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The Employment Equality (Age) Regulations and Beyond

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Abstract

In this paper, we consider the implementation of the employment (age) regulations in the United Kingdom in both an historical and an international context, drawing on evidence from the United States, Australia, Canada, New Zealand and Ireland. The workplace is not the only setting in which age-based discrimination makes itself felt, but research does indicate that employment provides the most common ground of age discrimination complaints and that age discriminatory practice affects older age groups more than younger age groups. Survey evidence does indicate that many employers regard older workers as equal to if not preferable to younger workers in a number of key employment and productivity areas, while other evidence suggests that age does have an influence on the recruitment decision-making process. Age is a factor in the recruitment process and few employers have mechanisms to encourage older workers to apply for jobs, even though many have a formal written policy on equal opportunities (also in respect of age). Older workers are also less likely to be offered job-related training and education. Thus, chronological age does figure in the workplace and in employers' policies and practices in relation to recruitment and promotion, access to training, retirement, and redundancy. These policies and practices influence the way in which older employees plan for withdrawal from the labour force. The implementation of the employment equality (age) regulations as of October 2006 indeed changes practice and policy in the workplace, but does not signal the end of retirement, and international evidence would indicate that only a small proportion of age-related cases are taken to tribunal, with an even smaller proportion being upheld there.

Background

It is only in recent years that discrimination on the grounds of age has forced its way onto the political agenda. Liberal democracies have been much slower in acknowledging the unfairness of age discrimination than they have been in squaring up to discrimination on grounds of race or sex. Unfavourable treatment of the young and the old has been persistently justified by appeal to its social utility. In the past decade, however, demographic and market trends have forced advanced economies to recognise that such attitudes threaten to undermine their sustainability. An appreciation of the economic impact of population ageing has converged with a sense of the requirements of social justice in such a way as to create a climate for change (Fredman, 2001).

Within the European Union full citizenship for all citizens regardless of age, sex, ethnicity, religious beliefs or other potentially discriminatory factors is an important dimension of the political, economic and social programmes of the member states. The effects of chronological age – defined in social terms in relation to an individual's chosen or forced behaviour on the grounds of age – have indeed been an issue of political, economic and social relevance ever since the United Nations approved its First Action Programme on Ageing in 1992. Member States of the European Union were required to have legislation in place by the end of 2006 that would make age discrimination in employment and vocational training unlawful.

In the United Kingdom, this legislation came into force in October 2006, and clearly had important implications for labour market practices, particularly with respect to older workers. Post World War II developments in the European workplaces have seen labour force participation rates of older (male) workers steadily decline as the average age of withdrawal from the labour market decreased, moving down well below the state pension age, though there is now some indication that this trend may be steadying or even reversing (Harper, 2006). Various pieces of research have suggested that age discriminatory practices, particularly in recruitment, retention and retraining of workers, have contributed to this decline (McKay and Middleton, 1998; Jensen, 2005).

It is important, however, that a somewhat utilitarian concern with the effective mobilisation of the potential labour supply (getting older people back into the labour market) should not altogether overshadow a proper concern with the interests and rights of the *individual* citizen in respect of non-discriminatory practices and full citizenship. An understandable preoccupation with the economic consequences of population ageing should not cause policy makers to neglect the interests of younger people, who will also come within the ambit of the new legislation. Indeed, it must be argued that in addressing the relationship of age to capability and participation we should consider issues across the complete (adult) age spectrum.

Employment and Vocational Training Context

The mean male age of retirement in the UK fell from 67.2 in 1950 to 62.7 by 1995. The actual percentage falls were

greatest for those aged 50-59 years. Furthermore, detailed analysis of labour force statistics reveal that each successive generation of older men has lower employment rates than the preceding generations. Currently in the UK, one-third of those aged between 50 and state pension age do not work, with the proportion of men of this age (50 – 64 years) who are not working doubling in the last 20 years. These changes have happened during a period of steady growth in longevity, so that average life expectancy for men aged 65 now stands at 80 years, with disability-free life expectancy reaching 79 years, a near 3 year increase over a period of only 15 years. The trends in retirement behaviour for women are more complex. Although there was a decline in mean age of retirement for women from 63.9 years in 1950 to 59.7 years by 1995, this is compounded by the fact that each successive cohort over the period contained a larger number of economically employed women, as women steadily entered the labour market at all ages during these decades.

The steady withdrawal of male workers in particular from the labour force at ever increasingly younger ages, coupled with a general increase in the number and proportion of the population in these later age groups, has raised concerns over predicted *dependency ratios* in all OECD countries. The worker/retired ratio will fall from 4.2 workers per pensioner in 2000 to 2.7 by 2030, while the total demographic support ratio (that is those aged 15-64 years to those aged 0-14 years plus those aged 65+ years) is predicted to fall from 1.89 to 1.58. In the new Member States of the European Union, employment rates of older workers are on average only 30.5%.

The UK appears to be entering a transitional period of tension between labour demand and work force practices. Work force practices will soon have to change in order to cope with a tightening in the labour supply. But they have not *yet* changed – and it should not be assumed that market forces by themselves will take care of the necessary adjustments. If increasing labour shortages, arising from the demographic ageing of the UK's population and focused within particular occupational sectors, are to be partially offset by the retention of older workers, then government has to do something about the barriers to their continued employment (OECD, 2006). It is the policy of the UK government, in line with that of other Western countries, to encourage older people to remain active within the workforce. This is in part recognition of the rise in longevity and the importance of living a healthy active and *productive* late life, but also to ameliorate the potentially large take-up of pension benefits in the future.

The industrial restructuring that followed the economic downturn of the 1970s and 1980s has added to the problems that older workers face in the labour market (Arrowsmith and McGoldrick, 1997; Trinder, 1989; Lindley, 1999). The shift from manufacturing to service economy, accompanied by changes in technology, has meant that the skills of many older workers have become obsolete – and there is much less demand for unskilled labour in the manufacturing sector (McKay and Middleton, 1998). The current cohort of older workers have fewer formal educational qualifications than younger cohorts, and all the evidence suggest that employers are more reluctant to invest in training for their older (over 40) workers than for their younger ones. The entrenched negative attitudes shown by employers toward older workers that were apparent in a series of surveys conducted in the immediate post-war period seem to have altered little in the second half of the 20th century (Harper and Thane, 1989).

There is evidence that early withdrawal from the labour market is both directly and indirectly encouraged through age discrimination by employers (McKay and Middleton, 1998; Leeson, 2001; Leeson, 2004), and that *push factors*, such as redundancy or fixed retirement ages, are responsible for a large percentage of early retirements. Analysis of the UK Retirement Survey, for example, indicated that up to 40% of early retirements might fall into this category (Disney *et al.,* 1997). Several authors contend that these push factors are stimulated by negative perceptions of older workers. *Slow work speed, low adaptability,* particularly to new technologies*, low trainability, low skills uptake,* and *too cautious*, are stereotypes which have appeared consistently in surveys in the UK and other countries (Taylor and Walker, 1998; Hayward, 1997; McGregor and Gray, 2002; Henkens, 2005). Consistent evidence thus revealed lack of practices aimed at including older workers, lack of training, and lack of flexible working arrangements.

The discriminatory use of age

What is age discrimination? According to one of the leading organisations working with and for older people in the United Kingdom, *age discrimination occurs when someone makes or sees a distinction because of another person's age and uses this as a basis for prejudice against and unfair treatment of the person* (Age Concern, 1998). Clearly, discrimination of this kind can be both direct (goods or services are unavailable to particular age groups) or indirect (attitudinal behaviour informs decision makers and determines levels of service provision).

Age discriminatory practice (or at least the existence of the age dimension as a determining factor) occurs in relatively easily definable and identifiable areas such as health and social care, employment, financial services, insurance, volunteering, education and training, but it also occurs in *grey areas*, which can affect the daily lives of those concerned (such as the renewal of driving licences). For many individuals, of course, age may be only one of several possible grounds for discriminatory practice, and it may be difficult to determine whether it is age or sex or religion or race which is the driving discriminatory force in any particular instance. The societal (not to mention individual) costs of age discrimination can be high, and has been estimated to be over 40 million euros annually in employment

in the UK alone (Employers Forum on Age, 2001; Cabinet Office, 2000).

Although the workplace is by no means the only setting in which age-based discrimination makes itself felt, and older age groups are not its only targets, research does indicate that employment provides the most common ground of complaint in this matter and that the practice affects older age groups more than younger age groups (Eurolink Age, 1993; Leeson, 2004; DWP, 2001; Hornstein, 2001, Taylor and Walker, 1998). Although there is some survey evidence to suggest that many employers regard older workers as equal to if not preferable to younger workers in a number of key employment and productivity areas (Van Dalen and Henkens, 2005; Khan *et al.,* 2006; Munnell *et al.,* 2006), there is plenty of other research to support the opposite view, namely that people aged between 50 years and the state pension age may be viewed less favourably by employers when recruiting, retaining and training staff. In a 2005 survey conducted by the Chartered Institute of Personnel Directors a quarter of the respondents – all working in 'human resources management' – conceded that age did have an influence on the recruitment decision-making process (CIPD, 2005). This confirms the conclusions of a recent publication from the Department of Trade and Industry (Urwin, 2004), which suggests that almost 25% of managers consider age in the recruitment process. This tendency to give weight to age in recruitment decisions is associated furthermore with workplaces that have a younger workforce. The same survey (using data from the 1998 Workplace Employee Relations Survey) reveals that only 5% of employers have mechanisms to encourage older workers to apply for jobs, even though more than 60% have a formal written policy on equal opportunities (and nearly half of these policies make explicit reference to age). Older workers are also less likely to be offered job-related training and education. It is important to note, however, that there is also clear (and uncontested) evidence that age discriminatory practices operate at the younger end of the age spectrum (Jackson, 2001). These findings have been replicated by more recent research (Harper *et al.,* 2004).

The fact remains that chronological age does figure in the workplace and in employers' policies and practices in relation to recruitment and promotion, access to training, retirement, and redundancy. These policies and practices have a significant impact furthermore on the choices and behaviour of older workers who are in employment. They are important for the way in which these older employees plan for – and are able to plan for – withdrawal from the labour force (Harper and Vlantouchi, 2004; Leeson 2004; Vickerstaff *et al.,* 2004). They also operate in relation to younger workers.

The research evidence across Europe does seem convincing:

- the age dimension in recruitment policies is prevalent at both ends of the age range;
- increasing numbers of workers are obliged or persuaded to leave the workplace 5-15 years before official retirement age;
- this early exit is decided on the grounds of age rather than on performance and abilities and skills needs;
- early exit for persons aged over 50 years is equivalent to permanent exit;
- targeted assistance to help older unemployed find employment is often no more than lip-service;
- there is widespread employers' practice of targeting older workers for job losses.

It is perhaps the central role of (paid) work not only for the individual but also for society that makes a legislative focus at this stage on employment and vocational training pertinent, but it is likely that this in itself will lead to an attitudinal and practice change in all walks of life as far as age discriminatory behaviour is concerned. Certainly, there has been work in other fields that reveal age barriers to participation (e.g. Wegens, 1987; DaneAge, 1993).

European focus on equality and non-discrimination

In May 2004, the European Commission summarised the progress that had been made to date in tackling discrimination on the grounds of sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation in a Green Paper on equality and non-discrimination in an enlarged European Union (European Commission, 2004). Since the early 1970s there has been a large body of European legislation addressing sex discrimination relating to pay, working conditions and social security. By the mid 1990s this had been incorporated so thoroughly into normal social practice that the Community decided to take a much broader view of discrimination. Hence, Article 13 was included in the EC Treaty empowering the Community to take action to deal with discrimination on the grounds of a wide range of factors. Article 13 was modified by the Nice Treaty, which reflected recognition of the need for a *coherent and integrated approach towards the fight against discrimination*, and importantly included a common legal and policy approach and common definitions of discrimination. By the end of 2000, the Council had adopted Council Directive 2000/43/EC implementing the principles of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, thereby providing the European Union with one of the most advanced legal frameworks.

These two Directives have required Member States in many instances to introduce new definitions and legal concepts and to establish (or reinforce existing) specialised equality bodies. To support and complement the Directives, a Community action programme was launched in 2001 aiming to improve the understanding of issues relating to discrim-

ination; to develop the capacity to prevent and address discrimination; to promote and disseminate the values and practices underlying the fight against discrimination.

The Eurobarometer opinion survey, published by the Commission in May 2003, revealed some interesting results relating to a number of aspects relating to discrimination. Overall, very few respondents stated that they had been victims of discrimination. Results were not segmented by age, gender or other socio-demographic characteristics. However, bearing in mind these limitations, it is worth noting that age was the most commonly cited grounds for personally experienced discrimination with 5% compared with 3% for discrimination on the grounds of racial or ethnic origin. There was a larger reporting of witnessed as opposed to experienced discrimination with age witnessed as grounds for discrimination by only 6 compared with 22% who witnessed discrimination on the grounds of racial or ethnic origin. Perceptions of equal opportunities within employment placed people over 50 years of age as the third most disadvantaged group after those with learning difficulties and physical disabilities. Some 71% of respondents felt that older people (compared with 62% for ethnic minorities) would have less access to employment opportunities as a result of their age – there is considerable cross-national variation in this proportion. Europeans indicated that discrimination on all grounds was *usually wrong*, with age ranked as the third most opposed form of discrimination behind religion and sexual orientation. The study revealed that opposition to discrimination was strongly correlated, in as much as those who felt that one type of discrimination was wrong tended to feel that other types of discrimination were wrong too, and vice versa. Consistently across Europe, the young, educated, non-manually employed and women showed higher levels of opposition to discrimination and on average, seven out of ten respondents said they would complain if discriminated against.

The European Charter of Fundamental Rights was proclaimed in December 2000 with Article 20 setting out the general principles of equality before the law and Article 21 dealing with the principle of non-discrimination in relation to all six grounds in Article 13 of the EC Treaty. Non-discrimination legislation and policies should play a central role in achieving the aims of the so-called *Lisbon agenda* arising from the March 2000 Lisbon European Council, namely to raise the levels of employment for certain groups (older workers and women, for example). The European Union has a broader strategy to promote inclusion and participation of disadvantaged groups, and the above-mentioned initiatives all form a package designed to achieve this. There seems to be a long way to go, however. Few of the Member States in their Social Inclusion National Action Plans make the link explicitly at least between combating social exclusion and combating discrimination. Many Member States seek to target specific vulnerable groups through their more mainstream initiatives.

International Perspectives on Age Discrimination Legislation

Examples of the workings of age discrimination legislation can be found in a number of Anglophone countries outside the EU, including the USA, Australia, Canada and New Zealand.

United States

Although the first comprehensive piece of US legislation on age discrimination was passed in 1967 – the Age Discrimination in Employment Act (ADEA) – the country has a longer history of relevant legislation. In 1956, the Civil Service Commission abolished maximum ages of entry into employment; and by 1960, eight US states had passed age discrimination legislation as part of their Fair Employment Practices Acts. The ADEA, in its original form, covered employees aged 40-65 years. This was followed in 1975 by the Age Discrimination Act, which prohibited age discrimination in all programmes/activities in receipt of federal assistance. The ADEA was then amended in 1978 to cover 65-70 year olds – effectively raising the mandatory retirement age to 70 years for most employers (mandatory retirement had already been eliminated for federal employees). However, in 1986 a further amendment removed mandatory retirement ages altogether. In the wake of this development, employers began to look for other ways of *encouraging* employees to retire, mainly financial. This was addressed in the 1990 Older Workers Benefits Protection Act, which aimed to restrict financial inducements to retire. Today, the ADEA relates to all private employers with at least 20 employees, state and local governments, the federal government, employment agencies and labour organisations. Enforcement of the legislation is the jurisdiction of the Equal Employment Opportunity Commission (EEOC).

Table 1: Age Discrimination in Employment Act Charges for USA in Fiscal Year 2005

		Number	%
Receipts		16585	
Resolutions		14076	100
By type:	Settlements	1326	9.4
	Withdrawals with benefits	764	5.4
	Administrative closures	2537	18
	No reasonable cause	8866	63
	Reasonable cause	583	4.1
	– Successful	169	1.2
	– Unsuccessful	414	2.9

In the fiscal year 2005, a total of 16,585 charge receipts were filed with the EEOC (Table 1). In the period 1992-2005 the annual number of these receipts has varied from a low of 14,141 in 1999 to a high of 19,921 in 2002. Not surprisingly, the level of charge receipts tends to follow the fortunes of the economy. When companies start to tighten their belts, more claims are filed. Most (85%) of the 16,585 charges filed in 2005 were resolved in the same fiscal year,

with the most common finding – as in other years – being that the complaint had no reasonable cause (63%). The monetary benefits received by complainants in 2005 amounted to $77 millions – and this excludes any payments made as a result of litigation.

The following definitions apply: *administrative closure* refers to a charge being closed for administrative reasons (including no statutory jurisdiction); *no reasonable cause* refers to charges where the Equal Employment Opportunities Commission finds no reasonable cause to believe that discrimination occurred (a private court action may then be taken); *reasonable cause* refers to charges where the Commission finds reasonable cause to believe that discrimination occurred. Attempts are usually made to reconcile the discriminatory issues. *Successful* refers in this category to conciliations, which result in substantial relief to the charging party, while *unsuccessful* refers to charges with reasonable cause that are closed after conciliation efforts have failed. The charge is then reviewed for litigation consideration; *settlements* refer to charges that are settled with benefits to the charging party; *withdrawal with benefits* refers to a charge withdrawn by the charging party upon receipt of desired benefits. Over recent years, the distribution of charges by the Commission under the ADEA has seen the majority of charges relating to *discharge* (27.5%) followed by *terms of employment* (10.5%), *recruitment* (8%) and *promotion* (6.7%).

Australia

In mid 2004, federal legislation – the Age Discrimination Act 2004 – was implemented to complement legislation at state level, which had developed to its present form since the 1970s. The New South Wales Parliament passed the first legislation in 1977 designed to ban discrimination in employment (and other areas) and in 1980 the Anti-Discrimination Board recommended that the legislation should also cover age discrimination while retaining compulsory retirement. Not until 1993 was the 1977 Anti-Discrimination Act amended to include age as a ground for complaint against discrimination, coming into effect in 1994. However, the first state to outlaw age discrimination was South Australia with its Equal Opportunity Act 1984 amended in 1990 to prohibit age discrimination. Other states soon followed suit: Queensland in 1992, Western Australia in 1993, New South Wales in 1994 as outlined above, the Northern territory also in 1994, the Australian Capital Territory in 1996, Victoria also in 1996 and finally Tasmania in 1999. Compulsory retirement was slowly abolished in the states up through the 1990s. The following areas, among others, are generally covered by the various pieces of legislation: advertising vacancies, offers of work, terms and conditions of employment, promotion and training, termination of employment, access to apprenticeship and training programmes. According to Encel (2004), age discrimination legislation in Australia has a long history of opposition from employers, and the 2004 Act is no exception – criticised by the Australian Chamber of Commerce and Industry as it *could hurt efforts by business to get the best from employees*, and at the same time criticised by the Council on the Ageing for *providing an excessively wide range of exemptions*.

In New South Wales in 1994-1995, the first year after the amendment to the Act to include age, the Anti-Discrimination Board received approximately 16,000 inquiries. However, only approximately 1500 were taken up, and this proportion (around 9%) has remained more or less the same in the subsequent 10 years – in 1999-2000 there were just over 16,500 inquiries with almost 1400 being taken up. Of the total complaints taken up in 1999-2000, age accounted for just 8% and of these (112 cases) 72% were related to age discrimination in employment, and of these the majority (approximately 70%) are filed by males.

Canada

Age discrimination in employment is covered by the Human Rights Code and is linked to mandatory retirement, which is not banned in Canada. To allow mandatory age-based retirement, an age limit is added to the employment section of the human rights code so that in effect the human rights code is inapplicable to persons aged 65 years and over. These human rights codes were established in the 1980s and cover actions that have an adverse effect (i.e. discrimination not necessarily intended). In addition, the Canadian constitution incorporates the Charter of Rights of Freedoms (1982) and this has become an additional important factor in relation to age discrimination in employment, allowing individuals not covered by existing provincial laws to utilise the Charter.

According to the 2003-4 Annual Report, the Ontario Human Rights Commission received a total of 2450 new complaints covering a total of 4594 grounds for discrimination/harassment. Of these 2450 new complaints, just under 10% corresponding to 232 cases were on the grounds of age, and of these age discrimination in employment accounted for the majority of complaints (171 complaints corresponding to 74%). A total of 2038 complaints (covering 3800 grounds for discrimination/harassment) were closed in the course of that year and of these 170 related to all forms of age discrimination and not in employment alone. The largest number (67) was resolved/settled between the parties, while 60 cases were not dealt with and 12 were withdrawn. Less than 10% (15 cases) were referred to the Human Rights Tribunal. In 2003-4, settlements, which related to all forms of age discrimination, amounted to 18 and the average compensation given was Can$7330.

New Zealand

Protection against discrimination in employment, amongst other areas, is provided by the 1993 Human Rights Act, which encompasses discrimination on the grounds of age, gender, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, political opinion,

employment status, family status and sexual orientation. In the labour market/employment, discrimination is prohibited in recruitment, promotion or transfer, terms and conditions, superannuation, other fringe benefits, training and dismissal. The legislation applies to those aged 16 years and over (with no upper age limit).

Ireland

Within the European Union prior to the implementation of the new legislation in 2006, Ireland is the country with the most comprehensive discrimination legislation. There are two fundamental pieces of legislation, namely the Equal Status Act 2002 and the Employment Equality Act 1998, both of which include age as one of nine grounds (age, sex, marital status, family status, sexual orientation, religious belief, disability, race and membership of the Traveller community). Together the two Acts cover discrimination in the labour market and in the provision of goods and services. Although the Acts prohibit direct and indirect discrimination, harassment and victimisation, strangely they operate with age limits of 18 (15) to 65 years and include a range of exemptions and justifications. There is an independent Equality Authority, which promotes and defends the equality legislation rights and works to raise public awareness. The Equality Tribunal in the Republic of Ireland is an independent statutory office, which investigates or mediates complaints of unlawful discrimination in relation to employment and in relation to access to goods and services, disposal of property and certain aspects of education. Figures for 2003 reveal a total of 1078 individual complaints referred. Of these, 361 related to employment and 717 to equal status (Equality Tribunal, 2003). Of the 361 employment complaints, only 32 were on the grounds of age corresponding to almost one per cent – this is a decrease in relation to 2002 when 13% were on the grounds of age. From the more detailed statistics available for 2002, it appears that 309 employment equality cases were referred and of these 39 (13%) as mentioned related to age (Equality Tribunal, 2002). The majority of the total of 309 cases referred were from the private sector (54%) with just 26% from the public sector, the remainder being in education or health. In all, 56 cases were decided in 2002, with 16 cases (covering 19 persons) being decided for the complainant and the remaining 40 cases (covering 492 persons) being decided for the respondent. The average settlement amounted to just over 12,000 euros (ranging from 500 to 70,000 euros).

Is this the end of retirement?

Since 1950, the percentage of adult life spent in retirement has increased from just 18 to over 30% (Mahmood, 2006), the result of a decline in the average age of exit from the workforce from 67.2 to almost 64 years, and an increase in the life expectancy at age of exit from 10.8 to just over 20 years. The UK Government initiated a number of programmes to address this over the years, ranging from *Winning the Generation Game* to the *New Deal 50 plus*, from the *Age Positive* campaign to *Welfare to Work*, and government responses also included improved state pension deferral options, tax rule changes on occupational pensions, an equalisation of the state pension age, an increase in (non-state) minimum pension age, and most recently, the age legislation of October 2006.

The scope of this legislation in respect of employment and vocational training covers recruitment, promotion, development/training, termination, perks and pay, and access to help and guidance (Leeson and Harper, 2005). On the employer side, training providers, trade unions, professional associations and employer organisations are covered by the legislation, while on the worker side, this is true for employees and applicants (Leeson and Harper 2005; Mahmood, 2006).

Perhaps one of the more interesting and controversial issues arising from the debate prior to and subsequent to the implementation of the legislation is the future of retirement – does this new legislation mean the end of retirement? Key elements in the UK around the legislation in respect of the termination of employment (retirement) are the introduction of a default retirement age (at least for an introductory period), the need to adhere to a fair retirement procedure, and the employee's right to request to continue to work beyond the retirement date. Let us consider a couple of retirement scenarios and their outcome in respect of the new legislation.

Scenario I: between 12 and 6 months prior to the (anticipated, practised) retirement date, the employer notifies the employee of intentions re retirement in accordance with the legislation. Between 6 and 3 months prior to this date of retirement, the employee has the right to request to work beyond the retirement date. Having received this request, the employer must respond to the request within *a reasonable period* (which is not defined in the regulations) and before the retirement date. The employer's decision cannot be challenged at Tribunal.

Scenario II: in the period up to 6 months prior to the retirement date, the employer gives no notification of intentions re retirement. This means that the employee's right to request to work beyond the retirement date is extended to the retirement date (and the employee is entitled to compensation of up to 8 weeks pay). Whatever, the employer must still respond within a reasonable period. In this case, the employer's decision can be challenged at the Employment Tribunal.

In scenario I, some may feel an element of unfairness on behalf of the employee. In effect, the age discrimination legislation is merely providing him/her with a right to request to work beyond the retirement date, and as long as the employer acts in accordance with the legislation (which stipulates deadlines for response) the employee has no Tribunal fall back if he/she feels discriminated against. In scenario II, some may feel an element of unfairness on

behalf of the employer. In this case, failure to act within the legislatively defined deadline could lead to compensation and a case at the Tribunal. In both scenarios, a decision from the employer not to accommodate the employee's right to work beyond the retirement date could be based on discriminatory practice, but only in the second scenario would the employee have any Tribunal fall back.

Concluding Remarks

The available international statistical data provide a picture of the composition of discrimination complaints, which can be illustrated with examples of international case law (Leeson and Harper, 2005). It is striking that age-related cases comprise a relatively small proportion of the total number of employment discrimination cases brought before a tribunal/commission. In the United States, for example, age as an issue in respect of employment discrimination comprises only about 10% of the total issues and 20% of the total charges brought against employers. However, perhaps the most salient feature of the statistical material in relation to the focus of this report is that a large majority of the (limited number of) age-related cases filed are dismissed as having no reasonable cause. This is true of 63% of resolutions in the United States in 2005. Indeed, only 1% of age discrimination in employment resolutions in the United States in 2005 were successfully taken to tribunal (while 28% were resolved out of tribunal).

Failure to proceed to a tribunal/commission does not prevent the complainant from pursuing private litigation (in some cases against the commission/tribunal for not pursuing his/her case). The most common causes of complaint across the age scale, incorporating both successful and unsuccessful claims, relate overwhelmingly to

- dismissal (including retirement),
- promotion,
- recruitment

with dismissal being the dominant problem (Leeson and Harper, 2005). In a large proportion of cases, age is only one of a number of areas in which discrimination is claimed by the complainant (and usually it is not the most important). The vast majority of cases, unsurprisingly, are filed against employers, with a few being filed against workers' organisations, and also the Human Rights Commissions or Equal Opportunity Commissions for dismissing the initial claim by the complainant.

As mentioned, a key feature of the new legislation in the UK is a default retirement age, which in effect introduces a national retirement age for the first time. While this will probably mean that few people work beyond the default age, it remains to be seen whether it will also mean that more people work until the default age. There are two interrelated aspects of interest here. One is the behavioural response of employers to the legislation in respect of successful cases (which are likely to be limited on international evidence) enabling older workers to remain in and return to the workplace. The second is the behavioural response of employees in respect of choosing to work at least until and perhaps beyond the default age of retirement. It seems unlikely that behaviours will change overnight. Experience with the introduction and take up of early retirement across Europe and North America suggests that 25 years of educating and training employees to leave the workplace as early as possible will need another 25 years of educating and training to persuade employees to remain in the workplace until and beyond the default retirement age (and for as long as otherwise possible should the default age at some instance in the future be abolished). Linked to this is the task of changing employer attitudes and behaviours.

The fact that age discrimination legislation is now in place sends a strong signal to the workplace, which may in time spread out to all walks of life. This does not presage the end of retirement however, nor does it mean that we shall be working until we drop. It does mean, however, that age is no longer acceptable as a proxy for competence, experience, knowledge, skill or potential.

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