

MALCOLM SARGEANT*

For Diversity, Against Discrimination:¹ the Contradictory Approach to Age Discrimination in Employment

Abstract: This article argues that there is a contradiction contained within the Framework Directive on Equal Treatment in Employment and Occupation and the UK Government's proposals for implementing it. There is a distinction between the business justification for encouraging diversity in the workforce and the human rights justification for ending age discrimination. The first approach weakens the latter by legitimising continued discrimination on the basis of age. This is especially important because there is a close relationship between age discrimination and discrimination on the grounds of sex, race and disability.

1. INTRODUCTION

By the end of 2006 it is likely that the United Kingdom will have adopted regulations intending to prohibit age discrimination in employment. This will fulfil the Government's obligations to transpose the age aspects of the Equal Treatment in Employment and Occupation Directive.² The process towards this implementation began shortly after the 1997 general election when the new government announced that it would consult on the best way to tackle age discrimination in employment. The results of this consultation were published in *Action on Age*.³ A major contributor

* Professor of Labour Law, Middlesex University, UK.

1 The Equality and Non-discrimination Annual Report 2004, European Commission Employment and Social Affairs, reported a new EU-wide information campaign with the slogan *For Diversity. Against Discrimination*.

2 Directive 2000/78/EC OJ L303/16.

3 *Action on Age* Report of the Consultation on Age Discrimination in Employment (1998) Department for Education and Employment (DfEE).

to this consultation was some research that had already been commissioned by the DfEE in 1996. The report entitled *Characteristics of Older Workers* was published in January 1998.⁴ The purpose of this report was to identify the effect of age on economic activity and to explore the characteristics of older workers, using data from the Family and Working Lives Survey.

In November 1998 the UK Government published a consultation on a *Code of Practice for Age Diversity in Employment*. It is not at all clear how a proposed code of practice on age *discrimination* in employment became a draft code of practice on age *diversity* in employment. It perhaps reflected the Government's concern that limiting age discrimination in employment was a means of encouraging employers to realise the advantages of an age-diverse workforce and encouraging those employers to adopt policies that would achieve this. There is a business or economic justification for encouraging diversity and dealing with age discrimination is part of the strategy for achieving this.

United Kingdom policy in this matter 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.⁵ The Commission summed up the concerns posed by the ageing population as, 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.⁶ The Commission's conclusions were that:

4 S. McKay, S. Middleton, Centre for Research in Social Policy, Loughborough University (1998) DfEE.

5 There is ample evidence that discrimination takes place in the EU. One EU-wide indicative survey (Alan Marsh and Melahat Sahin-Dikmen, *Discrimination in Europe* Eurobarometer May 2003) of people's perceptions of discrimination 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. There was a significant variation between countries though ranging from 17% in Greece to 83% in Finland.

6 *Towards a Europe for all Ages*, Communication from the Commission COM(1999) 221.

The magnitude of the demographic changes as we enter the 21st century will force the European Union to rethink and change outmoded 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.⁷ This report showed that 31.1% of the working-age population in the EU was economically inactive (i.e. 50 million women and 22 million men). Participation rates for men begin to decline rapidly from age 50 and for women from the age of 45 years. Changing attitudes, amongst other measures, was essential in order to raise the level of participation. The overall aims were to ensure that present and future working generations will remain active as they grow older; to attract a substantial part of those currently inactive but able to work and to maintain participation of today's older workers.⁸

2. THE FRAMEWORK DIRECTIVE

One positive measure of course was Directive 2000/78/EC on Equal Treatment in Employment and Occupation. The Directive reveals a contrasting approach between a desire to stop age discrimination as a means of enhancing individual human rights and a desire to create an environment for increasing the participation rate of older people in the workforce. The justification for the Directive, contained in its Preamble, cites a respect for human rights, the Universal Declaration of Human Rights, United Nations Covenants on civil and political rights, the European Convention on Human Rights and the International Labour Organisation Convention 111. It also cites the Community Charter of the Fundamental

7 *Report requested by Stockholm European Council: 'Increasing labour force participation and promoting active ageing'*. COM(2002) 9. See also Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Member States OJ L197/13.

8 The Lisbon and Stockholm Councils set ambitious targets for raising employment rates to 50% for older workers – an extra five million older workers.

Social Rights of Workers, which recognised the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of older and disabled people.⁹ Both in the Preamble and in the Directive itself there is also a recognition that an objective is to increase participation levels of older workers. The Preamble cites the Helsinki Council Guidelines, which stressed the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination, and, also, the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.¹⁰ It also states that discrimination may undermine the achievements of the objectives of the treaty, in particular the attainment of a high level of employment and social protection, and that the prohibition of age discrimination is an essential part of meeting the aims in the employment guidelines. Differences in treatment in relation to age, however, may be justified under certain circumstances. It is essential to distinguish between differences in treatment that are justified by legitimate employment policy, labour market and vocational training objectives and treatment arising from discrimination.¹¹ Thus the principle of equal treatment, which is the stated purpose of the Directive,¹² can be breached in certain circumstances, including, perhaps, the need for greater age diversity in workforces or, perhaps, the need to encourage greater participation by older workers.

This contradiction between an approach that calls for greater diversity and an anti-discrimination or human rights approach is evident in Article 6 of the Framework Directive.¹³ Member States may provide for differences of treatment on the grounds of age where the differences can be

objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Three examples of justifiable treatment are given by the Directive. The first is about the setting of special conditions for access to employment

9 Paragraphs 1, 4 and 6 of the Preamble.

10 Paragraph 8 of the Preamble.

11 Paragraphs 11 and 25 of the Preamble.

12 Article 1.

13 See M. Sargeant, 'Age discrimination: equal treatment with exceptions', *International Journal of Discrimination and the Law*, 2005, Vol. 6, pp. 251-266; see generally M. Sargeant, *Age discrimination in employment*, Institute of Employment Rights, London, 1998.

for young workers, older workers and those with caring responsibilities in order to promote their 'vocational integration' as well as providing them with protection. 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 exceptions were developed in the UK Government's proposals for age discrimination regulations.¹⁴ It will be possible to treat people differently on the grounds of age if the employer can justify doing so by reference to specific aims that are appropriate and necessary. These aims could be health, welfare and safety, e.g. the protection of younger workers; facilitation of employment planning, e.g. where a business has a number of people approaching retirement at the same time; the particular training requirements of the post in question, including those that have lengthy training periods and require a high level of fitness and concentration; encouraging and rewarding loyalty and the need for a reasonable period of employment before retirement.

The problem of legitimising discrimination by allowing significant exceptions is illustrated by the response to the Government consultation exercise on its proposals carried out between 2 July and 20 October 2003.¹⁵ Almost two-thirds of the respondents agreed with the question about whether they agreed or not with this list of aims in the document which might justify differences in treatment, although others were also suggested such as making an exception for the meeting of skills shortages.¹⁶ There was also a concern about the concept of allowing direct discrimination in anti-discrimination legislation.¹⁷

It is difficult to understand how these measures, that are aimed at encouraging diversity and the making of such diversity acceptable to employers, can also be deemed to be measures aimed at introducing the principle of equality in employment. It may be possible to do so if one adopts a, perhaps, broader approach to the meaning of equality.¹⁸ If one takes the approach that equality really means an equality of opportunity, then it may be possible to reconcile the two different approaches. In this

14 *Equality and Diversity: Age Matters* para 3.15 July 2003 DTI.

15 *Equality and Diversity: Age Matters* July 2003 DTI; Report of responses.

16 It is claimed that this is a particular problem in the manufacturing sector which was experiencing an increasing higher age profile.

17 Response by Help the Aged.

18 See, for example, S. Fredman and S. Spencer (eds.), *Age as an Equality Issue: Legal and Policy Perspectives*, Hart Publishing Oxford, 2003.

scenario the creation of a diverse workforce is a means of creating opportunities for older workers and this is seen as the means of positively encouraging equality of opportunity in employment. If the principle of equal treatment is taken to mean that age should not be a criterion for decision-making in employment, and that this should be a precursor of any targeted requirement for any measures to create equality of opportunity, then there is a real contradiction between the diversity and discrimination approaches.¹⁹ The first approach considerably weakens the implementation of the latter approach by legitimising continued discrimination on the basis of age.

3. MANDATORY RETIREMENT

Having a contractual rule that states that an individual must leave employment when that individual reaches a certain chronological age is discrimination on the basis of age. It does not take into account any individual merit, but is merely a decision based upon age. The majority of people who are made to retire would like to continue working in some capacity. Most people who are made to leave the workforce over the age of 50 are effectively ejected from the national workforce forever. Whatever their wishes, most people are unable to rejoin the national workforce.

There is no law in the United Kingdom that requires an employer to set a mandatory retirement date in their contracts of employment, although there is an obligation to inform employees of any terms and conditions relating to pension schemes.²⁰ There are currently, however, legal consequences in terms of employment protection. Employees who continue in employment beyond the contractual retirement age (provided that this is the same as the normal retirement age) lose their right to protection against unfair dismissal²¹ and their right to redundancy payments.²²

Many individuals do not retire at the contractual retirement age and many employers do, in some form or other, permit employees to work beyond normal retirement age. One DTI survey suggested that as many as one in four employers allowed this to happen, although it was less like-

19 Such an approach is illustrated by the Chartered Institute of Personnel and Development's statement on Age and Employment, which states that 'Employment decisions based on age are never justifiable because age is not a genuine employment criterion, age is a poor predictor of performance and it is misleading to equate physical and mental ability with age'. See CIPD's website <www.cipd.co.uk>.

20 Section 1(4)(d)(iii) Employment Rights Act 1996.

21 Section 109 Employment Rights Act 1996.

22 Section 156 Employment Rights Act 1996.

ly to occur in larger organisations.²³ 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.²⁴ 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.²⁵ According to the Government Green Paper on 'Working and Saving for Retirement' 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.

Article 6(2) of the Directive allows Member States to provide that the setting of age limits in occupational social security schemes, or setting ages for entitlement to retirement or invalidity benefits does not constitute age discrimination. Given the close relationship between pension and invalidity benefits and actual retirement ages, this does allow the process to be manipulated to achieve a later or earlier actual retirement practice, rather than some free-standing right to retire at any age. It is this relationship between state and pensionable benefits that is more likely to influence actual retirement ages than any straightforward abolition of the contractual retirement age.

Early retirement policies have traditionally been a means of encouraging older workers to exit the workforce. It is possible to argue that this is a voluntary process and that, often, workers will volunteer for early retirement. It is also possible to argue that early retirement policies are a manifestation of how age discrimination has become an acceptable method of reducing the size of a workforce. It is older workers who qualify for early retirement and who, often with the agreement of the trade unions, are selected for exiting purely because of their chronological age. It is an example of indirect discrimination, that has its major impact on older workers. It is not possible to say how many of these 'voluntary' schemes are really voluntary, although the European Commission estimated that some 40% of early retirees felt that there was an element of coercion in their decision,²⁶ or what proportion of affected workers feel under pressure to accept enhanced benefits, which might not be available in a situation of compulsory redundancies. The practice is seen as an

23 Carried out for the DTI report on the Code of Practice on Age Diversity.

24 'Early retirement schemes still the norm in final salary schemes', *IDS Pensions Bulletin* 160 November 2002, p. 4.

25 See DTI report on the Code of Practice.

26 *Towards a Europe for all Ages*, *op. cit.*

acceptable way of dismissing older workers in order to avoid dismissing workers in other age groups.

Justification

The UK Government has stated that ‘under the Directive, compulsory retirement ages are likely to be unlawful unless employers can show that they are objectively justified’.²⁷ Article 6 of the Framework Directive provides the opportunity for justification of differences of treatment on grounds of age. Such justification must be objectively and reasonably justified by a legitimate aim. One issue around justification and retirement is whether it is possible to justify the setting of a mandatory retirement age as a policy that is objectively or reasonably justified by a legitimate aim.

The issue of whether to abolish mandatory contractual retirement is the most divisive issue in the age discrimination proposals. There has been a division within Government about whether the retention of some sort of default retirement age can be justified. This exemplifies how the debate has moved on since 1997 when the Government was contemplating the introduction of a voluntary code of practice. The issue of compulsory retirement was raised a lot during the consultation, but the document stated

This is [retirement age] outside the scope of the consultation, as like other terms and conditions of employment, retirement ages are a matter for negotiation between individual employers and their employees, or their representatives.

It is the opposition of some employers to the straightforward removal of the contractual retirement age that led to the setting up of a committee chaired by Ms Rita Donaghy, chair of ACAS. The committee, which consisted of representatives of the CBI, the TUC and age pressure groups was given the task, at which it was ultimately unsuccessful, of trying to reach common ground between the conflicting views. This is not to suggest that there is a united employers’ view or a united trade union view. It is clear that some employers, as well as some trade unions, are concerned and suspicious about the possible removal of the contractual retirement age.

27 Green Paper *Simplicity, Security and Choice: Working and Saving for Retirement*, Cm 5677 Department for Work and Pensions 2002.

The preamble to the Framework Directive states that it is without prejudice to 'national provisions laying down retirement ages'. The problem for the United Kingdom is that, unlike some other Member States, it does not have such national provisions. The result is the need to justify any continuation, or replacement with a default age, under Article 6. A survey carried out for the Government's 2003 consultation²⁸ had 57% of respondents against employers being able to require people to retire at a certain age.²⁹ In that consultation the Government put forward two choices: either to make compulsory retirement ages unlawful, except in certain justifiable situations, or to have a default age of 70 years where employees would not have to justify the decision to retire employees. This latter approach would effectively mean the introduction of 'national provisions laying down a retirement age' and it is difficult to see it as anything else but an introduction of such an age at 70.

The report on responses to the 2003 consultation³⁰ showed a small overall majority in favour of specifying a default retirement age (51.8% in favour with 42.9% against). A similar response from employer contributions showed that 50.8% of employers would rely on the default age of 70 years, perhaps suggesting that such an age might become the standard retirement age. The feelings of employers were further illustrated when employers were asked the question as to whether they would set a higher retirement age. In this case a large majority said no (82.4%). There was, according to the response report, 'a significant call for a default retirement age to be set no higher than the current state pension age (65)'. This effectively is to try and introduce national provisions retrospectively by using a justification based upon employers' concerns about being able to dismiss older employees without risk of a tribunal claim for discrimination or unfair dismissal.

The issue for employers, as cited in the consultation report, was that the lack of an ability to retire people compulsorily

would place enormous pressure on employers, particularly where employees were not performing badly enough to warrant dismissal on performance grounds.³¹

28 *Equality and diversity: age matters* DTI.

29 Similar to a Middlesex University survey of retired members of NATFHE and PCS where 55.6% of respondents were in favour of abolishing compulsory retirement ages.

30 DTI 2004.

31 Page 11.

Trade union responses all opposed the introduction of a default retirement age. It was suggested, however, that if there was to be a default retirement age it should be set at the current age of 65 years. There was a fear that having an older age would mean reduced pension benefits for those retiring at the age of 65.³²

This argument does not take into account the loss suffered by much greater numbers of individuals if a mandatory retirement policy were to remain, or a default retirement age introduced. One view is that 'it is an offensive stereotype to suggest that there will be a problem due to older employees failing to meet standards of competence... It is more likely that they will be the first to notice that their performance has deteriorated and will retire voluntarily.'³³ This raises the question of the relationship between age discrimination and other types of discrimination, especially disability which is further discussed below.

The Transport and General Workers' response, as cited in the consultation response document, stated that the Government proposals were 'driven more for Government economic reasons than age discrimination'. This is the problem with this whole argument. There are undoubtedly difficult issues to be faced, but the proposed solution is to legitimise continued discrimination against older workers. The human rights rationale for action is forgotten in the desire to provide a straightforward means for employers to ensure the exit of older workers from their workforce, and probably the national one.

4. INTERSECTIONAL DISCRIMINATION

A further problem associated with this conflict is the need to view age discrimination in a wider context and accept that it is intertwined with other forms of statutorily forbidden discrimination. Through the policy of encouraging age diversity, rather than ending discrimination, the approach to age discrimination differs from other types of anti-discrimination legislation. This is more harmful because there is a strong link between discrimination on the grounds of age and other, already regulated, grounds for discrimination. The strongest argument for a human rights approach to age is so that it can be combined with other areas of discrimination with which it overlaps.

32 The view of Amicus and the TGWU.

33 M. Rubenstein, 'Mandatory retirement and the dignity canard', *Equal Opportunity Review*, No. 131, 2004, p. 32.

4.1. Age and Gender

Older women suffer from disadvantages compared to older men. This is because they tend to live longer and they are significantly poorer because they will on average receive a much lower occupational pension income, partly because they are dependent upon male pensions and partly because they will have a broken work history and are more likely to work part-time with lower average earnings anyway.

In 1984, for instance, when today's 65-year-old pensioner was aged 45, the employment rate for 35-49 year old women was 65% versus 88% for men, and 55% of these women were employed as part-timers compared to 1% of men. Lower overall employment meant fewer opportunities to accrue pension rights, and part-time employment, until the early 1990s, very rarely involved pension-scheme membership.³⁴

In the European Union (pre-2004 expansion) it was estimated that more than 50% of working age women over the age of 50 years did not have paid work.³⁵ In the United Kingdom research has shown that, 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'. For women the chances of moving out of inactivity were much reduced after the age of 40 years and this 'was particularly uncommon for those older than their late 50s'.³⁶ Thus women are perceived as being 'older' at a much younger age than men and a greater proportion are likely, therefore, to suffer from age discrimination related to their sex. One survey showed a respondent employer stating that women who returned to work in their mid-thirties after a career break to raise children were regarded as older workers.³⁷ Another survey concluded that 'the disadvantage incurred in being 'too young' or 'too old' was found to impact more on women than men, suggesting that in these age ranges at least, being female acted to intensify age prejudice'.³⁸

There have also been surveys about the effects of physical attractiveness on decisions concerning recruitment and promotion, and one study did show that there was a relationship between physical attractiveness and promotion. There has also been research showing that women are perceived to

34 *Pensions: Challenges and Choices*, p. 262 Pensions Commission HMSO, 2004.

35 *Towards a Europe for all ages*, *op. cit.*

36 S. McKay and S. Middleton, *op. cit.*

37 H. Metcalf and M. Thompson, *Older workers: Employers' attitudes and practices*, Institute of Manpower Studies report no 194, 1990.

38 C. Duncan and W. Loretto, 'Never the right age? Gender and age-based discrimination in employment', *Gender Work and Organisation*, Vol. 11, pt 1 Jan, 2004, pp. 95-115.

decline in attractiveness as they age far more than men. Thus women are more likely than men to suffer from these prejudices as they age.³⁹

It is through the use of sex discrimination legislation in the United Kingdom that the limited judicial attempts to consider age discrimination have taken place. In *Rutherford*⁴⁰ an individual was dismissed on the grounds of redundancy at the age of 67 years. Sections 109 and 156 of the Employment Rights Act 1996 exclude employees who have reached the age of 65 years from the right not to be unfairly dismissed, or the right to receive a redundancy payment.⁴¹ This legislation is clearly discrimination based upon age and is likely to be amended when the Government introduces its age regulations. In the meantime Mr Rutherford has attempted to argue that these age restrictions amount to indirect discrimination against men. The original Employment Tribunal agreed with him on the not unreasonable basis that significantly more men than women were economically active after the age of 65 years.⁴² Unfortunately the Employment Appeal Tribunal and the Court of Appeal disagreed. The latter stated that the correct population that was to be considered was not the 55- to 74-year-old population considered by the Tribunal but the whole workforce of 16-65 years. If one looks at this latter group, then there is very little difference between the proportions of men and women in terms of disparate impact. Thus, rather than just examining the affected workforce, the Court of Appeal decided that the correct basis was the whole population, most of whom would not wish to work beyond the age of 65 years. This unfortunate decision finally meant that it would not be possible to use the Sex Discrimination Act 1975 to defeat age discriminatory legislation, despite the fact that there is a close link between age and sex discrimination. Women (and men in certain circumstances) are more likely to be discriminated against on the grounds of age, but the legislation and judicial decisions do not recognise this.

Age and Ethnicity

Unemployment rates generally for black and minority ethnic groups tend to be higher than for the white population. According to one report by the

39 A. E. Hurley and C. M. Giannantonio, 'Career attainment for women and minorities: the interactive effects of age, gender and race', *Women in Management Review*, Vol. 14, No. 1, 1999, pp. 4-13; see also D. Ashiagbor, 'The intersection between gender and race in the labour market: lessons for anti-discrimination law', in A. Morris and T. O'Donnell (eds.), *Feminist Perspectives on Employment Law*, Cavendish Publishing, 2000.

40 *Rutherford v Secretary of State for Trade and Industry (no 2)* [2004] IRLR 892.

41 See also *Nash v Mash/Roe Group Ltd* [1998] IRLR 168.

42 8% of men compared to 3% of women.

House of Lords Select Committee on Economic Affairs, this problem is exacerbated by age:⁴³

However, this disadvantage appears to be compounded by age. In the late 1990s, the unemployment rate for whites was 5% for both 35-44 year olds and for people aged between 45 and state pension age. For blacks it was 12% among 35-44 year olds, and 16% among those aged between 45 and state pension age, and for members of the Pakistani/Bangladeshi communities it was 13% among the 35-44 age group, but 26% among persons aged between 45 and state pension age.

A Commission for Racial Equality representative, speaking to the Select Committee,⁴⁴ stated that it appeared that many black and minority ethnic persons aged between 45 and state pension age suffered both an 'ethnic penalty' and an 'age penalty' in the labour market. The Select Committee noted that the Government's initiatives in this field appeared to be directed at young people and new entrants to the labour market⁴⁵ and recommended that more attention should be given to those over the age of 50 years.

The comparison of employment rates between various ethnic minorities and the white population are revealing. It appears that with some groups such as the black or black British group, discrimination takes place against both young people and older workers, as shown in Table 1.

Table 1. Employment rates by ethnicity and age (%)⁴⁶

	16-24	25-44	45-59/64	All ages
<i>Ethnic group</i>				
Asian or Asian British	42	69	55	59
Black or Black British	35	69	63	60
White	67	83	74	77

This is illustrative of the fact that there may be a particular issue with younger people and race discrimination. Whilst all ages have much lower employment rates than the white population, the gap is greater with older people and younger ones, notably amongst the black or black British group.

43 *Aspects of the Economics of an Ageing Population* House of Lords Select Committee on Economic Affairs 4th Report Session 2002-03 HL Paper 179-1 para 4.29.

44 Ms Maureen Fraser para 4.30.

45 *Ethnic Minorities and the Labour Market* Cabinet Office Strategy Unit 2003.

46 Taken from the CRE website <www.cre.gov.uk>; original source Labour Force Survey.

Age and Disability

There is a close relationship between age discrimination and disability discrimination.⁴⁷ According to figures from the UK Disability Rights Commission⁴⁸ some 19% of the labour market population are long-term disabled (6,860,000 people) compared to 81% not disabled (29,342,000). Of the disabled work population only some 49% (3,389,000) are in work, compared to 81% of the non-disabled (23,847,000).

The likelihood of disability also increases with age, so that some 9.2% of working-age men and 8.4% of working age women in the 16-29 years age band, for example, are disabled compared with 33.9% of men and 33.6% of women in the 50-64 years age group, suggesting a high correlation between age and disability.⁴⁹ These figures are reflected in EU figures with some 31.7% of people over the age of 60 reporting that they have a disability, as shown in Table 2.⁵⁰

Table 2. People of working age with disabilities (%)

Age	Men	Women
16-29	9.2	8.4
20-24	10.3	10.6
25-34	12.1	13.6
35-49	17.5	19.5
50-64	33.9	33.6
Total	19.3	19.3

There is some positive discrimination for disabled workers. In particular, an employer discriminates against a disabled person if the employer fails to comply with a duty to make reasonable adjustments in relation to the disabled person.⁵¹ Older workers, who are more likely to be disabled than other workers, do not have this extra protection. The employers' response (see above) is to have a default age at which an employee can be removed from the workforce without any of the related problems (for the employer) of any potential unfair dismissal claims, discrimination claims etc.

47 For a more detailed consideration of this issue see M. Sargeant, *Disability and Age; multiple potential for discrimination*, *International Journal of the Sociology of Law*, 33 (2005), pp. 17-33.

48 See the Commission's web site: <www.drc-gb.org.uk>.

49 A. Smith and B. Twome, *Labour market experiences of people with disabilities*, Labour Market Division Office of National Statistics Labour Market Trends August 415-427, 2002.

50 *Disability and social participation in Europe*, European Commission, 2001.

51 Section 3A(2) DDA 1995.

This is an argument which effectively states that the employer wishes to have the ability to remove employees because they are more likely to become disabled. The alternative approach is that it would be more appropriate to extend to older workers the duty of employers to make reasonable adjustments. Thus, if a person has a genuine impairment to their health, mental or physical, then the employer should be required to treat them in the same way as a disabled employee. If a worker does not have a mental or physical impairment, then the only reason for adopting the CBI approach is to dismiss them because they are likely to have such an impairment in the future. This in itself, it could be argued, may be enough to justify further protection for older workers.⁵²

5. CONCLUSION

Intersectional discrimination is where the multiple discrimination cannot usefully or effectively be broken down into its component parts. It is where the sum of the parts is something more than the constituent elements.⁵³ Thus a young black woman may suffer discrimination in a way that an older black woman does not. The grounds for complaint should be that she is young and black and a woman, not necessarily three different complaints under first, age regulations, then racial discrimination and then sex discrimination. Intersectional discrimination is where the different forms of discrimination meet but result in a form of discrimination that is not necessarily covered by any of the individual statutes or regulations.

The close relationship between age and other areas of discrimination⁵⁴ highlights the difference of treatment of age discrimination and these other areas. The Race Directive⁵⁵ and the Equal Treatment Directive⁵⁶ have no such qualifications in their preambles apart from that which 'constitutes a

52 Interestingly, one study of the effects of combined age and disability discrimination, in relation to age discrimination, found that there was a positive effect upon the employment levels of young people, rather than older ones; see W. A. Stock and K. Beegle, 'Employment Protection for Older Workers: do disability discrimination laws matter?', *Contemporary Economic Policy*, Vol. 22, No. 1 January, 2004, pp. 111-126.

53 See, for example, S. Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1, 2003, pp. 65-86.

54 There are likely to be other areas of discrimination which overlap with age, that have not been discussed here, such with gay and lesbian workers.

55 Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin OJ L180/22.

56 Directive 76/207/EC on the implementation of the principle of equal treatment for men and women OJ L39/40.

genuine and determining occupational requirement'. The human rights justification is similar to that contained in the Framework Directive on Equal Treatment and Occupation. This overlap requires a wider view of discrimination and somehow an end to the compartmentalisation of discrimination into separate categories. Age discrimination regulation is likely to emphasise this overlap and encourage an approach which recognises that discrimination is more the individual compartments and more than just a multiple of those individual compartments. The linking of age to disability and/or gender and/or race creates different forms of discrimination.

The conflict between diversity and discrimination contained in the Directive and the UK Government proposals further weakens this process. Creating diversity requires measures that may discriminate in favour of or against particular age groups and particular categories of employees. The two are not necessarily complementary and there is a need to apply a consistent approach to the principle of equal treatment in all areas of discrimination.