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## **OLDER WORKERS AND THE NEED FOR REASONABLE ACCOMMODATION**

MALCOLM SARGEANT

*Middlesex University Business School, London, UK*

### **ABSTRACT**

This article is concerned with the close relationship between age and disability and argues that the duty to make reasonable accommodation, a measure intended to achieve a level of substantive equality for disabled workers, should also be applied to older workers. It considers the special provisions with regard to discrimination on the basis of disability and age contained in Articles 5 and 6 of the Framework Directive for Equal Treatment in Employment and Occupation and their justification. It then considers the relationship between disability and age and how the likelihood of having a disability increases with age. It then looks at the duty for reasonable accommodation and the perceptions of employers towards this duty, age and disability. The argument put forward is that some discrimination against older workers may take place because of the likelihood of them developing a disability or long term health problem and that, in order to be properly protected, the duty of reasonable accommodation should be extended to include older workers.

### **INTRODUCTION**

This article is concerned the close relationship between disability and ageing. It considers legislative measures taken to tackle discrimination on both grounds and argues that there is reason for treating older workers in a similar way to workers with a disability. One reason for age discrimination against older workers is the fear by employers that they may become less competent due to declining health and the possibility of becoming disabled. It considers the duty of reasonable accommodation towards persons with a disability and the case for extending this to older workers as a means of achieving substantive equality.

### **THE FRAMEWORK DIRECTIVE**

According to Article 1 of the Framework Directive for Equal Treatment in Employment and Occupation<sup>1</sup> its purpose is to lay down a

general framework for combating discrimination on a number of grounds<sup>2</sup> with a view to putting into effect the principle of equal treatment. Article 2 provides that the principle of equal treatment means that there should be no direct or indirect discrimination whatsoever on any of the stipulated grounds. Direct discrimination occurs where a person is treated less favourably than a comparator and indirect discrimination occurs when an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared to another on any of the grounds allowed. There is an exception on all grounds for a difference of treatment based on occupational requirements.<sup>3</sup>

Essentially this is a formal equality approach to discrimination where equal treatment is required of equal cases. The Directive applies what has been called the principle of equality as consistent treatment, i.e. one person is not to be treated less favourably than another. 'The ideal of equality is the elimination of the difference and such a view creates powerful conformist pressures'.<sup>4</sup> Without further measures this approach would assume that all workers are to be treated equally and the purpose of the Directive is to ensure that this is so. This approach does not take into account the fact that there may be material differences between the two groups being compared so that, without more substantive action, real equality is not achieved. A substantive equality approach is more likely to take account of the realities of discrimination and attempt to compensate for the disadvantages suffered by some groups. It concerns 'taking an active attitude to dismantling the obstacles which stand in the way of equality.'<sup>5</sup>

The Directive, of course, does take this approach with regard to disabled persons. Article 5 provides that:

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.

Thus, with respect to disabled persons, there may be a requirement to compensate for the disadvantages which such persons are perceived to have. More needs to be done than merely stopping unequal treatment as provided for in Article 2. The purpose of the duty to accommodate is perhaps to ensure that people with disabilities have an equal opportunity to achieve the same results as others.<sup>6</sup>

The question, however, that ought to be asked is why only disability? Why is there only provision for reasonable accommodation for disabled people and not for people who suffer discrimination on other grounds? Here we argue the case for reasonable accommodation for older workers, but it is not assumed that a case cannot be made out for other grounds of discrimination. The argument here is that in order to create equality of opportunity for older workers, then more is needed than just the removal of formal barriers which allow discrimination based upon age. This is not the same as arguing for a policy that is based upon an equality of results. Equality of results depends upon much more than the creation of equal opportunities. Outcomes depend upon decisions made and perhaps the aim of equality is to give equality in choice (or opportunities) so that people may achieve their own outcomes regardless of perceived obstacles.<sup>7</sup>

In contrast to this approach, the Directive, in Article 6, actually provides for specific exceptions to the principle of equal treatment with respect to age. There is to be no positive duty in this respect. The approach with age is based upon less favourable treatment compared to the appropriate comparator. It is an equal treatment model which does not provide for special measures to encourage equality of opportunity. It actually provides greater opportunities for discrimination to be justified when compared to the other grounds of discrimination.

Article 6(1) states that differences of treatment on grounds of age shall not constitute discrimination under certain circumstances. They must be 'objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives'. In addition the means of achieving the aim must be 'appropriate and necessary'. It is not clear what 'legitimate employment policy' means. Article 6 then continues to give some specific examples of differences in treatment which could be justified. Age discrimination is the only ground of discrimination in the Framework Directive that receives this special attention in having its own specified lists of areas where discrimination is to be justified. The list is, firstly, the setting of special conditions on access to employment and vocational training, employment and occupation (including dismissal and remuneration conditions) for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; secondly, the fixing of minimum conditions of age, professional experience or seniority of service for access to employment or to certain advantages linked to employment; and, thirdly, the fixing of a minimum age for recruitment which takes into account the training period and the need for a reasonable period of work before the individual retires.<sup>8</sup>

The ability to make these justifiable exceptions to the principle of non-discrimination in relation to age is manifested in the Age Regulations in the United Kingdom.<sup>9</sup> The Minister for Employment told the House of Commons European Standing Committee, reviewing the proposed Directive, that:

The Government have welcomed the proposal. It is important to establish minimum standards to combat discrimination at work throughout the whole European Community. The key to tackling discrimination, however, is not just the aspiration to end it... It is essential to ensure workable and proportionate mechanisms that deliver redress effectively. Otherwise we risk introducing a parody of proper standards and unnecessary litigation. Such an outcome would undermine the confidence of the public, employers and employees, whose support is essential to the effectiveness of the measures.

There is a provision in Regulation 3(1) which allows the respondent to show that the less favourable treatment is a 'proportionate means of achieving a legitimate aim'. Discrimination on the grounds of age is the only ground for which it is possible to justify direct discrimination apart from the limited possibility of a genuine occupational requirement. In addition to this, Part 4 of the Regulations is devoted to further possible exceptions. These are exceptions for national security, benefits dependent upon marital status, positive action, statutory authority, retirement, national minimum wage, the provision of benefits based on length of service, the provision of enhanced redundancy payments and the provision of life assurance cover for retired workers.

There are important arguments to be made in favour and against each of these exceptions. These are not recounted here.<sup>10</sup> Of importance really is the way in which discrimination on the grounds of age is treated differently to that of disability, despite there being such a close link between the two. There will be, of course, historical, political and social reasons for this. One contributory reason might be that the derivation of measures on age are essentially economic and concerned with the ageing population and the costs associated with ever increasing numbers of retired people. This ageing process is as a result of a combination of people living longer and a reducing birth rate. Until recently there has been an increase in the number of older people exiting the workforce, so that there appears to be the prospect of a declining workforce with the responsibility of maintaining an increasing retired or unemployed older population. The derivation of attempts to help workers with a disability perhaps lies with attempts to re-integrate injured soldiers returning from wars and to whom society owes a humanitarian debt.

In respect of age there appears to be a willingness to compromise the principle of equality in favour of perhaps more 'pragmatic' and functional exceptions. Age discrimination in employment has been allowed to continue in certain circumstances in order to encourage the employment of older people and not to place an apparently too onerous a burden upon employers. This debate 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.<sup>11</sup>

## DISABILITY AND AGE

Part of the argument in favour of providing the duty of reasonable accommodation to older workers is the close link between age and disability and that one of the reasons why older workers suffer from age discrimination is perhaps the fear of employers that they will become disabled.<sup>12</sup> There is one particularly revealing comment contained in the report *Winning the Generation Game*.<sup>13</sup> This report by the Cabinet Office was about helping people to remain active in later life, which meant not writing off or excluding people from work, leisure or community participation. The Innovation Unit of the Cabinet Office was asked to look at the implications of the trend towards economic inactivity of people between 50 years and state pension age, and to identify whether the Government should take action. The report's conclusions state:

The fact is that age is not a sound basis on which to judge ability to work or learn. Even though people change as they age, they do not all change in the same way, at the same speed or the same extent. Some will change for the better and some for the worse, and that judgment will in itself be different in respect of different activities. It is essential, therefore, that people should be judged on the basis of ability and not age. Moreover, insofar as it is possible (though potentially misleading) to assess older workers as a group, evidence shows that their productivity and return to employers is no different to younger ones.

This states that people should be judged on the basis of ability and not age, but it also admits that people change at different rates as they age. This, of course, is true, but if one is to judge purely on the basis of ability, then it must follow that those older people who 'decline' in ability, may be treated differently. There is no suggestion that any 'decline' should be compensated for by any positive action. If the older person declines to the extent of having a disability, as many do, then they will be protected. There is no protection during the process of decline and this is the likely reason why many employers were in favour of the default retirement age during the consultation process prior to the adoption of the Age Regulations 2006.

There is a close correlation between disability and age. In all some 10.8% of the population of Great Britain have a disability or limiting long standing illness.<sup>14</sup> Over 60% are aged 55+ and over 40% are aged 65+. This is of particular interest when one discusses the removal of the mandatory retirement age, as it is likely that many older workers will suffer both age and also disability discrimination.

Almost 80% of disabled people of working age are over the age of 35 years, including some 43.7% of all disabled people of working age<sup>15</sup> who are over 50 years of age. The chances of becoming a disabled worker therefore increase with age (Table 1).

Part of the explanation for this is that health problems associated with ageing itself account for a higher proportion of disabled at older ages. It is likely to be independent of social and economic circumstances to a greater extent than the main causes of disability at younger ages. At younger ages, although many fewer people become disabled overall, nearly one quarter are the result of accidents.<sup>16</sup> These figures are correlated by figures which show those who are inactive in the labour market as a result of sickness, disability and injury (Table 2).

Having established that there is a correlation between age and disability, it is then worth considering the issues surrounding the demographic change that is taking place in the United Kingdom

Table 1 Percentage of disabled people for age groups

Age group	Percentage of disabled population	Numbers (000s)
16-24	9.7	668
25-34	12.4	850
35-49	34.2	2,353
50-59/64	43.7	3,001
All	100.0	6,871

Table 2 Inactivity due to sickness, disability or injury (percentage of age group)

Age	%
16–24	1.9
25–49	4.4
50–SPA <sup>17</sup>	12.8

and elsewhere. Table 3 shows the percentage of people in certain age groups in 2005, compared to the projected figures for 2029.<sup>18</sup>

The population is ageing. In 2005 some 40% were aged 45 years or more. This is projected to increase to almost 47%. This is a significant increase over such a relatively short period of time. It is partly explained by the large increase of those aged 75 years or over, but the figures concerning the other age groups confirm the reduction in the proportion of those under the age of 45 years.

It is because of this demographic trend, which is happening throughout the European Community, that the European Council of Ministers, meeting in Lisbon in 2000, set targets to both increase the proportion of those aged between 55 and 64 years in work and to reduce the early exit from the workforce of older workers.<sup>19</sup> This policy is now included in the European Employment Strategy aimed at persuading Member States to join up to these targets.<sup>20</sup> In 2005 there were eight Member States which exceeded the target of 50% employment rate.<sup>21</sup> There were, however, nine Member States with 33% or less of the 55–64 year old workforce employed. As far as the average exit age is concerned there is a great variety ranging from 62.9 years in Latvia to 56.2 years in Slovenia; 12 of the 25 Member States failed to reach the interim target of 60.7 years (in 2004). It is interesting that one of the

Table 3 Percentage of population in age groups in 2005 and 2029 (United Kingdom)

Age group	2005	2029
0–4	5.7	5.3
5–15	13.6	11.9
16–44	40.2	36.1
45–59/64	21.8	24.5
60/65–74	11.0	10.8*
75 and over	7.6	11.3

\* By 2029 the state retirement age will have changed from 60 years for women and 65 years for men to 65 years for both sexes.



Member States which exceeds all the Lisbon job targets is the United Kingdom.

One other factor regarding an ageing workforce is that the Government is committed to reviewing its policy of having a default retirement age of 65 years by 2011. This was introduced as part of the Employment Equality (Age) Regulations 2006.<sup>22</sup> In the consultation prior to their introduction the Government stated:

In 2011 we will review whether all retirement ages that are not objectively justified should be outlawed. As we said when we announced the retirement age decision: “The review will be firmly grounded in evidence...” It will look at, among other things, the evidence on longevity, and employment patterns of older workers. If the evidence shows that we no longer need the default retirement age we will abolish it.

There is pressure to bring this review forward. The House of Commons Select Committee on Work and Pensions stated that the Government should reconsider its decision not to address the issue until 2011.<sup>23</sup>

Thus there are three distinct pressures leading to an older workforce.<sup>24</sup> These are the natural demographic change in the population, the European Community (and British Government) policy to increase the proportion of older workers who are economically active and the possibility that the default or mandatory retirement age will be abolished. The likelihood of disability increases with age, so the successful creation of an older workforce will lead to a greater proportion of the workforce either having a disability or having the potential to become disabled.

## **AGE, DISABILITY AND DISCRIMINATION**

One, perhaps self-evident, statement on disability and discrimination is that:

People with a disability or health condition have been denied the opportunity to enter or remain in work because of fears and stereotypes about their abilities and because of policies and practices that hold them back.<sup>25</sup>

There has been a gradual increase in the proportion of disabled people at work, but it still remains at only 50%. According to the Disability Rights Commission, there are some 1.3 million disabled people without a job who want to work.

The employment rate of disabled people is partly related to the type of disability which they have. It ranges from highs of 72% for those with skin conditions or allergies to 52% for those with arm

or hand problems (including arthritis or rheumatism) to lows of 22% for those with mental illness and 23% for those with learning difficulties. This breadth of employment rates suggests that it is a mistake to regard disabled people as one group who suffer a certain type of discrimination. As has been stated elsewhere:

First, whilst the traditional grounds of discrimination (that is, sex, race and religion) can easily be classified into clearly defined groups, this is not the case with disability – people with disabilities simply do not form an homogenous group. There are many different forms of disability, each demonstrating large variations as to their nature and severity and this is further compounded by the existence of multiple disabilities.<sup>26</sup>

There are a number of barriers to disabled people entering employment. These include ‘lack of qualifications, training and experience, financial disincentives, difficulties with application forms and interviews, inaccessible transport, lack of understanding on the part of employment advisers, employers’ perceptions that the job can’t be done by a disabled person and discrimination on the part of employers’.<sup>27</sup> There are also barriers created by factors affecting an individual’s willingness to apply for or enter work. These include the severity of the disability, access to and within a potential workplace; beliefs about the likelihood of facing discrimination or the availability of suitable jobs and the relationship between employment income and benefit receipts.<sup>28</sup>

Examples of discrimination are contained in a report commissioned by the Department for Work and Pensions which reported on a survey that a third of employers agreed with the statement that taking on disabled employees was a major risk for the employer and that some 22% of employers agreed with the statement that it would be a risk for their business to take on a person who had a disability or severe illness in the past but who was now recovered.<sup>29</sup>

Age discrimination might be different from other forms of discrimination, apart from possibly discrimination on the grounds of disability, because there is no discrete group that has its own membership. Everyone has some age<sup>30</sup> and old age is a state that the majority of the population will reach at some time. As the US Supreme Court stated:

Old age does not define a ‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process’. Instead, it marks a stage that each of us will reach if we live out our normal span.<sup>31</sup>

There is ample evidence that discrimination takes place against this group, in relation to work. Older workers are more likely to lose their jobs through redundancy. This figure was one in ten workers in the 55–64 year age group according to one survey.<sup>32</sup>

One Government report on older workers stated that older workers were less likely to be in paid work than younger groups and when they did work they were more likely to be working as self-employed or part-time. It also stated that there was a greater risk of becoming economically inactive beyond the ages of 50 and 55 years; and that 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 'was particularly uncommon for those in their late 50s'.<sup>33</sup>

There is also some evidence that, as with those who have a disability (see above), individuals in this age group deselect themselves from jobs because they assume that their age will be a hindrance in applying for jobs. Some 21% of the age group claimed in one survey to have been put off from applying for jobs because of their age.<sup>34</sup>

Health is an increasingly important issue when workers reach this age group. One in eight over 50s is economically inactive because of long term illness. Some 33% gave up work for health reasons, 15% took early retirement and some 16% were made redundant or took voluntary redundancy. This compares to some 13% of people in their 30s, for example, who gave up work for health reasons and 11% who were made redundant or took voluntary redundancy.

Some people over the age of 60/65 wish to continue to work and some people under this age wish to continue working when they reach the state pension age. In fact, about 34% of those in their 50s in one survey stated that 'the idea of retirement doesn't make sense to me'.<sup>35</sup> Not entirely surprising is the statistic that almost 20% of people in their sixties are dreading retirement and almost the same number of people have been put off applying for work because of their age.<sup>36</sup>

The older a worker becomes the more likely he or she is to be self-employed and to work part-time. He or she is less likely to be in a permanent job and will, on average, earn a lower gross hourly wage than younger age groups (see Table 4).

Table 4 Characteristics of people in the GB labour market<sup>37</sup> (percentages)

	16-24	25-49	50-SPA	SPA+
Self-employed	3.7	12.1	17.3	24.7
Part-time	36.8	21.0	23.7	69.7
In a permanent job	86.0	95.6	96.2	88.8
Average gross hourly wage	6.60	12.08	12.12	8.67

The relationship with age is even more pronounced when one breaks down the figures for those aged 50+ into 5 year age groups, e.g. 20.2% of men aged between 50 and 54 are self-employed. This increases to 22.7% for those aged 55–60; 27.9% for those aged between 60 and 64; and 40.8% between 65 and 69 years.

A further link between age and disability concerns the role of carers. According to the 2001 census, there are some 5.2 million carers in England and Wales. The age group where the largest proportion of people are providing care is in the fifties. More than one in five people aged 50–59 years are providing some unpaid care and over half of those who provide more than 50 hours care per week are aged 55 years or more. In *Attridge Law v. Coleman*<sup>38</sup> the court has referred the question of associative discrimination and the Framework Directive 2001/78/EC to the European Court of Justice. This case concerns alleged discrimination against an employee because of the particular care needs of her son. If it is ultimately decided that the Disability Discrimination Act must be interpreted as providing protection for those who are not themselves disabled, but also who are associated with disabled people, then this clearly will be of assistance to many older workers by bringing them within the scope of the 1995 Act.

## RETIREMENT

The Government Actuary's Department estimates that in 2006 there were approximately 20 million people aged 50 or over in Great Britain, who make up about 42% of the adult population. This number will rise to 24.5 million by 2020 and 28.4 million by 2041.<sup>39</sup> There are a number of issues that can play an important part in work decisions of older workers, especially with regard to when they might decide to retire.<sup>40</sup> These are, firstly, health and fitness issues. Many people may live and work longer, but for a substantial minority health issues will have an important effect on their working lives, e.g. the large numbers of people who retire for reasons of sickness and disability. The second issue suggested is that of having caring responsibilities. About one in five people in their fifties has responsibility for care in relation to older relatives and to grandchildren. Thirdly, peoples' views and outlook may change as they get older. Work may become less important than roles in the family or the community, especially, for example, in relation to partners who may retire or have health or other problems. According to the Government Green Paper on 'Working and Saving for Retirement'<sup>41</sup> 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.

The Age Regulations 2006 introduced a default retirement age of 65 years. This despite the fact that many workers previously had contracts of employment which did not stipulate a retirement age. Although the Government is committed to reviewing this policy by 2011 it is clear that it introduced it because of the concerns of employers about not being able to rid themselves of older workers. A 2005 Government consultation document<sup>42</sup> stated that:

In setting the default age, we have taken careful note of a number of representations we received in the course of consultations, which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. This is our primary reason for setting the default retirement age.

Most of the employers' responses to the 2003 Consultation on the Age Regulations<sup>43</sup> supported the introduction of the default retirement age and all the trade unions, who responded, opposed it. The employers were concerned with how to end peoples' careers with dignity, rather than through disciplinary procedures. There was a general assumption that older workers would decline in competence and capability as they aged, but would nevertheless wait to be dismissed or retired rather than leave voluntarily. One employer's association<sup>44</sup> stated that there were bound to be circumstances where employees wished to continue working and the employer wished them to retire. Having to go through the formal disciplinary procedure on competence grounds may be much more distressing than having to retire at a certain age. British Energy stated that 'we would not want to resort to using our capability/competence procedure for long serving loyal employees who chose to stay on to a point where it affects their ability to do the job effectively. The effect would be very negative on staff morale generally if this were to happen in organisations'. The Food and Drink Federation was also concerned that employees kept on at the moment until retirement would lose out. They stated that 'we think that the abolition of the mandatory retirement age would send entirely the wrong signal. We believe that the focus of this legislation should be ensuring fair treatment for older employees in their employment.'<sup>45</sup>

Thus retirement can be seen as a tool in dealing with potential disability and the apparent physical and mental problems that are more likely to occur with age.

## REASONABLE ACCOMMODATION

Section 4A(1) of the Disability Discrimination Act provides that where a provision, criterion or practice applied by or on behalf of an employer places the disabled person concerned at a substantial disadvantage, in comparison with persons who are not disabled, it is the duty of the employer to take such steps as is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, from having that effect.<sup>46</sup> Failure to make such adjustments amounts to an act of discrimination.<sup>47</sup>

Reasonable accommodation is concerned with the needs of disabled people in order to create a greater equality of opportunity. Baroness Hale stated, with reference to the Disability Discrimination Act 1995,<sup>48</sup>

The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment.

The duty of reasonable accommodation, in the directive, requires employers to take 'appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, or participate in, or advance in employment and training'. It is argued that 'reasonableness' should mean 'effectiveness' and that 'the key component of the duty to make reasonable accommodation is the effectiveness of the measure in removing barriers to employment'.<sup>49</sup>

Of importance is the fact that the duty is individualised, so that the needs of the individual person are taken into account. The Code of Practice on Employment and Occupation issued by the Disability Rights Commission in 2004 states that it does not matter if a disabled person cannot point to an actual non-disabled person compared with whom he or she is at a substantial disadvantage. The fact that a non-disabled person or another disabled person would not be substantially disadvantaged by the provision, criterion or practice is not relevant. The duty is owed to the individual.<sup>50</sup>

The Code of Practice also points out that 'it would be prudent for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each employee and job applicant'.<sup>51</sup>

For many older workers the duty to make adjustments would be irrelevant as they will continue to work normally. It is those that

suffer from an ailment, a disadvantage linked to age or who are on the margins of disability that need protection. The emphasis on the needs of the individual is important as is the lack of necessity in having a suitable comparator. It recognises, in the case of disability, that each individual disabled person may have particular needs that require attention. The same could be said if the principle were applied to older workers.

There are a number of examples in the Code of Practice of reasonable adjustments that might be made and it is striking how many of these could be applied to older workers. If an individual employee is genuinely slower as a result of age (see above for employer's concerns about the potential deterioration or capacity of older workers); or if an employee requires extra training in new technology; if physical tasks are more demanding, then some of the suggested duties outlined in the DDA and the Code of Practice might be relevant, e.g. allocating some of the older persons duties to another person; transferring the person to fill an existing vacancy, altering hours of working or training; allowing the person to be absent during working hours to deal with health issues. The important argument is that if there is a deterioration in the performance of older workers, as many employers fear, or if there is a deterioration in the capacity to do certain types of work, then there should be a duty upon the employer to take special measures to assist the older worker, rather than just be able to retire them or dismiss them for a reason related to capacity or performance.

## **EMPLOYER PERCEPTIONS AND REASONABLE ACCOMMODATION**

One survey of employers reported that:

Overall, the responses indicated that attitudes were generally favourable to the employment of disabled people and appear to suggest that the barriers to employment were few. However, there is a minority view which, when coupled with those with neutral opinions, show that the known barriers may, at least in part, be due to entrenched attitudes.<sup>52</sup>

As has already been shown, disabled people are less likely to be employed than those without a disability. About half of all disabled people in the UK are in work and some 28% of those who are economically inactive state that they would like to work This is especially so for older disabled people. There are some 1.25 million claimants of incapacity benefits aged between 50 and the state pension age, making up some 46% of all working age sick and disabled claimants.

The Employers' Forum on Disability stated in a memorandum to the House of Commons Work and Pensions Committee<sup>53</sup> that:

The Forum believes that barriers to work are created by perceptions among individuals and organisations, by structural factors within organisations, and by societal factors. Barriers are not created by impairments of individuals. The most common barriers that exist in the employment sector are assumptions of a person's ability to do a job and assumptions of costs or availability of reasonable adjustments. These assumptions can be held by employers, intermediaries and disabled people themselves.

These 'assumptions of a person's ability to do a job' also occur with regard to age and there are numbers of surveys of employers' perceptions that reveal that stereotypical views of age and ability are still held.<sup>54</sup> Thus older workers are seen as being more reliable than younger workers as well as being more loyal, committed and likely to stay longer. In contrast they are also seen as being less flexible, less creative and less willing to train. Other studies have shown that 'the evidence from gerontologists... consistently finds that on average ageing reduces hearing, vision, lung capacity, muscular strength, bone structure, speed of activity and reaction, memory'. Studies on the relationship between work performance and age all come to the same clear conclusion: there is little or no relationship between the performance of older and prime age workers who are doing the same job.<sup>55</sup>

It is clear that stereotypical attitudes of some employers will also affect the opportunities in work on other grounds of discrimination, but those perceptions on age and disability are important here because of the inter relationship of the two grounds. If there is a stereotypical view of the abilities of an older worker and one of a worker with a disability, then these views are likely to be re-enforced when considering a worker who is an older person with a disability. As we have shown above this will be a common event as a significant proportion of older workers are disabled and, because of the trend towards an older workforce, this may become a more common event in the future.

There is a close link between age and disability as there is a close link between health and labour market participation. A half of participants in one survey of those not working and between 50 and state pension age were not looking for work for health reasons. The discrimination suffered by disabled and older workers suggests that being older, having no educational qualifications and not being in paid work are all independently associated with the risk of being disabled.<sup>56</sup>

Given this relationship between these two grounds it is likely that the only way to effectively remove the barriers to employment



for older workers is to take some more positive action than just adopting an approach which encourages an attitude that the principle of equality means the same as the principle of equal treatment. In order to create equality of opportunity for older workers it is suggested that an approach similar to that taken with disabled workers would be most appropriate, thus leading to the introduction of the duty of reasonable accommodation with respect to older workers.

## NOTES

- 1 Directive 2000/78/EC OJ L303/16.
- 2 Religion or belief, disability, age or sexual orientation.
- 3 Article 4 Directive 2000/78/EC.
- 4 Sandra Fredman (2001) *Equality: A New Generation?* ILJ Vol. 30, No. 2, June, 145–168.
- 5 Evelyn Ellis (2005) *EU Anti Discrimination Law*, Oxford University Press.
- 6 See Cai R. Feldblum (2000) ‘Definition of Disability under Federal Anti-Discrimination Law: What Happened? Why? And what can we do about it?’ 21, *Berkeley Journal of Employment & Labor Law*, 91, 15.
- 7 See Sandra Fredman (2003) *The Age of Equality* contained in ‘Age as an equality issue’. Sandra Fredman and Sarah Spencer (eds.) Hart Publishing.
- 8 Article 6.2 provides that retirement ages can be fixed for the purposes of admission to or retirement from social security and invalidity benefits, and the use of ages for actuarial purposes in such schemes.
- 9 The Employment Equality (Age) Regulations 2006 SI 2006/1031.
- 10 See Malcolm Sargeant (2007) *Age Discrimination in Employment*, Gower Publishing.
- 11 See *Equality and Diversity: Age Matters*, Age Consultation 2003, DTI.
- 12 For a further exploration of this link see Malcolm Sargeant (2005) *Disability and age – multiple potential for discrimination*, *International Journal of the Sociology of Law*, 33, 17–33.
- 13 *Winning the Generation Game* (2000) Performance and Innovation Unit, Cabinet Office.
- 14 These and subsequent figures, unless otherwise stated, are taken from *Disability Briefing May 2007* published by the Disability Rights Commission.
- 15 Up to 60 years of age for many women and 65 years for men.
- 16 Tania Burchardt (2003) *Being and becoming: Social exclusion and the onset of disability*. ESRC Centre for Analysis of Social Exclusion, Report prepared for the Joseph Rowntree Foundation CASE report 21; November 2003.
- 17 State pension age.
- 18 These figures come from *Population Trends*, Summer 2007; published by the Office for National Statistics; see [www.statistics.gov.uk](http://www.statistics.gov.uk)

- 19 The target was to increase the employment rate of older workers to 50% by 2010; see *Facing the Challenge: the Lisbon Strategy for Growth and Employment*. Report from the High Level Group chaired by Wim Kok, November 2004.
- 20 Communication from the Commission Common Actions for Growth and Employment: The Community Lisbon Programme COM (2005) 30.
- 21 These were Denmark, Estonia, Ireland, Cyprus, Portugal, Finland, Sweden and the UK.
- 22 SI 2006/1031.
- 23 House of Commons Select Committee on Work and Pensions Third Report Session 2006/07. *The Government's employment strategy*, HC 63-1.
- 24 This is not to suggest that there are only three such pressures, but these are the three used here to exemplify the trend.
- 25 See the Disability Rights Commission website – [www.drc-gb.org](http://www.drc-gb.org)
- 26 Richard Whittle (2002) *The framework directive for equal treatment in employment and occupation: an analysis from a disability rights perspective*. *European Law Review* Vol. 27, 3, 303–326.
- 27 John Rigg (2005) *Labour Market Disadvantage amongst Disabled People: A Longitudinal Perspective*. CASE/103 Centre for Analysis of Social Exclusion, London School of Economics.
- 28 Allan Smith and Brenda Twomey (2002) *Labour market experiences of people with disabilities*. *Labour Market Trends*, 415–427.
- 29 Carol Goldstone with further analysis by Nigel Meager (2002) *Barriers to the employment for disabled people*. A study carried out on behalf of the Department for Work and Pensions by NOP Consumer and Institute for Employment Studies.
- 30 See Lawrence M. Friedman (1984) *Your time will come: the law of age discrimination and mandatory retirement*. Russel Sage Foundation, New York.
- 31 *Massachusetts Board of Retirement v. Murgia* 427 U.S. 307 (1976); taken from Christine Jolls *Hands-Tying and the Age Discrimination in Employment Act*. 74 *Tex. L. Rev.* June 1996, pp. 1813–1846.
- 32 *Age discrimination at work Survey Report*. CIPD, February 2001.
- 33 *Characteristics of Older Workers*. DFEE Research Report RR45, 1998.
- 34 Employers Forum on Age *Age at Work: the definitive guide to the UK's workforce* (2005).
- 35 *Age at Work*, 2005; *ibid*.
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- 37 *Older Workers: Statistical Information Spring 2006*. Department for Work and Pensions.
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- 39 *Older Workers: Statistical Information Spring 2006*. Department for Work and Pensions.
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- 41 (2002) Department for Work and Pensions.

- 42 *Equality and Diversity: Coming of Age* (2005) Department of Trade and Industry.
- 43 *Equality and Diversity: Age Matters Consultation 2003 Summary of Responses*, DTI (2005).
- 44 The British Hospitality Association.
- 45 See Malcolm Sargeant (2007) *Age Discrimination in Employment* Ch 5, Gower Publishing.
- 46 Section 4A(1) also refers to the effects of any physical feature of the premises; this is not considered here, although one might argue that this is also relevant to older workers.
- 47 Section 3A(2) Disability Discrimination Act 1995.
- 48 In *Archibald v. Fife Council* [2004] IRLR 651.
- 49 Katie Wells (2003) The impact of the framework employment directive on UK disability discrimination law. *ILJ* Vol. 32, No. 4, December, 253–273.
- 50 Section 5.4 Code of Practice.
- 51 Section 5.7 Code of Practice.
- 52 Carol Goldstone with further analysis by Nigel Meager (2002) *Barriers to employment of disabled people*. Department for Work and Pensions.
- 53 Third report 2006/07 HC 63-1.
- 54 See, for example, Philip Taylor and Alan Walker (1994) *The Ageing Workforce: Employers' Attitudes Towards Older People*. *Work, Employment and Society*, Vol. 8, No. 4, December and, more recently, Judy McGregor (2002) *Stereotypes and Older Workers*. *Journal of Social Policy New Zealand* Issue 18, pp. 163–177.
- 55 Pamela Meadows (2003) *Retirement ages in the UK: a review of the literature*. Employment Relations Research Series No. 18, DTI.
- 56 Alun Humphrey, Paddy Costigan, Kevin Pickering, Nina Stratford and Matt Barnes (2003) *Factors affecting the labour market participation of older workers*. DWP Research Report No. 200.