

## Prohibition of Age Discrimination in the Labour Market – Case Study of Finland in the Context of European Union

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**Abstract:** *This Article analyses the case of Finland in the context of European Union from the perspectives of general non-discrimination law and labour law, and the functioning of legal anti-discriminatory provisions from the sociological point of view. It is maintained that age anti-discriminatory provisions in general and specific (labour-law-related) legislation, in collective agreements and soft law documents as labour-law-related instruments compose an extensive background for preventing age discrimination in employment in Finland. It is asserted that the existence of age anti-discriminatory provisions interacts with the objective to ensure longer working careers and aims at improving the chances of the elderly to stay in employment after reaching retirement age.*

**Key words:** *retirement age, age discrimination, compulsory retirement, European Union, Finland, labour market*

**Prepoved diskriminacije na podlagi starosti na trgu dela – primer Finske v luči prava EU**

**Povzetek:** *Prispevek analizira finski primer v luči prava evropske unije z vidika splošne protidiskriminacijske in delovne zakonodaje in delovanje protidiskriminacijskih zakonskih določb iz sociološkega vidika. Menimo, da protidiskriminacijske določbe v splošni in posebni (delovnopравни) zakonodaji, v kolektivnih pogodbah in dokumentih mehkega prava kot elementi delovnega prava predstavljajo široko podlago za preprečevanje starostne diskriminacije pri zaposlovanju na Finskem. Obstoj protidiskriminacijske zakonodaje ima za cilj, da se zagotovi podaljšanje delovne*

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*kariere z izboljšanjem možnosti za starejše, da ostanejo zaposleni tudi potem, ko so že dosegli zahtevano upokojitveno starost.*

**Ključne besede:** *upokojitvena starost, diskriminacija na podlagi starosti, obvezna upokojitev, Evropska Unija, Finska*

## 1. INTRODUCTION

The number of people facing problems in seeking employment because of old age is growing in the European Union, age thus becoming one of the most important reasons for discrimination in the labour market<sup>1</sup>. Therefore, the participation of the elderly in the labour market and their right not to be discriminated when entering and remaining in employment has become of significant importance<sup>2</sup>. This issue is of particular relevance for Finland facing the growing number of aged people in its population.

After the pension reform of 2005 introducing flexibility to retire between the ages of 63 and 68<sup>3</sup>, Finns have a possibility to postpone their retirement and even continue working after the age of 68 on certain conditions. Thereby aged Finns are encouraged to stay employed for a long period of time. For this reason their right not to be discriminated due to old age when entering and remaining in the labour market – having good access to employment, fair working conditions and lawful dismissal procedure – has become of significant importance.

Referring to two different age groups of employees – those between 63 and 68 years old, who can individually choose their age for retirement pursuant to the Employees Pensions Act<sup>4</sup> and those who have already reached the age of

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<sup>1</sup> Lynn Roseberry, Equal Rights and Discrimination Law in Scandinavia, in *Stability and Change in Nordic Labour Law*, 215 (Wahlgren ed., 2002). W. J. A. van den Heuvel, M. M. van Santvoor, Experienced discrimination amongst European old citizens, 8 *European Journal of Ageing* 8 (2011).

<sup>2</sup> Albert Evrard sj and Clemence. Lacour, *A European Approach to Developing the Field of Law and Ageing, in Beyond Elder Law – New Directions in Law and Ageing*, 164 (Doron and Soden eds., 2012).

<sup>3</sup> Hannu Piekkola, Active Ageing Policies in Finland, 898 *The Research Institute of the Finnish Economy (ETLA) Discussion Papers* 38 (2004); Raija Gould, Choice or Chance – Late Retirement in Finland, 5 *Social Policy and Society* 519 (2006).

<sup>4</sup> Employees Pensions Act of Finland, No. 395/2006 (with amendments up to 1097/2008), Section 11 of Chapter 3.

68 and who can still continue working under certain conditions pursuant to the Employment Contracts Act<sup>5</sup> (these two groups of Finnish employees will be further referred to as *aged employees* or *the elderly*) – this Article analyses age discrimination of the elderly in the Finnish labour market with the objective to identify and scrutinize national provisions relevant for prohibition of age discrimination of aged employees. Since age discrimination is considered as a multifaceted problem, this research is aimed at answering the research question whether Finnish national anti-discriminatory legislation ensures an appropriate protection of aged employees in the labour market, how that affects their possibility to stay in employment after reaching retirement age, and whether, as a result, Finland can be regarded as a model to other Member States of the European Union facing problems in employment of aged people.

By combining the method of legal research with the method of sociological research three important aspects are examined in this Article. Firstly, prohibition of age discrimination in general non-discrimination legislation from a legal point of view. Secondly, prohibition of age discrimination specifically in labour law from a legal point of view. Thirdly, the practical effect of age anti-discriminatory legislation in the Finnish labour market, taken from sociological point of view. The research of these three different aspects is essential. On the one hand, the method of legal research is helpful to examine not only the content of general non-discrimination law as the basis for the prohibition of age discrimination in labour law, but also the prohibition of age discrimination in labour law regulating employment relationships between employers and employees, which interacts with the general perception of age discrimination. On the other hand, the method of sociological research aims to scrutinize reasons related to discrimination of aged employees in the Finnish labour market. This method similarly helps to conclude whether national legislative background ensuring the prohibition of age discrimination is effective and whether the elderly are encouraged to continue working. The concurrent use of both methods will help to finally decide whether Finland offers a good legal model for prohibiting age discrimination within the context of the European Union and what could be done in order to evade the discrimination of aged part of the population in employment.

This Article is based on the analysis of Finnish anti-discriminatory legislation, the most important being the Non-Discrimination Act<sup>6</sup> and the Employment Contracts

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<sup>5</sup> Employment Contracts Act of Finland, No. 55/2001 (with amendments up to 398/2013).

<sup>6</sup> Non-Discrimination Act of Finland, No. 2014/1325.

Act. Furthermore, particular pertinent aspects of the Employees Pensions Act, the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (hereinafter referred to as the *Employment Equality Directive*)<sup>7</sup> and judgments of the Court of Justice of the European Union (hereinafter referred to as the *CJEU*) interpreting the Employment Equality Directive are examined, as it is essential to evaluate the effects of the transposition of this EU legal act to Finnish national law. Legal doctrine helps to critically evaluate the abovementioned legislation and CJEU's judgments. Selected collective agreements and *soft law* documents as labour-law-related instruments, containing relevant age-related anti-discriminatory provisions are also of relevance.

Because of the language reason, this research is mostly based on sources in English rather than Finnish.

## 2. AGE AND GENERAL NON-DISCRIMINATION LAW IN FINLAND

Finland has different layers of legal acts comprising age anti-discriminatory provisions. Some of them are of general application, others deal with different age anti-discriminatory provisions in employment only. Age discrimination is primarily prohibited by Section 6 of the Constitution of Finland<sup>8</sup>, stating that “no one, without an acceptable reason, shall be treated differently from other persons on the ground of sex, *age*, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person”<sup>9</sup>. Age being mentioned at the second place after sex implies that the prohibition of age discrimination is of significant importance for the Finnish legislator and thus forms the expression of the “constitutional principle of equality of all citizens”<sup>10</sup> notwithstanding their age.

Another important piece of anti-discriminatory legislation, which regulates the prohibition of age discrimination in Finland, is the Non-Discrimination Act.

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<sup>7</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. *Official Journal* L 303, 02/12/2000 P. 16–22

<sup>8</sup> Constitution of Finland of 11 June 1999, No. 731/1999 (with amendments up to 1112/2011), Section 6.

<sup>9</sup> *Id.*

<sup>10</sup> Evrard and Lacour (note 2) 164.

This legal document was enacted in 2004 in order to implement *inter alia* the Employment Equality Directive<sup>11</sup> and can be regarded as “the core national document prohibiting discrimination”<sup>12</sup>. In order to promote equality at a higher level, the new Finnish Non-Discrimination Act entered into force on 1 January 2015<sup>13</sup> for the first time covering all private and public activities thus being not limited to employment relationships<sup>14</sup>. This new law has not changed main principles of the preceding Non-Discrimination Law. However, it has amended some provisions and introduced new legal norms aiming at a better protection of employees, including the elderly, in employment in Finland.

The Non-Discrimination Act foremost establishes a general principle formulated in the same way as in the Constitution of Finland that no one can be discriminated on the basis of “personal characteristics” (their list is non-exhaustive)<sup>15</sup>, including age. The Non-Discrimination Act likewise defines direct and indirect discrimination, instructions to discriminate, and harassment having the same meaning as required by the Employment Equality Directive<sup>16</sup>. Furthermore, very extensive duties of employers to promote equality have been described: the employer must assess how equality should be realized in the workplace, in particular taking into account working conditions, the selection of personnel; employers should secure effective, appropriate and proportionate working environment. Finnish employers hiring 30 and more employees have a special additional duty – they are responsible for drawing an equality plan promoting equality and further discussing this plan with their employees or their representatives<sup>17</sup>. Discriminatory work advertisements are also prohibited

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<sup>11</sup> Kevät Nousiainen, Age Discrimination and Labour Law in Finland: Legal Treatment of Younger and Older Workers in Ageing Society, in Age Discrimination and Labour Law. Comparative and Conceptual Perspectives in the EU and Beyond, 173 (Numhauser-Henning and Rönmar eds., 2015).

<sup>12</sup> L. Larja, J. Warius, L. Sundbäck, K. Liebkind, I. Kandolin, I. Jasinskaja-Lahti, Discrimination in the Finnish Labor Market. An Overview and a Field Experiment on Recruitment, 16 Publications of the Ministry of Employment and the Economy of Finland 16 (2012).

<sup>13</sup> The New Non-Discrimination Act entered into force. Information from the website of the Ministry of Justice of Finland: <<http://www.oikeusministerio.fi/en/index/currentissues/tiedotteet/2014/12/uusiyhdenvertaisuuslakivoimaanensivuodenalusta.html>> (accessed on 29.05.2015).

<sup>14</sup> Non-Discrimination Act, Section 2 of Chapter 1.

<sup>15</sup> Nousiainen (note 11) 176–177.

<sup>16</sup> Non-Discrimination Act, Sections 8, 10, 13 and 14 of Chapter 3; Employment Equality Directive, Article 2 of Chapter I.

<sup>17</sup> Non-Discrimination Act, Section 7 of Chapter 2.

meaning that employers cannot unlawfully discriminate job applicants on the basis of their personal characteristics. In other words, age discrimination must be evaded in recruitment process already<sup>18</sup>. As a result, Finnish employers are bound by rather strict legal obligations for promoting equality. These legal rules are of relevance for aged employees wishing to postpone their retirement and stay active in the labour market. However, the Non-Discrimination Act is silent on employers' duty to foster equality at the end of the employment relationship, i.e. when terminating the employment contract. This is considered as the main drawback, as excluding termination of the employment relationship from the scope of equality promotion leaves more opportunities for discriminating the elderly in the labour market. Thus pursuant to the Non-Discrimination Act, the legal protection against age discrimination is more aimed at the prohibition of age discrimination in recruitment and while already employed.

Justification of discrimination in employment due to old age deserves a particular attention in this context. Pursuant to the Non-Discrimination Act, *discrimination based on age* is justified if the different treatment is objective and appropriate and if there is a legitimate aim related to employment policy or labour market or if the different treatment concerns age limits for retirement<sup>19</sup>. The latter provision of the Non-Discrimination Act mirrors the so called 'exception clause' of Article 6(1) of the Employment Equality Directive entitling the justification of age discrimination on the basis of the legitimate aim, including employment policy, labour market, vocational training, if the means of achieving this aim are appropriate and necessary (proportional)<sup>20</sup>. This provision forms a central issue in age discrimination cases dealt with in the CJEU<sup>21</sup> showing that in fact every employment or labour market measure used by a Member State can be justified and hence regarded as anti-discriminatory<sup>22</sup>. The abovementioned possibility to justify age discrimination according to the Non-Discrimination Act makes clear that Finland has adopted a broad concept offered by Article 6(1)

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<sup>18</sup> Id., Section 17 of Chapter 3.

<sup>19</sup> Non-Discrimination Act, Section 12 of Chapter 3.

<sup>20</sup> Employment Equality Directive, Article 6(1).

<sup>21</sup> Helen Meenan, Age Discrimination and the Future Development of Elder Rights in the European Union: Waking Side by Side or Hand in Hand, in *Beyond Elder Law – New Directions in Law and Ageing*, 90 (Doron and Soden eds., 2012).

<sup>22</sup> Frank Hendrickx, Age and European Employment Discrimination Law, in *Active Ageing and Labour Law*, 9–10 (Hendrickx ed., 2012); Ann Numhauser-Henning, The EU Ban on Age-Discrimination and Older Workers: Potentials and Pitfalls, 29 *International Journal of Comparative Law and Industrial Relations* 403 (2013).

of the Employment Equality Directive defining measures, which can justify age discrimination<sup>23</sup>. In that way Finland possesses a wide margin of discretion when deciding, which particular measures can justify the discrimination of the elderly in the labour market. Compulsory retirement age is a very commonly used justification, which because of its importance will be separately analyzed in this Article.

One more issue relevant for evasion of discrimination of the elderly in the labour market in Finland is a mechanism of supervisory institutions dealing with discrimination cases. The new Non-Discrimination Act has adjusted this mechanism. However, the number of supervisory institutions – the Non-Discrimination Ombudsman, the Discrimination and Equality Tribunal and occupational safety and health authorities<sup>24</sup> – does not always help to delineate their competence.

From the perspective of discrimination including discrimination based on age, the Non-Discrimination Act specifies that main institutions responsible for compliance with equality in employment regarding recruitment, working conditions and dismissal will continue to be occupational safety and health authorities<sup>25</sup>. Six regional state administrative authorities cooperate with local occupational safety and health authorities in Finland<sup>26</sup>. Decisions of occupational safety and health authorities are not final and can be appealed against to Finnish administrative courts<sup>27</sup>.

Pursuant to the Non-Discrimination Act, occupational health and safety authorities can ask the Discrimination and Equality Tribunal to issue an opinion on the interpretation and application of law<sup>28</sup>. Moreover, the Discrimination and Equality Tribunal reinforces reconciliation between the parties and can confirm

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<sup>23</sup> Employment Equality Directive, Article 6(1).

<sup>24</sup> Non-Discrimination Act, Sections 18–22 of Chapter 4.

<sup>25</sup> Information from the website of the Ministry of Justice of Finland: <<http://www.oikeusministerio.fi/en/index/currentissues/tiedotteet/2014/12/uusiyhdenvertaisuuslakivoimaanensivuodenalusta.html>> (accessed on 26.05.2015); Non-Discrimination Act, Paragraph 22 of Chapter 4.

<sup>26</sup> Information from the website of Regional State Administrative Agencies: <[http://www.avi.fi/en/web/avi-en/#.VX7W\\_U0w-70](http://www.avi.fi/en/web/avi-en/#.VX7W_U0w-70)> (accessed on 29.05.2015).

<sup>27</sup> Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces, No. 44/2006 (with amendments up to 701/2006), Section 44 of Chapter 6.

<sup>28</sup> Non-Discrimination Act, Section 22 of Chapter 4.

a reconciliation settlement, which must be enforced as a judgment<sup>29</sup>. The Non-Discrimination Ombudsman supervises compliance with Non-Discrimination Act regarding all grounds of discrimination, including age<sup>30</sup> and assists victims of discrimination in submitting their complaints, gives recommendations to prevent discrimination and promote equality, takes measures of reconciliation<sup>31</sup>, gives opinion in courts<sup>32</sup>.

There is a discussion if the existing system of supervision of discrimination in employment by occupational safety and health authorities is adequate. The main argument is that these institutions are not independent and have a too wide competence limited to not only dealing with discrimination in the labour market<sup>33</sup>. In addition, due to the fact that different institutions handle different equality issues, the process of handling complaints can be complicated in intersectional discrimination cases<sup>34</sup>. It can be considered that, on the one hand, occupational health and safety authorities have a wide competence comprising not only discrimination in the labour market but also compliance of a variety of occupational safety and health issues in accordance with the Act on Occupational Safety and Health Enforcement<sup>35</sup>. Moreover, these institutions do not have the same independence as that enjoyed by courts and operate under the Ministry of Social Affairs and Health<sup>36</sup>. On the other hand, occupational safety and health authorities have a lot of regional bodies and thus are easier accessible and less expensive than litigation in courts. That is undoubtedly helpful to victims of age discrimination to lodge their complaints. Hence the most effective way of solving intersectional discrimination in employment cases is the clearer attribution of all such complaints to occupational health and safety authorities, which possess enough material resources, personnel and regional units. This way of complaints settling will help the victims of intersectional discrimination cases, involving different discrimination grounds (including old age), to better enforce their rights and will assist in evading the confusing choice of competent authorities.

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<sup>29</sup> Id., Section 20 of Chapter 20.

<sup>30</sup> Information from the website of the Ministry of Justice of Finland (note 25).

<sup>31</sup> Non-Discrimination Act, Section 19 of Chapter 4.

<sup>32</sup> Id., Section 27 of Chapter 6.

<sup>33</sup> Nousiainen (note 11) 179.

<sup>34</sup> News report of the European network of legal experts in gender equality and non-discrimination: < [http://www.non-discrimination.net/content/media/3-FI-GE-Gender\\_legislation.pdf](http://www.non-discrimination.net/content/media/3-FI-GE-Gender_legislation.pdf) > (accessed on 01.06.2015) 2.

<sup>35</sup> Act on Occupational Safety and Health Enforcement.

<sup>36</sup> Id., Section 2 of Chapter 1.



The Non-Discrimination Act authorizes a proportional compensation from the employer<sup>37</sup> and does not preclude the compensation in damages in accordance to civil law or other labour law remedies pursuant to the Employment Contracts Act being dealt with in general courts<sup>38</sup>. In addition, discriminatory practices, including discrimination because of old age, can similarly form a basis for criminal sanctions pursuant to the Criminal Code of Finland<sup>39</sup>. Hence the employer can be sentenced to fine or imprisonment for six months if he discriminates the job applicant in recruitment process or if he treats his employee differently due to his old age<sup>40</sup>. As a result, the breach of the employer's duty to treat his aged employees equally can lead not only to application of specific compensatory remedies pursuant to the Non-Discrimination Act, but also to criminal sanctions. Therefore, the prohibition of age discrimination is taken seriously in Finland and the breach of this important principle is subject to a mechanism of different legal remedies, what has an objective to discourage Finnish employers from discriminating their aged employees.

In summary, general Finnish anti-discriminatory legislation forms an extensive background for preventing age discrimination in employment. Starting from the main constitutional principle of equality notwithstanding old age, the Non-Discrimination Act is the most comprehensive legal statute having the broadest scope of applicable age anti-discriminatory provisions. From the perspective of the duty of employers to promote equality of their aged employees at work, the Non-Discrimination Act is particularly aimed at encouraging them to stay longer in the labour market and increasing their possibilities in employment after reaching retirement age. The Non-Discrimination Act, however, lacks a better protection of aged employees when terminating their employment contracts. Hence this stage of employment relationship is left more vulnerable.

Finland has chosen the possibility offered by the Employment Equality Directive to justify age discrimination by different legitimate objectives, such as employment policy, labour market or which are related to the fixing of certain retirement age. These objectives are formulated in a very general way and their list is non-exhaustive. Hence Finland possesses a wide margin of discretion when deciding which particular measures can justify the discrimination of the

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<sup>37</sup> Non-Discrimination Act, Sections 23 and 24 of Chapter 5.

<sup>38</sup> Nousiainen (note 11) 178–179, 181.

<sup>39</sup> Criminal Code of Finland, No. 39/1889 (with amendments up to 927/2012).

<sup>40</sup> *Id.*, Section 3 of Chapter 47.

elderly in employment, what, as a consequence, can hinder their right to further continue working.

The supervision of compliance with the Non-Discrimination Act in employment relationships by occupational safety and health authorities starts from the presumption that these public institutions possess enough material resources, personnel and regional units, are easier accessible and much less expensive than litigation in courts. Therefore, occupational safety and health authorities can effectively and inexpensively deal with complaints lodged by aged employees for being discriminated due to their old age. In addition, the most effective way of solving intersectional discrimination<sup>41</sup> in employment cases is a clearer attribution of such complaints to occupational health and safety authorities. This way of complaints settling will help the elderly discriminated on the basis of different grounds to better enforce their rights in the Finnish labour market.

Since the prohibition of age discrimination is an important constitutional principle, the breach of the employer's duty to treat his aged employees equally leads not only to the application of legal redress pursuant to the Non-Discrimination Act, but also to criminal sanctions in accordance with the Criminal Code. Hence the existence of these remedies as a whole has an incentive of discouraging Finnish employers from discriminating their aged employees.

### 3. AGE DISCRIMINATION AND LABOUR LAW IN FINLAND

Finnish employers have a duty to treat their employees equally since the 1970s<sup>42</sup>. However, the prohibition of age discrimination in labour law was firstly introduced in 2001 in Finland. Even though this piece of legislation, namely the Employment Contracts Act, is not as exhaustive as laws prohibiting gender discrimination<sup>43</sup>, this legal document is relevant for research purposes. In addition, particular provisions of selected Finnish collective agreements and *soft law* documents as labour-law-related instruments containing relevant anti-discriminatory provisions will be examined.

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<sup>41</sup> This is a situation when an employee is discriminated on the basis of different grounds or personal characteristics.

<sup>42</sup> Nousiainen (note 11) 180.

<sup>43</sup> Roseberry (note 1) 245.

### 3.1. Prohibition of Age Discrimination in Labour Law

The main legal statute explicitly forbidding age discrimination in the Finnish labour market is the Employment Contracts Act. The Employment Contracts Act is a *lex specialis* in relation to Non-Discrimination Act as the former is applicable to employment contracts between employers and employees in the private sector<sup>44</sup>. However, both laws are closely interrelated as many fundamental provisions forbidding age discrimination come from the Non-Discrimination Act, to which the Employment Contracts Act either gives a reference or repeats some of its provisions<sup>45</sup>. As an example can be mentioned the legal provision of the Employment Contracts Act obliging every employer to not exert any unjustified age discrimination against his employees on the basis of the Non-Discrimination Act<sup>46</sup> or the delegation of supervision of the Employment Contracts Act, including discrimination due to old age, to occupational safety and health authorities<sup>47</sup>.

It is important to ensure that aged employees are not discriminated and are treated equally while employed in all stages of employment process, i.e. when being recruited, employed, receiving training, promotion, other career advancement possibilities and proper remuneration for work, and finally being dismissed. The Employment Contracts Act is applicable to recruitment of employees and prohibits age discrimination in recruitment process already. However, the Non-Discrimination Act is much more extensive from this perspective. On the one hand, the Employment Contracts Act is founded on the basic principle of the Non-Discrimination Act prohibiting age discrimination in job advertisements<sup>48</sup> and selecting personnel, the latter obligation being part of the equality plan to be drawn by every Finnish employer<sup>49</sup>. On the other hand, the Employment Contracts Act autonomously specifies that employers have a duty to respect the principle of non-discrimination when recruiting their employees<sup>50</sup>.

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<sup>44</sup> Employment Contracts Act, Section 1 of Chapter 1.

<sup>45</sup> Id., Section 2 of Chapter 2.

<sup>46</sup> Employment Contracts Act, Section 2 of Chapter 2; compare with Section 8 of Chapter 3 of Non-Discrimination Act.

<sup>47</sup> Employment Contracts Act, Section 12 of Chapter 13; compare with Section 22 of Chapter 4 of Non-Discrimination Act.

<sup>48</sup> Non-Discrimination Act, Section 17 of Chapter 3.

<sup>49</sup> Id., Section 7 of Chapter 2.

<sup>50</sup> Employment Contracts Act, Section 2.

The Employment Contracts Act is more extensive regarding prohibition of age discrimination while already employed. Based on the Non-Discrimination Act obliging all employers to promote equality – to prepare an equality plan aiming to evaluate equality in the workplace regarding working conditions as such and to secure appropriate working environment<sup>51</sup> – the Employment Contracts Act stipulates that employers have an obligation to not discriminate their employees on the basis of their age. Employers are also responsible for improving relations with their employees and relations between employees themselves ensuring that employees have a possibility for development at work and advance in their careers<sup>52</sup>. In addition, employers must provide information on principal terms of work to their employees<sup>53</sup>.

Relevant provisions of collective agreements forming an important part of the Finnish labour law and playing a significant role in practice<sup>54</sup> are also designed to cope with age discrimination at work. Collective agreements introduce special measures aiming to ensure that employers discuss with their employees possibilities to help them better cope at work. These are measures designed not only for employees between the ages of 63 and 68 or older ones. Such measures are aimed at employees already attaining 58 years and include promotion of health and working capacity, introducing career planning and career schemes, arranging a better working time and maintaining working capacity by modifying the duties of older employees and organizing their working time schedules, developing skills and expertise<sup>55</sup>. To put differently, collective agreements

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<sup>51</sup> Non-Discrimination Act, Section 7 of Chapter 2.

<sup>52</sup> Employment Contracts Act, Sections 1 and 2 of Chapter 2.

<sup>53</sup> Id., Sections 3 and 4 of Chapter 2.

<sup>54</sup> Niklas Bruun and Jonas Malmberg, *The Evolution of Labour Law in Denmark, Finland and Sweden 1992–2003*, in *The Evolution of Labour Law (1992–2003)*, 14–15 (2 National Reports, 2004).

<sup>55</sup> Collective agreement for IT services sector: <<http://www2.teknologiateollisuus.fi/en/labour-market/collective-agreements.html>> (accessed on 25.05.2015), Paragraph 3; Collective agreement for metalworkers:

<[http://www.metalliliitto.fi/documents/10137/13003/Collective\\_Agreement\\_2013-2016.pdf/2893add3-dd1d-4eb3-bc3c-9e06b0456282](http://www.metalliliitto.fi/documents/10137/13003/Collective_Agreement_2013-2016.pdf/2893add3-dd1d-4eb3-bc3c-9e06b0456282)> (accessed on 25.05.2015), Paragraphs 2.1 and 31.1.10; Collective agreement for senior salaried employees: [http://webcache.googleusercontent.com/search?q=cache:WRTy834G6psJ:www2.teknologiateollisuus.fi/file/17227/CA\\_YTN\\_2013-2016\\_12022014\\_www.pdf.html+&cd=1&hl=it&ct=clnk&gl=de](http://webcache.googleusercontent.com/search?q=cache:WRTy834G6psJ:www2.teknologiateollisuus.fi/file/17227/CA_YTN_2013-2016_12022014_www.pdf.html+&cd=1&hl=it&ct=clnk&gl=de)> (accessed on 25.05.2015); Collective agreements for blue collar employees, 2013–2016:

<[http://teknologiateollisuus.fi/sites/default/files/file\\_attachments/collectiveagreementsforbluecollaremployees2013-2016.pdf](http://teknologiateollisuus.fi/sites/default/files/file_attachments/collectiveagreementsforbluecollaremployees2013-2016.pdf)> (accessed on 25.05.2015).

represent the duty of employers to consider the process of ageing of their employees before they reach the lowest flexible retirement age of 63 years in accordance with the Employees Pensions Act. That means that individual capacities of every single older employee are examined, so that his productivity is increased and that he is not forced to leave the labour market. As a result, Finnish collective agreements indirectly promote equality by aiming to make the situation of aged employees better by not only promoting their continuation in employment, but also seeking to eradicate discrimination in the labour market.

*Soft law* documents as labour-law-related instruments can likewise be helpful for coping with age discrimination of the elderly in the Finnish labour market. The Finnish Centre for Occupational Safety has prepared a Guide on longer careers with the job life cycle model – guide to designing an age plan (hereinafter referred to as *the Guide on longer careers*)<sup>56</sup>. This important document was the outcome of the frame agreement of 13 October 2011 of employers and trade unions on a joint age plan model for industry, municipalities and government agencies and the agreement of the extension of work careers concluded on 22 March 2012 by labour market confederations<sup>57</sup>. Both agreements emphasized the creation of the common model for age plans, stressing the importance of flexible working hours, health check programs and training activities for older employees. Moreover, these agreements underlined that after the employee reaches the age of 58 years, he takes part in the career extension program designed to lead to personal progress at work<sup>58</sup>.

In more detail, the Guide on longer careers encourages Finnish employers to implement an age plan, which enables to enhance occupational well-being and declares the objective to eradicate discrimination of older employees<sup>59</sup>. Therefore, each Finnish employer carries his responsibility for the well-being of his aged employees, in particular regarding their education, skills necessary

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<sup>56</sup> B. Andersson, K. Haggren, K. Haring, P. Lantolla, O. Marttila, J. Schugk, R. Työläljärvi. Longer careers with the job life cycle model – guide to designing an age plan. Prepared by the Finnish Centre for Occupational Safety: < [http://www.ttk.fi/files/3751/Job\\_Life\\_Cycle\\_Model\\_in\\_English.pdf](http://www.ttk.fi/files/3751/Job_Life_Cycle_Model_in_English.pdf) > (accessed on 21.05.2015).

<sup>57</sup> Id., 5.

<sup>58</sup> Guide on Longer Careers (note 56) 40.

<sup>59</sup> Id.

for fulfilling their duties at work<sup>60</sup> and individual career planning<sup>61</sup>. The group of employees, who attain 55–58 years, attracts special attention as employers should create additional measures to enhance the occupation well-being of such employees<sup>62</sup>. This is very much evident from age plans examples of different Finnish organizations (companies) attached to the Guide on longer careers. These age plans justify that employees who attain 55 years require special attention regarding their health, career plans, work ability, extra days off and that there is an interest to ensure that the occupational well-being of such older employees is promoted<sup>63</sup>.

The abovementioned leads to a conclusion that occupational well-being of aged Finnish employees has become of exceptional relevance for their employers. Even though the Guide on longer careers is not that extensive concerning the discrimination of the elderly and concerns mostly the improvement of the chances of the aged employees to postpone their retirement, it can be maintained that this objective is very much related to the prohibition of age discrimination in the labour market. This proposition is supported by the fact that the better working conditions aged employees have, the less possibilities for their discrimination in employment are created. Moreover, when divergent interests of different employees groups are taken into account, their chances in employment are improved and, as a result, age discrimination can be eradicated.

Prohibition of age discrimination in the context of termination of employment contracts is of significant importance. Even though a big number of legal provisions of the Employment Contracts Act regulate grounds for terminating employment contracts, procedure of termination and liability in damages for groundless termination of the employment contract, the Employment Contracts Act does not expressly indicate whether the prohibition of age discrimination is to be respected in this case.

Pursuant to the Employment Contracts Act, the employer cannot terminate the employment contract without a weighty reason<sup>64</sup> with the exception of specific rules applicable to fixed-term employment contracts<sup>65</sup>. By instituting the

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<sup>60</sup> Bruun and Malmberg (note 54) 23–24.

<sup>61</sup> Guide on longer careers (note 56) 5.

<sup>62</sup> *Id.*, 32–37.

<sup>63</sup> *Id.*

<sup>64</sup> Employment Contracts Act, Section 1 of Chapter 7.

<sup>65</sup> *Id.*, Section 1 of Chapter 6.

employer's duty for compensation of illegal termination of employment contract "contrary to the grounds laid down in this Act"<sup>66</sup>, the Employment Contracts Act indirectly gives reference to the main employer's obligation to treat his employees equally, including due to their age<sup>67</sup>. Hence old age cannot form a proper ground for terminating employment contracts<sup>68</sup> and employers must be liable in damages for unlawful termination of employment contracts with their aged employees<sup>69</sup>. The Employment Contracts Act also contains a specific rule related to the exclusion of the applicability of non-discrimination principle when terminating employment contracts with employees of 68 years of age<sup>70</sup>. This provision establishing compulsory retirement rule attracts a special attention and will be separately analyzed in the next Chapter of this Article.

Since any agreements between employers and employees, which reduce employees' rights and benefits, are invalid<sup>71</sup>, every employer having infringed his obligations stemming from the employment relationship is liable in damages<sup>72</sup>. This legal norm of the Employment Contracts Act is essential for the basic right of the elderly to be treated equally and their right to receive compensation for being discriminated due to their old age in the labour market. How the previous research has shown, remedies under the Non-Discrimination Act and the Criminal Code are similarly possible. Therefore, the existence of the plenitude of legal remedies for the breach of the prohibition of age discrimination constitutes an important means for dealing with age discrimination of aged employees and is aimed at guaranteeing that this important constitutional principle is taken seriously in the Finnish labour market.

Summing up, from the perspective of prohibition of age discrimination in specific labour law legislation, the Finnish Employment Contracts Act for the most part reiterates age anti-discriminatory provisions of the Non-Discrimination Act and does not go much beyond this statute. Even though the Employment Contracts Act does not mention the principle of non-discrimination because of old age when terminating the employment contract, a context-related, systematic

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<sup>66</sup> Id., Section 2 of Chapter 12

<sup>67</sup> Id.

<sup>68</sup> Termination of employment relationships, Legal situation in the Member States of the European Union. The synthesis report of the European Commission (2006) 49.

<sup>69</sup> Employment Contracts Act, Section 2 of Chapter 12.

<sup>70</sup> Employment Contracts Act, Section 1a of Chapter 6.

<sup>71</sup> Id., Section 6 of Chapter 13.

<sup>72</sup> Id., Section 1 of Chapter 12.

interpretation of this law indicates that age cannot form a lawful basis for the termination of the employment relationship. Thus specific labour law provisions ensure that age discrimination is prohibited in the whole employment process and that Finnish employers have to respect this essential constitutional principle in their everyday activities. The mechanism of legal redress in accordance with the Employment Contracts Act forms an important means of dealing with age discrimination in employment, complements legal remedies pursuant to the Non-Discrimination Act and criminal sanctions according to the Criminal Code and in such a way completes an extensive remedial field for coping with age discrimination in the labour market. Relevant provisions of collective agreements and *soft law* documents are also designed to cope with age discrimination at work, what makes them labour-law-related instruments aiming at eradicating the discrimination of aged employees in Finland.

### 3.2. Age Discrimination and Compulsory Retirement

The previous research has shown that old age cannot be considered as a lawful ground for terminating the employment contract. However, a specific rule is applicable to aged employees of 68 years. Pursuant to the Employment Contracts Act, when the aged employee becomes 68 years of age, his employment contract ends automatically (unless both the employer and the employee agree to continue the employment relationship on the basis of the fixed-term employment contract)<sup>73</sup>. In the latter case the employment relationship is terminated without a notice what makes exception from a general rule. Since legal rules regulating the termination of employment contracts form an essential part of employment protection in the Finnish labour market<sup>74</sup>, it can be regarded that aged employees of 68 years lose their right to employment protection at a certain level<sup>75</sup>. Nevertheless, it must be emphasized that every employee can voluntarily decide to retire before the age of 68. That means that on this occasion his employment contract is terminated only after the compulsory procedure of

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<sup>73</sup> Employment Contracts Act, Section 1a of Chapter 6.

<sup>74</sup> Bruun and Malmberg (note 54) 18.

<sup>75</sup> Ann Numhauser-Henning, Labour Law in a Greying Labour Market – in Need of a Reconceptualization of Work and Pension Norms. The Position of Older Workers in Labour Law, 4 European Labour Law Journal 93 (2013).



termination required by the Employment Contracts Act is being complied with<sup>76</sup>.

Two important interrelated questions can be raised in this context: whether the age of 68, as compulsory retirement age, does not constitute a limitation to continue working and unjustified age discrimination of the elderly; whether the automatic termination of the employment contract in such cases does not limit the possibility of aged employees to stay in the labour market in Finland and whether that does not contradict the aim to ensure that age discrimination is prohibited in the whole employment process. The constitutionality of the compulsory retirement provision of the Employment Contracts Act has never been tested by Finnish courts<sup>77</sup>. As a consequence, these issues must be assessed in light of the Employment Equality Directive and relevant jurisprudence of the CJEU.

Pursuant to the Employment Equality Directive, which has been implemented by the Non-Discrimination Act in Finland, Member States can introduce differences in treatment on the basis of age by “fixing of a maximum age for recruitment”<sup>78</sup> if it is “objectively and reasonably justified by a legitimate objective”<sup>79</sup>. The CJEU treats such national provisions of EU Member States as rules regulating compulsory retirement and assesses them from the perspective of age discrimination, which can be justified in light of the Employment Equality Directive<sup>80</sup>. The CJEU has not yet had the occasion to interpret the aforesaid legal rule of the Employment Equality Directive in the context of the Finnish Employment Contracts Act. Therefore, the CJEU's practice in similar cases concerning other EU Member States is of relevance.

It must be recalled that in *Palacios* the CJEU approved the system of compulsory retirement in general<sup>81</sup>. The CJEU decided that Spanish national legislation had a legitimate aim and that the compulsory retirement age of 65 years was justifiable in light of the public interest – “employment policy designed to improve opportunities for entering the labour market for certain categories of workers”<sup>82</sup> on the condition that the compulsory retirement system guarantees a reasonable

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<sup>76</sup> R. Hiltunen. Report on measures to combat discrimination (Directives 2000/43/EC and 2000/78/EC). Country Report 2012 Finland: <<http://www.non-discrimination.net/countries/finland>> (accessed on 21.05.2015) 77.

<sup>77</sup> Nousiainen (note 11) 175.

<sup>78</sup> Employment Equality Directive, Article 6(1).

<sup>79</sup> Id.

<sup>80</sup> Numhauser-Henning (note 75) 93; Numhauser-Henning (note 22) 403.

<sup>81</sup> Hendrickx (note 22) 14.

<sup>82</sup> Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531, paras. 62–65.

pension for a single employee at an individual level<sup>83</sup>. In *Rosenblatt* the CJEU ruled that particular provisions of the German collective agreement, providing that the employment contract automatically ends when the employee reaches 65 years, are justifiable within the context of national social and employment policy if they are appropriate and necessary<sup>84</sup>. However, the CJEU was no longer willing to accept the argument of reasonableness of the pension at an individual level<sup>85</sup>. In *Georgiev* the CJEU judged the Bulgarian compulsory retirement system obliging university professors to retire at the age of 68 to be in compliance with the Employment Equality Directive. This system was considered as appropriate and necessary for promoting the career of young university professors. The reasonableness of the pension was no longer considered by the CJEU as relevant<sup>86</sup>, but the CJEU established a link between personal abilities to continue working and the system of compulsory retirement<sup>87</sup>.

The CJEU's decision in *Hörnfeldt*<sup>88</sup> is most relevant in this context as this case is related to a very similar Swedish compulsory retirement rule. To recall, in *Hörnfeldt* the CJEU examined a Swedish rule, according to which an employee has a right to be employed until the age of 67. If the employer wishes, the employment contract is then terminated with such employee of 67 years of age<sup>89</sup>. By referring to its former decisions in *Rosenblatt* and *Georgiev* cases, the CJEU ruled that automatic termination system is widely used in many Member States of the EU and has a legitimate aim of encouraging the recruitment of young people in the labour market<sup>90</sup>. Moreover, the 67-year rule reduces obstacles for the elderly wishing to continue working and helps to increase the amount of their future pension. The rule of compulsory retirement also helps to avoid such situations when the termination of the employment contract is humiliating for aged workers and does not force them "to withdraw indefinitely from the labour market"<sup>91</sup>. This proposition is supported by the fact that employees of 67 years old can be offered a fixed-term employment contract by their employer<sup>92</sup>. As a result, the employer

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<sup>83</sup> Id., para 73; Numhauser-Henning (note 75) 93.

<sup>84</sup> Case C-45/09, *Rosenblatt* [2010] ECR I-09391, paras. 41, 51, 53.

<sup>85</sup> Id., paras 73–74.

<sup>86</sup> Cases C-250/09 and C-268/09, *Georgiev* [2010] ECR I-11869, paras 45, 51.

<sup>87</sup> Id., paras 41–42, 44–46.

<sup>88</sup> Case C-141/11 *Hörnfeldt* [2012] not yet reported.

<sup>89</sup> Id., paras 6–9.

<sup>90</sup> Id., paras 25, 28–29.

<sup>91</sup> Id., paras 33–34, 40, 42

<sup>92</sup> Id.

can derogate from the principle of non-discrimination because of age and thus terminate the employment contract on the ground that the employee reaches the age of 67<sup>93</sup>. The CJEU has similarly decided that in principle not only public interest but also the pension level (its reasonableness) of the private individual shall be taken into account<sup>94</sup>. In *Hörnfeldt*, however, the public interest prevailed and the abovementioned Swedish legal rule was consequently considered as compatible with the Employment Equality Directive<sup>95</sup>.

The argumentation of the CJEU in compulsory retirement cases, in particular regarding its justification, raises comments from legal scholars. It is argued that Member States' discretion is extremely wide in determining compulsory retirement rules<sup>96</sup>. In other words, every compulsory retirement system can in fact be justified in accordance with Article 6 of the Employment Equality Directive, as different traditions of various Member States prevail<sup>97</sup> and everything depends on the interpretation of each single Member State<sup>98</sup>. Notwithstanding the fact that the CJEU has a difficult duty to balance the right of younger workers to be employed with the right of ages employees to receive particular social security benefits<sup>99</sup>, the CJEU is currently more inclined to prioritize collective interests<sup>100</sup> rather than individual ones<sup>101</sup>. That creates contradiction with the EU policy of active ageing<sup>102</sup>.

The jurisprudence of the CJEU on the interpretation of Article 6(1) of the Employment Equality Directive and legal doctrine confirm that the provision of the Finnish Employment Contracts Act allowing employers to terminate the employment contract when the employee reaches the age of 68 establishes the rule of compulsory retirement, creating age discrimination. This age discrimination must be justified pursuant to relevant provisions of the Non-Discrimination Act,

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<sup>93</sup> *Id.*, para 40.

<sup>94</sup> *Hörnfeldt* (note 88), paras 36 and 38.

<sup>95</sup> *Id.*, paras 46–47.

<sup>96</sup> Monika Schlachter, Mandatory Retirement and Age Discrimination under EU law 27 *International Journal of Comparative Labour Law and Industrial Relations* 290 (2011).

<sup>97</sup> Numhauser-Henning (note 22) 408–409.

<sup>98</sup> Maria Do Rosario Palma Ramalho, Age Discrimination, Retirement Conditions and Specific Labour Arrangements: the Main Trends in the Application of Directive 2000/78/EC in the Field of Age Discrimination, in *Active Ageing and Labour Law*, 112 (Hendrickx ed., 2012).

<sup>99</sup> Hendrickx (note 22) 14, Numhauser-Henning (note 22) 406–407.

<sup>100</sup> For example, employment and social policy measures.

<sup>101</sup> Such as a right to a reasonable pension.

<sup>102</sup> Numhauser-Henning (note 22) 408.

which implemented Article 6(1) of the Employment Equality Directive.

It can be considered that this kind of age discrimination and, as a result, the automatic termination of the employment contract with the elderly can be justified as the means of achieving the legitimate objective, for example, employment policy, are proportional (appropriate and necessary). This proposition is supported by the fact that, firstly, Finnish national legislation is aimed at ensuring a reasonable level of the future pension and, secondly, a possibility to have a long working career is safeguarded.

Considering the reasonableness of the pension, the Employees Pensions Act establishes that all-life incomes are taken into account when calculating future pensionable earnings. Working Finnish pensioners can receive their pension and salary at the same time and in such a way increase their future incomes. Moreover, no waiting periods are needed and there is no limit for maximal earnings-related pension<sup>103</sup>. Finally, pension accrual from earnings at work for Finnish employees between the ages of 63 and 68 is much higher and comprises 4,5 per cent of annual earnings<sup>104</sup>.

Regarding the possibility to have a long working career, the Employees Pensions Act establishes flexible retirement age meaning that every employee can choose when to retire between the ages of 63 and 68<sup>105</sup>. After reaching the age of 63 employees can further continue working until they turn into 68 years, what means that every employee has a right to work until the age of 68. Even after attaining 68 years the Employment Contracts Act entitles Finnish employees to prolong their employment relationship in case they reach an agreement with their employer to continue working on the basis of the fixed-term employment contract. Hence retirement at the age of 68 is a late retirement safeguarding the right of the elderly to stay in the labour market for a long period of time and is thus aimed at prolonging their working careers.

In summary, particular provisions of the Employment Contracts Act introduce a rule of compulsory retirement at the age of 68 and consequently the automatic termination of the employment contract in the latter case. That can be regarded as inconsistent with the general objective to ensure that age discrimination should be prohibited in the whole employment process. However, this age

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<sup>103</sup> Employees Pensions Act, Sections 11, 12, 63, 64 and 70 of Chapter 3.

<sup>104</sup> Id., Section 64 of Chapter 4.

<sup>105</sup> Id., Section 11 of Chapter 3.

discriminatory rule can be justified as, interpreted together with relevant provisions of the Employees Pensions Act, it safeguards the right of the elderly to stay in the labour market for a long period of time and is aimed at guaranteeing a reasonable pension. Moreover, aged Finnish employees are not forced to indefinitely withdraw from the labour market with the age of 68. If they reach an agreement with their employer, they can further continue working on the basis of the fixed-term employment contract. As a result, the Finnish compulsory retirement rule is compatible with the constitutional principle of age equality and leaves discretion to both parties of the employment relationship to reach a compromise on the further continuation of employment.

#### **4. FUNCTIONING OF LEGAL ANTI-DISCRIMINATORY PROVISIONS IN PRACTICE – A SOCIOLOGICAL PERSPECTIVE**

This Chapter is aimed at examining whether the aforementioned provisions of the Finnish national legislation prohibiting age discrimination in different stages of employment are effective, so that the right of the elderly to stay longer in the labour market and postpone their retirement is safeguarded. Therefore, the legal analysis is supplemented by the method of sociological research disclosing the functionality of the Finnish anti-discriminatory legislation.

Only some sociological research related to discrimination of the elderly in the Finnish labour market is available, as most scientific studies concentrate on reasons encouraging / discouraging aged employees to stay in the labour market<sup>106</sup>. However, an interplay between those reasons, for example, experiencing good or bad working conditions and the attitude of employers towards their employees on the one hand and age discrimination in employment on the other hand, can be identified.

Age is regarded as one of the most common factors for discrimination in recruitment process meaning that old age can have harmful consequences for chances to find gainful employment<sup>107</sup>. Furthermore, Fins themselves

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<sup>106</sup> Pauli Forma, Eila Tuominen, Irma Väänänen-Tomppo, Who wants to continue at work? Finnish pension reform and the future plans of older workers, 7 *European Journal of Social Security* 3 (2005); Raija Gould, Choice or Chance – Late Retirement in Finland, 5 *Social Policy and Society* 4 (2006).

<sup>107</sup> Research project on discrimination in the Finnish Labor Market (note 12) 105.

acknowledge that old age can be disadvantageous and even severe when considering a possibility of finding a new working position after being unemployed for a certain period of time<sup>108</sup>. Even though employers deny discriminating the elderly in recruitment, younger workers are usually preferred<sup>109</sup>. In addition, old age is considered as an obstacle even for a renewal of fixed-term contracts or concluding employment contracts of permanent duration<sup>110</sup> thus creating the main problem of unemployment of the elderly. These findings imply that age discrimination in recruitment is often decisive and very much dependent on the negative attitude of Finnish employers towards aged job applicants. Aged Fins are, therefore, at a worse position when looking for a new employment.

There is a strong relationship between old age on the one hand and worse working conditions and negative attitude of employers towards older employees on the other hand. How different surveys of the Finnish Centre for Pensions have shown, working conditions is the main work-related reason for a decision to retire<sup>111</sup>, inasmuch as employees who are satisfied with their jobs are more inclined to retire later<sup>112</sup>. The research has showed that aged employees in Finland experience worse working conditions<sup>113</sup>, even though this kind of discrimination is decreasing<sup>114</sup>. Aged Fins perceive to be discriminated due to their old age by their colleagues and supervisors in different situations: when receiving benefits, information, training and work assignments, getting career advancement and salary<sup>115</sup>. In other words, worse working conditions, little autonomy, lack of support from employer's side and poor working cooperation makes it easier for aged employees to decide to leave the labour market<sup>116</sup>. Hence old age

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<sup>108</sup> Id., 113.

<sup>109</sup> Id., 41.

<sup>110</sup> Id., 41–42.

<sup>111</sup> The executive summary of the Report of the Finnish Centre for Pensions, Working conditions and retirement intentions 2013, No 08/2014:

<[http://www.etk.fi/fi/gateway/PTARGS\\_0\\_2712\\_459\\_440\\_3034\\_43/http%3B/content.etk.fi%3B7087/publishedcontent/publish/etkfi/fi/julkaisut/tutkimusjulkaisut/raportit/tyoolot\\_ja\\_elakeajatukset\\_2013\\_9.pdf](http://www.etk.fi/fi/gateway/PTARGS_0_2712_459_440_3034_43/http%3B/content.etk.fi%3B7087/publishedcontent/publish/etkfi/fi/julkaisut/tutkimusjulkaisut/raportit/tyoolot_ja_elakeajatukset_2013_9.pdf)>(accessed on 05.06.2015) 1.

<sup>112</sup> Forma, Tuominen and Väänänen-Tomppo (note 106) 230.

<sup>113</sup> Research project on discrimination in the Finnish Labor Market (note 12) 43, 48.

<sup>114</sup> Id., 114.

<sup>115</sup> Id., 47.

<sup>116</sup> The working paper of the Finnish Centre for Pensions, Flexible retirement age in Finland. The evaluation of the Finnish flexible retirement scheme in light of employer and employee surveys, No 03/2013:

<[http://www.etk.fi/fi/gateway/PTARGS\\_0\\_2712\\_459\\_440\\_3034\\_43/http%3B/content.etk](http://www.etk.fi/fi/gateway/PTARGS_0_2712_459_440_3034_43/http%3B/content.etk).

is a disadvantage when already employed and can be a hindrance of not only having better working conditions, but also staying in the labour market. This proposition is supported by the fact that experiencing age discrimination at work can encourage older employees to leave their jobs<sup>117</sup>. On the contrary, equal treatment, flexible working hours, opportunity to learn and be trained, possibility to get promoted at an older age, interesting tasks, well-functioning occupational healthcare, integrating staff policy, cooperation and support from employer's side<sup>118</sup> and matching the needs of the aged employees in general<sup>119</sup> can be an incentive to stay longer in the labour market. Therefore, the positive attitude of Finnish employers can be very helpful for the eradication of age discrimination in the labour market.

Regarding discrimination when terminating employment contracts, age discrimination is one of the most prevalent reasons for lodging complaints to occupational health and safety authorities. That means that Finnish employees often perceive to be discriminated when their employment contract is terminated<sup>120</sup> implying that old age is a disadvantage for continuing working and staying active in the labour market.

Summing up, the existence of certain provisions of the Non-Discrimination Act, the Employment Contracts Act, collective agreements and *soft law* documents as labour-law-related instruments, which both directly and indirectly outlaw age discrimination in employment, do not on all occasions help to ensure that aged Finnish employees are not differentiated because of their age. Discrimination in the recruitment process is decisive as it creates the main obstacle to enter into a new employment relationship and is very much dependent on the negative attitude of Finnish employers towards aged job applicants. After being employed aged Finnish employees similarly face the risk of having worse working conditions and being discriminated not only by their employers but also harassed by their colleague employees, receiving worse working conditions and

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fi%3B7087/publishedcontent/publish/etkfi/fi/julkaisut/tutkimusjulkaisut/keskustelualoitteet/flexible\_retirement\_age\_in\_finland\_the\_evaluation\_of\_the\_finnish\_flexible\_retirement\_scheme\_in\_light\_of\_employer\_and\_employee\_surveys\_7.pdf> (accessed on 05.06.2015) 20–21; Forma, Tuominen and Väänänen-Tomppo (note 107) 242.

<sup>117</sup> Nousiainen (note 11) 172.

<sup>118</sup> Forma, Tuominen and Väänänen-Tomppo (note 106) 230.

<sup>119</sup> Alysia Blackham, Rethinking Working Time to Support Older Workers, 31 International Journal of Comparative Labour Law and Industrial Relations 123 (2015).

<sup>120</sup> Research project on discrimination in the Finnish Labor Market (note 12) 47.

less remuneration for their work or finally being dismissed on the basis of their old age. Experiencing age discrimination at work can encourage older workers to leave employment thus depriving them of their right to continue working until the age of 68 and having an impact on their future pension level. As a result, it is of great relevance to not only ensure a positive attitude of employers and their employees towards their aged colleagues, but to also safeguard that elderly employees can continue working on the basis of good working conditions. That will undoubtedly increase the participation of the aged part of the population in the labour market in Finland.

## 5. CONCLUSIONS

Notwithstanding the fact that the Non-Discrimination Act lacks a more extensive protection of the elderly when terminating their employment contracts and that Finland possesses a wide margin of discretion when deciding which particular measures, formulated in a general way and providing a non-exhaustive list, can justify the discrimination of aged employees in the labour market, Finnish national legislation composes a comprehensive legal background for preventing age discrimination in employment and having an aim to ensure an appropriate protection of the elderly in the labour market. The existence of relevant age anti-discriminatory provisions interacts with the aim to ensure longer working careers and, as a result, with the postponement of retirement. Therefore, Finland can be considered as a model to other Member States of the EU facing problems in the employment of aged people for the following reasons:

5.1. From the perspective of general anti-discriminatory legislation, the Non-Discrimination Act has the broadest scope of applicable age anti-discriminatory provisions. This statute ensures a strong protection of aged employees against age discrimination while already employed, establishing most extensive obligations of Finnish employers to promote equality of their employees by assessing equality in the workplace and drawing an equality plan, what aims at encouraging the elderly to stay longer in the labour market and increasing their possibilities to be employed beyond retirement age. The functioning of the Non-Discrimination is supplemented by a supervisory mechanism entrusted with occupational safety and health authorities, which possess enough material resources, personnel and regional units, can be easier accessible and less expensive than litigation in courts. All that ensures that such specialized institutions can effectively



and inexpensively deal with complaints lodged by older employees for being discriminated due to their age in the labour market. This way of complaints settling is helpful for the elderly to better enforce their rights. Since the breach of the employer's duty to treat his aged employees equally can lead not only to application of legal redress pursuant to the Non-Discrimination Act, but also to criminal sanctions in accordance with the Criminal Code, the existence of such remedies as a whole has an incentive of discouraging employers from discriminating their aged employees in the labour market.

5.2. From the perspective of prohibition of age discrimination in specific labour law legislation, the Employment Contracts Act interacts with the Non-Discrimination Act by reiterating fundamental age anti-discriminatory provisions in employment. A context-related, systematic interpretation of the Employment Contracts Act indicates that age discrimination is outlawed in the whole employment process meaning that this *lex specialis* complements general age anti-discriminatory legislation and ensures that elderly employees cannot be discriminated not only in recruitment process and while already employed, but also dismissed on the basis of their old age. The mechanism of legal remedies in accordance with the Employment Contracts Act forms an important means of dealing with age discrimination in the labour market. Since legal redress under the Non-Discrimination Act and the Criminal Code is likewise possible, the existence of the plenitude of remedies constitutes an important means for dealing with age discrimination of the elderly and is aimed at guaranteeing that prohibition of age discrimination is taken seriously.

5.3. Relevant provisions of Finnish collective agreements and *soft law* documents as labour-law-related instruments complement legal norms of the Non-Discrimination Act and the Employment Contracts Act regarding the eradication of age discrimination in employment. From the perspective of equality at work, collective agreements and *soft law* documents assist in developing a better working environment for the elderly and are designed to improve the functioning of general and specific (labour-law-related) anti-discriminatory provisions by creating more chances for aged employees to stay longer employed. Collective agreements and *soft law* documents are hence designed to help to effectively cope with age discrimination in the labour market and consequently prolong working careers of the elderly by promoting their occupational well-being.

5.4. Specific legal norms of the Employment Contracts Act introducing age discrimination in case of compulsory retirement at the age of 68 and hence the

automatic termination of employment contracts in the latter case can be justified as, interpreted in unison with pertinent provisions of the Employees Pensions Act, such legal norms safeguard the right of the elderly to stay in the labour market for a long period of time and are aimed at guaranteeing a reasonable pension. In addition, employees are not forced to indefinitely withdraw from the labour market. If they reach an agreement with their employer, they can further continue working beyond the age of 68 on the basis of fixed-term employment contracts. As a result, the compulsory retirement rule is compatible with the constitutional principle of age equality and leaves discretion to both parties of the employment relationship to reach a compromise on the further continuation at work.

5.5. Nevertheless, the existence of general and specific labour-law-related age anti-discriminatory provisions do not on all occasions help to effectively cope with age discrimination of the elderly or prevent this kind of discrimination in the labour market. Discrimination in the recruitment process is often decisive as it creates the main obstacle to enter into a new employment relationship and is very much dependent on the negative attitude of Finnish employers towards aged job applicants. However, even after being employed aged Finnish employees face the risk of having worse working conditions, are discriminated not only by their employers but also harassed by their colleague employees, receive less remuneration for their work or are dismissed on the basis of their old age. Experiencing age discrimination at work can force older employees to leave employment thus depriving them of their right to continue working until the age of 68 and having an impact on their future pension level. As a result, it is of great relevance to not only strictly apply general and specific (labour-law-related) age anti-discriminatory provisions, but to also respectively ensure a positive attitude of employers towards their aged employees, safeguard that older employees can continue working on the basis of good working conditions and thus make full use of their chances, guaranteed in accordance with the national legislation, to stay in employment for a longer period of time.

## Prepoved diskriminacije na podlagi starosti na trgu dela – primer Finske v luči prava EU

Agne Vaitkeviciute\*

### Povzetek:

Ne glede na to, da Zakon o nediskriminaciji ne predpisuje bolj obsežne zaščite starejših delavcev ob prenehanju njihove pogodbe o zaposlitvi in da ima Finska široko diskrecijsko pravico pri odločanju o tem, kateri konkretni ukrepi, sicer le ohlapno in v skromnem obsegu definirani, lahko upravičijo diskriminacijo starejših delavcev na trgu dela, pa finska nacionalna zakonodaja nudi obsežen pravni okvir za preprečevanje starostne diskriminacije pri zaposlovanju s ciljem, da se zagotovi ustrezna zaščita starejših na trgu dela. Namen konkretnih protidiskriminacijskih zakonskih določb je, da se zagotovi daljša zaposlenost in posledično kasnejše upokojevanje. Finska bi zato lahko predstavljala model za druge države članice EU, ki se soočajo s problemom nezaposlenosti starejših. Razlogi so naslednji:

1. Kar se tiče splošne protidiskriminacijske zakonodaje vsebuje Zakon o nediskriminaciji zelo širok nabor protidiskriminacijskih določb. Zagotavlja močno zaščito starejših delavcev pred diskriminacijo na podlagi starosti še v obdobju, ko so zaposleni in finskim delodajalcem predpisuje veliko obveznosti glede spodbujanja enakosti svojih zaposlenih. V ta namen se ocenjuje enakopravnost na delovnem mestu in pripravi načrt za enako obravnavo, katerega namen je, da bi starejši zaposleni dlje ostali na trgu dela in si tako povečali možnost, da bi ostali zaposleni tudi potem, ko so že dosegli zahtevano upokojitveno starost. Poleg Zakona o nediskriminaciji so v proces zagotavljanja enakosti vključeni še nadzorni postopki za zagotavljanje varnosti pri delu in zdravstvene službe, ki imajo na voljo dovolj materialnih sredstev, osebja ter območnih enot, kar vse je v primeru sporov lažje dostopno in cenejše od postopkov na sodišču. Tak način reševanja sporov omogoča, da specializirane inštitucije učinkovito in poceni rešujejo pritožbe starejših zaposlenih zaradi diskriminatornega odnosa na podlagi starosti in jim pomaga, da lažje uveljavljajo svoje pravice. Če delodajalec

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krši pravice starejših zaposlenih glede enakopravne obravnave, ima to lahko za posledico ne le odškodninsko tožbo v skladu z Zakonom o nediskriminaciji, ampak tudi kazenske sankcije po kazenskem zakoniku, kar delodajalce odvrča od tega, da bi svoje starejše zaposlene diskriminirali na podlagi njihove starosti.

2. Z vidika prepovedi starostne diskriminacije v delovnopравни zakonodaji se Zakon o pogodbah o zaposlitvi navezuje na Zakon o nediskriminaciji; oba namreč vsebujeta določbe o nedopustnosti starostne diskriminacije pri zaposlovanju. Iz sistematične vsebinske interpretacije Zakona o pogodbah o zaposlitvi izhaja, da je starostna diskriminacija prepovedana v celotnem procesu zaposlovanja, kar pomeni da ta *lex specialis* dopolnjuje splošno protidiskriminatorno zakonodajo in da starejših zaposlenih ni dovoljeno diskriminirati niti v procesu izbire kandidatov za zaposlitev ali ko so že zaposleni, niti ne morejo biti odpuščeni zaradi svoje starosti. Pravni mehanizmi, ki jih vsebuje Zakon o pogodbah o zaposlitvi predstavljajo pomembno sredstvo za boj proti starostni diskriminaciji na trgu dela. Ker je možno ukrepati tako po Zakonu o nediskriminaciji kot tudi po Kazenskem zakoniku, predstavljajo številne določbe, ki jih vsebujeta pomembno sredstvo za boj proti diskriminacij starejših zaposlenih, vse s ciljem, da se prepoved starostne diskriminacije jemlje resno.

3. Bistvene določbe finskih kolektivnih pogodb in dokumentov *mehkega prava* kot so instrumenti delovnega prava dopolnjujejo predpise iz Zakona o nediskriminaciji in Zakona o pogodbah o zaposlitvi glede odprave starostne diskriminacije na področju zaposlovanja. Z vidika enakosti pri delu, kolektivne pogodbe in dokumenti mehkega prava pomagajo pri oblikovanju boljšega delovnega okolja za starejše delavce. Namenjeni so ustvarjanju več možnosti za starejše zaposlene, da ostanejo dlje v delovnem razmerju in pomagajo pri razvoju boljšega delovnega okolja za starejše delavce, kot tudi za izboljšanje uveljavljanja splošnih in specifičnih delovno-pravnih protidiskriminacijskih določb. Kolektivne pogodbe in dokumenti *mehkega prava* so namenjeni pomoči za učinkovito spopadanje s starostno diskriminacijo na trgu dela, kar posledično vodi do podaljševanja delovne dobe starejših zaposlenih, če se izboljša njihovo počutje na delovnem mestu.

4. Posebni predpisi v Zakonu o pogodbah o zaposlitvi, ki obvezno upokojevanje pri starosti 68 let in posledično avtomatsko prenehanje pogodbe o zaposlitvi upravičeno opredeljujejo za starostno diskriminacijo so v skladu z relevantnimi določbami Zakona o upokojevanju, saj le te ščitijo pravico starejših, da ostanejo na trgu dela dalj časa in si tako zagotovijo dovolj visoko pokojnino. Zaposlenim

se tudi ni potrebno trajno umakniti s trga dela. V primeru, da dosežejo dogovor s svojim delodajalcem, lahko ostanejo zaposleni na podlagi pogodbe o zaposlitvi za določen čas tudi potem, ko so že dosegli starost 68 let. Taka rešitev je tudi v skladu z ustavnim načelom o enakosti pred zakonom ne glede na starost in obema stranema pušča diskrecijsko pravico, da dosežeta kompromis glede nadaljevanja zaposlitve.

5. Kljub temu, da v delovnem pravu obstajajo splošne in posebne protidiskriminacijske določbe, pa slednje vedno ne zagotavljajo učinkovite zaščite starejših in v vseh primerih ne preprečujejo starostne diskriminacije na trgu dela. Ključnega pomena je diskriminacija v postopku izbire kandidatov za zaposlitev, saj imajo finski delodajalci negativen odnos do starejših kandidatov za zaposlitev; starost dojemajo kot glavno oviro za sprejem na delo. Tudi že zaposleni starejši se pogosto soočajo s slabšimi delovnimi pogoji, diskriminacijo s strani delodajalca in nadlegovanjem sodelavcev. Dobivajo nižje plačilo za svoje delo ali izgubijo zaposlitev zaradi starosti. Diskriminacija starejših zaposlenih na delovnem mestu slednje lahko pripelje do tega, da predčasno prenehajo z delom, kar jih prikrajša za pravico, da ostanejo zaposleni do 68. leta starosti in ima za posledico nižjo pokojnino. Zelo pomembno je torej, da se dosledno upoštevajo splošne in posebne delovno-pravne protidiskriminacijske določbe glede starosti; da se zagotovi pozitiven odnos delodajalcev do svojih starejših zaposlenih in da se zaradi dobrih delovnih pogojev slednjim omogoči, da ostanejo zaposleni dlje časa in tako izkoristijo možnosti, ki jim jih zagotavlja nacionalna zakonodaja.