged to offer such schemes, and rightly so. On the other hand, one has to ensure that such schemes are not used as a form of cheap labour. Training should be regulated and formalised within recognised frameworks, which include a proper agreement on the training content and on adequate supervision and remuneration for the work carried out. In most cases, problems do not arise when young trainees or apprentices

¹⁶ Quoted in Madeleine Reid, “The prohibition of age discrimination in employment: issues arising in practice” Paper presented at the Academy of European Law Conference “*The Race and Framework Employment Directives*”, March 2003.

do their placements through agencies such as Employment and Training Corporation (ETC), but ad hoc arrangements risk increasing the possibilities of malpractice and abuse.

Health and Safety

Employers are obliged to guarantee the required standards of health and safety at the workplace. This issue can be addressed across all industries but especially in the manufacturing, construction and leisure industries. The abovementioned example of young people working long hours at the beach can be cited as a case where employers do not always guarantee adequate health and safety standards. Young people may not be sufficiently aware of the importance of Health and Safety regulations and many are not given the necessary instructions or, where required, protective gear.

Ignorance of the Law and Legal Rights

A common feature in cases of discrimination is that young employees do not know their legal rights and do not appreciate having legal rights. This is why they are sometimes coerced into working illegally (without a work permit) or without being granted certain rights such as sick leave, vacation leave and so on.

The need for proper education becomes paramount at this point. In addition to this, employers should be required to visibly and adequately advise all employees of their rights in an appropriate manner.

Conclusion: Fighting Discrimination and Promoting Equality in a Holistic Manner

Very often, the most pressing issues in relation to young people and employment revolve around the creation of jobs in order to lower the level of unemployment among young people. Positive action includes the adoption of specific measures to prevent or compensate for disadvantages young people suffer because of the fact that they are just entering the workforce. Curbing discriminatory practices should form part of any strategy aimed at ensuring the availability of more job opportunities for young people.

It should be recalled once more that young people who potentially suffer a double disadvantage (e.g. because they are women or disabled) are safeguarded against discrimination under other legal provisions and regulations. Basing itself on the principle of intergenerational solidarity and justice, this paper sought to point towards the need to raise the awareness of discrimination taking place against young people for the sole reason that they are young. The conclusions, which are meant to provide some food for thought and possibly a few proposals for concrete action following further discussion, can be divided into a number of categories. Each category calls for action in various spheres but any action will not achieve much unless there is an adequate level of interrelatedness and interdependency between the various areas. The aim, therefore, is to bring age discrimination (especially in the area of employment) to the forefront and seek to find solutions for redress against discrimination in a holistic manner. These areas can be delineated as follows:

Legislation

It seems that Maltese laws are not in full conformity with European Directives (even though direct effect is applied) when it comes to the inclusion of discrimination on the grounds of age in its provisions against discrimination. Domestic civil and labour laws in particular should explicitly prohibit age discrimination, while allowing different treatment as an exception in a defined number of cases when the distinction can be objectively justified.

Education

Education has a pivotal role in the fight against all forms of discrimination. Developing trends seem to highlight more than ever the need to facilitate the school-to-work transition in such a way as to better equip school-leavers to move into the working world. This transition requires preparation on a number of aspects, including the relation between curricula and employment requirements. Helping young people to become more aware of their rights and to get to know how to deal with cases of age discrimination should form an integral part of the educational system.

Youth Policy

Youth policies across Europe, including Malta's Youth Policy, should continue highlighting anti-discrimination against particularly vulnerable groups of young people. However, they should also place some emphasis on anti-discrimination of young people in general because of their age. By its very nature, then, the youth policy should ensure that such issues are taken up in other areas, such as education and employment. The youth policy should also serve as a means to 'youth-proof' policies in other sectors which have a direct or indirect impact on young people.

Civil Society

Young people and their associations, especially their representative organisations, form an integral part of civil society and should therefore mobilise the rest of civil society, which is usually at the forefront of the fight against any form of discrimination, to pay more attention to discrimination based on age. Youth organisations and other civil society organisations which have a constituted youth section should carry out advocacy work aimed at accentuating and addressing the problem of age discrimination, especially (though not exclusively) in the field of employment.

Trade Unions

Most trade unions across Europe seem to have embarked on membership campaigns targeted at young people. This is partly a response to the fact that young people in particular have little interest in joining a union (although they may well change their minds as they grow older). Such campaigns have registered varied levels of success but the fact that unions are seeking to recruit young people is indeed a positive thing. This should hopefully mean that issues relating to young workers, including age discrimination, will emerge more clearly in trade union agendas and that young people will have the backing of movements

which have traditionally been very powerful in fighting workplace discrimination on other grounds. The need is felt for greater sensitivity from trade unions' administrations, which should ideally include young people too.

Structures

The functioning of adequate structures to address age discrimination largely depends on the legal definition of discrimination and the inclusion of age in such definitions. Structures such as industrial tribunals, the ombudsman, and the law courts themselves would be in a better position to pass judgement on cases of age discrimination should this be explicitly provided for in the law. Moreover, what needs better legal definition also requires structures within an institutional set-up to deal with it. As has already been pointed out, other areas of discrimination such as gender and disability have already been taken up by means of legislation and institutions. The Equality between Men and Women Act provided for the setting up of the National Commission for the Promotion of Equality for Men and Women. Likewise, the Equal Opportunities (Persons with Disability Act) provided for the setting up of the National Commission Persons with Disability. In order to address discrimination based on age or any other grounds, one need not necessarily pass a new law or create a completely different structure. One might instead consider the extension of existing instruments and structures by including age and other forms of discrimination within their remit. Another possibility is that of including within the existing institutional framework, or creating as a separate entity, an equality office or commission with the authority to provide a more effective level of protection to people who are subject to discrimination on the grounds of age, sexual orientation, religion or belief and so on. Such entities should also be given the possibility to engage in proceedings either on behalf or in support of any victim of discrimination according to the prescribed procedure before adjudicating bodies, including administrative tribunals and the law courts. The law should provide for the setting up (or the extension) of an entity or authority that should actively promote equality of opportunity between persons of different ages.