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AGE DISCRIMINATION: EQUAL TREATMENT WITH EXCEPTIONS

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ABSTRACT

The likelihood of age discrimination in relation to employment increases the older a person becomes. The concern is that, partly as a result of this discrimination, large numbers of older workers leave the workforce and become economically inactive. This in turn brings increased pressures on the remaining members of the workforce and increased pressures on public finances in relation to pensions and healthcare.

The Equal Treatment in Employment and Occupation Directive (2000/78/EC) approaches this problem by introducing the principle of equal treatment in a number of areas related to employment, including age. The reasons for action on age discrimination rests upon two potentially conflicting justifications. The first is a human rights one based upon the right of all persons to equality before the law and the second is one concerned with implementing EC Employment Guidelines on integrating disadvantaged groups into the workforce. This second justification is likely to lead to a much more pragmatic approach which in turn may compromise the principle of equality of treatment. This article, uses survey material, to argue that the potential conflict between an equal treatment approach and the functional, more pragmatic, approach may lead to a lessening of the effectiveness of measures prohibiting age discrimination.

The population of the United Kingdom is growing and ageing. The 2001 census revealed the following age breakdown (Table 1):

Table 1: Population of the United Kingdom by age

| | |
|------------------------|--------------|
| All ages | 58.8 million |
| Under 16 | 11.9 million |
| Men 16–64, women 16–59 | 36.1 million |
| Men 65+, women 60+ | 10.8 million |

For the first time there are now more people over the age of 60 years than there are children under 16 years. The change in the age population is noticeable when compared to the 1951 census. During this 50 year period the proportion of the population aged under 16 years has fallen from 24% to 20%. At the same time the proportion aged 60 years and over has increased from 16% to 21%.¹

The average age of the population in the United Kingdom as a whole is increasing as is the average age of the economically active population. Over the 25 year period between 1996 and 2021 the proportion of people over the age of 44 years will increase from 38% to 46%; the 45 to 59 age group will increase by almost one quarter; the 60 to 74 age group will increase by over one third and the 75 years and over group will increase by 28%. In contrast the 16 to 29 years age group will fall by 5.7%.² This process is a Europe wide one, although the speed of the process is variable (see below).

AGE AND ECONOMIC ACTIVITY

The ageing of the population is relevant because the likelihood of discrimination, on the grounds of chronological age, increases the older one becomes. The Department for Education and Employment commissioned a research project in 1996³ with two main aims. The first, and principal, aim was to identify the effect of age on economic activity. The second was to explore the characteristics of older workers. Older workers were defined as those aged 50 years or over. The main conclusions were:

(i) Older workers were less likely to be in paid work than younger age groups. When they did work they were more likely to be working as self employed or part time.

The overall self employment rate is 11.6%, but the self employment rate for the 50–SPA (state pension age) group is 16.7% and, for those over SPA, some 24.4%. The figures are even more dramatic when one looks at the gender differences. Some 22.2% of men between 50 and SPA are self-employed and some 40.5% of those over SPA. This is likely to reflect the greater difficulty that older workers have in obtaining employed positions. Long term unemployment also affects older workers much more than other age groups.

(ii) Among white collar occupations there was a ‘sharply increased’ likelihood of becoming economically inactive beyond the ages of 50 and 55. Those in blue collar jobs also faced higher risks of unemployment and those risks became greater with age.

The total potential working population in 2003 was 36,157,000 people. This accounts for 78.1% of the adult population (16 years+). Some 70.1% of the 50–SPA age band were in employment (6,133,000). This compares to an overall employment rate for all ages of 74.9%. Only 9% of those over SPA were also continuing to work.

(iii) When older workers were unemployed and claiming benefit they tended to use fewer methods of job search. Once people had

Table 2: Age at which someone was too old to employ

| Age | % of respondents |
|-----|------------------|
| 40 | 12 |
| 50 | 25 |
| 55 | 43 |
| 60 | 60 |

become unemployed, their chances of returning to paid work were much reduced if they were older than 50 years. A survey of 500 companies (Table 2) asked those companies to consider their most common job and estimate at what age, on average, they would consider someone too old to employ.⁴

The effect of excluding an individual through retirement, redundancy or some other form of dismissal from work is to make it very difficult for them to re-enter the workforce at all as they were often regarded as being too old to recruit. At the same time large numbers of older unemployed workers are likely to live in relative poverty, e.g. only about one third of unskilled workers are members of occupational pension schemes and will rely on state pension provision when they retire or exit the workforce. Similarly, 44% of all non-white males aged over 40 years lacked any non-state pension provision of any kind (compared to 13% of white males over the age of 40 years).⁵

(iv) People in their 50s appeared reluctant to say that retirement represented their main economic activity. 'Only after prompting did many concede that they had, effectively, now retired'. In one survey of retired people, for example, over two thirds of respondents (67.6%) stated that they would like to have continued working in some capacity. This included 22.7% who would have liked to continue working on a full-time basis, 31% on a part-time basis and 21.7% on a casual basis.⁶

(v) Taking all forms of inactivity together, the chances of men leaving inactivity for paid work were sharply reduced after the age of 50 years 'and were close to zero for those over 60'.⁷ For women the chances of moving out of inactivity were much reduced after the age of 40 years and 'was particularly uncommon for those older than their late 50s'. The average time spent unemployed was substantially longer for those over 50 than all ages. For example, those aged between 55 and 59 spent an average of 44 weeks unemployed as opposed to 23 weeks for all ages.

The clear picture that one obtains from the research and analysis in this report is that the subject of potential disadvantages suffered by older workers is a complex one. People do not leave the workforce

merely because of age discrimination, nor do substantial numbers leave involuntarily. Nevertheless the report makes clear that older workers are disadvantaged compared to younger workers. They are at a greater risk of exiting the workforce permanently and they do find it much more difficult, if not impossible, to re-enter the workforce. There is enough evidence put forward in this publication to show that one of the reasons for this are discriminatory practices used by employers. Indeed this was a conclusion accepted by the Government in its subsequent consultation document and its Code of Practice on Age Diversity.⁸

REASONS FOR ACTION

Current United Kingdom policy is, of course, essentially determined by the European Union. The European Commission has been concerned about the demographic change that is taking place and its impact upon the labour market and future plans for growth of the European economy.

There is ample evidence that discrimination takes place in the EU. One EU wide indicative survey⁹ of people's perceptions of discrimination¹⁰ found that the most often cited ground for discrimination was age (5%) followed by racial or ethnic origin (3%), religion or beliefs, physical disability, learning difficulties or mental illness (2% each). In the same survey people were asked which of the following would have the most difficulty in finding a job, training or promotion:

- a person from another ethnic origin;
- a person with minority beliefs;
- a physically disabled person;
- a person with learning difficulties;
- a person under 25;
- a person over 50;
- a homosexual.

Some 87% of respondents thought those with learning difficulties would be the most disadvantaged and some 77% thought that the physically disabled would be the next most disadvantaged. In third place was the over 50 year old. Some 71% thought that such a person would have less chance in employment. There was a significant variation between countries though, ranging from 17% in Greece to 83% in Finland.

The European Commission summed up the concerns posed by the ageing population.¹¹ There was, firstly, a relative decline of the population of working age and the ageing of the workforce;

secondly, pressure on pension systems and public finances resulting from a growing number of retired people and a decline in the working age population; thirdly, a growing need for old age and health care; and finally a growing diversity among older people in terms of resources and needs.

The Commission's conclusions were:

'The magnitude of the demographic changes as we enter the 21st century will force the European Union to rethink and change out-moded practices and institutions. An active society for all ages requires a strategy which both enables and motivates older people to stay involved in working and social life. The growing number of older people constitutes a wealth of under-utilised experience and talent. They also create new needs to be met by enterprises, public organisations and NGOs.'

The matter was also an issue at the Stockholm European Council meeting in 2002. In response to that meeting the European Commission produced a report on increasing labour force participation and promoting active ageing.¹² This report showed that 31.1% of the working-age population in the EU was inactive (i.e. 50 million women and 22 million men). Many of these wished to work now and, over a five year perspective, some 56% of inactive men and some 49% of inactive women wished to return to work.

Thus changing attitudes, amongst other measures, was essential in order to raise the level of participation. The Commission concluded that:

'Raising participation rates will not be easy, partly because it will depend on changes in cultural and socio-psychological factors, in particular attitudes to older people in employment, and partly because it will require important changes in policy instruments to achieve changes in behaviour of employers and workers.'

One positive measure was Directive 2000/78/EC on Equal Treatment in Employment and Occupation.¹³ This Directive provides for the principle of equal treatment in a number of areas related to employment, including that of age. The Government's plan is for Regulations transposing this Directive to come into effect in October 2006.

There appear to be at least two strands to the justification of the Equal Treatment Directive contained in the Directive's Preamble. The first is one based upon the right of all persons to equality before the law and the second one is concerned with implementing the European Council Employment Guidelines on integrating disadvantaged groups into the workforce. There is potentially a conflict between these two strands which is likely to result in confusion in the implementation of the Directive. The second strand is likely to

require a much more pragmatic approach in order to achieve these goals. This requirement for pragmatism results in a lessening of effectiveness in implementing the principle of equality.

The first strand is a human rights approach. In support of this the Preamble cites the Universal Declaration of Human Rights and a number of other conventions adopted by the United Nations, the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Labour Organisation's Convention 111 prohibiting discrimination in the field of employment and occupation.¹⁴ This approach is reflected in Article 2 of the Directive which states that the 'principle of equal treatment' means that there is, with regard to employment, to be no direct or indirect discrimination on a number of grounds including age. Harassment on the grounds of age is also deemed to be a form of discrimination and is defined as unwanted conduct which takes place for the purpose of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁵ In a sense this is a somewhat purist approach because the other strand contained in the justification requires a compromising of these principles.

The second strand relates to the Employment Guidelines agreed by the Community at the Helsinki meeting of the European Council in 2000.¹⁶ One of those guidelines concerned the promotion of a labour market that was open to all and called upon each Member State of the Community to:

'give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventive and active policies to promote their integration into the labour market.'

Other groups in this context includes older workers. Indeed by 2003 the Employment Guidelines issued by the Council of Ministers included a section on increasing labour supply and promoting active ageing.¹⁷ This stated that Member States should:

'Promote active ageing, notably by fostering working conditions conducive to job retention... and eliminating incentives for early exit from the labour market, notably by reforming early retirement schemes and ensuring that it pays to remain active in the labour market; and encouraging employers to employ older workers.'

The Preamble to the Directive¹⁸ recognises that the prohibition of age discrimination is 'an essential part of meeting the aims set out in the Employment Guidelines', but then continues by stating that some differences might be 'justified under certain circumstances'. The Directive stipulates that both direct and indirect discrimination at work (including harassment) are to be made unlawful. There is a

general exception concerning indirect discrimination where there is 'objective justification by a legitimate aim and the means of achieving that aim are appropriate and necessary'.¹⁹ Article 6, however, then proposes three exceptions which can justify differences of treatment on the grounds of age. The first permits some positive action for specific groups, including young people, older workers and those with caring responsibilities in order to encourage their integration into the workforce. The second allows for the fixing of minimum conditions or the giving of advantages linked to age, professional experience or seniority. The third allows for a maximum recruitment age based on the training requirements of the post or the need for a reasonable period of employment before retirement. These potentially significant exceptions seem to be in opposition to any principle of equality. They reveal a much more functional approach to age discrimination. The Government is likely to follow this approach and its 2003 consultation proposed a number of specific areas for exceptional treatment. These were – health, welfare and safety; e.g. the protection of young workers; the facilitation of employment planning; e.g. where a business has a number of people approaching retirement age at the same time; the particular training requirements of the post in question; e.g. air traffic controllers, who have to undertake 18 months theoretical and practical training at the College of Air Traffic Control, followed by further on the job training; encouraging and rewarding loyalty and the need for a reasonable period of employment before retirement. The Government proposes that there will be an opportunity for employers to justify specific practices in relation to the retirement age, pay and non-pay benefits, recruitment, selection and promotion. This appears to be an invitation to compromise the principle of equality for 'legitimate employment policy, labour market and vocational training objectives' and is in contrast to the human rights justification for action, where much more limited exceptions can be justified.

EMPLOYEE VIEWS

Respondents to the 2002 DTI consultation survey²⁰ had suggested a variety of age practices that could be justified in certain circumstances:

- If a job required a minimum age such as driving or bar work.
- If the return on training was not cost beneficial.
- If the work was of a very physical nature.
- Minimum or maximum age on grounds of health and safety.
- If a job needed life experience, e.g. a social worker.

- If peers of a similar age were needed, e.g. a holiday representative on an 18–30 holiday.

Some 41% of respondents thought age based recruitment schemes were justifiable, 59% thought not. Some 65% of respondents thought employers should not be able to deny promotion on age grounds, but about 68% of respondents thought that it was permissible to deny training in certain circumstances, e.g. the cost of training compared to amount of career left.

The ambivalence in the Directive and the proposed Regulations appears sometimes to be reflected in the views of individuals. The Middlesex survey was an illustrative survey of retired members facilitated by two trade unions²¹ between September and November 2003. This was a survey that was followed previous interviews with trade unions on age discrimination and mandatory retirement.²² A total of 1363 questionnaires were sent out by NATFHE²³ and PCS²⁴ to retired members who were members of their retired members' sections.²⁵ Some 648 completed responses were received giving a return rate of 47.5%.²⁶

The purposes of the survey were, firstly, to provide the two trade unions with some feedback as an aide to developing their own policies on age discrimination in employment; secondly, to provide information about the views of individuals on the issues raised by the Government's 2003 consultation exercise on age discrimination in employment especially those related to a mandatory retirement age; and, finally, to consider whether there was any sign of the confusion between a functional and non-functional approaches to age discrimination, i.e. to discover to what extent any support for the principle of equality was limited by the practical considerations illustrated in the 2003 consultation exercise (see below).

RETIREMENT

The mean age of the respondents in the Middlesex survey was 65.14 years. One in five people (22.8%) had retired early because of illness or disability and a similar number retired as a result of redundancy measures (22.8%). There was not a great demand from respondents to retire any earlier than they did. Only 14.6% of respondents wished that they had been able to do this. Over two thirds of respondents (67.6%) stated that they would like to have continued working in some capacity. This included 22.7% who would have liked to continue working on a full-time basis, 31% on a part-time basis and 21.7% on a casual basis. The majority of these respondents would have liked to continue in the jobs from which they were retired, on a full-time, part-time or casual basis.

A majority of respondents were in favour of abolishing a compulsory retirement age (55.6%). About one third of respondents were, however, in favour of retaining the present system (34.6%) and 9.8% were in favour of replacing the present retirement age with one of 70 years.²⁷

It is likely that the possibility of a contractual mandatory retirement age will be excluded by the new measures. There is presently no national mandatory retirement age, but over half of working men in the United Kingdom have a fixed retirement age in their contract of employment; 75% of these have the State Pension Age as their retirement age. Traditional reasons for having a fixed retirement age are, firstly, occupational pensions have a normal retirement date; secondly, there is a correlation between state pension age and normal retirement date; thirdly, older workers should make way for younger ones and, finally, that younger workers have a higher level of productivity.²⁸

People do not necessarily retire at the contractual retirement age (see Table 3), however. Research suggests that about one-third of all those who begin to draw their pensions are aged 54 years or less and about two-thirds are aged 59 years or under.²⁹

Only 37% of men are still working at the age of 64 years and two-thirds of men who work after 65 years retire within two years. The figures are not directly comparable, but the contrast with the USA is marked (Table 4).

A DTI survey showed that only 43% of the male respondents and 40% of the female ones expected to retire at the state pension age, although one in three would like to retire earlier. According to the Government Green Paper on *Working and Saving for Retirement*³⁰ the mean age for men retiring in the United Kingdom is 62.6 years and for women 61.1 years. Amongst those already retired and who had retired early, the survey found that 33% had retired because of illness or disability, 16% were made redundant and 17% had their workplace closed or changed. Perhaps not surprisingly, given these figures, some three-quarters of all firms have no employees over the age of 60 years.³¹

Table 3: Proportion in paid employment by age

| Age | Men (%) | Women (%) |
|-------|---------|-----------|
| 50-54 | 82 | 69 |
| 55-59 | 68 | 53 |
| 60-64 | 45 | 25 |
| 65-69 | 13 | 8 |
| 70-74 | 8 | 3 |
| 75-79 | 4 | 2 |

Table 4: Proportion of economically active men by age (USA 1996)

| Age | % |
|-----|------|
| 65 | 33.4 |
| 66 | 31.7 |
| 67 | 26.5 |
| 68 | 22.7 |
| 69 | 22.2 |
| 70 | 21.3 |
| 72 | 16.3 |

AGE DISCRIMINATION

Age discrimination, or at least the perception of it, is a common place phenomena in the workplace. One survey of managers revealed 55% of respondents had personally experienced some form of age discrimination and up to 75% of those surveyed had witnessed it.³² The Middlesex survey showed lesser figures, although still unacceptably high. Some 31.7% claimed that they had been discriminated against.³³ The most significant areas where it took place were as follows (Table 5).

Respondents were asked whether age discrimination should be made unlawful in all circumstances, some circumstances or not at all. The majority felt that this should be the case in all circumstances (56.2%) with a substantial minority (40.9%) stating that it should be made unlawful in some circumstances. Relatively few respondents preferred the no option (3.0%).

The questionnaire then posed a number of scenarios in order to test the respondents' resolve in making such discrimination unlawful. The questions were posed in such a way as to be supportive of the Government's proposed approach to allowing exceptions to the general rule of non-discrimination. Some of the answers revealed an ambivalence which might be typical of the reactions to age discrimination. Having said that age discrimination should be made unlawful, a number of respondents clearly did not accept

Table 5: Experiences of age discrimination in the Middlesex survey

| Category | Percentage of total |
|--------------------------------------|---------------------|
| In applying for jobs | 14.9% |
| In respect of promotion | 14.2% |
| In respect of training opportunities | 5.5% |
| On grounds of redundancy | 5.2% |

that some ageist practices were discriminatory. There were divisions, for example, as to whether young people should continue to receive a lower rate of national minimum wage than those over 21 years of age. Views were divided with some 43% agreeing with this statement and some 47.4% disagreeing. This ambivalence was even more pronounced when respondents were asked to agree or disagree with the statement that 'at present older people receive a higher rate of redundancy pay than younger workers. This should be ended and all receive the same rate'. Interestingly a large majority (56%) disagreed with this statement and were in favour of continued differences, with only 34.8% agreeing. A much greater proportion of male respondents (38%) than female respondents agreed (23.6%).

The most pronounced difference between the belief in abolishing age discrimination and retaining apparently age discriminatory measures came when the group were asked whether some benefits, such as longer holidays or extra privileges associated with seniority, can be justified on the basis of rewarding service, even though they inevitably mean that older workers receive more benefits than younger ones. A large majority agreed with this statement (70.7%). Seniority, in terms of length of service, was an acceptable compromise with the principle of non-discrimination. This is an exception in US age discrimination law and it seems likely that it would be a welcome exception, for older workers, in the UK Regulations.

There is wider evidence of the acceptability of age discrimination. An example of employees' acceptance of age discrimination is cited in the DTI evaluation of the effectiveness of its Code of Practice. In relation to training opportunities, the report states:

'... where training for new jobs was concentrated on younger employees, some older people believed this to be acceptable to ensure that they did not impede career progress of younger staff, especially if they believed they were close to retirement or beyond training.

Similarly, when discussing mandatory retirement as a form of age discrimination, it is clear that many people welcome retirement from work and look upon it as something to look forward to, rather than to be resisted.

FUNCTIONALISM VERSUS EQUAL TREATMENT

The contradictions reveal a debate between a pragmatic acceptance of age discrimination on the one hand in contrast to a more human rights motivated approach.

This first approach is a functional one. It appears to have little to do with a concern about discriminatory treatment except insofar

as this treatment interferes with the primary objective of keeping a greater proportion of older people in work and reducing the burden of support from the State and from a smaller workforce. If one adopts this standpoint then making age discrimination in employment unlawful makes sense unless it actually produces unwanted economic effects, e.g. an employer's ability to have an age diverse workforce in order to assist in long term succession planning. Perhaps, in contrast to the treatment of discrimination on the grounds of gender, racial origin and disability, there can be justifiable exceptions to the 'principle of equality' in the treatment of age discrimination.³⁴

The alternative, non-functional, justification for making age discrimination in employment unlawful is the equal treatment argument. The principle of equal treatment is mentioned in Article 1 of Directive 2000/78/EC and it is mentioned a number of times in the preamble to that Directive.³⁵ It is not difficult to see where this principle leads in terms of gender or race, but there is more of a problem when considering its application to age issues. Equal treatment suggests equality of treatment between parties or ensuring that one individual or group is not treated less favourably than another group. This presents real problems when considering age discrimination because 'everyone has an age'.³⁶ There does not appear to be a discrete group, such as black people or women who can be judged to have been treated less favourably, say, than white people or men. In the United States there has been a long history of protection for older workers against age discrimination in employment.³⁷ Only workers over the age of 40 years are protected, so there is an opportunity to compare the treatment of an over 40 year old with a person or group under that age.³⁸ This will be more difficult in the United Kingdom because all ages will be protected, so, without further sub-divisions, there will not be a discrete group being discriminated against.

Nevertheless, the non-functional approach provides that discriminatory treatment is wrong and such treatment cannot be justified on the grounds of age. Perhaps more is needed than just a concept of equal treatment, which requires that likes be treated in the same way. The aim of equality, according to Fredman, is 'to give all people an equal set of alternatives from which to choose and thereby to pursue their own version of the good life'.³⁹ In order to achieve this there needs to be some positive action that recognises the need to cope with inter-generational cultural differences. The focus might therefore be on supporting individuals rather than on some equation of relative equality.

This approach requires that individuals be treated on a merit basis,⁴⁰ or at least on a basis which does not take into account

stereotypical assumptions about age. One survey asked employers to agree or disagree about various statements made about older workers in their Company. It concluded that 'there are still sizeable proportions of employers who continue to maintain negative and inaccurate stereotypes...'.⁴¹ As an example, employers were asked to agree or disagree that older workers 'are hard to train'. In response only 11% stated that they were not sure, whilst 39% agreed and 28% disagreed with the statement. What is surprising is not that a proportion agreed or disagreed with the statement, but that so many were prepared to agree or disagree with any such generalisation.

Ageing, according to John Grimley Evans,⁴² comes about because people change from how they were when they were young. All differences between young and old, however, are not necessarily due to age. An example of this might be what Evans calls the 'cohort phenomena' which is the result of the different experiences of people born at different times. Older people will have been through an education and training system which is different to that experienced by young people. Perhaps, in training, older people are subjected to teaching and learning techniques experienced by the young, but not by a previous generation. As a result the older worker may be faced with a greater challenge when experiencing training.

CONCLUSION

The important outcome of this debate is that the reasons for tackling age discrimination in employment are concerned with creating equality of opportunity for workers of all ages, although the principle does not necessarily require equal treatment in all circumstances. It is, however, a different debate to the functional one which derives from the economic/demographic issues. This functional approach regards the issue from a perspective where discrimination can be justified sometimes because, from a collective perspective, not to discriminate will harm employers, employment prospects, good business, etc. The Directive and the proposed UK Regulations both possess this dual and possibly conflicting approach which might result in much less effective protection for individuals than was perhaps intended.

NOTES

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1 Office for National Statistics; see www.ons.gov.uk.

- 2 House of Commons Select Committee on Education and Employment report *Age Discrimination in Employment* Seventh Report Session 2000–01; see generally, Sargeant, Malcolm (1999) *Age discrimination in employment*. Institute of Employment Rights, London.
- 3 McKay, Stephen and Middleton, Sue (Researchers) (1998) *Characteristics of Older Workers* Centre for Research in Social Policy, Loughborough University Research Report RR45 DfEE.
- 4 Taylor, Phillip and Walker, Alan (1994) The ageing workforce: employers' attitudes towards older people *Work, Employment and Society* 8, 4 pp. 569.
- 5 Living in Britain – General Household Survey 2000; Current pension scheme membership by sex and socio-economic group. See also *Uncovered: workers without pensions* (2002) TUC.
- 6 Survey of retired individuals belonging to two trade unions, PCS and NATFHE, carried out by Malcolm Sargeant 2003; hereinafter referred to as the Middlesex age survey. For a full analysis of this survey see Sargeant, Malcolm (2004) Age Discrimination in Employment in Further and Higher Education *Education Law Journal* 91–97.
- 7 Inactivity here means not being in paid employment; it does not necessarily mean being inactive in any wider sense.
- 8 *Age Diversity in Employment* (1999) DfEE Publications, Nottingham.
- 9 Marsh, Alan and Sahin-Dikmen, Melahat (2003) *Discrimination in Europe* Eurobarometer May.
- 10 In relation to racial or ethnic origin, religion or beliefs, disability, age and sexual orientation.
- 11 *Towards a Europe for all Ages* Communication from the Commission COM (1999) 221.
- 12 *Report requested by Stockholm European Council: 'Increasing labour force participation and promoting active ageing'*. COM (2002) 9.
- 13 Directive 2000/78/EC OJ L303/16.
- 14 Clauses 4 and 5 of the Preamble to the Equal Treatment in Employment Directive.
- 15 This definition of harassment has already been implemented in the United Kingdom in other Regulations on Equal Treatment in Occupation concerning sexual orientation and religion or belief.
- 16 Council Decision 2000/228/EC.
- 17 Council Decision 2003/578/EC.
- 18 Clause 25.
- 19 Article 2 Directive 2000/78/EC.
- 20 Contained in Towards Equality and Diversity DTI.
- 21 Public and Civil Service Union (PCS) and the National Association of Teachers in Further and Higher Education (NATFHE).
- 22 See Sargeant, Malcolm (2004) Mandatory retirement age and age discrimination in employment *Employee Relations* Vol. 26 2 pp. 151–166.
- 23 National Association of Teachers in Further and Higher Education.
- 24 Public and Civil Service Union.

- 25 This was made up of 500 to NATFHE members in Further Education, 363 to members in Higher Education and 500 to associate members of PCS. A number of other trade unions expressed an interest in participating but failed to do so mostly because of problems associated with identifying a random sample of retired members.
- 26 The rate for NATFHE was 48.6% and for PCS 45.6%.
- 27 This was an option proposed by the Government in its consultation proposals in 2003.
- 28 Meadows, Pamela: *Retirement ages in the UK: a review of the literature* DTI Employment Relations Research Series No. 18.
- 29 (2002) Early retirement schemes still the norm in final salary schemes *IDS Pensions Bulletin* 160 November p. 4.
- 30 Department for Work and Pensions 2003.
- 31 Grattan, Patrick (2002) Short guide to pensions, retirement and work *Third Age Employment Network* October.
- 32 *Equality and Diversity: Age Matters* Response by the Chartered Management Institute, October 2003.
- 33 It might be interesting to do a comparative survey about experiences between the public and private sectors.
- 34 See *Equality and Diversity: Age Matters* Age Consultation 2003 DTI, also considered below.
- 35 Clauses (1) to (6) of the Preamble; there is mention of the Community's long history of supporting the principle of equal treatment between men and women, but, of course, action on other issues, such as racial discrimination, and age are much more recent initiatives.
- 36 See generally Friedman, Lawrence M (1984) *Your time will come: the law of age discrimination and mandatory retirement*. Russel Sage Foundation, New York.
- 37 Age Discrimination in Employment Act 1967 as amended.
- 38 This is not necessary, however, because discrimination can still take place between those people in the protected group, i.e. those over 40 years of age. *O'Connor v. Consolidated Coin Caterers Corp* 517 U.S. 308 (1996) at 313; see also *Metz v. Transit Mix Inc.* 828 F.2d 1202 (7th Cir 1987) which concerned the dismissal of an older worker with 27 years service in favour of a much younger worker who would be paid considerably less. See also Beth M. Weber, *The effect of O'Connor Consolidated Coin Caterers Corp on the requirements for the establishing of a prima facie case under the age discrimination in employment act*. Rutgers Law Journal vol. 29 no. 3 (1998).
- 39 Fredman, Sandra and Spencer, Sarah (2003) *Age as an equality issue* Chapter 3 'The age of equality' Sandra Fredman p. 43; see also Janet Dine and Bob Watt *Discrimination Law* Longman (1996): 'If liberalism could be said... to have a central dogma it would surely include, at least at a preliminary stage, the provision that all citizens irrespective of gender, origin or other irrelevant characteristics should have an opportunity to secure for themselves, in reliance upon their own merits and endeavours, their choice from among the goods available in a given society'.

40 Although Sandra Fredman (op. cit.) suggests that reliance on merit is too limited because it requires judgements which are neither scientific nor objective.

41 Op. cit. n4 at p. 580.

42 Fredman, Sandra and Spencer, Sarah (n39) Chapter 2 *Implications of the ageing process* p. 12.