Challenging Ageism in Employment: An Analysis of the Implementation of Age Discrimination Legislation in England and Wales

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DECLARATION

I, Lynda Diane Irving, declare that no portion of the work referred to in this thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning

Abstract

The Employment Equality (Age) Regulations were introduced in England and Wales in 2006, seeking to prohibit age discrimination in employment and vocational training. This thesis assesses whether the legislation adopted is an effective mechanism by which to address age discrimination in the workplace and achieve the dual but contradictory objectives of the European Union Framework Directive on Equal Treatment of achieving equal treatment between age cohorts whilst encouraging the active participation of older citizens in the workplace. The thesis sheds light on this hitherto unregulated suspect ground of discrimination by means of a quantitative and qualitative analysis of all employment tribunal judgments which relate to an age discrimination claim over a three and a half year period.

This study shows that very few claimants were successful if their claim of age discrimination was considered by a tribunal and there was considerable inconsistency of implementation and interpretation of the legislation by individual tribunals. Employers have quickly developed defences against claims of age discrimination in order to maintain their freedom to contract and the imbalance between the two parties was particularly noticeable with claimant credibility often under scrutiny – a process claimants appeared unprepared for. Regional discrepancies were found in terms of success rates and compensation awards. A gender award gap was found in both overall compensation and injury to feelings awards, with women given smaller awards than men, whilst younger workers were given smaller awards than older workers. Legal representation made a substantial difference to success rates and compensation awards, but the majority of awards were low and many would not have covered legal costs. The low compensation awards do not provide an effective deterrent, as required by the Article 17 of the Directive. The legislation is particularly ineffective for those who claimed they had suffered multiple discrimination.

Although an important first step in regulating ageist behaviour, the Regulations and the subsequent Equality Act 2010 will be unlikely to achieve the aims of the Directive as they provide little incentive for claimants to undertake the stressful process of making a claim under the legislation, which relies upon individual fault-finding.

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Contents

List of Abbreviations

ADEA	Age Discrimination in Employment Act
CA	Court of Appeal
CAADE	Campaign Against Age Discrimination in Employment
DRA	Default Retirement Age
EAT	Employment Appeal Tribunal
EC/EU Treaty	Treaty establishing the European Community
ECJ	European Court of Justice
EFA	Employers Forum on Age
ET	Employment Tribunal
ETS	Employment Tribunal Service
Framework Directive	European Union Council Directive 2000/78/EC of November 27th 2000 establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ 2000 L 303/16
ILO	International Labour Organisation
NACE	Nomenclature Statistique des Activités Economiques dans la Communauté Européenne
NHS	National Health Service
NMW	National Minimum Wage
OECD	Organisation for Economic Co-operation and Development
OFCOM	Office of Communications
PASW	Predictive Analytics Software Statistics
Regulations	Employment Equality (Age) Regulations 2006, SI 2006/1031
SIC	Standard Industrial Classification
SPSS	Statistical Package for the Social Sciences
TUC	Trades Union Congress
TUPE	Transfer of Undertakings Protection of Employment

Cases

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Introduction

'He was somebody, once, but now he has grown old.'[1]

Ageism has been described as 'the ultimate prejudice, the last discrimination, the cruellest rejection'[2] and yet it has only recently been the subject of legislation in the United Kingdom. On the 1st October 2006 the Employment Equality (Age) Regulations 2006,[3] (the Regulations) were introduced. This followed the adoption of Council Directive 2000/78/EC of November 27th 2000 establishing a General Framework for Equal Treatment in Employment and Occupation[4] (the Framework Directive) by the European Union. This placed an obligation on member states to introduce legislative protection for workers against age discrimination. The Framework Directive was introduced as a response to twin concerns; social injustice caused by discrimination and the fiscal consequences of an increasingly large number of economically inactive, older citizens. The domestic age legislation has subsequently been criticised as providing a weak standard of protection for employees, reflecting an ambivalent attitude to ageism[5] and has been described as a 'step into the unknown'.[6]

This aim of this thesis is to assess whether the legislation adopted in England and Wales is an effective mechanism by which to address age discrimination in the workplace and achieve the dual objectives of the Framework Directive of enabling equal treatment and encouraging the active participation of older citizens in the workplace.[7] It seeks to shed light onto this 'unknown' territory by examining age discrimination claims and furthering our knowledge and understanding of the interpretation and application of the Regulations. The thesis is based upon the premise that ageism – the adoption of negative stereotypes that develop from implicit prejudice against age cohorts – and resulting age discriminatory conduct causes injustice to

[1] Herondas, *The Mimes of Herondas: VI The Gossiping Friends* (first published c250 BC) trn M.S. Buck 1921.
[2] EB Palmore, *Ageism: Negative and Positive* (Springer Publishing 1999) 3.
[3] SI 2006/1031. Now replaced by the Equality Act 2010. The text of the Regulations is contained in Appendix A.
[4] [2000] OJ L 303/16. The text of the Framework Directive is contained in Appendix B.
[5] M Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment' (2006) 35 ILJ 209.
[6] J Swift, 'Justifying Age Discrimination' (2006) 35 ILJ 229.
[7] Framework Directive, Recitals 8 and 12.

individuals and due to changing demographics will cause major financial problems for the economy.

Chapter One sets out the context in which the Regulations have been introduced. It provides an introduction to ageism, negative stereotypes and age discrimination and examines the problems that prejudice reduction schemes have in addressing deep-seated, implicit and explicit responses to age. It explores the difficulties surrounding the introduction of legislation and the type of equality that is sought with regard to age as a suspect ground. Chapter Two considers early attempts to prohibit age discrimination and the demographic change that provided the impetus for age legislation. It discusses the introduction of the Framework Directive in the European Union and the subsequent Regulations which were introduced in the UK, whilst reflecting upon problems that arise from the framework laid down in the Directive.

Chapter Three explains the methodology used in undertaking this research. The study employs a mixed methodological approach to evaluate and analyse all of the judgments made under the Regulations over a period of three and a half years, as found in the UK Employment Tribunal Judgment Register. A traditional, qualitative, 'case-by-case' examination of judicial decisions has been combined with a quantitative content analysis of all judgments relating to claims of age discrimination. This research attempts to quantify many of the characteristics of age discrimination claims by creating a unique data-set of 16 variables which relate to a wide variety of factors such as outcome of claims, gender of claimants and activity of respondent employers.

Chapters Four and Five present the results of the quantitative study which encompassed all 4001 judgments pertaining to age discrimination claims handed down from October 2006 to April 2010. Chapter Four describes the characteristics of claims and parties, in terms of overall number, location, claimant age, gender, legal representation, concurrent discrimination claims and employer activity, legal status, size and solvency and issue, that is, whether the claim is made by a worker who alleged they were discriminated against because they were 'old', 'young' or part of a disadvantaged age cohort. Chapter Five concentrates on an analysis of the outcome of these claims and the remedies given to successful claimants, including overall compensation and injury to feelings awards. It quantifies the problems associated with

multiple discrimination and examines the outcomes of claims and compensation awarded with regard to gender and representation – providing an understanding of the statistical difference that results from representation. The resulting information will enable action to be taken to address particular areas which are revealed as having significant problems, for example, the employer activities in which discrimination most often occurs.

Chapters Six and Seven contain the results of a traditional case-by-case examination of hard-copy folio reports of judgments pertaining to age discrimination claims. These Chapters refer directly to the individual provisions of the Regulations in the context of the claim procedure and complaint. Chapter Six explores the establishment of an age claim by a claimant. It discusses the problems that employees and job applicants had in establishing that the tribunal had jurisdiction to hear the claim and in gathering sufficient evidence to substantiate the claim and reverse the burden of proof. Consideration is given to the difficulties that those making concurrent claims of discrimination suffer whilst making a claim. Chapter Seven describes the responses made to these claims by employers, including the objective justification given for discriminatory behaviour and the consideration of the justification by the tribunal. Chapter Eight discusses the findings of the qualitative analysis with reference to factors found significant in the quantitative analysis. It suggests further avenues of research which have come to light and presents the conclusions.

A literature search indicates this is the first study of this type to be undertaken of such factors in the UK. Although the literature concerned with age discrimination is found over a widespread area, little is concerned with the details of difficulties that claimants have in establishing an ‘age’ claim, the outcome of claims and the relationship between, for example, gender, representation and compensation. This research seeks to fill the gap in the literature by uncovering evidence found in an under-utilised, primary source holding substantial information – the judgment reports issued by employment judges in tribunals, that is, those at the ‘coal face’ of the interpretation and application of the Regulations. O’Cinneide has asserted that ‘equality rights can be interpreted and applied in a manner that can render them empty

vessels, lacking any significant legal impact or substance'.[8] The conclusion presented in this thesis is that the legislation is ineffective as a mechanism with which to address age discrimination and will lack any significant legal impact. As such it is unlikely to achieve the objectives of the Framework Directive of enabling equal treatment and encouraging the active participation of older citizens in the workplace.

[8] C O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) 1 UCL Human Rights Review 81.

Chapter One:
Ageism and Age Discrimination

1.1: Introduction

This Chapter explores the concept of ageism and subsequent discrimination based on stereotypical attitudes to particular age cohorts. Ageism has emerged 'as the third great 'ism' in our society; partly because it affects everyone in society, young and old'.[1] It has been described as a set of beliefs or attitudes 'that undervalue individuals on the basis of assumed age-related characteristics'.[2] In 1969 Butler described ageism as the 'systematic stereotyping … of older people because they are old'.[3] Butler referred specifically to the elderly but Palmore has extended the definition to 'any prejudice … against or in favour of an age group'[4] thereby including all age cohorts.

On the other hand, age discrimination comprises differential treatment which separates individuals, usually using 'age proxies', that is, adopting age categories or making stereotypical assumptions instead of individual characteristics in order to allocate resources. Ageism and age discrimination are therefore closely inter-linked, as the adoption of age proxies often occurs as a result of stereotypical, ageist attitudes. The discussion that follows describes the concept of ageism, ageist attitudes in the past and possible reasons for its prevalence. The negative stereotypical assumptions that arise from ageist prejudice and the consequent discrimination that follows the adoption of such views are explored. Finally, the problems that surround prejudice reduction schemes and the enactment of legislation to prohibit age discrimination are considered.

1.2: Ageism

There is common agreement in the academic literature that ageism is a negative response to individuals in an age-cohort based on stereotypical assumptions regarding characteristics attributed on the basis of age. Butler and Lewis produced a seminal definition of ageism in 1973 as:

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[1] EB Palmore, *Ageism: Negative and Positive* (Springer Publishing 1999) *x*.
[2] J Macnicol, 'The Age Discrimination Debate in Britain' (2005) 4 Social Policy & Society 296.
[3] RN Butler, 'Ageism: Another Form of Bigotry' (1969) 9 Gerontologist 243.
[4] Palmore (n 1) 4.

> a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this for skin color and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills.[5]

This association of ageism with racism and sexism suggested that all three types of stereotyping are equally censured and is highly significant as the latter two were regarded as offensive and unjust.

Sunstein believes that the existence of prejudice such as ageist beliefs encompasses 'three fallacies'[6] which are:

- a mistaken belief that members of a group have certain characteristics
- a belief that many or most members of a group have certain characteristics when in fact only some or a few do
- a reliance on fairly accurate group based generalisations when more accurate classifying devices are available.

Discrimination only occurs when 'someone is acting on the basis of irrational prejudice'[7] based on any of these three incorrect assumptions. Hughes and Mtezuka also stress that ageism is the first stage in a 'social process … based solely on the characteristics of old age itself'[8] that can result in discrimination.

However, all age-cohorts can be subject to negative stereotyping. Adultism, a form of ageism, refers to negative assumptions relating to young people who are assumed to portray such characteristics as irresponsibility and lack of judgment.[9] Bytheway drew attention in the 1990's to adultism and stated that it 'is by linking age to such presumptions that young people suffer from the ageist prejudice of their elders'.[10] Indeed Rodham has argued that an overemphasis on ageism and older persons in academic literature has resulted in little attention being given to younger

[5] RN Butler and MI Lewis, *Aging and Mental Health* (Mosby 1973) 30.
[6] C Sunstein, 'Three Civil Rights Fallacies' (1991) 79 Cal L Review 751.
[7] ibid 752.
[8] B Hughes and EM Mtezuka, 'Social Work and Older Women' in M Langan and L Day, *Women, Oppression and Social Work: Issues in Anti-Discriminatory Practice* (Routledge 1992) 220.
[9] J Flasher, 'Adultism' (1978) 13(51) Adolescence 517.
[10] Bytheway B, *Ageism* (Open University Press 1995) 11.

age-cohorts, producing 'ageist ageism literature'[11] and feels that the problems of the young have been eclipsed by those of older individuals.

It is claimed that ageism is 'a relative newcomer to the equality arena'.[12] There is widespread belief in the literature that ageism has developed as a result of the marginalisation of the elderly in the twentieth century and that recent unease over age discrimination is a renewal of interest which began in the 1930s when it became increasingly common to use age proxies.[13] Achenbaum suggests that in ancient societies the aged were given esteemed supervisory roles as their physical health declined because their wisdom and experience were valued.[14] The presumption is that the elderly were respected in the past, occupying a valued role in society. Simmons asserted that:

> the proportion of the old who remain active, productive, and essential in primitive societies is much higher than in advanced civilization, for they succeed to an amazing degree in providing cultural conditions which utilize the services of their few old people, thereby giving the old person a greater chance to be regarded as a treasured asset.[15]

The Roman Senate was named after the 'old men' (senecta) who occupied positions of power. Prominent religious positions were normally reserved for candidates over 60 and political activists were often over 70. In Ancient Sparta the 'elders' formed the city council – the gerousia – the qualification for membership being 'a deserving individual aged over 60 years old,' from whom the gerontes were chosen to sit in judgment in early jury trials.[16] This is in sharp contrast to the modern day ageist behaviour towards Menzies Campbell who, at 65, was considered too old to

[11] K Rodham, 'Ageism, Young Academics and the Buffalo Stance' in M Branine and I Glover (eds), *Ageism, Work and Employment* (Avebury 2001) 177.
[12] S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003) 1.
[13] J Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (CUP 2006) 263.
[14] WA Achenbaum, 'Ageing and Changing' in ML Johnson, PG Coleman and VL Bengtson (eds), *The Cambridge Handbook on Age and Ageing* (CUP 2006) 26.
[15] LW Simmons, 'The Role of the Aged in Primitive Society' (1945) 1 Journal of Gerontology 72.
[16] Plutarch, *Lycurgus* (first published c5 AD) trn <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Lycurgus*.html > accessed 4 October 2012.

be a leader of a political party, and those over 69 who are automatically disqualified to serve on a jury in the UK.[17]

However, there is evidence of an awareness of and debate on ageist attitudes in early Western philosophical writings, demonstrating a myriad of approaches to ageing. One of the earliest surviving documents describes old age as when 'feebleness has arrived … What old age does to people is evil in every way'.[18] Mimnermus in 630 BC asserts that ageing makes a man hateful and dishonoured.[19] Aristotle describes ageist negative stereotypes in *Rhetoric*. He asserts that older people are positive about nothing, show an excessive lack of energy, are malicious, neither witty nor fond of laughter and incessantly talk of the past, rather than looking toward the future.[20] Aristotle also characterised the young, surmising that they are excitable and do everything to excess.[21]

Cicero drew a very positive picture of old age stating it is marked by its wisdom, good sense and sound advice.[22] In a remarkable analysis written two millennia ago, he asserted that moderate physical exercise, good diet, exercise for the memory and mind and a positive view of ageing will help enable adults to continue to participate in economic activity for as long as is wished – all of which are confirmed by recent gerontological research.[23] He felt that 'old men have their powers of mind unimpaired when they do not suspend their usual pursuits and their habits of industry',[24] a message echoed by Plutarch.[25] He urged adults to keep working as society needed their skill – 'for age does not so much diminish our power to perform inferior services as it increases our power for leading and governing'.[26] For exceptional individuals age was irrelevant, but the lack of a functional military role, vitally important in the

[17] Juries Act 1974, s 1(a).
[18] Ptah-hotep, *The Instruction of Ptah-Hotep* (first published c2400 BC) trn <http://www.digitalegypt.ucl.ac.uk/literature/ptahhotep.html> accessed 4 October 2012.
[19] A Allen, 'The Fragments of Mimnermus' (1995) 45 The Classical Review 156.
[20] Aristotle, *Rhetoric* 2.12 (first published c355 BC) trn <http://classics.mit.edu/Aristotle/rhetoric.1.i.html> accessed 4 October 2012.
[21] ibid.
[22] Cicero, *De Senectute* (first published c44 BC) trn <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/Cato_Maior_de_Senectute/text*.html> accessed 4 October 2012.
[23] ibid s X, s XI.
[24] ibid s VII.
[25] Plutarch, *An Seni Respublica Gerenda* Sit X 54 s 1 (first published c98 AD), trn <http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Moralia/An_seni_respublica_gerenda_sit*.html> accessed 4 October 2012.
[26] ibid s 28.

ancient world, meant that many older men found it difficult to command respect. If economic resources permitted older individuals could participate in society for as long as they wished but poorer individuals had to work until death.

Despite ageism now being recognized as a global phenomenon, the variety of views about ageing found in the West is not seen in the history of the Far East and negative stereotypes of older adults are difficult to find. This appears to be because of religious tenets which stressed that older individuals must be treated with respect. Confucianism lays down strict rules concerning filial piety and there is strict obedience to the will of older members of the family. Confucius described passage through the age continuum as 'at fifteen I aspired to learning, at thirty I established my stand, at forty I had no delusions, at fifty I knew my destiny, at sixty I knew truth in all I heard and at seventy I could follow the wishes of my heart without doing wrong'.[27] Similarly in Taoist narratives the founding figure Lao Tzu was born as an old man of 82 with flowing, grey hair, as this was the cultural image of a perfect adult.

There are elements of ageist views of the young in eastern philosophies. The young were expected to defer to the old in all matters, even when the young demonstrated more ability, but this was thought justifiable in order to protect the hierarchical structure of society which allowed everyone to benefit from preferential treatment as they grow older.

1.3: The adoption of ageist responses

There are several postulated explanations for the prevalence of ageism, principally falling into three categories: economic, sociobiological and psychological. Economic and cultural changes over the last century have led to the marginalisation of older age cohorts. The increasing prevalence of early male retirement from the workforce has led to a negative impression of the fiscal burden of health, pension and social welfare costs of a large number of economically inactive elderly individuals. Socio-biologists argue that older individuals are given lower social status because society which prizes the youthful energy, strength and fertility of those in their prime. If human beings are biologically programmed to prioritise these values the question

[27] Confucius, *Lun Yu* 2.4 (first published c483 BC) trn <http://www.confucius.org/lunyu/ed0204.htm> accessed 4 October 2012.

should be asked whether ageism will ever be eliminated, or will the symptoms merely be treated?

Many psychologists believe that ageism is a factor of Terror Management Theory[28] which argues that disturbing thoughts about our own mortality lead to anxiety buffers which produce negative attitudes to those people nearer death.[29] This theory is used to explain unconscious reactions and discriminating behaviour and builds upon work by Freud, Rank and Ernest Becker.[30] Depaola et al postulated that 'negative attitudes toward other older adults were predicted by personal anxieties about aging and death, and, more specifically, fear of the unknown'[31] and this fear manifests itself in deep-seated, ageist attitudes. Older people are a 'bleak reminder'[32] of the inevitable and by refusing to identify with the elderly this acts as a defence to mortality salience. The more frightened one is of old age the more likely to manage this fear by activating negative thoughts towards the elderly.[33] Fear of death compels individuals to develop self-esteem in order to protect their vulnerability – achieved by identifying with their own 'in-group' and denigrating 'out-groups.'

In 1998 Greenwald developed the Implicit Association Test, a commonly used assessment tool which measures unconscious responses to different age cohorts, in the manner of a 'lie detector' test.[34] Greenwald, Nosek and Rudman have found older individuals have stronger responses than those younger [35] and adults favour those in similar groups to their own in-group.[36] Over 80% of those tested showed implicit, negative responses to older people. Subjects were often completely unaware of their implicit biases and consciously asserted that they were not biased.[37]

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[28] A Rosenblatt et al, 'Evidence for Terror Management Theory (TMT) 1' (1989) 57 Journal of Personality and Social Psychology 681; Links to 300 studies of empirical research supporting TMT at <http://www.tmt.missouri.edu/publications.html> accessed 4 October 2012.
[29] TD Nelson, 'Ageism: Prejudice Against Our Feared Future Self' (2005) 61(2) Journal of Social Issues 207, 214.
[30] E Becker, *The Denial of Death* (Free Press 1973).
[31] SJ Depaola, M Griffin, JR Young and RA Neimeyer, 'Death Anxiety and Attitudes Toward the Elderly Among Older Adults: The Role of Gender and Ethnicity' (2003) 27 Death Studies 335, 351.
[32] A Blaikie, *Ageing and Popular Culture* (CUP 1999) 26.
[33] J Greenberg (ed), *Handbook of Experimental Existential Psychology* (Guilford Press 2004) 64, 65.
[34] Tests available online at <https://implicit.harvard.edu> accessed 4 October 2012.
[35] BA Nosek, AG Greenwald and MR Banaji, *The Implicit Association Test* (2007) <http://www.projectimplicit.net/nosek/iat/> accessed 4 October 2012.
[36] ibid 276.
[37] Rudman et al, 'Measuring the Automatic Components of Prejudice' (1999) 17 Social Cognition 438.

Rudman has described how explicit age discriminatory behaviour is decreasing in the USA following the enactment of age legislation but implicit stereotyping is still affecting decision making and causing social injustice – 'Biases that we do not acknowledge but that persist, unchallenged, in the recesses of our minds, undoubtedly shape our society … the *application* of implicit biases may be nonconscious'.[38] It follows that discriminating conduct may take place without the instigator being aware of their action. Those that have stronger implicit biases have been shown to discriminate more than those with weak biases. Significantly, it has been found in several studies that the strength of ageist responses is much greater than those responses held on the basis of racism, ethnic grouping or gender and may be very difficult to eliminate.[39]

1.4: Negative age stereotypes

Ageism manifests itself in a myriad of both subtle and overt ways that have led to a general acceptance of stereotypes exhibiting age-related characteristics such as decline and ineptitude or youthfulness and vigour. The Chief Justice of Canada has succinctly expressed the negative stereotypical view of senior citizens:

> Our society has a tendency to think of elderly people as less vital and less important than younger people. They've had their day. Their life-forces are waning. They're on the way out … Our newspapers, magazines and television screens brandish the culture of youth … The message is that youth is good; age is not so good. The elderly are human beings, yes, but diminished human beings.[40]

Stereotypes are based on standardised characteristics assumed to be shared by all members of a group. Plato talked of the irrationality of using such preconceptions in his dialogue *Meno*[41] but Lippmann introduced the word stereotype, in its modern

[38] LA Rudman, 'Social Justice in our Minds, Homes, and Society' (2004) 17 Soc Justice Res 129, 134.
[39] KA Ranganath & BA Nosek, 'Implicit Attitude Generalization Occurs Immediately, Explicit Attitude Generalization Takes Time' (2008) 19 Psychological Science 249 (emphasis in original).
[40] B McLachlin, *The Law's Response to an Aging Population*, 6 <http://www.cnpea.ca/Ottawa%20Presentations%202008_files/Cheif%20Justice's%20speech%20final.pdf> accessed 4 October 2012.
[41] Plato, *Meno* (first published c400 BC) trn <http://www.gutenberg.org/files/1643/1643-h/1643-h.htm> accessed 4 October 2012.

sociological sense of 'mental categorising' in 1922.[42] He expressed the view that stereotypes are invaluable in a democracy, embellishing human life by establishing an order to which the individual can respond. However, he emphasised that what 'matters is the character of the stereotypes, and the gullibility with which we employ them'.[43]

Many psychologists feel that mental categorising is a part of human nature and that without it individuals would find the complexities of life too difficult to manage. Allport believed that 'the human mind must think with the aid of categories. Once formed, categories are the basis for normal prejudgment. We cannot possibly avoid this process. Orderly living depends on it.'[44] Stereotyping may be inaccurate, but it is efficient and enables the simplification, prediction and organisation of the world. It involves categorising people into sub-groups – in-groups, normally that which an individual aspires to or associates with and feels is superior, and out-groups – all other groups which are seen as inferior. It usually follows a two-stage process of automatic assessment followed by a conscious check, allowing the pre-programmed stereotype to be reinforced. It is seen by some as a positive process whereby holding negative stereotypes about out-groups enables individuals to feel more positive about themselves and build self-esteem,[45] and may serve a 'cognitive economy function'[46] and/or a social function as an aid to identification with a social in-group.[47]

Age-based stereotypes lead us to assume that the old and young have particular attributes shared by their age cohort. For example, a young person with back pain might be assumed to have an injury which can be treated but an older person with similar pain is assumed to have a chronic condition. The assumptions may prove to be true, but many old people suffer short-term injuries and many young people have chronic conditions. Erber found that forgetting a particular name was thought highly

[42] W Lippmann, *Public Opinion* (1922) <http://www.gutenberg.org/ebooks/6456> accessed 4 October 2012.
[43] ibid ch 6.
[44] GW Allport, *The Nature of Prejudice* (Addison-Wesley 1954) 20.
[45] J Collange, ST Fiske and R Sanitionso, 'Maintaining a Positive Self-Image by Stereotyping Others' (2009) 27 Social Cognition 138.
[46] M Snyder and PK Miene, 'Stereotyping of the Elderly' (1994) 33 British Journal of Social Psychology 63.
[47] R Baumeister and M Leary, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117 Psychological Bulletin 497, 528.

significant in a 70 year old but of little note in a 20 year old.[48] This is of consequence if it leads to inappropriate age-related discrimination.

Numerous studies have investigated the personal characteristics which are attributed to older individuals. In a 'pioneering'[49] study, Taylor and Walker undertook a survey of 500 employers with over 500 or more employees and found employers thought older workers had inappropriate skills and qualifications, were more difficult to train but were reliable and productive.[50] Hassell and Perrewe found that many thought older workers resistant to change, were absent more often than younger workers and not willing to train.[51] The AARP in the USA[52] and Ipsos-Mori in the UK[53] found in separate studies that mature workers are valued for their experience, knowledge, commitment, punctuality and ability to keep cool in a crisis, but were also thought to be inflexible and unwilling to use new technology. Marshall,[54] Munnell et al[55] and Chiu et al[56] found that older employees are valued for their dependability and honesty, whilst they are held in low esteem because they are seen as inflexible, poor with new technology and liable to suffer from ill-health. Kite and Johnson[57] uncovered beliefs that competence, perceived intelligence and ability decreases with age and

[48] J Erber, 'Young and Older Adults' Appraisal of Memory Failures in Young and Older Adult Target Persons' (1989) 44 Journal of Gerontology: Psychological Sciences 170; J Erber and ST Rothberg, 'The Relative Effect of Age and Attractiveness on Judgments About Memory Failure' (1991) 46 Journal of Gerontology 116; J Erber, *Aging and Older Adulthood* (Wiley-Blackwell 2011).
[49] C Brennan et al, *Ageism and Employment: A Survey of the Literature* (2007) 18 <http://www.mams.salford.ac.uk/PWO/Projects/Ageism-Employment/papers/pdf/AgeismandEmploymentlitreview.pdf> accessed 4 October 2012.
[50] P Taylor and A Walker, 'The Ageing Workforce: Employers' Attitudes Towards the Employment of Older People'(1994) 8 Work, Employment and Society 569, 580.
[51] BL Hassell and PL Perrewe, 'An Examination of Beliefs About Older Workers' (1995) 16 Journal of Organizational Behaviour 457.
[52] AARP, *Business and Older Workers: Current Perception and New Directions for the 1990's* (AARP 1989); AARP, *Workers Over 50* (AARP 1995a); AARP, *Business and Older Worker: A Roadmap to the 21st Century* (AARP 1995b)*;* AARP, *American Business and Older Employees* (AARP 2000); AARP-DYG, *Employment Policy and the Older Worker in the 1990's* (AARP 1992).
[53] Ipsos-Mori, *Age Discrimination at Work* (2002) <http://www.ipsos-mori.com/researchpublications/researcharchive/953/Age-Discrimination-At-Work.aspx> accessed 4 October 2012.
[54] VW Marshall, *Issues of an Aging Workforce in a Changing Society* (University of Toronto 1996).
[55] AH Munnell, SA Sass and M Soto, *Employer Attitudes Towards Older Workers* (Center for Retirement Research 2006).
[56] W Chiu, A Chan, E Snape and T Redman, 'Age Stereotypes and Discriminatory Attitudes Towards Older Workers' (2001) 54(5) Human Relations 629.
[57] ME Kite and BT Johnson, 'Attitudes toward Older and Younger Adults' (1988) 3 Psychology and Aging 233; A Cuddy, M Norton and S Fiske, 'This Old Stereotype' (2005) 61(2) Journal of Social Issues 265.

Campbell observed that many employers thought memory and judgment-making processes were slow in older workers.[58]

Gross and Hardin have demonstrated in controlled experiments that individuals also hold negative views of the young and 'are not simply engaged in perception of adolescent behaviour alone. Given identical information, participants used stereotypes about adolescents in their judgments of members of the adolescent age group'[59] and used these judgments to make decisions concerning the young people. Loretto, Duncan and White found that stereotypical attitudes held about the young were more often expressed than those of older individuals.[60] A UK government study in 2001 found two different forms of stereotyping exist with regard to the young. Firstly, they are thought to be well-educated, responsible and ambitious but are more likely to move to another job elsewhere as soon as they gain experience and training from the employer. Conversely, they are sometimes considered unreliable, cavalier about responsibilities, disrespectful, poor timekeepers, impetuous, less able to handle difficult situations and less loyal.[61] Both of these stereotypical attitudes may lead to less favourable treatment of the young.

Negative stereotypes of older individuals are found throughout society. Scrutton describes the wide diffusion of age stereotypes as 'structural ageism' when such attitudes 'become part of the rules of institutions, govern the conduct of social life and blend imperceptibly into everyday values and attitudes'.[62] Incidental items such as birthday cards perpetuate negative images of unfit, hapless, elderly people.[63] In the best-selling books' list for 2010-11 are some solely concerned with jokes about older people describing 'senior' examples of incompetence containing references to age which were identical to several comments which have formed the basis of age

[58] JT Erber, ME Etheart and LT Szuchman, 'Age and Forgetfulness' (1992) 7 Psychology and Aging 479.
[59] E Gross and C Hardin, 'Implicit and Explicit Stereotyping of Adolescents' (2007) 20(2) SJR 140, 156.
[60] W Loretto, C Duncan and P White, 'Ageism and Employment' (2000) 20(3) Ageing and Society 279.
[61] Department for Work and Pensions, *Evaluation of the Code of Practice on Age Diversity in Employment* (2001) 134.
[62] S Scrutton, 'Ageism' in E McEwen (ed), *Age: The Unrecognised Discrimination* (Age Concern 1990) 17, 21.
[63] SR Ellis and TG Morrison, 'Stereotypes of Ageing' (2005) 61 International Journal of Aging & Human Development 57.

discrimination claims to the employment tribunal.[64] Zebrowitz and Montepare found that in a study of TV programmes only 1.5% of fictional characteristics are elderly and a substantial proportion of these are in minor roles and portrayed in a negative manner as 'doddery,' grumpy or hapless.[65] Sargeant investigated stereotypes in newspapers, television and magazines and found that older individuals were categorised as eccentric, curmudgeons, overly conservative and physically or mentally afflicted.[66] He suggests that the media industry itself displays considerable evidence of ageism as journalists, television presenters and actresses are mainly young.[67] Donlon et al found that 'exposure to television is a significant predictor of more negative stereotypes of aging'[68] and found that ironically the elderly, who watch more TV than other age cohorts, were likely to develop ageist views of their own in-group as a result.

Posthuma and Campion reviewed 117 research projects which examined negative stereotypes of older individuals and found, almost without exception, that the studies concluded there was no substance to them and that 'skill is much more important than age in predicting job performance'.[69] Broadbridge[70] and Hedge et al[71] found that older workers were less likely to be absent from work than younger workers. Liden et al[72] discovered that, using both subjective and objective assessments, older workers are rated higher. In separate studies Prenda and Stahl[73] and Warr ascertained that 'there is no significant difference between the job performance of older and younger workers'.[74] Landy[75] found that individual experience was more

[64] G Tibballs, *The Book Of Senior Jokes* (O'Mara 2009); T Hay, *Suddenly Senior* (Summersdale 2010); G Tibballs, *Seriously Senior Moments* (O'Mara 2010).
[65] LA Zebrowitz and JM Montepare, 'Too Young, Too Old' in T Heatherton, R Kleck, M Hebl and J Hull (eds), The Social Psychology of Stigma (Guilford Press 2000) 334.
[66] M Sargeant, 'Ageism in the Media' (2008) 13(4) CL 121.
[67] ibid124.
[68] MM Donlon, O Ashman and BR Levy, 'Re-Vision of Older Television Characters: A Stereotype-Awareness Intervention' (2005) 61(2) JSI 307, 314.
[69] R Posthuma and M Campion, 'Age Stereotypes in the Workplace' (2009) 35(1) Journal of Management 182.
[70] A Broadbridge, 'Ageism in Retailing: Myth or Reality?' in Glover I and Branine M (eds), *Ageism in Work and Employment* (Ashgate 2001) 153.
[71] J Hedge, WC Borman and SE Lammlein, *The Aging Workforce: Realities, Myths, and Implications for Organizations* (American Psychological Association 2006).
[72] RC Liden, D Stilwell and GR Ferris, 'The Effects of Supervisor and Subordinate Age on Objective Performance and Subjective Performance Ratings' (1996) 49 Human Relations 327.
[73] KM Prenda and SM Stahl, 'The Truth About Older Workers' (2001) 19 Business and Health 30.
[74] P Warr, in Select Committee on Economic Affairs, *Aspects of the Economics of an Ageing Population 4th report* (HL 2002-2003, 179-I) para 5.22.
[75] FJ Landy, 'Age, Race and Gender in Organizations' in NJ Smelser & PB Baltes (eds), *International Encyclopedia of Social and Behavioral Sciences* (Blackwell 2001) 270.

important than attributes due to age whilst Bennington and Tharenou assert that these negative representations are 'myths'[76] and concluded that age is an inadequate indicator of performance. They found that older workers are as likely as those younger to adapt to new skills and undertake new training if offered and both the young and old are as effective as other age cohorts in their work.

Age is a fluid attribute and workers move along a continuum from one cohort to another at differing rates because of personal experiences, health and well-being. Gerontological research has shown that although mental and physical functions can decline gradually with advancing age it will not be at the same rate or manner for each individual and these declines are often compensated for by knowledge and experience. The clinician Fries found that 'variation between healthy persons of the same age is far greater than the variation due to age; age is a relatively unimportant variable'[77] so an assumption that an individual's performance deteriorates with age may be unfair to a large number of people. Fries' findings have been reinforced in many studies – from sociological studies which have found that 'chronological age in itself, although once a useful proxy indicator … is becoming an increasingly imperfect measure'[78] – to medical surveys which conclude it 'is no longer possible to make adequate generalizations about the ageing process that are grounded on biological assumptions about the ages of life'.[79]

Cognitive decline is often stereotypically attributed to older workers, but if workers remain in employment a substantial majority will show no significant deterioration that will affect their ability to work.[80] Studies have shown that the brain will continue to produce new cells if stimulated and the individual remains physically active. [81] Over time brain activity moves from the anterior to posterior circuitry in

[76] L Bennington and P Tharenou, 'Older Workers: Myths, Evidence and Implications for Australian Managers' (1996) 34(3) Asia Pacific Journal of Human Resources 63.
[77] J Fries, 'Ageing, Natural Death, and the Compression Of Morbidity' (1980) 303(3) New England Journal of Medicine 113, 134.
[78] RM Suzman, DP Willis and KG Manton (eds), *The Oldest Old* (OUP 1992) 12.
[79] M Featherstone and M Hepworth, 'Ageing, the Lifecourse and the Sociology of Embodiment' in G Scambler, P Higgs (eds), *Modernity, Medicine, and Health: Medical Sociology Towards 2000* (Routledge 1998) 161.
[80] S Studenski, MC Carlson, H Fillit, WT Greenough, A Kramer and GW Rebok, 'From Bedside to Bench: Does Mental and Physical Activity Promote Cognitive Vitality in Late Life?' (2006) 10 Science of Aging Knowledge Environment 21.
[81] RN Butler, F Forette and S Greengross, 'Maintaining Cognitive Health in an Ageing Society' (2004) 124 The Journal of the Royal Society for the Promotion of Health 120.

order to make efficient use of the brain's capacity in order to compensate for a slight decrease in size[82] and such processing is 'qualitatively different and possibly better'[83] than younger adults. Newton found that, on average, there is little change in intellectual perception with age – the slight decline in speed and reaction time is usually made up for in terms of general knowledge and experience.[84] Similarly, language ability is maintained with age because a wider vocabulary compensates for any decline in speed.[85] Perpetuating stereotypes is therefore manifestly unfair to those individuals who do not possess the assumed characteristics of their age group.

1.5: Age discrimination

The perpetuation of negative stereotypes leads to problems of age discrimination.[86] The term discrimination is no longer a neutral process of differentiation and has assumed a derogatory quality so that it implies 'unjust or prejudicial treatment of different categories of people'.[87] Fredman asserts that discrimination occurs when 'individuals are subjected to detriment on the basis only of their status, their group membership, or irrelevant physical characteristics'.[88] Thompson also attaches adverse consequences to the differential treatment and has defined discrimination as 'unfair or unequal treatment of individuals or groups; prejudicial behaviour acting against the interest of those people who characteristically tend to belong to relatively powerless groups'.[89]

The phrase 'relatively powerless' suggests that the differential treatment is of someone who belongs to a vulnerable group and Sunstein asserts that the victims belong to a 'subordinate social group'[90] and a suspect class which has suffered

[82] A Brickman, M Buchsbaum, L Shihabuddin, E Hazlett, J Borod and RC Mohs, 'Striatal Size, Glucose Metabolic Rate and Verbal Learning in Normal Aging' (2003) 17 Cognitive Brain Research 106.
[83] A Wingfield, SC Wayland and EAL Stine, 'Adult Age Differences in the Use of Prosody for Syntactic Parsing and Recall of Spoken Sentences' (1992) 47 Journal of Gerontology: Psychological Sciences 350.
[84] NA Newton, LW Lazarus and J Weinberg, 'Biopsychosocial Perspectives' in D Offer and M Sabshin (eds), *Normality and the Life Cycle. A Critical Integration* (Basic Books 1984).
[85] T Arbuckle, D Gold, D Andres, A Schwartzman and J Chaikelson, 'The Role of Psychosocial Context, Age and Intelligence in Memory Performance of Older Men' (1992) 7 Psychol Aging 25.
[86] A Foner, 'Age Conflicts' in GL Maddox (ed), *The Encyclopaedia of Aging* (Springer 1995).
[87] *The Oxford Dictionary of English* (2nd Edition 2005).
[88] S Fredman, *Discrimination Law* (OUP 2002) 66.
[89] N Thompson, *Anti-Discriminatory Practice* (Palgrave Macmillan 2001) 33.
[90] Sunstein (n 6) 764.

'systemic disadvantage'.[91] The Supreme Court in the USA has described a suspect class as one 'subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process'.[92] The Court went on in *Murgia*[93] to describe the class of 'older citizens' as not defining a discrete and insular group in need of extraordinary protection.

An ambivalent attitude to age as a suspect group has resulted in a tentative approach by the judiciary in interpreting age legislation, as evidenced above. Justification for interfering in the market economy and freedom to contract by enacting discrimination legislation is usually intended to remedy the disadvantage suffered by a suspect group. However, age cohorts do not form homogeneous, discrete groups. Indeed with regard to older age cohorts, even if they are accepted as a discrete group, the view is increasingly expressed that a substantial number of older citizens are relatively privileged and to whom society owes no remedial obligation.[94] A 2012 report for the ESRC suggested removing many benefits such as national insurance and tax exemptions for pensioners as over the past decade 'the income of the median pensioner increased by 29.4% whereas the income of the median non-pensioner increased by 26.0%'.[95] Many older citizens are financially secure and enjoy inflation-proofed pensions and may not need additional protection. However, this type of argument can also be employed to race as a suspect group, where individual members of ethnic minority groups may not have suffered disadvantage, but the overall status of race as a suspect group is not questioned.

An important issue to be considered is whether differential treatment based on age is discrimination if it is not irrational. Sunstein's definition of discrimination, discussed above, relies upon someone 'acting on the basis of irrational prejudice'.[96] An important difference between age and other suspect groups is that age discrimination is not always the result of irrational prejudice but can be based on

[91] ibid 770.
[92] *Massachusetts Bd. of Retirement v Murgia* 427 US 307 (1976) [313] (Justice Powell).
[93] ibid.
[94] C Berry, *The Rise of Gerontocracy?* (The Intergenerational Foundation 2012) <http://www.if.org.uk/wp-content/uploads/2012/04/IF_Democratic_Deficit_final.pdf> accessed 4 October 2012.
[95] S Adam, J Browne and P Johnson, *Pensioners and the Tax and Benefit System* (IFS Briefing Note 130 2012) 10.
[96] Sunstein (n 6).

practical considerations and may be justified. For example, if an employer seeks to recruit a worker for a position for which a substantial amount of training is required it might not be thought appropriate to employ someone known to be near the normal retirement age for that activity. The employer may hold no stereotypical views or irrational prejudice against mature individuals but may favour a younger person who may stay working for a longer period and provide a greater return for the employer's investment. In these circumstances there is a rational explanation for the differentiation but this may be unjustified as individual older applicants may intend or need to continue to work for a number of years. If discrimination 'comes about only when we deny to individuals or groups of people equality of treatment which they may wish',[97] an older applicant seeking work may feel that discrimination has taken place. In this type of instance a rational explanation exists for the employer's conduct so that it fails to satisfy Sunstein's test, indicating it is not discriminatory. The use of objective justification tests in age legislation is designed to permit this differential treatment. Legislative measures which prohibit age discrimination always permit the objective justification for differential treatment and this has become central to the judicial consideration of a claim of age discrimination. This allows a balancing act to be made between the needs of various age cohorts, the needs of employers and the right of individual citizens to be treated fairly.

A report prepared for the European Commission revealed that age is frequently a factor in multiple discrimination and highlighted the fact that elderly disabled and young ethnic minority men were especially vulnerable to discriminatory treatment.[98] The concept of multiple discrimination has been described in a seminal work by Makkonen and is said to occur when an 'individual suffers discrimination on two or more grounds at different times'.[99] On the other hand, 'intersectional discrimination' occurs in a situation involving discrimination which is 'based on several grounds operating and interacting with each other at the same time',[100] whilst 'compound

[97] GW Allport, *The Nature of Prejudice* (Addison-Wesley 1954) 51.
[98] European Commission, *Tackling Multiple Discrimination* (Office for Official Publications of the European Communities 2007) 47.
[99] T Makkonen, *Multiple, Compound and Intersectional Discrimination* (Institute for Human Rights 2002) 10.
[100] ibid.

discrimination' occurs on 'the basis of two or more grounds which add to each other to create a situation of compound discrimination … *at one particular instance*'.[101]

With regard to age, it may be asserted that much discrimination falls under the heading of intersectional discrimination as age can rarely be disassociated from a person's identity, interacting with their other qualities, and in the workplace may occur on more than one instance. Nevertheless the terms 'multiple and intersectional discrimination are commonly interchanged with each other'.[102] This thesis therefore uses a broad interpretation of the term multiple discrimination, inclusive of compound and intersectional discrimination, rather than the more specific definition suggested by Makkonen.

The noteworthy problem with multiple discrimination is that when it occurs it is difficult to assess whether a person has been discriminated against on one or a combination of grounds which interact with each other. An elderly, disabled, black worker may be discriminated against because of her perceived identity – a result of a combination of four suspect grounds or on any one of age, gender, disability or race. Older women have a particular problem with discriminating behaviour in the media and are replaced, despite their capability, because they look old.[103] Selina Scott and Miriam O'Reilly both received large settlements for claims that they suffered age discrimination in selection as television presenters.[104] This pattern is also seen in other occupational groups, for example, Granlesse and Sayer found that female academics suffer from a combination of ageism, sexism and 'lookism' and subsequently often fail to improve their academic status.[105]

Systemic age discrimination has a substantive impact on the employment relationship, evidenced in several large surveys undertaken by governmental

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[101] T Makkonen, *Multiple, Compound and Intersectional Discrimination* (Institute for Human Rights 2002) 11. Emphasis in the original.
[102] KN Ruwanpura, *Exploring the Links of Multidiscrimination* (International Institute for Labour Studies 2005) 14.
[103] 'Women Over 55 "Invisible on TV"' *BBC News* (6 December 2008) <http://news.bbc.co.uk/1/hi/entertainment/7768809.stm> accessed 4 October 2012.
[104] S Scott, 'My Fury at Ageist Bosses' *Daily Mail* (London 24 July 2009) <http://www.dailymail.co.uk/femail/article-1201805/SELINA-SCOTT-My-fury-ageist-BBC-bosses-sacked-Arlene-Phillips.html> accessed 4 October 2012; *O' Reilly v British Broadcasting Corporation & Anor* EW Misc 1, ET 2200423/10.
[105] J Granleese and G Sayer, 'Gendered Ageism and "Lookism": A Triple Jeopardy for Female Academics' (2006) 21(6) Women in Management Review 500.

agencies.[106] As a result harm may be suffered by individuals, employers and the wider community. The effects on the individual can be life-changing as the loss of employment can bring a fall in self-esteem, financial insecurity and the end of a working-life and accompanying social circle. Irrational, discriminating attitudes are 'morally objectionable'[107] on social justice grounds and can result in physical illness,[108] emotional stress[109] and financial hardship to individuals.[110] The subsequent mental and physical illness can be serious and long term.[111] To those seeking a job or who are refused promotion it is demoralising and often creates a circle of disadvantage.[112] Snape and Redman found that age discrimination contributes to a belief by a worker that they are unemployable or unwanted and destroys their feeling of self-worth.[113] Perry and Freeland investigated the psychological effects of age discrimination on workers and found that it can cause 'shock, grief, humiliation, loss of confidence and long term adverse effects on health and wellbeing … The demoralisation and age discrimination they suffer means that their employability depreciates at a rapid rate once unemployed'.[114]

On the other hand, those older individuals who remain active in the workforce have been shown to have longer life expectancy,[115] resistance to disease,[116] improved cognitive function[117] and enhanced quality of life in old age[118] so that for the

[106] Eg Cabinet Office Performance and Innovation Unit, *Winning the Generation Game: Improving Opportunities for People Aged 50–65 in Work and Community Activity* (The Stationery Office 2000); European Commission, 'Discrimination in the European Union' *Special Eurobarometer 263* (Directorate General Employment, Social Affairs and Equal Opportunities 2007) 9.
[107] J Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (CUP 2006) 15.
[108] *Kessell v Passion for Perfume Ltd* (2007) ET 1700345/07.
[109] *Plewes v Adam Pork Produce Ltd* (2007) ET 2600842/07.
[110] *Martin v SS Photay & Associates* (2007) ET 1100242/07.
[111] EK Pavalko, KN Mossakowski and VJ Hamilton, 'Does Perceived Discrimination Affect Health? Longitudinal Relationships between Work Discrimination and Women's Physical and Emotional Health' (2003) 44(1) Journal of Health and Social Behavior 18.
[112] BA Gutek, AG Cohen and A Tsui, 'Reactions to Perceived Age Discrimination' (1996) 49(6) Human Relations 791.
[113] E. Snape and T Redman, 'Too Old or Too Young? The Impact of Perceived Age Discrimination' (2003) 13(1) Human Resource Management Journal 78.
[114] J Perry and J Freeland, *Too Young to Go: Mature Age Unemployment and Early Retirement in NSW - Implications for Policy and Practice* (Committee of Ageing 2001) 9.
[115] M Gulati, HR Black, LJ Shaw, MF Arnsdorf et al, 'The Prognostic Value of a Nomogram for Exercise Capacity in Women' (2005) 353(5) The New England Journal of Medicine 468.
[116] JN Morris, 'Resist Old Age: Exercise!' (1997) 50(4) World Health 6.
[117] LCW Lam, CWC Tam, VWC Lui, WC Chan, SSM Chan, HFK Chiu, A Wong, MK Tham, KS Ho and WM Chan, 'Modality of Physical Exercise and Cognitive Function in Hong Kong Older Chinese Community' (2009) 24(1) International Journal of Geriatric Psychiatry 48.

individual worker there are many advantages in continuing to work. The removal of discriminating barriers enables more people to enjoy these rewards as well as making contributions to the nation's wealth whilst making smaller demands on the welfare state. Individual employers who implement ageist practices may lose skills and experience garnered by older workers and human resources may be misallocated and underutilised.[119] The government has estimated that the removal of age discriminatory practices would benefit the economy by £24 - 460m[120] each year as 'talent and ability will be better matched to recruitment and training decisions. Labour market competition will also increase from tapping a greater pool of applicants, increased training and improved promotion prospects'.[121]

Studies have found that women are far less likely than men to discriminate but both sexes are equally subject to age discrimination.[122] Gee and Pavalko used the USA National Longitudinal Surveys from 1972 to 1988 to show that age discrimination is felt to be suffered particularly by those under 25, falling to a low from 30-40 years old and slowly rises thereafter to a peak at 57-58 years old.[123] These age-related patterns of perceived age discrimination match age preferences for workers cited by employers.[124]

Evidence indicates that discrimination takes place throughout the employment process but particularly in recruitment. Unemployed older individuals have to respond to more advertisements in order to obtain a job than those younger.[125] Shen and Kleiner found that those over 45 were out of work for longer than younger

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[118] CH Hillman, KI Erickson and AF Kramer, 'Be Smart, Exercise Your Heart: Exercise Effects on Brain and Cognition' (2008) 9(1) Nature Reviews Neuroscience 58; J Stessman, R Hammerman-Rozenberg, Y Maaravi and A Cohen, 'Effect of Exercise on Ease in Performing Activities of Daily Living and Instrumental Activities of Daily Living From Age 70 to 77' (2002) 50(12) Journal of the American Geriatrics Society 1934.

[119] Department of Trade and Industry, *Partial Regulatory Impact Assessment of the Age Regulations* (2005) 9 <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24286.pdf> accessed 7 July 2013.

[120] ibid Table 7, 16.

[121] ibid 14.

[122] S DeArmond, M Tye, PY Chen, A Krauss, DA Rogers and E Sintek, 'Age and Gender Stereotypes: New Challenges in a Changing Workplace and Workforce' (2006) 36(9) Journal of Applied Social Psychology 2184; JM Kalavar, 'Examining Ageism: Do Male and Female College Students Differ?' (2001) 27(6) Educational Gerontology 507.

[123] GC Gee, EK Pavalko and JS Long, 'Age, Cohort and Perceived Age Discrimination: Using the Life Course to Assess Self-reported Age Discrimination' (2007) 86(1) Social Forces 265.

[124] AE McGoldrick and J Arrowsmith, 'Recruitment Advertising: Discrimination on the Basis of Age' (1993) 15(5) Employee Relations 54.

[125] JN Lahey, 'Do Older Workers Face Discrimination?' (2005) (Issue in Brief 33) Boston Center for Retirement Research.

unemployed and often faced failure in obtaining work by placing their age and whole career path (thereby disclosing their age cohort) on their curriculum vitae.[126] Once through the selection process applicants often have to undergo stringent medical and fitness pre-employment screening to prove their suitability for a position. Older applicants are usually disadvantaged by such procedures as all consultations with medical practitioners over a lifetime are assessed and such screening tests may be indirectly age discriminatory. Ageist attitudes may also influence the training, job status and career development of workers, preventing their achievement of an optimum economic contribution. Cox and Nkomo found that older workers in employment scored lower in subjective performance assessment exercises despite achieving good scores[127] and Cleveland and Shore found that older workers were less likely to be promoted than younger workers.[128]

In 2009 the EU noted that 61% of individuals surveyed thought age discrimination 'very widespread'[129] in the UK, experienced by both younger and older workers. A government report in 2000 found that a third of those aged 50-65 were unemployed and a key factor impeding their re-entry into the workplace was age discrimination by employers.[130] An Ipsos-Mori survey in 2002 found that 22% of the UK workforce has experienced discrimination and 38% thought it occurred on the grounds of their age.[131] Of these, 38% felt it occurred in the recruitment process, 25% in selection for promotion and 16% in being offered training. A quarter of those aged 50 to 69 reported age discrimination in work or when seeking work.

Age discrimination is therefore a significant problem for both individuals and the economy. Over a quarter of people in the UK (28%) claim to have suffered from

[126] G Shen and B Kleiner, 'Age Discrimination in Hiring' (2001) 20(8) Equal Opportunities International 25, 30.
[127] T Cox and SM Nkomo, 'Candidate Age as a Factor in Promotability Ratings' (1992) 21 Public Personnel Management 197.
[128] JN Cleveland and LM Shore, 'Self and Supervisory Perspectives on Age and Work Attitudes and Performance' (1992) 77 Journal of Applied Psychology 469.
[129] European Commission, *Eurobarometer 317* (Directorate General Employment, Social Affairs and Equal Opportunities 2009) 72.
[130] Cabinet Office Performance and Innovation Unit, *Winning the Generation Game: Improving Opportunities for People Aged 50-65 in Work and Community Activity* (The Stationery Office 2000) 38.
[131] Ipsos-Mori, *Age Discrimination at Work* (2002) <http://www.ipsos-mori.com/researchpublications/researcharchive/953/Age-Discrimination-At-Work.aspx> accessed 4 October 2012.

age discrimination, more than any other suspect ground.[132] For example, 17% claim to have suffered from religious discrimination and 15% from disability discrimination[133] and those disabled or belonging to an ethnic minority were found to have suffered more age discrimination than that directed towards their disability or race.[134] In a UK survey one third of respondents thought the over 70's incompetent and incapable.[135] Whilst age discrimination is acknowledged as a potential problem, many therefore still hold views that reflect stereotypical assumptions about ageing and capability.

1.6: Prejudice reduction

The vast majority of people in Europe – 83% – think 'age discrimination is wrong'.[136] Three primary avenues along which to address the problem have been suggested:[137] these are 'high-quality intergenerational contact',[138] exposure to 'positive stereotype images'[139] and 'individuating information'.[140] Prejudice reduction schemes have been subject to much evaluation. It has been shown that training related to a specific prejudice can produce 'reduced stereotype activation'.[141] Hill and Augoustinos found that a combination of methods, such as workshops, leaflets and seminars,[142] especially those stimulating mental imagery, are recommended in order to reduce negative stereotyping.[143] Recent work in the USA and Australia has shown that all age-groups can modify their view of other age cohorts if explicit contradictory

[132] Figures taken from S Ray, E Sharp and D Abrams, *Ageism: A Benchmark of Public Attitudes in Britain* (Age Concern 2006) 47.
[133] ibid.
[134] ibid 48.
[135] ibid 22.
[136] European Commission, *Eurobarometer 57* (Directorate General Employment, Social Affairs and Equal Opportunities 2003) 11.
[137] A Cuddy, M Norton and S Fiske, 'This Old Stereotype: The Pervasiveness and Persistence of the Elderly Stereotype' (2005) 61(2) Journal of Social Issues 265.
[138] A Caspi, 'Contact Hypothesis and Inter-Age Attitudes: A Field Study of Cross-Age Contact' (1984) 47 Social Psychology Quarterly 74; LK Schwartz and JP Simmons, 'Contact Quality and Attitudes Toward the Elderly' (2001) 27 Educational Gerontology 127.
[139] LA Jackson and LA Sullivan, 'Age Stereotype Disconfirming Information and Evaluations of Old People' (1988) 128 Journal of Social Psychology 721.
[140] JT Erber, ME Etheart and LT Szuchman, 'Age and Forgetfulness: Perceivers' Impressions of Targets' Capability' (1992) 7 Psychology and Aging 479.
[141] K Kawakami, J Moll, S Hermsen, JF Dovidio and A Russin, 'Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation' (2000) 78(5) Journal of Personality & Social Psychology 871, 887.
[142] ME Hill and M Augoustinos, 'Stereotype Change and Prejudice Reduction: Short- and Long-Term Evaluation of a Cross–Cultural Awareness Programme' (2001) 11(4) Journal of Community & Applied Social Psychology 243.
[143] I Blair, JE Ma and AP Lenton, 'Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery' (2001) 81 J Pers Soc Psycho 828.

evidence is presented.[144] Martens et al recommend that 'by more openly and consciously living with awareness of mortality, we may view elderly people as less of a threat'.[145] This may be achieved by classes that 'teach about death and the dying process that may help people to live more honestly with their mortality'.[146] Research by the University of Kent has shown that 'intergenerational contact can reduce vulnerability to stereotype threat among older people'[147] and reduces ageist behaviour whilst inter-group contact has been shown to reduce implicit biases in the USA in several studies.[148] Educational initiatives aimed at the young, as exist in Texas, can deliver high-quality intergenerational contact and their results are impressive.[149]

A significant change could be achieved by requiring the media to promote positive stereotypes of all age groups by means of a public regulatory body. Sergeant maintains that it is 'surprising' that there are no age 'pressure groups dedicated to influencing the media and criticising it'[150] and he feels 'that the establishment of such a body might be more influential than considering any legal alternatives'[151] to eliminating ageism. The media frequently portrays older people as inept, whilst those younger are depicted as innovative and creative (although at times the young are unfairly portrayed as 'lazy hoodies'[152]). Under the Communications Act 2003, OFCOM, in carrying out its statutory function, must have regard to the needs of persons, including the elderly,[153] and 'the opinions of consumers in relevant markets and of members of the public generally'[154] but OFCOM has not intervened in the stereotypical portrayal of 'senior' individuals as it is regarded as acceptable. OFCOM also has a statutory duty to carry out research into 'matters relating to, or connected

[144] GA Radvansky, NA Lynchard and W von Hippel, 'Aging and Stereotype Suppression' (2009) 16(1) Aging, Neuropsychology & Cognition 22.
[145] A Martens, JL Goldenberg and JA Greenberg, 'Terror Management Perspective on Ageism' (2005) 61(2) Journal of Social Issues 232.
[146] ibid.
[147] D Abrams, A Eller and J Bryant, 'An Age Apart: The Effects of Intergenerational Contact and Stereotype Threat on Performance and Intergroup Bias' (2006) 21 Psychology & Aging 691.
[148] E.g. LA Rudman, RD Ashmore and ML Gary, 'Unlearning' Automatic Biases: The Malleability of Implicit Stereotypes and Prejudice' (2001) 81 J Pers Soc Psychol 856.
[149] Under the auspices of the US National Academy for Teaching and Learning about Aging; further information at <http://www.cps.unt.edu/natla/> accessed 12 July 2013.
[150] M Sargeant, 'Ageism in the Media' (2008) 13(4) CL 125.
[151] ibid.
[152] 'Kids These Days ... Criminals or Celebrities' *BBC News* (London 13 March 2008) <http://news.bbc.co.uk/1/hi/magazine/7293873.stm> accessed 4 October 2012.
[153] Communications Act 2003 s3(4)(i).
[154] ibid s 3(4)(k).

with, the prevention of unjust or unfair treatment in programmes'[155] but little, if any, research has been carried out on its behalf into the prevention of unfair treatment of specific age groups.

The removal of age as a differentiating factor in public administration, for example, in the provision of work experience and training schemes is also a prerequisite in the fight against ageism.[156] Many commentators have asserted that only a 'culture change' will remove such discrimination.[157] Such change may not evolve organically when pressures within our society, particularly evident in the media, are often focused on a youth culture. Social structures have not kept pace with demographic changes and gerontological research as society is suffering from 'structural lag'.[158] It has been suggested that changes in employment practice can remedy this deficit by providing different opportunities for work throughout the age continuum, for example, providing more flexible working practices, more parental leave and benefits, phased retirement, promoting education and training at all ages.[159]

Studies have consistently demonstrated that changes in implicit attitudes are more readily achieved by encouraging free choice decisions rather than as a result of 'induced compliance'[160] such as age discrimination legislation.[161] Significantly, research has shown that training in the 'affirmation of counter-stereotypes' leads to reductions in the use of stereotypes, in contrast to 'training in the negation of stereotypes'[162] which enhances rather than reduces negative evaluations. Merely instructing employers not to discriminate on the basis of age, rather than providing good counter-stereotypes, may therefore encourage such discrimination. It may be

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[155] ibid s 14(6)(d).
[156] Eg *New Deal 50 Plus* is only for those over 50.
[157] C Duncan, 'Assessing Anti-Ageism Routes to Older Worker Re-Engagement' (2003) 17(1) Work, Employment and Society 101; M Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment' (2006) 35(3) ILJ 209.
[158] As discussed by MW Riley, RL Kahn and A Foner (eds), *Age and Structural Lag* (John Wiley & Sons 1994).
[159] VL Bengtson, NM Putney and ML Johnson, 'The Problem of Theory in Gerontology Today' in ML Johnson, P Coleman and VL Bengtson (eds), *The Cambridge Handbook on Age and Ageing* (Cambridge University Press 2006) 14.
[160] B Gawronski and F Strack, 'On the Propositional Nature of Cognitive Consistency: Dissonance Changes Explicit, but not Implicit Attitudes' (2004) 40(4) Journal of Experimental Social Psychology 535.
[161] RE Petty, RH Fazio and P Briñol (eds), *Attitudes: Insights from the New Implicit Measures* (Psychology Press 2008) 102.
[162] B Gawronski, R Deutsch, S Mbirkou, B Seibt and F Strack, 'When 'Just Say No' is Not Enough: Affirmation Versus Negation Training and the Reduction of Automatic Stereotype Activation' (2008) 44(2) Journal of Experimental Social Psychology 370, 376.

surmised therefore that introducing legislation to regulate age discrimination, without promoting the use of positive counter stereotypes, may possibly enhance negative evaluation of susceptible age cohorts.

1.7: Legislation to prohibit age discrimination in the workplace

Concern over the fiscal problems caused by a growing number of economically inactive, mature citizens induced many countries to introduce legislation to prohibit age discrimination in the late 1990's. As the impetus was stimulated by economic rather than social justice grounds most legislation was directed only to employment relationships rather than the wider environment, indicating that the prohibition of age discrimination is viewed as less important than other grounds. The response to age discrimination demonstrates very sharply the contrasting attitudes as to whether such behaviour should be prohibited by legislation – on one hand by the proponents of the 'economic reality' theory which opposes legislative intervention in the freedom to contract and on the other hand by social rights supporters who advocate the achievement of equality. Economic realists argue that a rational employer will always employ the best candidate for the job, irrespective of age – if productivity is affected by age in any way then this will naturally be reflected in the higher unemployment figures of older people – merely a rational result to an economic reality.[163]

Age discrimination can be as irrational as refusing to hiring someone because they have ginger hair based on an assumption that ginger-haired individuals are short tempered. Yet the law does not seek to intervene in such irrational behaviour because freedom to contract remains at the heart of the employment relationship. The tension stemming from legislative intervention was described by Marshall in 1949 as a conflict between social rights and market values and competitiveness.[164] Even Hayek, who opposed 'social legislation' which aimed 'to direct private activity towards particular ends and to the benefit of particular groups', recognised that public law needs to supplement private law in order to realign the marketplace to make it fairer for all.[165]

[163] RA Epstein, *Equal Opportunity or More Opportunity? The Good Thing About Discrimination* (Civitas 2002).
[164] TH Marshall, *Citizenship and Social Class* (CUP 1949) 42.
[165] L Hayek, *Legislation and Liberty: Rules and Order I* (Routledge 1973) 142.

The intervention of notions of equality and social rights by means of age legislation into the workplace, where the market forces of freedom to contract, efficiency and competitiveness are paramount, has been unwelcome in many places. Posner argues that age discrimination is an efficient, cheap form of differentiation and is less demeaning than using ability or performance.[166] He suggests that age discrimination legislation may harm the elderly by pressuring workers to continue working and provides evidence to show that employers in the USA are less inclined to hire older workers for fear of later discrimination claims.[167] Nevertheless the prohibition of social injustices such as age discrimination can be viewed as institutional support for personal capabilities which will improve the labour market freedom of all workers. By promoting legislation to prohibit discrimination, increasing access to the workforce for individuals, benefits can be felt by all. In addition, the mere existence of age legislation can be a catalyst for change, sending a powerful message to society that negative stereotypes are not necessarily accurate and raising awareness of ageist attitudes.

However, evidence from the USA, where age legislation has existed for nearly fifty years, does not provide a basis for a convincing argument that the prohibition of ageist conduct is successful in tackling unfair treatment. Adams found that the adoption of age discrimination legislation resulted in fewer older individuals obtaining work and concluded that the 'implications of age discrimination legislation for workers above specified age ranges are unambiguously negative, with a large decrease in net employment'.[168] Sunstein argues that results in the USA demonstrate that 'adjudication remains an extremely poor system for achieving social reform … Courts simply lack the tools to respond to these problems'.[169] Rothenberg and Gardner assert that the American Age Discrimination in Employment Act 1967 (the ADEA) has been 'ineffective'[170] whilst in Australia the equivalent Age Discrimination Act 2004 has

[166] RA Posner, *Aging and Old Age* (University of Chicago Press 1995) 328.
[167] RM Hutchens, 'Do Job Opportunities Decline with Age?' (1988) 42(1) Industrial and Labor Relations Review 89.
[168] S Adams, 'Age Discrimination Legislation and the Employment of Older Workers' (2004) 11 Labour Economics 219, 239.
[169] Sunstein (n 6).
[170] JZ Rothenberg and DS Gardner, 'Protecting Older Workers: The Failure of the Age Discrimination in Employment Act of 1967' (2011) 38(1) Journal of Sociology & Social Welfare 9, 10.

been described as a 'mode of regulation' which 'has not brought about the type of social change necessary for discrimination to be adequately addressed'.[171]

Issacharoff and Worth claim that age discrimination legislation in the USA has disturbed the natural life-cycle of work and older workers are unfairly extending their working life to the detriment of those younger, producing cross-generational inequities, particularly in times of high youth unemployment rates.[172] The 'fair-innings' rationale, or 'vampire theory,'[173] whereby older workers are expected to stand aside to make way for younger individuals bringing new blood to organisations, is used to counter-act these inequities. However, this rationale assumes a standard pattern of working-life which is not viable for all. For instance, women who have spent years caring for family members may not have enjoyed the opportunity to work whilst young and may value the opportunity to work in later years.

Nonetheless the UK Supreme Court declared lawful a fair-innings justification for an enforced retirement age of 65 which was based on a legitimate 'social policy aim of sharing out professional employment opportunities fairly between the generations' in *Seldon v Clarkson Wright & Jakes*.[174] If a fair-innings argument is considered valid this implies that when a certain age threshold is reached rights become diminished, placing the rights of those younger above that of older individuals – thereby effectively legitimising age discriminatory conduct. This illustrates the 'crisis'[175] that age-equality agendas need to confront and which is perpetuated by current age legislation in the UK.

Duncan[176] and Macnicol[177] question the legitimacy of age discrimination legislation per se, as they feel if age-based differentiation in the workplace is prohibited this may create a new form of discrimination against those who may not perform well in performance appraisals. Duncan feels that 'age-equality constructs may be contributing to, rather than confronting, the marginalisation of older

[171] T Macdermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation' (2011) 34(1) UNSW Law Journal 182, 183.
[172] S Issacharoff and EW Worth, 'Is Age Discrimination Really Age Discrimination?' (1997) 72 New York University Law Review 780.
[173] LM Friedman in S Fredman and S Spencer, *Age as an Equality Issue* (Hart Publishing 2003) 175.
[174] [2012] UKSC 16, [2012] ICR 716 [67] (Lady Hale SCJ).
[175] C Duncan, 'The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice' (2008) 28 Ageing & Society 1144.
[176] ibid 1152.
[177] J Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (CUP 2006).

people'.[178] Indeed, Macnicol argues that 'some critics would argue that this is exactly what legislation against age discrimination in employment is fundamentally designed to do'.[179] He believes that age legislation will disadvantage the majority of older workers by relying upon age-neutral appraisals and 'it may be the Trojan horse of an attack [by employers] upon the welfare rights of older people'.[180] Age discrimination legislation may be seen as permitting discrimination on the justifiable ground of productivity, encouraging the removal of age-related work practices which favour older workers.

Two polarised views have also developed with regard to the type of equality that age legislation is based upon – those who want equal treatment with those in other age-cohorts and those who want recognition of the special problems that each age-cohort faces. The perplexing contradictory nature of age equality constructs undermines the basic objective of most age legislation which often relies on an insistence of equal treatment, described as an out-dated concept and which treats all as 'ageless.'[181] It has been claimed that to treat all individuals as ageless downgrades the 'distinctive needs and actual and potential contributions'[182] of age cohorts and 'especially denigrates those who cannot conform'.[183] The application of equal treatment may result in mature individuals losing benefits and advantages given in recognition of their specific needs if they are levelled down rather than up so that no age cohort receives them.

Both the young and old suffer from negative stereotypes and all are entitled to protection, but using an equal treatment legislative format may undermine the interests of older and younger age cohorts. For example, allowing older workers to have flexible working or phased retirement may be considered age discriminatory when using a test of equal treatment if younger workers are not allowed to vary their working practices. Supporting the needs of particular age-cohorts is age-

[178] ibid 1134.
[179] J Macnicol, *Ageism and Age Discrimination: Some Analytical Issues* (ILC paper presented to the Pensions Research Network 2010) 6 <http://www.ilcuk.org.uk/files/pdf_pdf_139.pdf> accessed 4 October 2012.
[180] Macnicol (n 177) 267.
[181] B Hepple, *Delivering Age Equality in Employment* (Institute for Public Policy Research 2002); S Fredman, *Discrimination Law* (OUP 2002) 2; Mowbray AR, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights* (Hart Publishing 2004).
[182] C Duncan, 'The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice' (2008) 28 Ageing & Society 1152.
[183] ibid 1152.

discriminatory to those cohorts who do not receive support. This conflict was illustrated by the first 'age' case heard by the ECJ, *Mangold v Helm,*[184] where a relaxation of fixed-term contract regulations designed to encourage employers to hire workers over the age of 58 was found to be in breach of the principle of equal treatment and therefore discriminatory. McHugh has questioned whether 'non-ageist thinking' is even 'fathomable or culturally possible' as negative images of age cohorts are overtly ageist, whilst positive images are ageist because they may unreasonably deny the experience of the majority of older people.[185]

Age discrimination is unfair when individuals are not treated with equal dignity or respect throughout the life-span. Fredman acknowledges that there is 'little consensus on the meaning of equality in the context of age and how it can be achieved'.[186] She supports an approach which facilitates the 'equal participation of all in society, based on equal concern and respect for the dignity of each individual'[187] rather than equal treatment. This recognises that affording equal respect to individuals from different age cohorts sometimes requires treating them differently. Appiah has pointed out that equality 'as a social ideal is a matter of not taking irrelevant distinctions into account'.[188] However, the achievement of substantive equality requires more than this. The nature of negative perceptions regarding older and younger individuals will not be addressed by an insistence on equal treatment without confronting the roots of prejudice. The removal of negative stereotypical attitudes which lead to the adoption of 'irrelevant distinctions' is a prerequisite to age cohorts receiving equal treatment and this requires structural reform to counter-act their effects.

The requirement to make 'reasonable accommodation' on grounds of age may provide a means by which allowance can be made of the needs of age cohorts. In Canada (where protection within an equal treatment format[189] is extended outside employment to cover access to goods, services and facilities) a legal duty exists to

[184] C-144/04 *Mangold v Helm* [2005] ECR I-9981.
[185] K McHugh, 'Three Faces of Ageism: Society, Image and Place' (2003) 23(2) Ageing & Society 165, 181.
[186] S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003) 2.
[187] ibid 21.
[188] KA Appiah, 'Stereotypes and the Shaping of Identity' in RC Post (ed), *Prejudicial Appearances: The Logic Of American Antidiscrimination Law* (Duke University Press 2001) 57.
[189] Canadian Charter of Rights and Freedoms 1982, s 15(1).

make ‘accommodation of the needs of an individual or a class of individuals affected’[190] unless it ‘would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost’.[191] This requires providers and employers to take reasonable steps to adjust their practices to accommodate individuals according to their particular needs. For example, older workers finding they are not physically capable of fulfilling the role adequately because of age-related problems should be offered equivalent but less physically demanding work if it does not cause undue hardship to the employer, rather than being dismissed. Moon develops a persuasive argument for the adoption of such a requirement asserting that it ‘could facilitate those at the beginning and end of their working life being able to reduce their hours, work flexi-time or work in part from home’.[192] However, this compelling suggestion was rejected by the UK government as it ‘would be unduly burdensome and reduce clarity if employers and service providers were required to respond to extensive new duties in this way’.[193]

An alternative legislative format based on the need to uphold the dignity of individuals would allow all age-cohorts to be treated with equal respect whilst permitting different treatment according to their needs. However, O’Connell argues convincingly that, whilst legislative formats based on dignity appear to offer many benefits, case-law from Canada and South Africa shows that dignity is too ambiguous a concept to define and a dependence upon it often results in subjective and perverse decisions. [194] Similarly Moon and Allen, in a study of the suitability of dignity as a test in determining discrimination, conclude that it should only ‘be used as a tool for refining the analysis’[195] rather than an independent right.

Amartya Sen has developed a ‘capabilities’ approach in which an individual can be viewed as possessing a set of ‘functionings’ which vary ‘from elementary ones, such as being adequately nourished and being free from avoidable disease, to very complex activities or personal states, such as being able to take part in the life of the

[190] Canadian Human Rights Act 1985, s 15(2).
[191] ibid.
[192] G Moon, ‘From Equal Treatment to Appropriate Treatment’ (2006) 6 EHRLR 717.
[193] Discrimination Law Review, *A Framework for Fairness: Proposals for a Single Equality Act for Great Britain* (Department for Communities and Local Government 2007) para 4.40.
[194] R O’Connell, ‘Dignity’ (2008) 6(2) IJCL 267.
[195] G Moon and R Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 EHRLR 610, 649.

community and having self-respect'. A 'capability' may be seen as 'a kind of freedom: the substantive freedom to achieve alternative functioning combinations'.[196] An individual's ability to achieve their functionings is determined by their personal characteristics and environment, including the legal and political context. Social rights, such as the prohibition of discrimination, act as conversion factors which extend and enable an individual's functionings, enabling an optimum contribution to be made to society, which in turn enhances the labour market for all. As a result a goal of 'equality of capability' can steer the labour market towards more efficiency and competitiveness whilst enabling individuals to achieve an optimum contribution to society. This is a goal which has yet to be translated into legislation but it is clear that citizens from all age cohorts should be treated as individuals with particular needs, capabilities and circumstances, rather than using age as a proxy by which to decide when someone should be given employment, services or opportunities.

1.8: Conclusion

This Chapter has discussed the concept of ageism, the associated process of age discrimination, prejudice reduction schemes and problems which beset the introduction of age discrimination legislation. The damaging effects of age discrimination have wide ranging implications for the individual, employers and the economy. Irrational beliefs with respect to age are hard to eradicate but prejudice reduction schemes have been shown to have promising results in the USA. Nonetheless, legislation has been the chosen method of addressing the problem in most countries despite evidence which shows that it may not provide a suitable mechanism for change.

There is a lack of agreement over the type of equality that is to be achieved with regard to age discrimination. Ageism is qualitatively different to racism and sexism in that age is not a fixed characteristic. Each individual obtains a benefit or detriment from the conditions prevailing at different ages and unequal treatment may be thought acceptable if all age cohorts share benefits and detriments over a life-span, described as 'intergenerational fairness'[197] but which is in itself age discriminatory. Equality

[196] A Sen, *Development as Freedom* (OUP 1999) 75.
[197] *Seldon* (n 174) [56] (Lady Hale SCJ).

agendas which are based on equal treatment therefore may not be the most apposite with which to address the problem.

A lack of consensus over the acceptability of discriminatory treatment on the grounds of age is at the heart of the paradox in efforts to address age discrimination. An ambivalent attitude towards ageism has arisen because it is seen as sometimes justified, unlike other suspect grounds of discrimination, because age cohorts do not form discrete suspect groups with a history of disadvantage or a lack of political power which lessens the need for a remedial function of prohibitive discrimination legislation. Age is an accepted proxy for defining rights and responsibilities, such as driving and marriage, and allocating entitlements and benefits. This continued use of age in administrative decision-making further contributes to the notion that it is acceptable to use age as a differentiating factor. Action to tackle age discrimination has therefore been slow, unenthusiastic and inconsistent. The legislation that has been introduced reflects this ambivalence and age is the most qualified of the proscribed grounds of discrimination, with a wide array of exceptions. It is against this background that the European Union introduced the Framework Directive on Equal Treatment in Employment in 2000, discussed in the next Chapter.

Chapter Two:
Legislation to Regulate Age Discrimination

2.1: Introduction

This Chapter explores the legal response to the need for prohibitive action against age discrimination on an international, European and domestic level. The USA was the first country to regulate ageist conduct, stemming from concern over the arbitrary use of age-limits in recruitment and the consequent poverty experienced by older unemployed workers. However, the 1990's saw increasing unease over the global financial problems that an economically inactive older workforce would have on national budgets and this resulted in many nations enacting 'age legislation'. In the European Union (the 'EU') this action principally followed the introduction of a Directive in 2000 establishing a General Framework for Equal Treatment in Employment and Occupation.[1] In the UK the Framework Directive was transposed by means of the Employment Equality (Age) Regulations 2006[2] which were subsequently incorporated into the Equality Act 2010. After describing early efforts to prohibit age discrimination, the discussion in this Chapter will focus upon the introduction of the EU Framework Directive, the provisions it contains and the subsequent transposition of its requirements into domestic legislation.

2.2: Early action to prohibit age discrimination

Macnicol has described how interest in action to tackle the growing number of unemployed older workers stems from the early 1900's when economic restructuring of major industries and increased mechanisation stimulated the rise in male 'early' retirement.[3] Measures to encourage older individuals to work in order to address the economic consequences of demographic change in Europe were urged as long ago as

[1] OJ 2000 L 303/16 (the Framework Directive).
[2] SI 2006/1031 (the Regulations).
[3] J Macnicol, *Age Discrimination: An Historical and Contemporary Political Analysis* (CUP 2006) 211. Evidenced in works such as ET Devine, *Misery and its Causes* (Macmillan 1909); LW Squier, *Old Age Dependency in the United states: A Complete Survey of the Pension Movement* (Macmillan 1912); IM Rubinow, *Social Insurance* (Holt 1913).

1928 by the French economist Alfred Sauvy.[4] His forecast that severe financial problems would occur around 1954 because a fall in the birth rate would be accompanied by an increasing number of older citizens was only prevented from coming to fruition by the large number of deaths caused by the Second World War.

However, legislative action to tackle age discrimination had already been seen in the USA. Colorado introduced age legislation that protected 18-60 years old in 1903,[5] Louisiana protecting 18-49 year olds in 1934 and Massachusetts protecting 45-65 year olds in 1937. In 1956 maximum recruitment ages for federal workers were abolished. Eight states had age legislation by 1960 and more than half of US states had legislation[6] in place when the federal Age Discrimination in Employment Act (the ADEA) was enacted in 1967.[7] The rationale behind this series of legislative intervention in the freedom to contract was explained in the Wirtz Report.[8] This was prepared by US Secretary of Labor Wirtz in 1965 following an extensive examination of labour problems in the USA and was directly instrumental in the enactment of the ADEA. The debate in the USA centred upon the need to alleviate the extreme poverty that Wirtz found associated with unemployed older workers. For example, he found that in the state of New Jersey 36% of those over 65 lived in poverty compared to 9% of those under 65 years old.[9]

Wirtz found strong evidence of 'statistical discrimination'[10] which he defined as the rejection of a cohort based on general assumptions of the group 'without consideration of a particular applicant's individual qualifications'.[11] His focus was on the widespread arbitrary use of age limits of 35, 45 and 55 years in recruitment, as

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[4] A Sauvy, 'La Population Française Jusqu'en 1956. Essai de Prévision Démographique' (1928) 12 Journal de la Société Statistique de Paris 321.

[5] Colorado Revised Statutes (8-2-116) 1903 Session Laws, 307-308: House Bill 47 (April 10 1903) specified that 'no company or firm or person shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the ground of age'.

[6] Early USA legislation reviewed in D Lockard, *Towards Equal Opportunity: a Study of State and Local Antidiscrimination Laws* (Macmillan 1968).

[7] The Age Discrimination in Employment Act of 1967: Vol 29 of the United States Code, s 621 (Pub. L. 90-202).

[8] WW Wirtz, *The Older American Worker: Age Discrimination in Employment – The Wirtz Report* reprinted in U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (U.S. Government Printing Office 1981).

[9] United States Senate, *Hearings before the Special Committee on Aging* (U.S. Government Printing Office 1965) 520 <http://aging.senate.gov/publications/7101965.pdf> accessed 4 October 2012.

[10] MC Harper, 'ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda Symposium – The Aging American Workforce: Thirty Years under the Age Discrimination in Employment Act' (1997) 31 University of Richmond Law Review 580, 759.

[11] Wirtz (n 8) 6.

once unemployed, older workers found it very difficult to re-enter the workplace. The emphasis was on those we now regard as 'middle-aged', rather than near retirement age. Over half of all private job openings in the USA were barred to those over 55 and over a quarter to those over 45.[12] Wirtz placed an emphasis on the need to remove arbitrary assumptions although he accepted that not all stereotypical assumptions were incorrect as some were 'valid,' but false assumptions led to arbitrary decision-making.[13] However rational it seemed to individual employers to exclude older workers who might demand higher wages than those younger, Wirtz recognised this was detrimental to the individual and the economy. It was a 'waste … of a wealth of human resources … and the needless denial … of opportunity for that useful activity which constitutes much of life's meaning'.[14]

President Johnson agreed with Wirtz that age discrimination could result in 'a cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families'[15] and recommended the enactment of the ADEA. The rationale behind the enactment is set out in the 'Congressional Statement of Findings and Purpose':

> 2 (a) (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and

[12] WW Wirtz, 'Statement to the General Subcommittee on Labor of the House' (1967) 90th Cong. 7 Hearings HR 365L, HR 3768 and HR 4221.
[13] A study of this rationale, as expounded by Wirtz, discussed in D Miller, 'Age Discrimination in Employment: The Problem of the Older Worker' (1966) 41 New York University Law Review 383, 393.
[14] Wirtz (n 8) 5.
[15] 'Olders People's Message' of 23 January 1967: quoted in U.S. Equal Employment Opportunity Commission, *Legislative History of the Age Discrimination in Employment Act* (U.S. Government Printing Office 1981) 61.

employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

b) It is therefore the purpose of this Chapter –

- to promote employment of older persons based on their ability rather than age
- to prohibit arbitrary age discrimination in employment.[16]

The impetus for the first piece of national age legislation was therefore based on consideration of the needs of 'older persons' coupled with the effect of their unemployment on the economy.

A very small number of nations followed the lead taken by the USA – notably Japan,[17] Poland[18] and Canada.[19] Little further action was taken elsewhere until the introduction of the UN International Plan of Action on Aging in 1982. This acknowledged that it would be necessary 'to establish a new economic order'[20] to address demographic change. Recommendation 37 of the UN Plan stated that:

> 'Governments should eliminate discrimination in the labour market and ensure equality of treatment in professional life. Negative stereotypes about older workers exist among some employers. Governments should take steps to educate employers and employment counsellors about the capabilities of older workers…older workers should also enjoy equal access to orientation, training and placement facilities and services.'

[16] ADEA s 2(a).
[17] Japanese Law No. 68 Concerning Stabilization of Employment of Older Persons 1971.
[18] Polish Labour Code 1974, Article 94 2b.
[19] Canadian Charter of Rights and Freedoms 1982.
[20] United Nations World Assembly of Aging, *International Plan of Action on Aging* (1982) Resolution 37/51 Introduction, 1 Demographic Changes.

The aim was to encourage individuals to stay in work for as long as possible by voluntary means, but no specific methods were suggested for promoting these aims.

The UN has continued to advocate a voluntarist approach to the problem of demographic change. Thirty-five broad-ranging objectives and two hundred recommendations with regard to age discrimination have been made and adopted by the UN, committing nation states to eliminate all forms of discrimination to older persons. It is recommended that age barriers be removed, flexible retirement policies promoted, damaging stereotypes about older workers corrected and disincentives to continued working removed. In 2002 the UN reiterated that 'older persons should be enabled to continue with income generating work for as long as they want'[21] but made no recommendation to enact legislation – instead governments were encouraged to promote an atmosphere where the objectives can be achieved.

Age discrimination was not specifically subject to international convention rights or pledges prior to the 1990's but implicitly fell into an 'other status' category. The UN Universal Declaration of Human Rights states that all are 'entitled to rights without distinctions made on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[22] Other international treaties followed this pattern by including 'other status' as a protected category, such as the International Covenant on Civil and Political Rights 1966,[23] the International Covenant on Economic, Social and Cultural Rights 1966,[24] the ILO Convention No. 111 1958,[25] the European Convention on Human Rights[26] and the amended European Social Charter 1996.[27]

The inclusion of age within the phrase 'other status' was discussed in *Love et al v Australia*[28] where four pilots were compulsorily retired before their 60th birthday. It was held that a mandatory retirement age was objective and reasonable and a

[21] United Nations World Assembly of Aging, *International Plan of Action on Aging* (1982) Resolution 37/51 Introduction, II Issue 2: 27.
[22] Universal Declaration of Human Rights, General Assembly Resolution 217 A (III) of 10 December 1948, Article 2.
[23] International Covenant on Civil and Political Rights 1966, Article 26.
[24] International Covenant on Economic, Social and Cultural Rights 1966, Article 2(2).
[25] The ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation 1958, Article 1(1)(b) - 'such other distinction' which may impair 'equality of opportunity or treatment'.
[26] European Convention on Human Rights, Article 14.
[27] Council of Europe 1996: European Social Charter (revised), Part V Article E.
[28] *Love et al v Australia* [2003] Communication No 983/2001 UN Doc CCPR/C/77/D/983/2001.

'widespread national and international practice'.[29] The UN Committee found that age may be included in 'other status' only if the discrimination was 'not objective and reasonable'[30] which indicates that age is not automatically a prohibited ground. A similar view was taken in *Solís v Peru.*[31] Solis, aged 61, had been selected for redundancy on the basis of age. As the UN Committee found this action 'objective and reasonable'[32] the action did not fall into the category of 'other status'.

Prior to the introduction of the UK Age Regulations, the House of Lords held in *ex parte Carson and Reynolds*[33] that age did fall into the category of 'other status' but there was unanimous opinion that age was not a 'suspect' category which required severe scrutiny. Lord Hoffmann stated that certain characteristics 'such as race, caste, noble birth, membership of a political party, … gender, are seldom, if ever, acceptable grounds for differences in treatment' … but … '[D]iscrimination on grounds of old age may be a contemporary example of a borderline case'.[34] Lord Walker agreed and added that age 'is different in kind from other personal characteristics … There is nothing intrinsically demeaning about age'.[35] This failure to acknowledge that age is a bona fide suspect ground, discussed in the previous Chapter, resulted in a paucity of binding measures to tackle age discrimination prior to the 1990's and 'soft' voluntary measures were adopted by several countries, including the UK.

2.3: Demographic change

Despite the lack of acceptance of age as a suspect ground a rash of age discrimination legislation appeared in the late 1990's in many countries around the world, including three member states of the European Union. For example, legislation in Tajikistan,[36] Ireland,[37] Ecuador,[38] Eritrea[39] and Guyana[40] all came into force within

[29] *Love et al v Australia* [2003] Communication No 983/2001 UN Doc CCPR/C/77/D/983/2001, 8.3.
[30] ibid para 8.2.
[31] *Rubén Santiago Hinostroza Solís v Peru* [2006] Communication No 1016/2001 UN Doc CCPR/C/86/D/1016/2001.
[32] ibid para 6.2.
[33] *R v Secretary of State for Work and Pensions ex parte Carson and R v Secretary of State for Work and Pensions ex parte Reynolds* [2005] UKHL 37, [2005] 2 WLR 1369.
[34] ibid [16].
[35] ibid [60].
[36] Labour Code 1997.
[37] Employment Equality Act 1998.
[38] Political Constitution Amendment [Article 23(3)].
[39] Constitution Amendment (Article 14) 1997.
[40] Prevention of Discrimination Act 1997.

a few months. Almost every country in the world now has legislation prohibiting ageist practices.[41] The impetus for this action stemmed directly from anxiety regarding demographic change following a report produced by the World Bank in 1994[42] and a further seminal report for the OECD by Turner et al.[43] These reports stressed the need for new policies to be adopted in order to address the increasing financial demands on national funds made by economically inactive, older citizens.

Three factors have led to an increasing proportion of older citizens. The increase in the birth rate after the Second World War has led to the 'Baby Boom' generation reaching retirement age. Developments in medical care have led to improvements in health which has led to an increase in life expectancy. In addition birth rates have fallen by one-third since 1964 so the number of economically active, young people has decreased.[44] The ratio of older people to young people – the ageing index – rose from 64.0 in 1971 to 97.8 in 2006.[45] Whereas in 2000 we had 30.8 economically inactive people over 65 for every 100 active individuals of all ages, by 2050 there will be 54.7 economically inactive people over 65 for every 100 active individuals in the UK.[46] By 2050 the size of the older population worldwide will increase from 606 million in 2000 to about two billion, with those over 65 accounting for one in five persons.[47]

An ageing population places significant pressure on pension funds and requires increasingly expensive health and social service provision but if older citizens continue to work they enhance national funds by paying tax and national insurance contributions. There is also evidence to show that if individuals remain active by working they make lower demands on health services by remaining healthy for longer.[48] The combination of an increase in life-expectancy coupled with a growing tendency for early retirement from the workplace led the OECD and the World Bank to predict that a large number of economically inactive, older citizens would put

[41] Listed in N Ghosheh, *Age Discrimination and Older Workers* (ILO 2008) 47ff.
[42] World Bank, *Averting the Old Age Crisis - Policies to Protect the Old and Promote Growth* (OUP 1994).
[43] Turner D et al, *The Macroeconomic Implications of Ageing in a Global Context* (Working Paper No 193, OECD 1998).
[44] Office for National Statistics, *Population Trends – Fertility* (ONS 2008).
[45] Office for National Statistics, *Ageing* (ONS 2012).
[46] F Line, *The End of the Line for Retirement Ages* (EFA 2007) 6.
[47] RN Butler, F Forette and S Greengross, 'Maintaining Cognitive Health in an Ageing Society' (2004) 124 The Journal of the Royal Society for the Promotion of Health 119.
[48] S McKay and D Smeaton, *Working after State Pension Age: Quantitative Analysis* (Department for Work and Pensions Research Report 182, 2003) 4.

severe strain on governmental finances. It was forecast that 'a gradual slowdown in growth in OECD and non-OECD regions by about 1 per cent per annum between 2000 and 2080' would be 'caused by a decline in population growth'[49] but this would also be coupled with 'a fall in the OECD private savings propensity resulting from an ageing population'. This would produce 'OECD current account deficits and a consequent decline in OECD net foreign assets'.[50] It is the combination of these two factors that was predicted to lead to economic difficulties. This forecast assumed that there would be continued economic growth and a gradual reduction in unemployment, which unfortunately has not transpired. The current recession may turn this predicted difficulty into a potential disaster. The recent change in governmental attitude towards age discrimination legislation has therefore been forced by the need to encourage older citizens to remain active in the workplace in order to address potential economic problems rather than concern for unfair treatment of citizens.

2.4: Age discrimination as an issue in the European Union

The EU was not unaware of the demographic changes. The European Parliament adopted a resolution in 1982 on the 'situation and problems of the aged in the European Community'[51] and in 1986[52] which noted the increasing number of economically inactive citizens as a result of more workers taking early retirement and life expectancy improving. Figure 2.1 shows the projected changing relationship between the number of 15-64 and over 64 year olds in the EU, with the latter group increasing by 77% indicating a substantial increase in the age dependency ratio.

Figure 2.1: Projected changes in the size and age structure of the populations of EU member states, 2004 - 2050

Total population			**15-64 year old population**			**65+ year old population**		
2004	**2050**	**change**	**2004**	**2050**	**change**	**2004**	**2050**	**change**
456.8	453.8	-1%	306.8	259.1	-16%	75.3	133.3	+77%

Source**:** Information obtained from Carone et al, *The Economic Impact of Ageing Populations in the EU25 Member States* (Report No 236, EU Directorate-General 2005) 21.

[49] Turner et al (n 43) 35.
[50] ibid 36.
[51] Commission, *Resolution on the Situation and Problems of the Aged* OJ C 066, Document 51981IP0848 (15 March 1982) 71.
[52] Commission, *Resolution on Services for the Elderly* OJ C 88, Document 51985IP0219 (14 April 1986**)** 17; Commission, *Resolution on Community Measures to Improve the Situation of Old People in the Member States of the Community* OJ C 148, Document 51986IP0007 (16 June 1986) 61.

In 1990 the European Commission set up a Liaison Group for the Elderly as it felt that the growing elderly population 'will have considerable economic and social implications, inter alia, for the employment market, social security and social expenditure'.[53] The European Foundation held a symposium in 1991 which concluded that the falling birth-rate, coupled with increasing early retirement and life expectancy, would lead to substantial socio-economic problems which could be addressed by fighting 'against the systematic rejection of older employees',[54] balancing different age groups in the workplace and by having 'a complete turnaround in the policy towards elderly workers'.[55]

In its early years the EEC was concerned with promoting a single market within which workers, having equal rights, could move freely.[56] The original aim of European discrimination legislation was to avoid a situation where undertakings in some member states 'suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in states which have not yet eliminated discrimination'.[57] Intervention was necessary for the maintenance of a level-playing field across the Community to address any 'restriction or distortion of competition within the common market'.[58] McDonald and Potton claimed in 1997 that it was pressure from corporate employers 'for the creation of minimum rights in this area to avoid competitive disadvantage arising from the diverse legislative conditions prevailing among member states'[59] that led to the development of policies to combat ageism in the workplace. Fredman agrees that this new emphasis on ageism was not 'a result of the sudden appreciation of the need for fairness but gains its chief impetus from business and macro-economic imperatives'.[60]

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[53] Commission, *Decision of 17 October 1991 on the Liaison Group on the Elderly* (91/544/EEC) [1991] OJ L 296.
[54] S Droit, F Guerin and P Paoli, *Ageing at Work: A European Perspective* (Proceedings of a European Colloquium, Paris 12 June 1991, European Foundation for the Improvement of Living and Working Conditions 1993) 53.
[55] ibid.
[56] The EC Treaty, Article 39 and Regulation 1612/68/EEC of the European Economic Council of 15 October 1968 on Freedom of Movement for Workers [1968] OJ L 257.
[57] 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455, [1976] ICR 547 [9].
[58] EC Treaty, Article 81.
[59] F McDonald and M Potton, 'The Nascent European Policy Towards Older Workers: Can the European Union Help the Older Worker?' (1997) 26(4) Personnel Review 293, 304.
[60] S Fredman, *Discrimination Law* (OUP 2002) 62.

This mirrors the development of sex discrimination policies in the EEC. Hugh Collins has noted how throughout the twentieth century 'labour rights were not regarded as universal human rights, but rather as standards concerned to address problems of social justice or welfare caused by international regulatory competition and the globalization of markets'.[61] Sen agrees with this assertion and feels that 'the linkages between economic, political and social actions can be critical to the realisation of rights and to the pursuit of the broad objectives of decent work and adequate living for working people'[62] and indeed these linkages have been critical in providing the impetus for age legislation.

Nonetheless this economic pressure was accompanied by an increasing parallel concern to uphold fundamental rights. Developments in the 1980's and 90's saw an abandonment of purely market-based policies within the EEC and there was a growing recognition that social rights, both collectively and individually held, and economic efficiency are not indivisible. Indeed the European Court of Justice (the 'ECJ') stressed in 2000 that the economic aims of equality provisions law are secondary to the social aims of protecting fundamental human rights.[63]

The adoption of a 'rights' approach found an expanded role for the EU in building a sense of European citizenship. The European Social Charter 1989, promoted by the President of the Commission, Jacques Delors, concentrated on objectives which would help 'the development of the social dimension of the internal market'.[64] Delors felt the 'ultimate aim must be the creation of a European Social Area'[65] where 'social legislation'[66] guaranteed basic social rights to citizens. The Preamble to the Social Charter establishes that 'the same importance must be attached to the social aspects as to the economic aspects'[67] of the community. The goal was of 'equal treatment' and 'in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on grounds of sex, colour, race,

[61] H Collins, 'Theories of Rights as Justifications for Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 143.
[62] A Sen, 'Work and Rights' (2000) 139(2) International Labour Review 119, 127.
[63] Joined Cases C-270/97 and C-271/97 *Deutsche Post AG v Sievers* [2000] ECR I-929.
[64] Commission, *Communication from the Commission concerning its Action Programme relating to the implementation of the Community Charter of Basic Social Rights for Workers* COM (1989) 568, 61.
[65] J Delors, *L'Espace Social Européen* (EC Bulletin 2, European Union Press 1986) 12.
[66] ibid.
[67] EC Charter of the Fundamental Social Rights of Workers 1989, Recital 2.

opinions and beliefs'.[68] Age was not considered to be a suspect ground. Nonetheless the notion that all citizens deserved equal treatment so that solidarity between individuals from diverse backgrounds could be fostered was an essential element of the Charter, creating a unified feeling of 'belonging' to Europe. Giving the right to protection from discrimination to individual workers was set to achieve a socio-political objective of engendering a sense of European fellowship, enabling citizens to identify with European Union values.

Movements were also taking place in the European Commission itself. Criticisms had been made of its own employment policies as it was one of the 'worst offenders'[69] with regard to age discrimination. By October 1997 it had received many complaints about its use of age categories in recruitment – usually a maximum age limit of 32 or 34 was stipulated for administrators. However, in the face of Netherlands domestic legislation, which banned the use of age requirements in job advertisements, the EU was forced to abandon its practice as it was obliged to use the same advertisement in all member states. The EU Ombudsman threatened a legal challenge to the Commission and it was forced to change its policy. Age discrimination was becoming a more prominent issue. In a survey of 16,000 European Union citizens, 837 reported that they had experienced age discrimination in employment, which was greater than for any other type of discrimination and more than two-thirds thought those over 50 years old were disadvantaged in accessing training, work and promotion prospects.[70]

2.5: The Treaty of Amsterdam 1997 – Article 13

It is difficult to overestimate the nature of the change that was made in the approach to age discrimination by the EU from 1996 to 1997 as a consequence of the concern for demographic change. Although an EU White Paper[71] in 1994 suggested that citizens should be able to rely on equal treatment with respect to age, most references to suspect grounds in EU literature from 1994 to 1996 did not expressly refer to age. The Intergovernmental Conferences in Turin and Dublin in 1996 saw

[68] ibid Recital 8.
[69] 'Ageism in the EU – Europe Now' *BBC Radio 4* (London 2 November 1997).
[70] A Marsh and M Sahin-Dikmen, *Discrimination in Europe (Report B*) (Policy Studies Institute 2002) 13.
[71] Commission, *European Social Policy - A Way Forward for the Union: White Paper* COM (94) 333 Final (27 July 1994) 40.

demands from some member states to introduce wider-ranging provisions concerning fundamental rights. Bell and Waddington postulated in December 1996 that the EU was going to add a new Article 6a (renumbered 13) to the Treaty which would enable it to introduce provisions to prohibit 'discrimination on grounds of nationality, race, sex, sexual orientation, disability, religion or any other social status',[72] thereby not specifically encompassing age. Nonetheless when the new Article 13 of the Treaty of Amsterdam emerged in October 1997 it included age:

> Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[73]

This enabling provision was the first identification of a broader grouping of suspect categories of discrimination; prior to this only equal pay for equal work[74] and nationality[75] were specifically targeted. Bell draws attention to the fact that Article 13 represents a new horizontal approach where different suspect grounds are dealt with by a common measure with no hierarchy of grounds apparent.[76] Article 13 does not have direct effect as it does not satisfy the third limb of the *Reyners*[77] test, so it is merely an enabling clause, giving power to the EU to introduce further provisions. Nevertheless it is generally accepted that it marks the beginning of a 'new climate within the Community legal order'.[78]

Article 13 is not confined to discrimination in the workplace and may be used by the EU in the future to enable broader provisions. Waddington predicted that 'Article

[72] M Bell and L Waddington, 'The 1996 Intergovernmental Conference and the Prospects of a Non-Discrimination Article' (1996) 25 ILJ 320.
[73] Treaty of Amsterdam amending the EU Treaty, Article 13(1) – originally Article 6a.
[74] By means of Article 141, EU Treaty.
[75] By means of Article 12, EU Treaty.
[76] M Bell, 'Article 13 EC: The European Commission's Anti-discrimination Proposals' (2000) 29 ILJ 79, 80.
[77] 2/74 *Reyners v Belgian State* [1974] ECR 631. A Community instrument can be directly relied upon by an individual if i) the provision is clear and unambiguous, ii) it is unconditional, iii) its operation is not dependent upon further action (AG Mayras).
[78] L Waddington, 'Testing the Limits of the EC Treaty Article on Non-Discrimination' (1999) 28(2) ILJ 133, 151.

13 is likely also to exert more subtle influences, promoting the inclusion of equal opportunities clauses … and the development of inclusive policies'.[79] This was apparent in the European Council Employment guidelines issued in Helsinki in December 1999 which stressed 'the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force'.[80]

2.6: The European Union Framework Directive for Equal Treatment

The rationale for introducing legislation prohibiting age discrimination was set out by the European Commission in May 1999 in a report entitled *Towards a Europe for All Ages*.[81] The document concentrates solely on five 'dimensions' of demographic transition rather than a desire to uphold the rights of citizens. The dimensions comprise:

1. the relative decline of the population of working age and the increase in the number of economically inactive older citizens
2. the pressure on pension systems and public finances stemming from a growing number of retired people
3. the increasing need for and cost of old age health care and the promotion of healthy ageing
4. a recognition of the growing diversity among older people in terms of resources and needs
5. gender differences in longevity have left insufficient pension cover for many older women.[82]

The Commission noted that 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',[83] particularly with regard to pensions[84] and health care.[85] Workplace-based discrimination on the grounds of age would be dealt with by means

[79] ibid.
[80] Commission, *Communication of 8 September 1999: Proposals for Guidelines for Member States' Employment Policies 2000* [1999] COM (1999), reiterated in the Framework Directive, Recital 8.
[81] Commission, *Towards a Europe for All Ages - Promoting Prosperity and Intergenerational Solidarity* COM (1999) 221.
[82] ibid 4-5.
[83] ibid 6.
[84] ibid 15.
[85] ibid 18.

of proposals based on Article 13 in an effort to enable and motivate 'older people to stay involved in working'.[86] There seems little doubt that it was this economic rationale that provided the stimulus for age legislation in the EU.

However, Hepple claims that the enabling provision of Article 13 would have merely been an 'empty vessel'[87] without the events of 30th October 1999 when the far right Freedom Party won a share of power in Austria. Member states wanted to be seen to be opposed to racism and other forms of prejudice and within a month proposals for two Directives were produced which were designed to fight discrimination.[88] The first proposal was concerned with discrimination on grounds of race and ethnic origin[89] whilst the second was Council Directive 2000/78/EC, establishing a General Framework for Equal Treatment in Employment and Occupation,[90] aiming to offer protection to those subjected to discrimination on the basis of age, disability, sexual orientation and religion and belief.

Splitting these suspect grounds into two groups stimulated critical comment by those who felt that this produced a hierarchy of grounds, with gender[91] and race given preferential treatment, whilst age, disability, sexual orientation and religion and belief are treated less rigorously.[92] For example, the Race Directive extends protection beyond the workplace to access to services and goods, whereas the protection given in the Framework Directive is limited to discrimination in 'employment and occupation'.[93] Given that the EU Commission felt that particular problems were occurring with regard to age equality in pensions and access to health care, limiting the Framework Directive's scope to the workplace does not address these problems. Moreover negative stereotypes of older citizens are found throughout society and not just in employment. The non-regulation of ageist conduct outside the workplace

[86] ibid 23.
[87] B Hepple and B Veneziani, *The Transformation of Labour Law in Europe* (Hart 2009) 155.
[88] M Bell, 'Article 13 EC: The European Commission's Anti-discrimination Proposals' (2000) 29 ILJ 79.
[89] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin [2000] OJ L 180/22 – (the Race Directive).
[90] Framework Directive (n 1).
[91] Addressed by a series of Directives and Provisions, notably the EU Treaty, Articles 141 and 3(2).
[92] L Waddington, 'Testing the Limits of the EC Treaty Article on Non-Discrimination' (1999) 28(2) ILJ 133, 142; P Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy?' (2001) 30(1) ILJ 126; M Bell and L Waddington, 'Reflecting on Inequalities in European Equality Law' (2003) 28 EL Rev 349, 369.
[93] Framework Directive, Article 1.

suggests that this conduct is acceptable and sends a 'mixed-message' to society. Nonetheless the seemingly horizontal approach suggested in Article 13, where all suspect grounds are treated equally, belies the reality found in the Framework Directive where protection is undoubtedly weaker with regard to age discrimination.

Member states were given three years within which to transpose the requirements of the Framework Directive. It may be a reflection of the importance placed by member states upon the 'age' element of the Directive that Greece, the Netherlands and Denmark not only did not implement the 'age' requirements within three years, but failed to apply for an extension to the period. The UK implemented the religion and belief,[94] sexual orientation[95] and disability[96] elements within the three year period but took a further three to implement the Employment Equality (Age) Regulations 2006. All member states eventually transposed the Framework Directive but have varying degrees of protection, following the principle of subsidiarity.

The purpose of the Framework Directive is to lay down a construct in accordance with which member states can construct legislation to prohibit discrimination. The provisions contained in the Directive closely follow the precedents established in earlier EU legislation, particularly in the aim of implementing the principle of equal treatment and the promotion of equality between men and women.[97] Direct[98] and indirect[99] discrimination, harassment,[100] instructions to discriminate[101] and victimisation[102] which occur on the grounds of age are to be prohibited. If a prima facie case can be made out by a worker, the burden of proof shifts to the employer who must show there has been 'no breach of the principle of equal treatment'.[103] In addition the provisions permitting positive action,[104] genuine occupational requirements[105] and enforcement[106] are similar to those found elsewhere.[107] Sanctions

[94] Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673.
[95] Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661.
[96] Employment Equality (Religion and Belief) Regulations 2003, SI 2003/1660.
[97] Framework Directive, Recitals 2, 3.
[98] ibid Article 2(2)(a). Identical to Race Directive, Article 2(2)(a).
[99] ibid Article 2(2)(b). Identical to Race Directive, Article 2(2)(b).
[100] ibid Article 2(3).
[101] ibid Article 2(5).
[102] ibid Article 11.
[103] ibid Article 10(1).
[104] ibid Article 7.
[105] ibid Article 4.
[106] ibid Article 9.
[107] Eg EU Treaty, Article 141(4). Identical to Race Directive, Articles 5, 4, 7, 15.

for discriminatory treatment 'must be effective, proportionate and dissuasive'[108] and information concerning the legislation must be disseminated to citizens 'by all appropriate means, for example at the workplace, throughout their territory'.[109] Member states must ensure that procedures 'for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged'.[110] 'Age' is not defined and the Framework Directive applies to all age-cohorts, unlike the American ADEA which applies only to the over 40s.[111]

The EU Commission in an Explanatory Memorandum claimed that the Framework Directive 'does not rank … in any way' suspect grounds 'in order to adequately address problems of multiple discrimination'.[112] The Directive only refers to multiple discrimination once and this is in terms of its effect upon women. Recital 3 states that in 'implementing the principle of equal treatment, the Community should…promote equality between men and women, especially since women are often the victims of multiple discrimination'. This recognition is important, but no recommendation is made on how to address the problem. The resulting legislation across the EU is accordingly directed to individual suspect grounds rather than addressing the manner in which the grounds may interact in particular instances. For example, in *Bahl v The Law Society*[113] an Asian female claimant failed in her attempt to have the combined effect of her race and sex considered by the courts because evidence relating to each ground had to be separately presented, even though to the claimant they were inextricably linked. This lack of direction is a significant weakness in the Directive as those suffering multiple discrimination may find it difficult to obtain redress for their complaint in national courts.

Ghosheh has described five necessary aspects of age discrimination legislation and all are found within the requirements laid out in the Framework Directive.[114] Firstly, provisions should address the following components – direct and indirect age discrimination; harassment, victimization, discharge and redundancy, possible

[108] Framework Directive, Article 17.
[109] ibid Article 12.
[110] ibid Article 9.
[111] ADEA s 631(a).
[112] Commission, *Explanatory Memorandum for a Proposal for a Council Directive Establishing a General Framework for Equal Treatment in Employment and Occupation* COM (1999) 565 final, 6.
[113] [2004] IRLR 799.
[114] N Ghosheh, *Age Discrimination and Older Workers* (ILO 2008) 7.

justifications, burden of proof and remedies. Secondly, it should address recruitment of workers and thirdly, protection should apply through the whole employment process. Fourthly, the legislation should have an expansive definition so that encompasses a very broad age-group or all age-groups, giving protection to the widest possible group of workers. Lastly, positive action in the form of the promotion of policies and practices within organisations which will prevent discrimination taking place should be encouraged. However, this latter element is only referred to in a negative manner in the Framework Directive with member states 'not prevented'[115] from adopting positive measures rather than requiring that measures be taken that are proactive. This is a significant failing, especially bearing in mind that encouragement of older citizens in the workplace is the principal raison d'être of the legislation.

The type of transformative equality that is required to eradicate negative stereotypes and dismantle systematic disparities between age cohorts needs to ensure that workers have the skills they need to participate fully in society – some may need more resources to enable them to participate. A positive duty on employers to promote age equality, to reasonably adjust practices or accommodate the needs of older workers may more readily address this aim. The Framework Directive imposes such a duty with respect to disabled workers:

> employers shall take appropriate measures … 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.[116]

Age may affect an individual's ability to carry out tasks, for example, the young may not be old enough to possess a heavy goods vehicle licence or those older may lack more recent qualifications, but the Directive inconsistently imposes no requirement on employers to make reasonable accommodation or adjustments for age as it does for disability discrimination.[117] Using this format over the range of all suspect grounds would have maintained a non-hierarchical approach whilst addressing the particular problems of older workers.

[115] Framework Directive, Article 7.
[116] ibid Article 5.
[117] ibid Article 5.

2.6.1: The principle of equal treatment

The Preamble to the Framework Directive sets out the stated aim of the legislation to be enacted by member states; discrimination on the grounds of religion or belief, disability, age or sexual orientation is to be combated with a view to putting into effect 'the principle of equal treatment'.[118] Recital 4 contains justification for the prohibition of discrimination, based on international Declarations, Conventions and Covenants which uphold fundamental human rights:

> The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all member states are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.[119]

Ironically not one of these Declarations, Conventions and Covenants specifically mentions age discrimination but leaves it to be potentially and implicitly included by the use of the phrase 'other status', as discussed previously.

As the title indicates, the Directive implements the principle of 'equal treatment' and 19 further references are made to this throughout the text of the document.[120] Particular mention is made of the need to achieve 'equal treatment between women and men'.[121] This follows the template well-established under previous Directives such as those for race and gender.[122] As discussed in the previous Chapter, the

[118] ibid Recital 2.
[119] ibid Recital 4.
[120] Eg Framework Directive, Recitals 2, 3, Articles 1, 2, 5.
[121] ibid Recitals 2, 3.
[122] Council Directive 2000/43/EC of 29 June 2000 Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin – (the Race Directive); Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men

principle of equal treatment requires that all citizens have the right to receive the same treatment. This concept is one which, whilst admittedly tackling unjustified or irrational discriminatory treatment, does not achieve or seek to achieve equality of opportunity or capability. As it is also clear that the overall objective of the Framework Directive was to do more than ensure equal treatment – that is, to promote and facilitate the participation of older citizens in the workplace – the goal of equal treatment may not be a pertinent response.

The real economic objectives at the heart of this Directive are referred to in subsequent Recitals. The importance of the 'need to take appropriate action for the social and economic integration of elderly and disabled people'[123] and the 'need to pay particular attention to supporting older workers, in order to increase their participation in the labour force'[124] are both highlighted. Further justifications for legislative interference in the freedom to contract are found in Recital 11 where the Directive recognises that discrimination undermines the achievement of 'the Treaty objectives, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity and the free movement of persons'. Recital 25 adds that the prohibition of age discrimination 'is an essential part of meeting the aims and encouraging diversity'. The prohibition of age discrimination therefore is not a subsidiary concern, but essential to achieving the aims of the EC Treaty.

Using the template already adopted in earlier Directives, rather than specifically developing a format and provisions that would encourage older citizens to remain in or re-enter the workforce, may prove short-sighted. In approaching the task of tackling ageist practices the EU did not take advantage of learning from the experience of other jurisdictions, for example, from reports emanating from Australia in 1999 which highlighted the need for a radical format of legislation as the existence of numerous derogations from Australian discrimination legislation had proved detrimental to the

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and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions – (The Gender Directive).

[123] Framework Directive, Recital 6.

[124] ibid Recital 8.

eradication of age discrimination.[125] Using an existing template may have been expedient to the EU in terms of time as well as eliminating political problems which would ensue from the adoption of a new format requiring agreement from all member states.

Seeking equal treatment across all age cohorts may discourage the adoption of appropriate action to tackle the problems caused by demographic transition, as such measures may be discriminatory against the young. The goal of equal treatment for all age cohorts has resulted in measures which are discriminatory against the young becoming subject to prohibition whilst discrimination to older citizens outside the workforce is not. This contrasts with the format adopted by the USA which was directly related to the objective of addressing poverty in older cohorts. Duncan asserts that the 'symbolic priority accorded to younger employed people over those beyond state retirement age seems unmistakable'[126] and that the legislation benefits the young whilst not really helping the old. Fredman has drawn a distinction between the problems of ageist conduct against the young and the old and claims that they are two distinct types of discrimination, needing two separate approaches.[127] For example, the young will outgrow any stigma attached to their age cohort whilst the old cannot and the exclusion of mature individuals from the workplace is likely to increase with time. 'Old' age discrimination has links with disability discrimination and a format similar to that developed for disability is more likely to achieve the objective of promoting the participation of older citizens in the workplace, whilst the goal of equal treatment is applicable to all age groups, including the young. In grouping the two types of discrimination together and ignoring their important differences the Framework Directive may fail to address its real objective.

However, a real benefit of basing the legislation on equal treatment is that it ensures that the young are given protection irrespective of the prevailing predictions surrounding pension provision and funding for an ageing population. As the economic recession has deepened the plight of the young unemployed has become a significant

[125] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (Report 92, NSWLRC 1999); Human Rights and Equal Opportunity Commission (Australia), *Annual Report 1998-1999* (1999). Resulted in the Australian Age Discrimination Act 2004.
[126] C Duncan, 'The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice' (2008) 28 Ageing & Society 1136.
[127] S Fredman, *Discrimination Law* (OUP 2002) 60.

problem and the right to equal treatment will at least provide a foundation upon which to establish that the young are also deserving of equal consideration by employers.

2.6.2: Age as a general principle of European equality law

The ECJ sought to explain the position of age discrimination as part of the general principle of equality in community law in *Mangold v Helm*[128] where the court held that the principle of the prohibition of age discrimination must be regarded as a general principle of Community law 'deriving from common constitutional traditions and international instruments'.[129] Advocate General Tizzano stated that national courts must:

> guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that Directive has not yet expired.[130]

This suggests that the prohibition has been longstanding and deep-seated and should be as rigorously interpreted and applied as that against sex and race discrimination.

However, in *Lindorfer v EU Council*[131] the ECJ held that 'the prohibition of age discrimination should, both by its very nature and because of its history, be interpreted and applied less rigorously than the prohibition of sex discrimination'[132] – firmly indicating that the principle of equality is not to be interpreted equally amongst suspect grounds. Ms. Lindorfer claimed that the operation of the EU occupational pension scheme was discriminatory on grounds of age and sex as it treated officials starting their careers late less favourably than those who start theirs much earlier and women less favourably as men as their life expectancy was greater. The ECJ found that it was discriminatory on grounds of sex but not age. Advocate General Sharpston asserted that the general principle of *equality* had always existed within the Community from its inception and by having such a principle 'Community law would

[128] C-144/04 *Mangold v Helm* [2006] ECR I-9981.
[129] ibid paras 74, 75.
[130] ibid paras 78, 79(2).
[131] C-227/04 *Lindorfer v EU Council* [2009] ECR I-6767.
[132] C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* [2008] ECR I-724, para 59.

indeed have precluded certain distinctions based on age'.[133] But she drew a comparison between the specific prohibition of age discrimination and the general prohibition of discrimination present in the general equality principles of Community law. She felt the former 'too recent and uneven' to meet a description of a general principle and that 'it is not appropriate – or indeed possible – to apply the prohibition of age discrimination to the present case as rigorously as the prohibition of sex discrimination'.[134] A very similar reticence to acknowledge that age was as important a suspect ground was seen in *Kleist.*[135]

Schiek has suggested that European equality laws can be divided into separate categories – firstly those that apply to biological groups over which the individual has no control – including gender, race and disability, and secondly, those which reflect an individual's chosen characteristics, such as religious and political belief and sexual orientation.[136] Those falling in the latter groups are more able to avoid discrimination, if they wish, and so require less protection. On this basis age should be included in the first group and therefore subject to exacting and rigorous standards. But Advocate General Jacobs in the ECJ explained the difference between age and the other 'suspect' grounds as such:

> equality of treatment irrespective of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential.[137]

Age is therefore, once again, a lesser 'suspect' category of differentiation than other suspect groups and subject to less rigorous standards of interpretation and application.

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[133] *Bartsch* (n 132) para 59.
[134] *Lindorfer* (n 131) paras 55, 67.
[135] C‑356/09 *Kleist v Pensionsversicherungsanstalt* [2010] All ER (D) 37, para 27.
[136] D Schiek, 'A New Framework on Equal Treatment of Persons in EC Law?' (2002) 8(2) European Law Journal 290. (Although it should be noted that the ability to choose sexual orientation is disputed by many eg F Iemmola and A Ciani, 'New Evidence of Genetic Factors Influencing Sexual Orientation in Men' (2009) 38(3) Archives of Sexual Behaviour 393).
[137] *Lindorfer* (n 131) para 85.

2.6.3: Derogations from the principle of equal treatment

Notwithstanding the 'essential'[138] nature of the prohibition of age discrimination, the Framework Directive singles out age as subject to numerous derogations which firmly identifies age as at the bottom of the hierarchy of suspect grounds. Article 6 lays down specific constraints which apply only to age:

> 6(1) ... differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are 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.

The wording of this provision reflects that seen in the ECJ's decision in *Bilka-Kaufhaus*[139] which stresses that the measure should 'correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end'.[140] This implies that if alternative means can be used rather than the discriminatory treatment, then justification will not succeed. Notably no distinction is made between indirect and direct discrimination in Article 6(1) and all differences of treatment on grounds of age are capable of justification.

The suggestion that legitimate aims include employment policy, labour market and vocational training objectives indicates that a broad aim will satisfy this requirement. For example, an employment policy which aims to share 'employment opportunities fairly between the generations'[141] by dismissing older workers to make way for those younger or limits the need to expel older workers 'by way of performance management'[142] may satisfy this requirement. The enforcement of these types of aim undoubtedly discriminates against and discourages older workers from participating in the workforce. Employment policy aims may conflict: the need to encourage older workers to stay in the workforce clashes with the need to provide

[138] Framework Directive, Recital 25.
[139] 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110.
[140] ibid para 36.
[141] Legitimate aim established in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716 [67] (Lady Hale SCJ).
[142] ibid.

young people with employment. Moreover it is indicated that legitimate aims are not restricted to those stipulated in Article 6 and further aims may presumably be acceptable if appropriate 'within the context of national law'.[143]

Article 6(1) provides additional exceptions to the principle of equal treatment, with the conspicuous use of the phrase 'among others' implying that this list is also non-exhaustive and brings a myriad of other possible age discriminatory measures into consideration:

> 6(1) ... Such differences of treatment may include, among others:
> (a) 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;
> (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
> (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

It is therefore apparent that potentially discriminatory age-quota systems and age-based selection and reward procedures are acceptable. Further ambiguity is introduced in Article 6(1)(b) as no indication is given of the extent of the 'certain advantages' which are 'linked to employment'. State financial incentives such as payments to employers and employees to encourage workers of particular ages, jobseekers and unemployment benefits,[144] social security and protection schemes[145] and occupational social security schemes[146] are also exempt from regulation despite the fact that they may lead to age-related discrimination.

[143] Framework Directive, Article 6.
[144] ibid Recital 13.
[145] ibid Recital 13.
[146] ibid Article 6(2).

Additional derogations which apply to all four suspect grounds in the Directive are also stipulated. Genuine and determining occupational requirements[147] are exempt and Article 2(5) lays down a potentially very wide exemption, not found in the Race or Gender Directives, for 'measures laid down by national law … necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others'. These numerous derogations, particularly when considered with the ambiguous phrasing of Article 6 and the justification of direct age discrimination permitted by Article 6(1), may severely hamper the achievement of age equality as member states are able to dilute protection given to workers. The 'essential'[148] nature of the prohibition of age discrimination is thus severely mitigated.

2.6.4: Subsidiarity and national rules

Recital 37 of the Framework Directive draws attention to the importance of the principle of subsidiarity. It states that the requirements do 'not go beyond what is necessary in order to achieve' the objectives, but permit member states to introduce national rules. The existence of a diverse assortment of national rules across member states will not produce a level-playing field within the community with regard to discrimination law. Recital 14 notes that 'national provisions laying down retirement ages'[149] will not be prejudiced by the Directive. A major factor in determining the withdrawal of citizens from the workforce is the existence of mandatory retirement ages and the offering of early retirement schemes. The removal of a fixed retirement age appears to offer increased opportunities for individuals to carry on working if they wish, thereby achieving an increase in the participation of older workers in the workforce.[150] Nonetheless, Article 3 declares that all aspects of the employment relationship are within the scope of the Directive, including dismissals[151] and the ECJ

[147] ibid Recital 23.
[148] ibid Recital 25.
[149] ibid Recital 14.
[150] ibid Recital 8.
[151] ibid Article 3(1)(c).

confirmed in *Heyday*[152] that mandatory retirement falls within the ambit of the Directive.

The ECJ has stated that it is for national courts to assess the justification of mandatory retirement ages within member states but warned that they will face a 'burden of establishing to a high standard of proof the legitimacy of the aim relied on as justification'[153] under Article 6(1). Therefore if member states can justify a mandatory retirement age before a national court with a legitimate employment policy aim of, for example, creating job opportunities in the workforce for younger workers, they will be able to continue to discriminate on the grounds of age, contrary to the aims of the Directive. However, this has led to some member states removing their mandatory retirement ages and others retaining a variety of retirement ages, leading to a wide variation in policy, contrary to another of the stated aims of the Directive – 'namely the creation within the Community of a level playing-field as regards equality in employment and occupation'.[154]

There are many other manifestations of this inconsistency: for example, the Directive states that national laws may provide that indirect discrimination can 'be established by any means including on the basis of statistical evidence'[155] which gives member states considerable latitude in setting requirements. It may be that expert sociological or economic evidence is sufficient and statistical evidence is not necessary. If statistical evidence is provided the ECJ has consistently held that it must show substantial differences of treatment between comparators and claimants, although it may be sufficient that they show a 'lesser but persistent and relatively constant disparity over a long period'.[156] In the sex discrimination case *ex parte Seymour-Smith and Perez* the ECJ held that it was for the national court to assess whether the statistics 'are valid … whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena and whether, in general they

[152] C-388/07 *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] All ER (EC) 619, [2009] IRLR 373 (Heyday).
[153] ibid para 65.
[154] Framework Directive, Recital 37.
[155] ibid Recital 15.
[156] C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623 para 62.

appear to be significant'.[157] The national courts and tribunals within the EU therefore have discretion to decide what is 'valid' evidence, creating further inconsistency across the community.

Similarly member states have discretion to use rules pertaining to the burden of proof 'in accordance with their national judicial systems'.[158] Harassment and victimisation must also be as 'defined in accordance with the national laws and practice of the member states'[159] whilst 'national rules relating to time limits for bringing actions'[160] will be utilised. Sanctions vary enormously between member states. The 'sanctions' 'may comprise the payment of compensation to the victim'[161] but in some member states no financial remedy is given to claimants. Under the Luxembourg Penal Code 2006 Article 454, employers guilty of age discrimination face criminal sanctions of up to two years imprisonment and/or a €25,000 penalty whilst the victim receives no remedy. In the UK the sanction is usually the payment of compensation to the victim.[162] This undoubtedly encourages victims to seek a remedy in the UK, whilst there is little incentive for a claimant in Luxembourg to undertake an often stressful process. However, employers in Luxembourg may be less likely to discriminate as a criminal sanction may be a more effective deterrent.

The principle of subsidiarity has enabled member states to enact legislation based on the internal social, legal and political pressures within each nation. This discretion, coupled with the numerous derogations in the Directive and ambiguous phrasing, has resulted in a myriad of different models of transpositions with requirements across member states varying considerably. For example, in Austria benefits based on seniority are not regarded as discriminatory whilst in the Czech Republic age discrimination in access to goods and services, social benefits and health care is prohibited.[163]

Thus the Framework Directive encourages local-level solutions which have to comply with basic and loosely-articulated requirements. This is evident in reports

[157] C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623 paras 61, 62. In this case a statistical difference of 8.5% between men and women was insufficient to constitute indirect discrimination.
[158] Framework Directive, Article 10(1).
[159] ibid Article 2(3).
[160] ibid Article 9(3).
[161] ibid Article 17.
[162] Employment Equality (Age) Regulations 2006, Reg. 38(1)(b); now Equality Act 2010, s124 (2)(b).
[163] Czech Republic Anti-discrimination Act 2009, Act No 198/2009.

prepared by Ius Laboris which examined age legislation across Europe which found 'the varied interpretation countries are giving to the same piece of legislation and reaffirmed that any vision of standardised EU employment laws is far off'.[164] It is apparent that, as the Directive aimed to provide a level playing-field across the Community, it needed to be more focused on ensuring a uniform application of the rules. If an EU citizen is unable to obtain work across member states because of age discrimination, free movement of workers will be prevented. As a result, one of the cornerstones of the EU internal market may be unattainable.

Nonetheless the Directive has had significant positive impact in ensuring some legal protection against age discrimination in member states where previously none existed. But it is based on individual fault-finding, rather than the encouragement of positive action, and relies on retrospective examination of alleged acts of discrimination which may encourage defensive attitudes. Although it facilitates positive action it imposes no obligations to take such measures and may be criticised as 'a sticking plaster approach'. The Framework Directive may therefore have only limited success in addressing the economic problems of an aging society.

2.7: The Employment Equality (Age) Regulations 2006

Sargeant claims that, until the intervention of the EU, all UK governments 'consistently opposed'[165] any attempts to introduce statutory controls on age discrimination. In 1985 Ann Clwyd MP introduced the first of several unsuccessful private Bills to outlaw the use of age barriers in recruitment advertisements. In 1995 Ian McCartney MP indicated that an incoming Labour government would 'introduce legislation to make age discrimination illegal'[166] but there was no specific pledge in its 1997 manifesto, only a statement that, in work, older citizens 'should not be discriminated against because of their age'.[167]

When New Labour came to power it adopted a voluntarist stance. A Code of Practice was issued on 14th June 1999 entitled *Age Diversity in Employment*, which

[164] Ius Laboris, *Age Discrimination in Europe* (Geneva 2011).
[165] M Sargeant, *Age Discrimination in Employment* (Gower 2006) 23.
[166] HC Deb 9 February 1996, vol 271, cols 557-626, 618 (*House of Commons Debate on Employment (Upper Age Limits in Advertisements) Bill)*.
[167] Labour Party, *Manifesto* (1997).

was reissued, slightly updated and retitled *Age Diversity at Work*[168] on 2nd December 2002. The Code gave guidance on six stages in the employment process. It stated that procedures and practice in recruitment, selection, and promotion were to be based on ability, skills and potential rather than age and those chosen for training and development, redundancy selection and retirement schemes should be selected on objective job related criteria. Helen Desmond has pointed out that voluntary codes provide little 'impetus for change'[169] and commented that the Code was 'weak and withering'.[170] The TUC general secretary John Monks accurately predicted that the Code would be 'largely ineffective'.[171]

The government's soft initiative to deal with the need for increasing the employment rate of the 50-65 age group, which had fallen from 84% to 70% over thirty years, failed to provide enhanced opportunities or reduce age discrimination.[172] In a 2001 report it was found that 'few companies acknowledged that they had changed their company policies or practices as a result of the Code'.[173] The government noted in 2001 that there had been a 'marked increase in the number of economically inactive men'[174] and recognised that the code 'has not been sufficiently effective in combating age discrimination and that further measures are necessary'.[175] Hepple et al were told by employers in 2000 that 'without legislation … the voluntary code of practice on age discrimination … is ineffective'.[176] No employer interviewed by Hepple et al had taken any initiatives to combat age discrimination, even though they conceded that it was widespread. A typical comment on the voluntary code from one respondent was that it 'is a waste of time'.[177]

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[168] Age Positive, *Being Positive about Age Diversity at Work: A Practical Guide for Business* (Updated version, Department for Work and Pensions 2002).
[169] Desmond H, 'Age Diversity in Employment – A Code of Practice' (1999) 28 ILJ 186, 189.
[170] ibid 188.
[171] Quoted from J Arrowsmith, 'Ageism Back on the Employment Agenda' *eironline* (28 September 1998).
[172] Select Committee on Economic Affairs, *Aspects of the Economics of an Ageing Population 4th Report* (HL 2002-2003, 179-I) 4.9.
[173] Department for Work and Pensions, *Evaluation of the Code of Practice on Age Diversity in Employment: Report of Research Findings* (The Stationery Office 2001) 1.1.5.
[174] Select Committee on Education and Employment, *Age Discrimination in Employment 7th Report* (HC 2000-2001, 259) 18.
[175] ibid 21.
[176] B Hepple, M Coussey and T Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing 2000) 120.
[177] ibid.

However, the adoption of the Framework Directive by the EU meant that in 2006 the UK was forced to introduce the Employment Equality (Age) Regulations,[178] now replaced by the Equality Act 2010 which maintains virtually identical provisions. The striking difference between the earlier soft initiatives and the Regulations is that the former were directed towards older workers, whilst the Regulations were based on the principle of equal treatment, as required by the Directive, and the rights of younger workers were also protected.

Deakin and Wilkinson have described EU Directives as setting 'basic standards in the form of a "floor of rights"' and intervention as a 'precondition for local-level experimentation'.[179] The Framework Directive itself stipulates that it 'lays down minimum requirements, thus giving the member states the option of introducing or maintaining more favourable provisions'.[180] Hepple expressed the view that if the Directive was simply transposed by the UK without elaboration, this would have only 'limited effect' on age discrimination and 'at worst have some negative consequences'.[181] However, the UK legislature failed to develop further the framework suggested by the Directive and transposed it in a minimalist manner, providing a very basic level of intervention in the workplace with a low standard of employee rights.

The Regulations display a 'half-open' approach to transposition. There are several 'closed' specific exemptions, such as that for the National Minimum Wage (the 'NMW'). This is combined with an open objective justification test which gives flexibility to employers in choosing the exact nature of legitimate aims rather than producing a 'restrictive and prescriptive'[182] list. Some member states[183] have taken a fully open approach which requires the courts to assess justification and has been criticised as leading to 'policy-making … in the laps of the judiciary'.[184] Others have taken a closed approach in specifying the nature of each exception which gives

[178] Employment Equality (Age) Regulations 2006, SI 2006/1031 (the Regulations).
[179] S Deakin and F Wilkinson, 'Rights Versus Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 ILJ 289.
[180] Framework Directive, Recital 28.
[181] B Hepple, 'Age Discrimination in Employment' in S Fredman and S Spencer, *Age as an Equality Issue* (Hart Publishing 2003) 79.
[182] Department of Trade and Industry, *Equality and Diversity: Coming of Age – Consultation on the draft Employment Equality (Age) Regulations 2006* (The Stationery Office 2005) para 4.1.5.
[183] Eg Belgium.
[184] N Bamforth, M Malik and C O'Cinneide, *Discrimination Law: Theory and Context: Text and Materials* (Sweet & Maxwell 2008) 1127.

employers greater certainty but needs accurate anticipation of problems which may occur.[185]

As required, the Regulations prohibit direct[186] and indirect[187] discrimination, harassment,[188] instructions to discriminate[189] and victimisation[190] on grounds of age, including 'apparent age,'[191] in employment and vocational training, unless objectively justified. In addition to the ability to justify all types of discrimination as permitted by Article 6, numerous exceptions allowed employers to continue to discriminate on the grounds of age – notably for genuine occupational and determining requirements,[192] the NMW,[193] the default retirement age (since removed),[194] enhanced redundancy payments and service related benefits.[195] The Regulations are discussed in detail in Chapters Six and Seven by reference to the interpretation of each provision by employment tribunals and an abbreviated text may be found in Appendix A.

Age discrimination was predicted to become the most frequent ground for complaint at the employment tribunal[196] and the Regulations were said to provide 'one of the biggest changes in UK employment law for decades'.[197] It was estimated that a 'flood of age discrimination claims could leave UK employers facing a £12m compensation bill'[198] per year. The judiciary, primarily first instance employment tribunals, were given the difficult task of drawing the demarcation line denoting whether the age discriminatory conduct has a legitimate aim and is appropriate and necessary or is unjustified.

The numerous problems inherent in the Framework Directive, highlighted in the previous section, such as a lack of an insistence on positive action, ambiguous phrasing and numerous derogations, were transferred directly into the domestic

[185] Eg Ireland and Holland.
[186] Employment Equality (Age) Regulations 2006, reg 3(1)(a).
[187] ibid reg 3(1)(b).
[188] ibid reg 4.
[189] ibid reg 5.
[190] ibid reg 6.
[191] ibid reg 3(3)(b).
[192] ibid reg 8.
[193] ibid reg 31.
[194] ibid reg 30.
[195] ibid reg 32.
[196] G Vorster, 'Age Discrimination Set to Become Most Common Form of Discrimination' *Personnel Today* (8 January 2008).
[197] LewisSilkinDepth, *Age Discrimination: Its Time Has Come* (London October 2006) 1.
[198] 'Age Discrimination Claims Could Cost UK Employers £12m' *Personnel Today* (10 July 2007).

legislation. The burden for addressing ageist conduct in England and Wales fell upon aggrieved claimants alone. Age discrimination outside the workplace was not prohibited by the Regulations as it was not required by the Directive. This has endorsed the perception that age equality is an economic issue rather than one concerned with justice for the individual, addressing the problem purely in employment rather than it being an equality or human rights issue.

2.8: Conclusion

In contrast to early attempts to prohibit age discrimination, which were undertaken because of concern over poverty suffered by older citizens, the EU was motivated to introduce age legislation in order to address predicted financial problems caused by demographic change. The EU aims, by means of the Directive, to eradicate ageist practices in the workplace with the intention of encouraging older citizens to participate in the workforce and remain economically active. Member states were directed to achieve this goal by 'implementing the principle of equal treatment (which) shall mean that there shall be no direct or indirect discrimination whatsoever'.[199] The equal treatment model of legislation leads to direct conflicts between measures which discriminate against older and younger citizens; this may not be an appropriate template with which to achieve the original objective of the EU which requires measures which are directed to mature citizens rather than all age cohorts.

The specific requirements of the Directive were constructed with the intention of achieving equal treatment but its provisions are ambiguous, the justifications permitted for discriminatory treatment are wide-ranging and member states are allowed considerable latitude in many aspects of interpretation and implementation. The conceptual problem of how to achieve equality between age groups will be at the heart of many justifications and will determine the legitimacy of discriminatory conduct. The courts and tribunals have been given the task of distinguishing between prejudice-based behaviour and rational judgments based on legitimate concerns. O'Cinneide has commented that, in 'the absence of substantial pan-European agreement' as to how this will be achieved 'the courts are effectively left to do this job by themselves – they

[199] Framework Directive, Article 2.

have been left to "hold the baby" '.[200] The judgments that emerge from the courts can tell us much about how the needs of the employer are balanced with the rights of individuals and how intergenerational fairness is addressed in the establishment of justification for discriminatory treatment. This is of particular interest as legislation is now being extended to give protection outside the workplace[201] and justification of discriminating practices will be at the centre of the debate regarding age proxies.

The stated aim of Article 2 of the Directive that there shall be no 'discrimination whatsoever' seems unlikely to be attained as the scope for justified discriminatory treatment is extensive. It is inconceivable that this approach would be used for other suspect grounds and as a consequence age may be considered to be at the bottom of the hierarchy of suspect grounds. The true value of the Framework Directive can only be measured by the manner in which its provisions are implemented at a domestic level. The reality of the implementation of age discrimination legislation in England and Wales is assessed in the following Chapters.

[200] C O'Cinneide, *Legal Accountability and Social Justice* (Working Paper Series, UCL 2012) 9.
[201] The Equality Act 2010 (Age Exceptions) Order 2012, SI 2012/2466.

Chapter Three:

Methodology

'Our case material is a gold mine for scientific work. It has not been scientifically exploited …..'[1]

3.1: Introduction

This Chapter details the methodological approach and process used to examine the decisions of employment tribunals which relate to age discrimination claims in order to complete an analysis of the implementation of age discrimination legislation in England and Wales. An examination has been undertaken of all tribunal judgments on claims brought under the Employment Equality (Age) Regulations 2006 made between October 1st 2006 – the date of commencement of the Regulations – and April 1st 2010. The judgment reports are original documents written by employment judges and contain vital information relating to the parties, the issues brought to light in the hearings and the decision-making of the tribunal. This Chapter includes an explanation of the methodological approach and ethical considerations, an account of the data analysis process undertaken, that is, identification of and extraction of data from judgments, coding and input of data into PASW,[2] and lastly, a discussion of the limitations of this process.

3.2: Methodological approach

This research project utilises a mixed methodology, combining the traditional legal method of a qualitative 'case-by-case' examination of judicial decisions with a quantitative content analysis of judgments relating to claims of age discrimination in the workplace. A qualitative study explores judicial decisions in depth whilst a quantitative analysis allows a study in breadth.

The quantitative content analysis of discrimination claims has been carried out particularly in the United States, by researchers such as Kort,[3] Färber & Matheson,[4]

[1] H Oliphant, 'A Return to Stare Decisis' (1928) 14 American Bar Association Journal 161.
[2] IBM SPSS (Statistical Package for the Social Sciences) Version 17: PASW - Predictive Analytics SoftWare Statistics.
[3] F Kort, 'Predicting Supreme Court Decisions Mathematically: Quantitative Analysis of the Right to Counsel Cases' (1957) 51(1) American Political Science Review 1.

Field and Holley,[5] and Schuster and Miller.[6] Kort was the first to apply this technique to judicial decisions and he developed a 'scoring system' to predict claim outcome which he claimed was 86% accurate.[7] His development of 'jurimetrics'[8] has been criticised in that the facts of cases do not necessarily generate the outcome but rather the outcome is a reflection of the facts stated by the judiciary. It is claimed that judges are inclined to only mention those particular facts which justify their decision and this incompleteness leads to inaccuracy and distortion in predictive systems.[9] Current literature supports the theory that '[I]nstead of predicting outcomes, content analysis is better suited to studying judicial reasoning itself, retrospectively'.[10] Consequently the content analysis undertaken in this study is intended to be a retrospective study of judgments rather than attempting to be a predictive tool.

Quantitative analyses of age discrimination cases in the USA have uncovered statistically significant differences in the context and outcome of discrimination claims. In 1984 Schuster and Miller investigated 153 age discrimination cases, chosen at random from a search of lexisnexis.[11] They found that in the USA '57% of cases were brought on behalf of white men in professional and managerial occupations; employers won nearly two out of every three cases; women were more successful plaintiffs than men and more cases originated in the South than in any other region'.[12] Their findings have led to the use of the phrase 'pale, stale, male' typically applied to claimants in age discrimination cases. This study employs similar quantitative and statistical tools to those used by Schuster and Miller in order to produce a thorough analysis of British claimants, respondents and outcomes, creating a unique data-set of

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[4] DA Färber and JH Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"' (1985) 52 University of Chicago Law Review 903.
[5] HS Field and Holley WH, 'The Relationship of Performance Appraisal System Characteristics to Verdicts in Selected Employment Discrimination Cases' (1982) 25(2) Academy of Management Journal 392.
[6] MH Schuster and CS Miller, 'An Empirical Assessment of the Age Discrimination in Employment Act' (1984) 38(1) Industrial and Labor Relations Review 64.
[7] Kort (n 3).
[8] Term developed by L Loevinger, 'Jurimetrics: The Next Step Forward' (1949) 33(5) University of Minnesota Law Review 455 and defined by Franken as 'the application of quantitative methods to legal problems' in H Franken, *Maat en Regel* (Arnhem, Gouda Quint 1975).
[9] LL Fuller, 'An Afterward: Science and the Judicial Process' [1965/6] 79 Harvard Law Review (1604, 1622).
[10] MA Hall and RF Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California Law Review 60, 98.
[11] Internet search engine of legal databases.
[12] Schuster and Miller (n 6) 64.

64,016 pieces of data in order to analyse the characteristics and results of age discrimination claims.

Case content analysis has been criticised because it is possible that small changes in judicial interpretation, indicating trends which may eventually transform the law, may be overlooked. Mendelson has pointed out that Kort's jurimetrics predictive system failed to identify an unannounced and subtle change in attitude to interpretation, resulting in a complete reversal in the success of cases and an overt change in the law which Kort's work failed to predict.[13] Content analysis on its own may mask these changes in nuances and fail to identify important interpretative trends which can only be ascertained by means of a traditional, qualitative, 'case-by-case' examination of judgments.

In a study of empirical legal research Hall and Wright found 134 projects which employed a systematic content analysis of legal decisions, 16 of which projects coded judicial decisions of over 1000 cases.[14] They concluded that traditional qualitative method and empirical content analyses 'renders different kinds of insights that complement each other, so that, together, the two approaches to understanding caselaw are more powerful than either alone.'[15] This project therefore uses both quantitative and qualitative methods to extract information from age discrimination judgments. An interpretive method gives a detailed understanding suited to evaluation of legal principles whilst a content analysis can describe the social and economic landscape in which the judgments have been made.

3.3: The examination of judgments

3.3.1: The Judgment Register

The Secretary of State is required to maintain a Judgment Register of employment tribunal decisions which must 'contain a copy of all judgments and any written reasons issued by any tribunal or chairman … in accordance with the rules in Schedules 1 to 5.'[16] The only documents to be omitted from the Register or to be entered with deletions or amendments are those relating to cases where the tribunal sat

[13] W Mendelson, 'The Untroubled World of Jurimetrics' (1964) 26 Journal of Politics 921.
[14] Hall and Wright (n 10).
[15] ibid 121.
[16] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, reg 17(2).

or heard evidence in private.[17] The Register must be open to the inspection of any person without charge at all reasonable hours.[18]

The details and outcome of every judgment made by the 27 regional employment tribunals are forwarded to the Employment Tribunal Field Support Office situated in Bury St. Edmunds and entered onto the Judgment Register. The Register is maintained in a two-stage format. Firstly, a database is held on a computer at the Field Support Office and is accessed by means of five terminals located in an adjacent room.[19] The information regarding judgments is transferred onto the computerised Register database manually by staff at the Field Support Office. The computer database gives basic information of each of the 4001 claims – usually party details, date, brief outcome and concurrent claims – in a single claim report spread-sheet, along with a designated folio number. Secondly, the Register uses the folio number to identify hard-copy information which the Field Support Office holds on each judgment, kept in a further adjacent room in box files. If a case has been dismissed, struck out or settled, the folio report briefly states this on one sheet of paper, signed by the tribunal judge. If a case is successful or has been challenged by the respondent in a 'meaningful' way the folio report normally contains additional facts and the employment judge gives the reasoning behind the tribunal's decision. The individual records vary substantially, often depending on the outcome of the claim, so that the information collected is in a sense 'self-selecting.'

3.3.2: Judgment sampling

Obtaining data from all employment tribunal judgments made following the enactment of the Regulations allows a thorough assessment to be made of the first three and half years of their operation, whereas a study of a shorter period may hide long term trends. A continuous time period prevents any difficulties occurring which might arise from a random selection of judgments. Bias in judgment sampling will also be eliminated. Three and a half years is a sufficiently long period over which to detect patterns and trends apparent within the judgments. The maintenance of the Judgment Register relies upon regional tribunals forwarding case reports and

[17] ibid Schedule 1 Rule 32 para (2).
[18] ibid reg 17(1).
[19] ibid reg 17(3) states the 'Register, or any part of it, may be kept by means of a computer'.

judgments to the Field Office. In some instances a local problem occurs and reports are sent in batches which represent judgments handed down over many months. This would cause an excessive number of judgments to be entered on the Register at an arbitrary time which would give an unrepresentative view of the timing of judgments. By examining every judgment, rather than selecting particular time periods, a comprehensive analysis can be made and any anomalies which occur throughout different time periods will be removed from the data analysis.

3.3.3: The Employment Tribunal Annual Report

Consideration was given in this study to the utilisation of information relating to claims provided in the Employment Tribunal Annual Reports. The Annual Reports give a brief overview of tribunal activities, including the number of claims and awards made each year, but this system appears to be prone to inaccuracies. It does not, in any event, give details of individual judgments or awards, but gives overall totals and the maximum, median and minimum compensation awarded for each suspect ground. The Annual Reports use centralised information which is held on the Employment Tribunal Management Information System. This is gathered from 'a subset of the data held locally in each office,'[20] that is, each local Tribunal office forwards 'anonymised' data to the central system which is used for analysis. This method of amalgamating sub-sets of anonymised data will necessarily blur the specifics of the statistical picture.

It is noticeable that the subsets of data presented in the Annual Reports are not always representative of claims made. For example, in 2008/9 the Report stated that 53 claims[21] were successful but only 21 awards were made.[22] When the information system team were questioned on this data the following reply was forthcoming:

> Unfortunately footnote 20 on page 9 of the Annual Report Statistics states 'Compensation awarded is that of which the tribunal is aware' applies here, there were 53 successful age discrimination cases at tribunal in 2008/9 but details of only 21 awards are held on the ET

[20] E-mail from Traicey Dwyer, Forecasting & Modelling Officer, Strategic Planning and Information Unit, Finance and Resources Directorate, Ministry of Justice to author (2 December 2009).
[21] Ministry of Justice, *Annual Report and Accounts 2008 - 2009* (The Stationery Office 2009) Table 2, p 6.
[22] ibid 11.

> management information system hence the discrepancy.'[23] 'Unfortunately due to operator error, not all of the awards made for the new discrimination jurisdictions were entered onto local office systems. Hence the discrepancies between outcome numbers and number of awards recorded centrally.[24]

The Annual Report also contains the proviso that:

> the detail is subject to the inaccuracies inherent in any large-scale recording system. Whilst the figures shown have been checked as far as practicable, they should be regarded as approximate and not necessarily accurate.[25]

Omitting 32 out of 53 pieces of data is a substantial error. This study aims to provide a more accurate, detailed analysis of all decisions contained within the Register and provide a breakdown of the actual awards given by employment tribunals.

3.3.4: Ethical considerations

Coventry University, through which this project was conducted, has ethical requirements which all researchers must satisfy. The University guidelines follow the key principles of the Economic and Social Research Council Research Ethics Framework,[26] that is, the research should be designed and undertaken to ensure integrity and quality, independence of research must be clear and any conflicts of interest or partiality must be explicit. Participants must be aware of the risks involved and the purpose, methods and intended uses of the research. Harm to participants must be avoided; their anonymity must be respected and they must participate in a voluntary way, free from coercion. Coventry University has a procedure for obtaining ethical approval and projects which do not involve human participants are regarded as 'low risk' and proceed using self-certification. This project collects secondary data contained in publicly available judgments and does not directly involve such

[23] E-mail from Traicey Dwyer, Forecasting & Modelling Officer, Strategic Planning and Information Unit, Finance and Resources Directorate, Ministry of Justice to author (2 October 2009).
[24] Dwyer (n 20).
[25] Ministry of Justice (n 21) 14.
[26] Economic and Social Research Council, *Research Ethics Framework* (2010); Coventry University, *Ethics and Governance: Coventry University Ethics Statement* (2009).

individuals. The requisite 'low-risk' forms submitted for this project can be found in Appendix C.

This study concerns secondary data relating to both parties which may be regarded as sensitive. It may be difficult to identify accurately claimants from the data discussed in this thesis as addresses are not supplied but respondent employers can be directly identified. However, the English legal system is based on the premise that judicial processes are open to public scrutiny, ensuring that justice is not just done but is seen to be done. Article 6 of the European Convention on Human Rights states that in 'the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing … Judgment shall be pronounced publicly.'[27] This study uses information obtained from the public Register at Bury St Edmunds – information which is already in the public domain – and claimants surrender their anonymity when submitting a claim.

Although all hearings 'shall take place in public'[28] a tribunal judge has the power to 'conduct the hearing in such manner as he or it considers most appropriate for the clarification of the issues and generally for the just handling of the proceedings'[29] and the judge has the power to remove judgments relating to 'sensitive' claims from the Register, if necessary. Consequently material which is considered to be sensitive has already been removed from the Register before public inspection.

A very small number of claimants are under 18. The ethical problems surrounding the collection of data from claims involving minors were considered in conjunction with the Ethics Advisory Committee of Coventry University when discussing ethics approval for the project. As far as can be ascertained, following discussions with staff at the Employment Tribunal Field Support Office, all claims concerning minors have been held in public with the full names of the claimants given. Full names of all claimants, whatever age, are included in judgments on the Register. However, as the information gathered in this project is already fully available in the public domain, this issue was considered not to have ethical implications for the purpose of this study.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as amended by Protocol No 1, Article 6 Right to a Fair Trial.
[28] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, reg 26(3).
[29] ibid reg 14(2).

3.3.5: Case and folio report case content

The information gathered and available for public inspection falls into two categories: firstly, that which relates to all judgments, seen in the computerised case reports and secondly, that which relates to those claims given more detailed consideration in hard-copy folio reports. The systematic examination of this information reveals several claim, claimant and respondent characteristics. It is possible to identify the occupation, gender, age and representation of many claimants, as well as whether claims of multiple discrimination are being pursued. The type of respondent that claims are being made against, with regard to employer activity, size, solvency and structure, has also been ascertained. Previous empirical studies in the USA have had no success in identifying employer activity.[30] However, it is now possible to examine this aspect in Britain using the comprehensive material available on the internet and at Companies House.

It is possible to identify accurately in hard-copy folio reports the number of successful claims, the types of issue concerned and the amount of compensation that has been awarded by tribunals. This allows an analysis to be made of the degree of success of the average claimant, the amounts they are awarded and whether there is a difference in claims by women and men. Kort showed that those in employment cases with representation were more likely to be successful,[31] although more recent research has shown no correlation.[32] Hard-copy folio reports in the Register give details of claimant representation so that an examination can be made as to the accuracy of this hypothesis. It has been possible to examine factors such as systematic differences in success and awards made for claims concerned with, for example, retirement and discrimination against the young, regional patterns in the success of claims and compensation award size so that discrepancies may be addressed.

3.3.6: Identification of judgments and data collection

The data analysis process undertaken comprised three stages – firstly, identification and extraction of data from judgments, secondly, coding and input of

[30] MH Schuster, 'Analysing Age Discrimination Act Cases – the Development of a Methodology' (1982) 4(3) Law and Policy Quarterly 339, 343.
[31] Kort (n 3).
[32] A Brown and A Erskine, 'A Qualitative Study of Judgments in Race Discrimination Employment Cases' (2009) 31 Law & Policy 142, 147.

data into PASW and thirdly, analysis of results. In order to identify the relevant judgments it was necessary to search for claims made under the relevant jurisdiction using the drop-down menu on the start-up page on the computer terminal in the Field Support Office. The menu lists approximately 90 jurisdictions for claims ranging from discrimination to failure to allow time off for trade union duties. All judgments which included a claim of age discrimination, whether or not as a principal claim, can be selected by the search engine. However, a general search in this manner would give too many results for the system to handle so a time parameter was also used to select all age claims submitted within a specific period. For example, a search for claims brought under the 'age discrimination jurisdiction', looking for judgments which have been entered on the Register between 1st January 2009 and October 1st 2009 reveals 313 judgments. The 313 judgments each have one record per page on the computer database. This process was repeated to encompass all periods from October 1st 2006 to April 1st 2010. This is a fully replicable case selection procedure.

The database page for each judgment gives the case number, a folio number, the name of the applicant and respondent, the location of the tribunal hearing the claim, the date the judgment was signed, the date the judgment was entered on the Register, a very brief summary of each of the grounds of claim, whether or not there are any related claims and a very brief summary of the judgment. From these records it is possible to move into the adjacent room and, using the folio number, identify the original hard-copy judgment reports sent by the regional tribunal office. The basic information from the folio reports was recorded on pro-forma search record sheets. The standard pro forma sheet that was eventually used can be found in Appendix D. Where an appeal to an appellate court was made, the case report was obtained from the Employment Appeal Tribunal website[33] or BAILLI.[34] Further information was extracted and documented from all folio reports which contained additional records which cast light on the interpretation of the legislation. This information was used to make a qualitative analysis of the judgments found in Chapters Six and Seven.

As the project advanced it was found that characteristics such as race, religion and union membership of claimants, factors that Schuster and Miller attempted to

[33] <www.employmentappeals.gov.uk/Judgments/judgments.htm>.
[34] <www.bailli.org>.

investigate in the USA,[35] were not described in the folio reports. Another factor which it was hoped to investigate was the length of time taken for a claim to pass through the tribunal system but the date the claim was accepted is not stated on either the case report or the folio report. These aspects were therefore not included in the analysis.

Various pro-forma search record sheets were experimented with in order to find the most useful method of recording the data collected. The sheets eventually used included spaces in columns to document four claimant, four employer and eight claim characteristics as well as case and folio report numbers and the names of both parties. The characteristics collected were the gender, age, representation and occupation of the claimant, concurrent claims of discrimination, the size, activity, status and solvency of employer, the location of the tribunal which heard the claim, the date that the judgment was entered on the Register, the issue, type and outcome of the claim, additional costs incurred by claimant and the amount of compensation awarded.

3.4: Data coding procedure

3.4.1: Trial data collections

Two data collection pilot runs were undertaken, coded and entered into SSPS PASW Version 17 for analysis. The first trial used 45 case reports chosen at random. The second used 313 judgments, selected by choosing all cases entered on the Register between January 1st 2009 and October 1st 2009. These trials resulted in the modification of the parameters collected and the search record sheets. Replicability was tested at the first and second trial stage before the main data analysis by asking a fellow researcher to code 30 judgments to check that the coding process was reliable.[36] On the first trial three inconsistencies were found – one from an overt error and two from ambiguities in the 'claim outcome' category, which was subsequently amended to encompass more outcome factors. The second trial gave a resulting Cohen's kappa coefficient of 1, indicating perfect agreement.

3.4.2: Statistical tools

Each piece of data collected from the Judgment Register was coded, using numerical values, and entered into a database using the SPSS PASW Version 17

[35] Schuster and Miller (n 6).
[36] As recommended by Hall and Wright (n 10) 113.

statistical software package. PASW was chosen because it can handle large amounts of data, possesses the facility to examine frequencies, descriptives and cross-tabulations, perform multiple regression tests, t-tests and correlation analysis and has the capability to generate a wide variety of outputs such as tables, graphs, charts etc. In addition, Weitzman and Miles[37] recommend choosing a package which has a good support network for the researcher and as Coventry University provides training and advice for users of SSPS PASW this Windows-based package appeared most suitable. As 16 variables were examined in the study multivariate, as well as univariate, tests were performed. The correlation of the variables was tested using the statistical hypothesis Pearson chi-square test at a 5% significance level. The resulting quantitative analysis of data is contained in Chapters Four and Five.

3.4.3: Coding

Details of the codes allocated to data used for the purposes of analysis in SSPS PASW can be found in Appendix F. In all categories where a particular piece of data was not evident, or was in any way ambiguous, it was given the code 999 (not known). If the information sought was not applicable to that factor it was given the code 91 (not applicable). Codes 91 and 999 were regarded as 'missing values' in the data analysis.

Each piece of information was coded as follows:

3.4.3.1: Claim characteristics

Location of tribunal where judgment is made: Each regional tribunal was given a numeric value.

Date entered on the Register: All judgments contained a date which possessed the capability of being coded and this numeric value was used.

Issue: The issue, that is, whether the claimant alleged they were thought 'too young' or 'too old,' was recorded. 'Issue' is not necessarily related to age, as a 25 year old may complain that they were regarded as 'too old' even though they are comparatively young.

Type of complaint: Six areas of complaint emerged in the trial collections of data. These were recruitment, job status/benefits (including pay, promotion etc),

[37] E Weitzman and M Miles, *Computer Programs for Qualitative Data Analysis: An Expanded Sourcebook* (Sage Publishing 1995).

dismissal, retirement, redundancy selection and harassment/victimisation. In some judgments discharge and involuntary retirement were difficult to separate. In these instances if a claimant was over 64 years old the claim was included in the retirement category.

Outcome: Ten claim outcomes were established after the second trial run of 313 judgments. These were time expired, incorrect procedure, struck out, successful, settled, claim withdrawn, case dismissed, default judgment for claimant, not actively pursued and 'other' outcome. This latter category includes those referred for case management meetings or awaiting additional information. 'Successful' as a category was held to apply when a benefit of any type was awarded to the claimant by the tribunal. It is acknowledged that some 'claim withdrawn' outcomes could be 'settled' and some 'incorrect procedure' outcomes could be 'time-expired' but for the purposes of the study the outcome description stamped on the hard-copy folio report was utilised for coding.

Additional costs incurred by claimant: The numeric value was coded.

Amount of compensation awarded: The numeric value for the overall compensation and injury to feelings award was coded.

3.4.3.2: Claimant characteristics

Gender: Gender was inferred as data was collected from the claimant's name on the case report. Claims made by groups of workers were coded as 'not applicable' and individuals for whom it was not clear which sex applied (e.g. doctors) were coded 'not known.'

Age: The age of claimants was often difficult to establish. In cases where it was stated in the hard-copy folio report the numeric value was entered onto the data search sheet.

Representation: Claimant representation could be established in some hard-copy folio reports; however, it was impossible to differentiate between legal representation provided by unions, law centres or paid legal representation. For these reasons 'all legal representation' and 'self-representation' were the two categories chosen for this parameter. Employer representation could not be identified accurately.

Occupation: Very broad descriptions of claimant activity were utilised, following the nine major group categories of the International Labour Organisation

'ISCO08 (COM) for the European Union (Eurostat)' system of classification.[38] The nine categories were: Legislators, managers and senior officials, Technicians and associate professionals, Clerical and related workers, Service, shop and market sales workers, Craft and related trades workers, Plant and machine operators and assemblers, Elementary occupations and Armed forces personnel. If a particular occupation was difficult to categorise the sub- and minor group activities of ISCO08 were utilised to place an employee within a particular category.

Concurrent claims of discrimination: Reference is made on the computerised report on the Register to all concurrent claims made by the employee. This was noted on the record sheet using the three or four digit code used by the Field Support Office. These codes were grouped into broad categories, for example, the codes DDA, DDA1, DDA2, DDA3 and DDA4 relate to disability discrimination and were grouped under code '3'. Code 9 was given to concurrent claims which did not appear to relate to a discrimination claim.

3.4.3.3: Employer characteristics

The name and address of the respondent employer is detailed on every computerised record. This information was used to access employer characteristics, principally from internet sources. The Companies House Register contains information revealed by the web-check service which was utilised to identify employer size, status, solvency and activity.[39] Other internet data-bases which were utilised were KOMPASS,[40] FAME[41] and MacRAE's Blue Book[42] which were accessed through Coventry University e-library. When information about an employer from these sources was not forthcoming the direct link to FAME available at Birmingham public library was used. This database includes information on many small businesses which is difficult to find elsewhere. A sample search sheet is included in Appendix E.

Size: Four categories of the size of employer organisation – micro, small, medium and large – were used. The Companies Act 2006 defines a small company as one that has a turnover of not more than £6.5 million, a balance sheet total of not more

[38] International Labour Organisation, *International Standard Classification of Occupations* (2007).
[39] <www.companieshouse.gov.uk>.
[40] <www.kompass.com>.
[41] <www.bvdep.com/en/fame.html>.
[42] <www.macraesbluebook.co.uk>.

than £3.26 million or not more than 50 employees.[43] A medium-sized company has a turnover of not more than £25.9 million, a balance sheet total of not more than £12.9 million or not more than 250 employees. A large company is one which exceeds these parameters. The European Union Commission adopted Recommendation 2003/361/EC on 6th May 2003, which included a fourth category called a micro enterprise.[44] A micro enterprise has a headcount of less than 10 or/and a turnover or balance sheet total of not more than €2 million.[45] In cases where parameters overlapped the primary indicator of size for the purposes of data collection was the employee head-count – a practice adopted by UK National Statistics.[46]

Solvency: If an employer was in administration or insolvent this was recorded on the data sheet and coded accordingly. If an employer becomes insolvent after discriminating conduct takes place and subsequently has an award made against them the possible 'protective award is a debt or liability'[47] within the meaning of the Insolvency Rules 1986 'to which the company at that point 'may become subject' in due course'.[48] The award will be a contingent liability and the claimant will be entitled to be paid from the assets of the employer. In *Rank Nemo (DMS) Ltd v Coutinho*[49] the Court of Appeal held that where a business is taken over under TUPE Regulations the liability for compensation passes to the new employer, even though it was not responsible for the act of discrimination. However, for the purposes of this exercise the activity of the business responsible for the discriminating conduct was coded. In a few instances information concerning the solvency was not apparent in the folio reports but could be obtained from the Companies House.

Status: Employers were categorised using the 'Business Link' guide developed with Companies House and HM Revenue and Customs.[50] These categories are Sole Trader, Partnership including Limited Liability Partnership, Private Limited Company,

[43] Companies Act 2006, ss 382, 465.
[44] Commission, *Recommendation 2003/361/EC Concerning the Definition of Micro, Small and Medium-Sized Enterprises* OJ L 124 (6 May 2003) 36.
[45] At September 2012 assumed to be equivalent to £1.6 million.
[46] <www.ons.gov.uk/about-statistics/classifications/current/ns-sec/deriving/index.html>.
[47] Insolvency Rules 1986, Rules 12.3 and 13.12.
[48] *Haine v Day (liquidator of Compound Sections Ltd)* [2008] EWCA Civ 626, [2008] 2 BCLC 517 (Ch).
[49] [2009] EWCA Civ 454, [2009] ICR 1296.
[50] Available online at <www.businesslink.gov.uk>.

Public Limited Company, Government Agency or Public Body, Community Interest Company (CIC), Social Enterprise, Company Limited by Guarantee or Charity.

Activity or Industry: The principal activity of a respondent employer was established, usually from the Companies House Register or by using other internet search tools. Principal activities of employers are generally carried out with the support of a number of ancillary activities, such as accounting, transportation and maintenance. Although claimants may be working within an ancillary support business, the main activity of the actual business cited as respondent in the Register was coded, in order to maintain consistency.

The employer activity was recorded using the relevant UK Standard Industrial Classification SIC(2007) code.[51] SIC(2007) is a classification system used to categorise business establishments and other statistical units by the type of economic activity in which they are engaged. The UK SIC(2007), introduced in 1992 and amended in 2003 and 2007, is the United Kingdom's version of NACE Rev.1[52] which is the European Community's harmonisation of the classification of economic activities in member states introduced on 9th October 1990. NACE Rev.1 is based on the United Nations Provisional Central Product Classification (CPC), Series M, No77 established in 1991. SIC(2007) is identical to the United Nations system at the two digit Divisional level. Thus SIC(2007) relates coherently to other economic classifications at national and international levels. The Companies House Register uses SIC(2003) and where information from this source was utilised it was converted to SIC(2007) using the relevant conversion table.[53]

3.5: Limitations of methodology

This research has examined judgments, not applications or claims. A systematic evaluation of applications would reveal the details of all cases where employees felt sufficiently aggrieved to make a claim of discrimination on the grounds of age, but following the UK government decision to maintain a register of judgments rather than

[51] Office for National Statistics, *UK Standard Industrial Classification of Economic Activities 2007 (SIC 2007): Structure and Explanatory Notes* (ONS 2009).
[52] Council Regulation 3037/90 EEC of the European Economic Council of 24 October 1990 on the Statistical Classification of Economic Activities in the European Community OJ L 293/33.
[53] Available online at <http://www.companieshouse.gov.uk/infoAndGuide/sic/sicConversionTable.shtml> accessed 13 July 2013.

applications, information regarding applications is very difficult to find. It is highly probable that applications are themselves only 'the tip of the iceberg' as regards discriminating conduct.[54] If, as discussed in Chapter Two, a substantial proportion of the population feel that they have suffered age discrimination in the workplace, very few individuals feel that they are willing or able to make a claim to the Employment Tribunal. The UK currently has a workforce of 28.92 million people.[55] Taking a recent estimate, 1.2% of the workforce feels they have suffered age discrimination in the workplace within the last two years, which would give a potential pool of 347,040 workers who may feel they have suffered unfair treatment.[56] Yet only 6,750 applications were accepted by employment tribunals in the same period.[57] The Judgment Register contains 2,833 decisions recorded on the equivalent two-year period, indicating that the majority of applications accepted are not pursued. In limiting this study to the collection of data from judgments it is acknowledged that data cannot be included which relates to the thousands who make a claim and withdraw before judgment.

The analysis of party characteristics and case determinants is reliant on the limited type of information contained within the Judgments Register. The 2004 Regulations specify that the information must include the issues which the tribunal has identified as being relevant to the claim,[58] findings of fact[59] and how the relevant findings of fact and applicable law have been applied in order to determine the issues.[60] All of this information is not currently available for many judgments held on the Register. The majority of folio reports, particularly those which have been dismissed, time-expired, struck out or settled but for which a judgment was made, contain a single sheet and give no details of the issue, the applicable law or the findings of fact, indicating that the Register is not being maintained as it should be by the Ministry of Justice as specified in Schedule 1 para 30(6) of the 2004 Regulations.

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[54] J Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (CUP 2006) 257.
[55] Office for National Statistics, *Labour Market: Employment* (ONS 2012).
[56] Department of Business, Innovation and Skills, *Fair Treatment at Work Survey 2008* (2009). 'Personal experience of unfair treatment and discrimination at work in the last 2 years by equality strand' Chart 6.8 p 69.
[57] Ministry of Justice (n 21) Table 1, p 6.
[58] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Schedule 1 para 30(6)(a).
[59] ibid para 30(6)(c).
[60] ibid para 30(6)(e).

If the Register contained the required full range of particulars a much broader study could be undertaken, for example, a more comprehensive study of the age of claimants and factors such as the effect of the use of performance appraisal systems on the successful defence of a claim.

A limitation of the analysis is that the material contained in the folio reports is dependent upon the reporting consistency and capabilities of tribunal staff. The extraction of material from folio reports depends upon the efficient delivery to and organisation of records at the Field Support Office. The information available is reliant on the accuracy, consistency and completeness of facts given in the case report. It is assumed that each regional tribunal has forwarded the correct information to the Field Support Office but it is acknowledged that the process is subject to human error. The information is placed onto the computer system by staff who may make errors in transcription. In some instances spaces are left blank on the computerised record. In addition, when searching within overall time parameters it is conceded that some decisions which had been handed down were not added to the Register by the time the data collection was made. There may be further researcher errors in the process of collecting data from the reports and coding the data. However, as this process was undertaken by one person it was not subject to intercoder unreliability.

The research has been undertaken by a single researcher who is not an employer but is of a similar age to many of the claimants and may not be objective in extracting information from folio reports. Researcher creativity in discussing the material relating to the discriminatory treatment may be constrained because preconceptions have been formed during the literature review and data collection. In addition, reading numerous case reports in which the claimant is alleging that they have suffered discriminatory conduct may lead the researcher to be biased in the interpretation of the case notes.

A limitation of investigating employer activity is that this may not represent the particular activity the claimant is involved in. Using the SIC(03) code from the Companies House Register to gauge employer activity relies upon the employer supplying the correct code and as the SIC coding system is complex, errors may have occurred. It is often very difficult to identify the occupation of claimants accurately from case reports. For this reason very broad descriptions of claimant activity are utilised. A study of this type cannot establish whether claims are made in an industry

or profession because age discrimination is particularly prevalent in that industry or whether the claimants are more inclined to take action because of better knowledge and information about the Age Regulations. Some workers may be better supported by, for instance, a more supportive union or local advice bureau or may be involved in the legal profession and have more information pertaining to their rights. This study can nonetheless draw attention to any possible areas for further investigation.

Chapter Four:
Quantitative Analysis - Results 1
Claim and Party Characteristics

4.1: Introduction

This Chapter describes the characteristics of the claims found in 4001 age discrimination judgments in the Employment Tribunal Judgment Register for England and Wales. It was possible to obtain information on fourteen factors relating to the claim and parties in an age discrimination claim. The computerised records within the Register contain details of all claim dates, location, multiple claims and concurrent claims and nearly every claimant's gender and respondent employer's name and address. Using this latter information respondent employer size, status, solvency and activity data was obtained from internet information sources, such as the Companies House Register and FAME.[1] The data-sets for these factors each contain over 3,940 pieces of data. The hard-copy folio reports often contain details of five further factors: legal representation is sometimes specified on the first page of the judgment, whilst the age and occupation of the claimant, issue and complaint type is occasionally specified within the judgment. Consequently the data-sets collected on these factors are considerably smaller.

Figure 4.1 shows the number of receipts and judgments relating to age and all jurisdictions handed down from October 1st 2006 to April 1st 2010. Despite the number of receipts increasing substantially throughout this period, the percentage of claims not receiving judgment has remained fairly constant – ranging from 67.34% to 69.07%. This analysis is therefore based on approximately 32% of accepted receipts, as the majority of applications are not pursued and information regarding them is not recorded. Although the percentage of 'age' claims increased in the period 2008-2009, such claims as a percentage of 'all jurisdiction'[2] claims fell in 2009-2010 to 1.3%,

[1] E-resources available online at <http://www.companieshouse.gov.uk> and <http://www.bvdinfo.com>.
[2] Jurisdiction in this context refers to the jurisdiction categories used by the Employment Tribunal Service to describe the various heads of complaint brought by claimants. A claim can contain a number of grounds, known as jurisdiction complaints.

indicating that age has remained a relatively minor ground for complaint at the tribunal.

Figure 4.1: Table showing claim receipts & judgments handed down by tribunals

4.2: Date

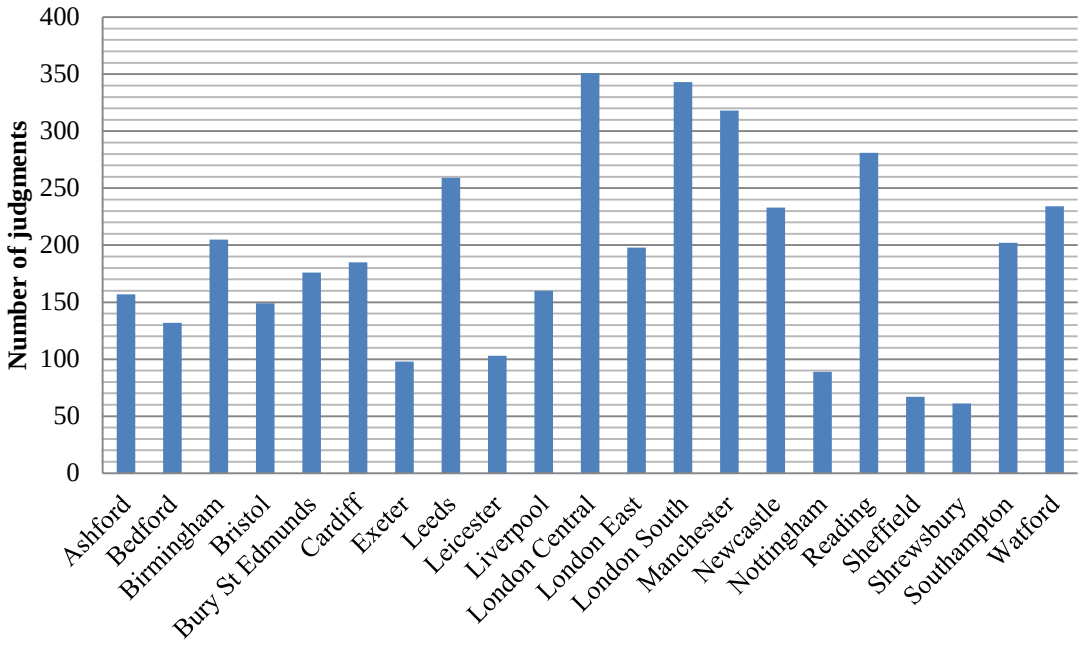
Figure 4.2 shows the number of 'age' judgments issued per month over the period of study. The Excel-generated best-fit line, shown in red, indicates a steady increase in judgments which reached a peak of 205 per month in March 2010.

[3] Ministry of Justice, *Employment Tribunal and EAT Statistics 1 April 2009 to 31 March 2010* (The Stationery Office 2010) 4.
[4] ibid.

4.3: Tribunal office

Figure 4.3 shows the number of 'age' judgments handed down by each tribunal during the total period of study. It is apparent that London Central and South, Reading, Manchester and Leeds handed down the highest number of judgments, whilst Sheffield, Shrewsbury, Exeter, Leicester and Nottingham handed down a smaller number of judgments than average. Over the period of study the South-east and London region issued the largest number of judgments (32.1% of the total), the North 26.6%, the South and South West 22.9% and the Midlands 18.4%.

Figure 4.3: Bar chart showing number of age claims handed down at tribunals over period of study



4.4: Complaint type

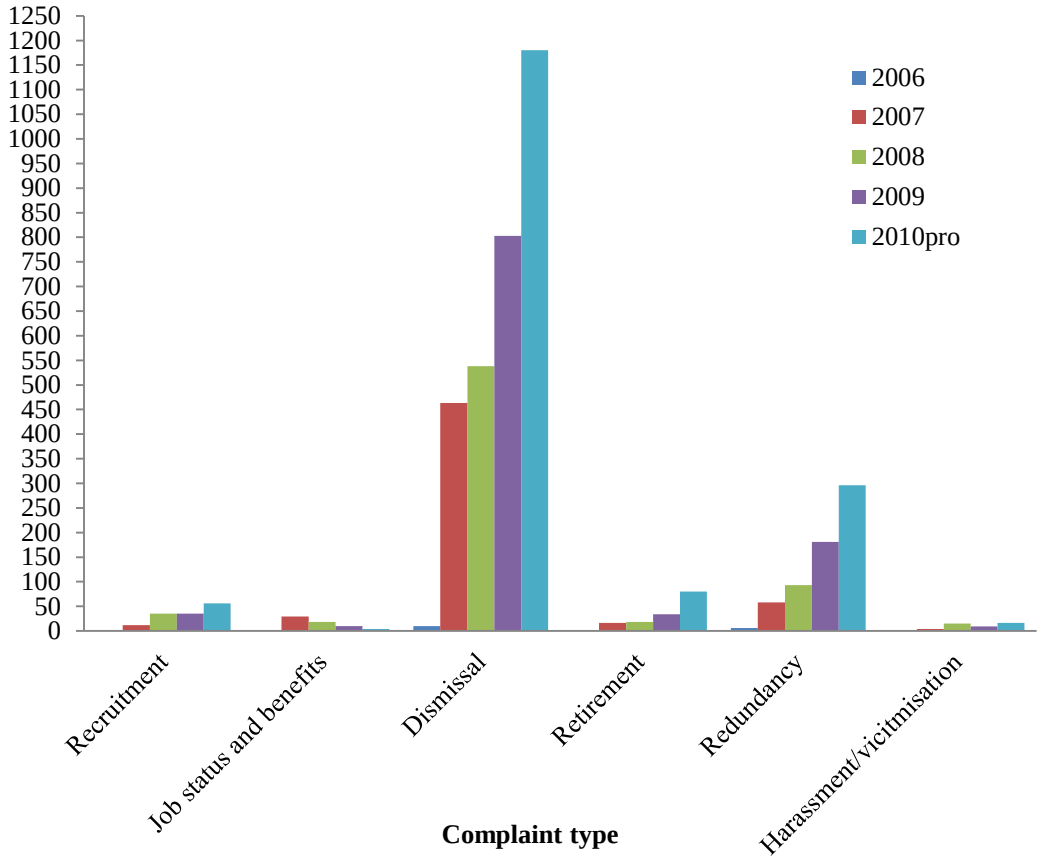
The specific cause of complaint of the employee was identified in 66.96% (2785) of the 4001 judgments examined. Of these, the overwhelming majority – 75.5% (2,104) – were concerned with dismissal, 14.6% (408) with redundancy selection and payments, 3.4% (95) with recruitment, 2.1% (58) with job status and benefits, such as pension entitlement, 3.2% (88) with retirement and 1.1% (32) with harassment or victimisation. Over 93% of judgments were concerned with workers at the termination of their employment.

The following bar chart, Figure 4.4, shows the frequency of complaint types over the period of study. Although there has been an increase in complaints concerned

with recruitment this has not matched the growth in claims as a whole. Judgments which relate to complaints concerned with victimisation, harassment, job status and benefits have remained low and those in the latter category have fallen gradually year on year since 2007.

Figure 4.4: Bar chart showing number of judgments each year relating to six complaint types

The 2010 figure is projected using the first quarter's figures



4.5: Issue

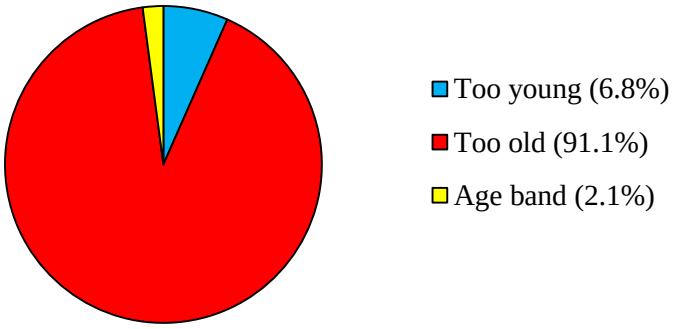
The Regulations could be relied upon by all employees, regardless of age. Employees making claims of direct discrimination on the grounds of age had to show that they suffered 'less favourable treatment' than 'other persons'[5] and for indirect discrimination that they suffered 'particular disadvantage' as the result of the application of a provision, criterion or practice when compared 'to persons not of the same age group'.[6] Employees at the tribunal claimed that they were discriminated

[5] Employment Equality (Age) Regulations 2006, reg 3(1)(a). Replaced by Equality Act 2010, s 13.
[6] ibid reg 3(1)(b). Replaced by Equality Act 2010, s 19.

against because they were thought either ‘old,’ ‘young’ or because they belonged to a particular age group in comparison with other persons or those not of the same age group.

The Register contains 620 folio reports which detail whether the issue in the employee’s complaint was that they were discriminated against because they were thought old, young or belonged to a disadvantaged age group. Of these, 6.8% (42) were employees who felt the issue was that they were discriminated against because they were young, 91.1% (565) because they were old and 2.1% (13) because they belonged to a disadvantaged age band, shown in Figure 4.5.

Figure 4.5: Pie chart showing proportion of claimants who felt they were discriminated against because they were young, old, or belonged to a disadvantaged age band



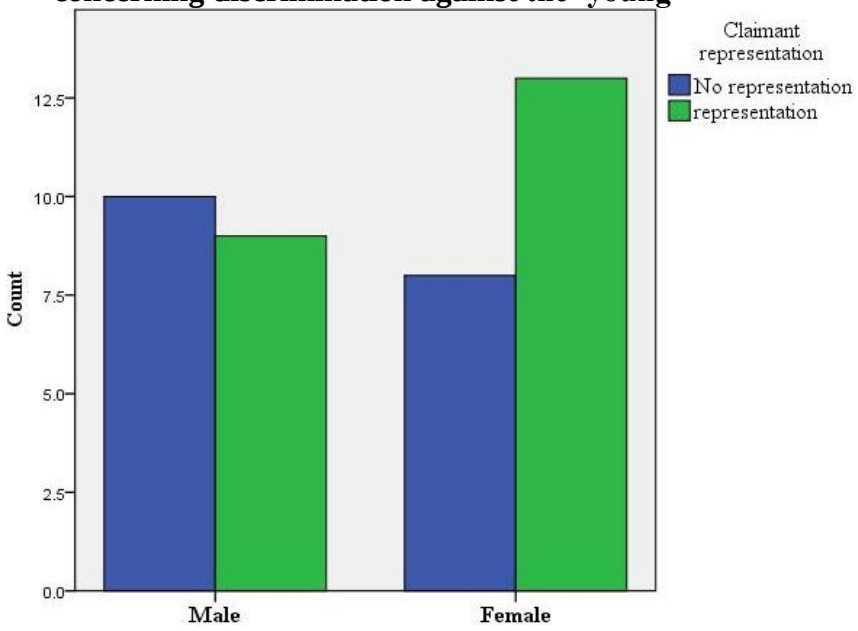
The characteristics of the claimants who felt that they were discriminated against because they were old generally followed the pattern of ‘all-age’ claimants. A significantly high percentage (42%) of these was handed down from offices in the South-east and London with 34% of judgments handed down from offices in Greater London. Over 50% of these claimants were ‘white-collar’ workers from the senior managers, professionals, technical and clerical workers occupational groups.

There were two groups of workers falling into the category comprised of those were felt they were ‘too young’; firstly, those from the 15-27 year age band who claimed that they were dismissed or harassed because they were young and, secondly, those in the 28-46 year old age band who felt that a redundancy payment, pension or benefit scheme disadvantaged younger workers. This type of claim can be made by workers who are not normally considered ‘young’ but who suffer disadvantage because they are younger than another group of workers. For example, in *Merchant v*

Siemens[7] a 46 year old engineer complained unsuccessfully that he was disadvantaged by a redundancy matrix scheme which gave additional points to older workers. Conversely claims were made by those normally thought 'young' who claimed to have been subjected to less favourable treatment because they were older than a comparator. In *Kent v Krazy Kidz Ltd*[8] a 25 year old claimed she was thought too old to work in a play centre for young children where 'nearly all'[9] of the 25 staff were seventeen years old or under. This latter type of worker is not included in the analysis of workers claiming they were discriminated against because they were young, even though they fall into a relatively young age category, as their complaint was that they were discriminated against because they were older than other workers.

More young women (22) than young men (19) were found to have received a judgment, despite the fact that there is a smaller proportion of women under 25 in the workforce, with 1,790,000 females and 1,961,000 males from this age group in employment in this period.[10] More young women than men had representation, as shown in Figure 4.6, following the pattern seen in 'all age' groups discussed in Chapter 4.10. Such women were considerably more successful in obtaining a remedy than men, as discussed in Chapter 5.5.

Figure 4.6: Bar chart showing claimant representation by gender in judgments concerning discrimination against the 'young'



[7] (2009) ET 2601323/08.
[8] (2008) ET 2701208/07.
[9] ibid [12] (Thacker EJ).
[10] Office for National Statistics, *Labour Market Statistics August 2011* (ONS 2011).

A small group of thirteen claimants asserted that they had suffered discrimination because they were part of a disadvantaged age band. This included seven workers who made a claim in Leicester relating to the withdrawal of a benefit which disadvantaged a particular age group, three workers in Liverpool who were also complaining about a disadvantageous benefit scheme and two workers in London Central who claimed they was discriminated against because they were of child-bearing age.

4.6: Multiple/Individual claim

The Register contains 3,964 'age' judgments in which it is possible to identify the number of claimants involved in a particular complaint. Of these, 3,532 (89.2%) judgments relate to individual claimants and 432 (10.8%) relate to multiple claims, that is, an application made by two or more claimants arising out of the same circumstances against the same respondent employer. However, the Employment Tribunal Service (ETS) reports that in 2009, with reference to all jurisdictions, that there were 71,300 individual claims whilst 164,800 were part of multiple claims[11] and accepted receipts relating to multiple claims showed an increase of nearly 90% in 2008-2009.[12] Age discrimination therefore appears to be very unusual when compared to other jurisdictions in that the number of multiple claims decreased over the period of study.

Legal representation was obtained by 80.7% of those involved in a multiple claim, compared to 42.5% of those involved in individual claims. Four claimants were found to have made a number of claims of age discrimination to tribunals around the country. Multiple judgments were received by the following: J Berry (37 judgments), M Keane (12), P Lucas (5) and NJ Fletcher (3).

The characteristics of individual and multiple claims differed considerably. There were no judgments handed down which concerned harassment/victimisation on the grounds of age related to claims by groups. Although dismissal was the major cause for complaint in both individual and multiple categories, judgments relating to job status and redundancy payment selection formed a larger percentage of multiple claims than of individual claims; nevertheless in terms of frequency there were 53

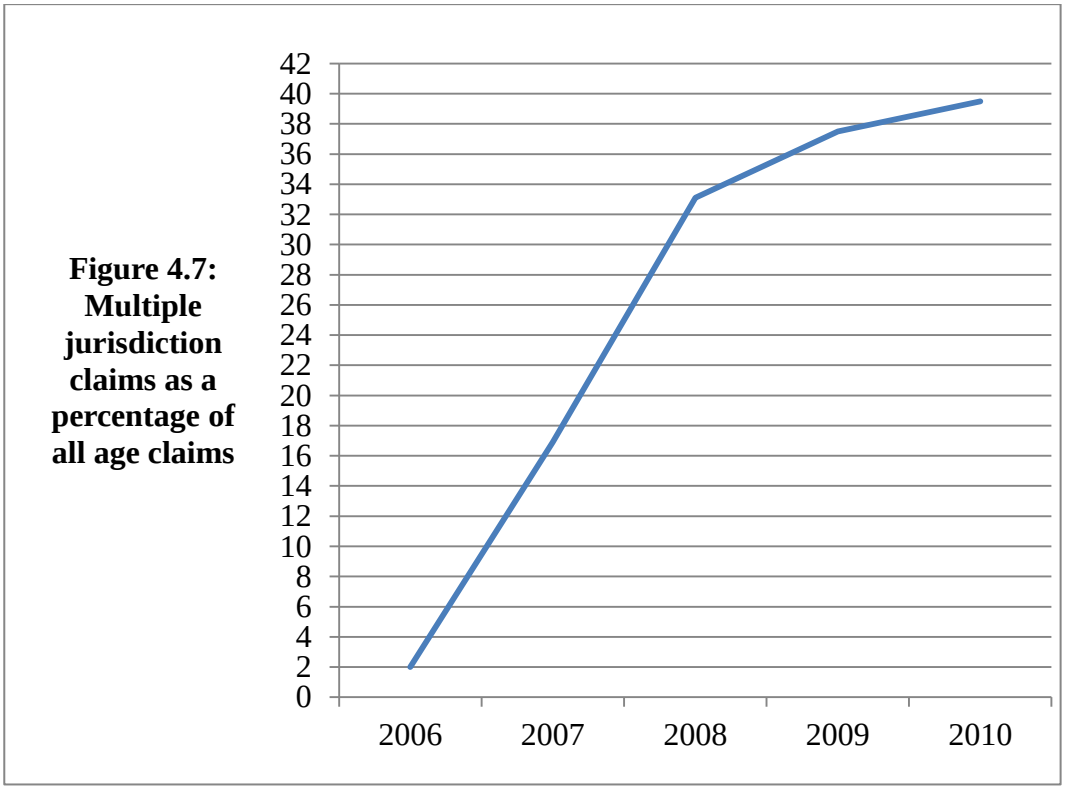
[11] Ministry of Justice (n 3) 2.
[12] ibid.

made by individuals and 34 by members of groups. This underlines the fact that even in fields where multiple claims are more prevalent, individual claimants form the majority in age discrimination judgments in stark contrast to other jurisdictions.

4.7: Concurrent claims of discrimination

The computerised Register contains comprehensive information relating to concurrent grounds of complaint for all 4001 'age' judgments. Concurrent claims for discrimination on grounds in addition to age were found in 28% (1119) of judgments and such claims have increased over the period of study, in overall numbers and as a percentage of all age claims, as shown in Figure 4.7. Figure 4.8 shows the number of additional claims made under the various discrimination jurisdictions. The majority of those claims made under four, five and six jurisdictions were made by Lee Frayling.[13] Frayling made 38 separate unsuccessful claims involving multiple jurisdictions against employees of Pirton Grange in Cardiff and was described on the Register as 'vexatious and scandalous'.[14]

Figure 4.7: Multiple jurisdiction claims as a percentage of all age claims



[13] Eg *Frayling v McLeod* (2009) ET 1305883/8. Frayling claimed discrimination on the grounds of age, disability, sex, race, sexual orientation and religion and belief.
[14] Newspaper report of incident which led to claim available online at <http://www.worcesternews.co.uk/news/local/4764643.Man_lied_to_get_job_in_a_home/ > (accessed 05/10/12).

Combination of grounds	Number of judgments
Age Discrimination	4001
Age + Sex Discrimination	609
Age + Disability Discrimination	507
Age + Race Discrimination	505
Age + Sex + Race Discrimination	161
Age + Religion/Belief Discrimination	140
Age + Sex + Disability Discrimination	125
Age + Race + Disability Discrimination	119
Age + Race + Religion/ Belief Discrimination	108
Age + Sexual Orientation Discrimination	100
Age + Sex + Religion/ Belief Discrimination	73
Age + Sex + Race +Disability Discrimination	71
Age + Race + Sexual Orientation Discrimination	66
Age + Disability + Religion/Belief Discrimination	58
Age + Sex + Race + Religion/ Belief Discrimination	58
Age + Sex + Sexual Orientation Discrimination	57
Age + Race + Disability + Religion/ Belief Discrimination	52
Age + Disability + Sexual Orientation Discrimination	51
Age + Sex + Race + Sexual Orientation Discrimination	49
Age + Religion/ Belief + Sexual Orientation Discrimination	48
Age + Race + Disability + Sexual Orientation Discrimination	44
Age + Race + Religion/ Belief + Sexual Orientation Discrimination	44
Age + Sex + Disability + Sexual Orientation Discrimination	43
Age + Sex + Disability + Religion/Belief Discrimination	42
Age + Sex + Race + Disability + Sexual Orientation Discrimination	42
Age + Sex + Race + Disability + Religion/ Belief Discrimination	41
Age +Disability + Sexual Orientation + Religion/ Belief Discrimination	39
Age + Sex + Race + Sexual Orientation + Religion/Belief Discrimination	39
Age + Race + Disability + Sexual Orientation + Religion/ Belief	39
Age + Sex + Sexual Orientation + Religion/Belief Discrimination	38
Age + Sex + Disability + Sexual Orientation + Religion/ Belief Discrimination	38
Age + Sex + Race + Disability + Sexual Orientation + Religion/ Belief Discrimination	38

Figure 4.8: Table showing numbers of judgments with concurrent discrimination claims

(Categories are cumulative, i.e. the 609 Age + Sex claims, include 161 Age + Sex + Race)

The following table, Figure 4.9, shows the variation in numbers of complaint types made by those claiming under multiple and individual jurisdictions. This shows a significant difference in the number relating to dismissal and redundancy payment and selection. Over one third (144) of the 408 redundancy claims were made alongside multiple claims of discrimination, with claimants asserting that they were selected for redundancy for reasons relating to a combination of their age, sex, disability, sexual orientation and race. More claimants (56) cited disability as an additional reason for redundancy selection than any other ground.

Figure 4.9: Table showing percentage of judgments relating to complaint types made under multiple and single jurisdictions

	Judgments for claims made under multiple jurisdictions	Judgments for claims made under single jurisdiction	All judgments
Recruitment	3%	3.7%	3.4%
Job status and benefits	0.5%	3.1%	2.1%
Dismissal	65.4%	81.7%	75.5%
Retirement	3.2%	4.1%	3.2%
Redundancy	28.5%	6.3%	14.6%
Harassment/victimisation	1.1%	1.2%	1.1%

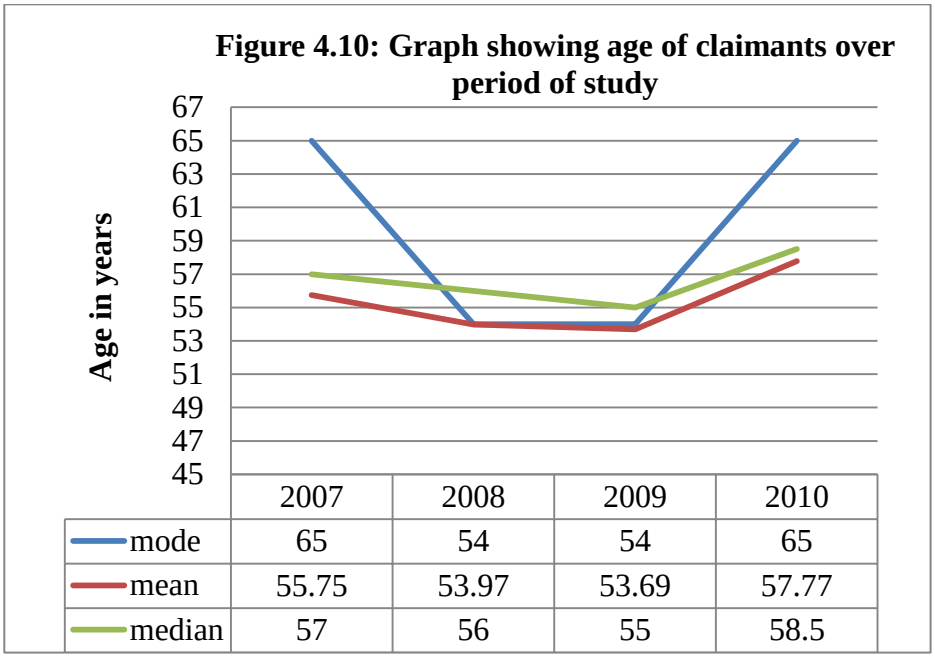
More women (384 claims, 27.6% of all female claims) than men (218 claims, 8.6% of all male claims) claimed under age and sex discrimination jurisdictions but an identical proportion of men and women (12.5% of both female and male claims) claimed under age and race discrimination jurisdictions. Men were more likely than women to claim under age and sexual orientation (73 claims compared to 25), age and religion and belief (95 claims compared to 40) and age and disability discrimination jurisdictions (351 claims compared to 145).

4.8: Claimant age

Information relating to the age of claimants, although a central factor in the consideration of the facts of each claim, was only detailed in 436 folio reports out of the 4001 judgments. The average age of claimants was 54.73, the mode 54 and the median 56 years old. Although the youngest claimant was 15 and the oldest was 80, indicating a wide range of ages, the 25-75% quartile range was much narrower, spanning from 52 to 62 years old. As can be seen in Figure 4.10, for two of the four

years the modal age of claimants was 65 years old reflecting the number of claims concerned with the former default retirement age.

Figure 4.10: Graph showing age of claimants over period of study



	2007	2008	2009	2010
mode	65	54	54	65
mean	55.75	53.97	53.69	57.77
median	57	56	55	58.5

Figures 4.11-4.13 illustrate the age profiles of all, female and male claimants found in judgments. The average male claimant was 56.13, with a modal value of 54, followed by prominent peaks at 60 and 65 years old. The average age of female claimants was younger at 51.97, but the modal value was 65, older than that of men, with smaller peaks at 52 and 54 years old.

Figure 4.11: Bar chart showing age of claimants

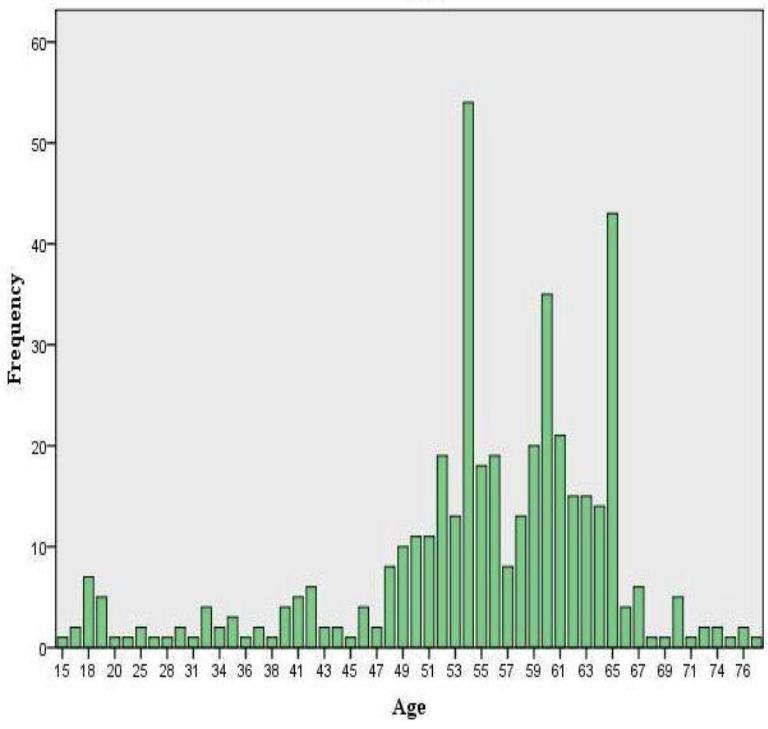


Figure 4.12: Bar chart showing age of male claimants

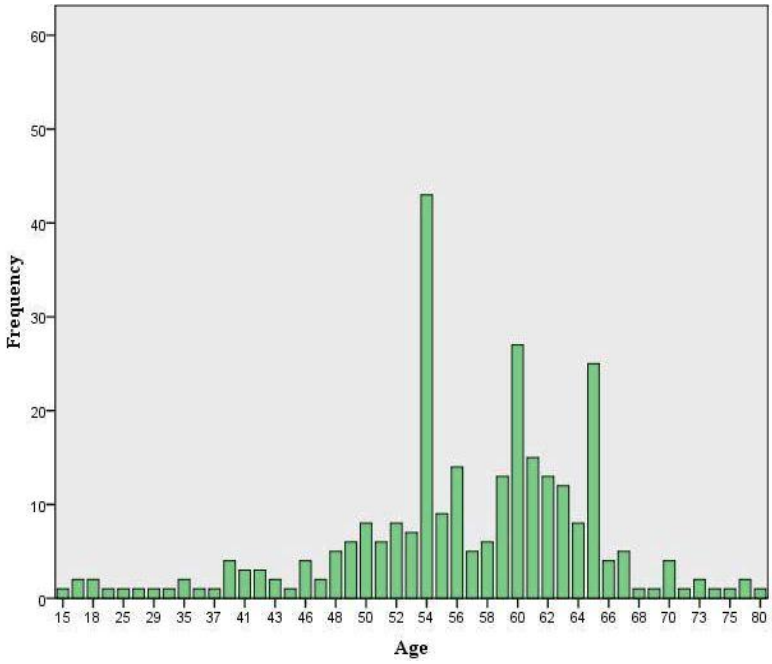
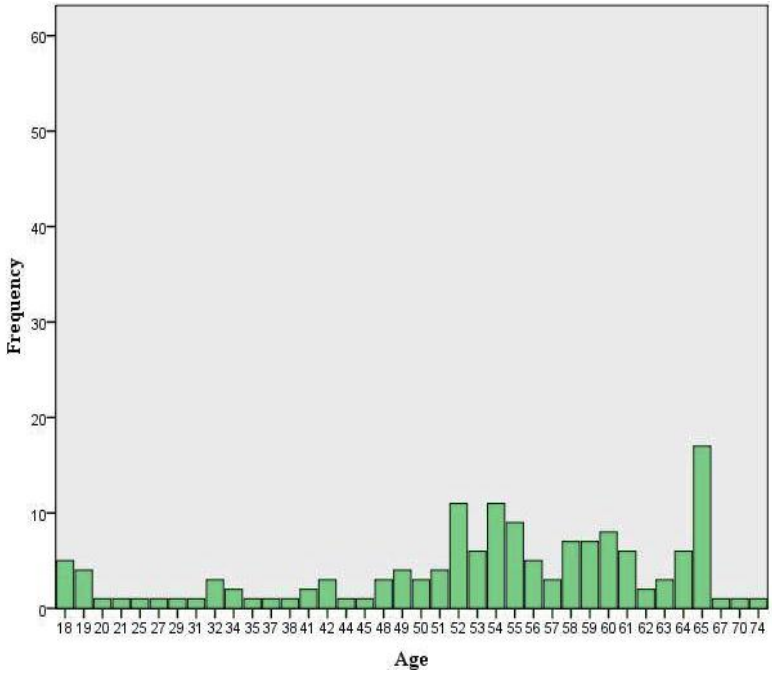


Figure 4.13: Bar chart showing age of female claimants



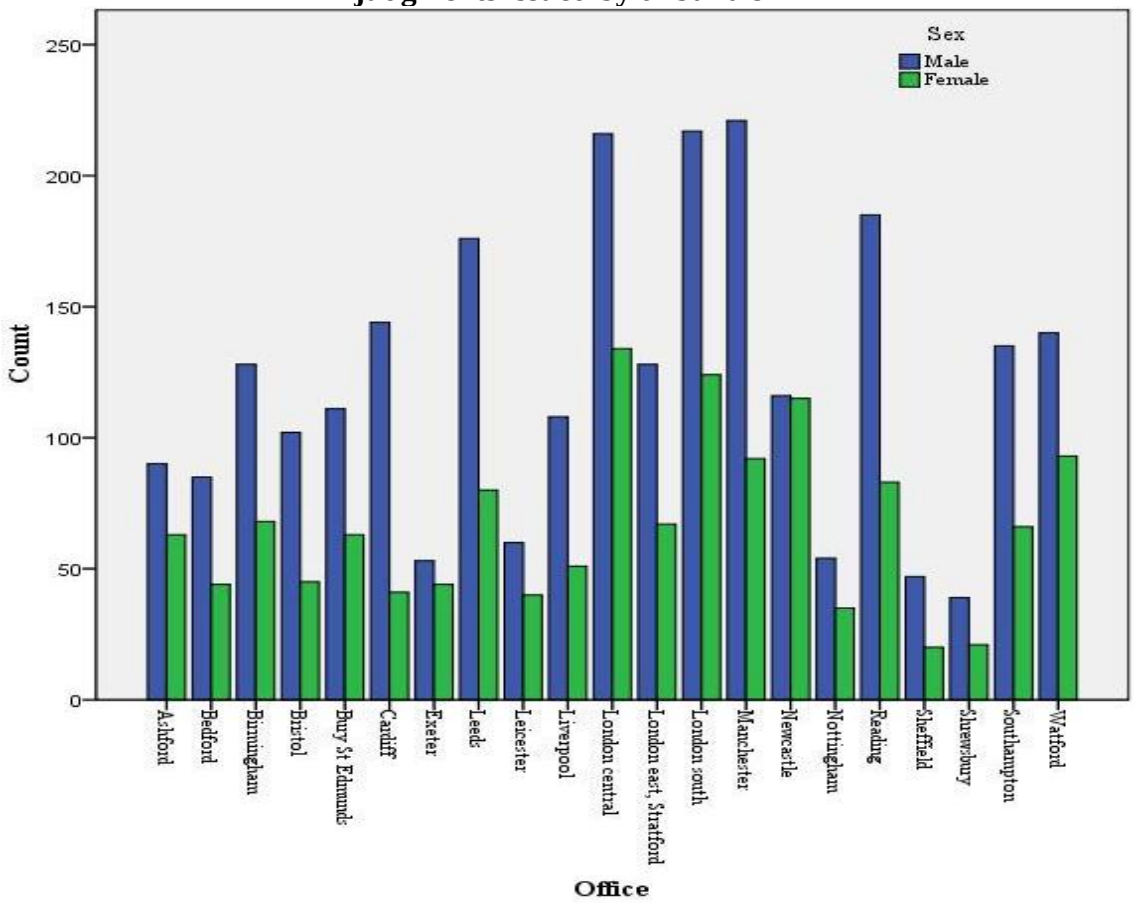
These results underline the fact that, although claimants came from a wide age range, the majority of claims were made by those in their mid-fifties – a group identified as being at particular risk of age discrimination.[15]

[15] C Brennan et al, *A Survey of the Literature in the Context of Current Research Agendas* (Salford University Business Discussion Paper 2007) 32.

4.9: Claimant gender

Claimant gender was identifiable in 3944 judgments; most of those claimants where gender was not identifiable were doctors. Men formed 64.8% (2,555) of claimants and women 35.2% (1,389). Male claimants outnumbered female claimants at all tribunal offices, as can be seen in Figure 4.14. The figures for the Newcastle Tribunal are skewed by the addition of an age claim to a large sex discrimination claim against Gateshead and Newcastle City Councils. The characteristics of claims made by men and women differed in that women made proportionally more claims relating to harassment (53% of all harassment claims) and fewer claims relating to recruitment (23% of all recruitment claims).

Figure 4.14: Bar chart showing frequency of male and female claimants in judgments issued by tribunals



4.10: Claimant representation

Statistics produced by the Ministry of Justice indicate that the majority of claimants making claims to the tribunal under all jurisdictions have legal representation. Figure 4.15 shows figures collated from the ETS Annual Reports

which indicate that over a three year period the percentage of claimants with legal representation has varied between 62.71% and 73.86%, with a mean of 69.23%.[16]

Figure 4:15: Table showing a summary of statistics on claimant legal representation in all jurisdictions, collated from ETS Annual Reports 2007-2010

Year	Claimants with legal representation	Total number of claimants	Percentage of claimants with representation
2007-2008	136,700	189,300	71.12%
2008-2009	94,700	151,000	62.71%
2009-2010	174,400	236,100	73.86%

Information relating to the legal representation of age discrimination claimants was found in 1,311 hard-copy folio reports. This revealed that 659 claimants were self-represented and 652 had some manner of legal representation, whether by a lawyer, citizen's advice specialist, trade union official or other advisor. Contrary to the ETS statistics therefore, very slightly more age claimants (50.3%) had no legal representation at the tribunal than had representation, although this is not as low as the 58% without legal representation found in all jurisdiction claims by Hayward *et al* in 2004.[17]

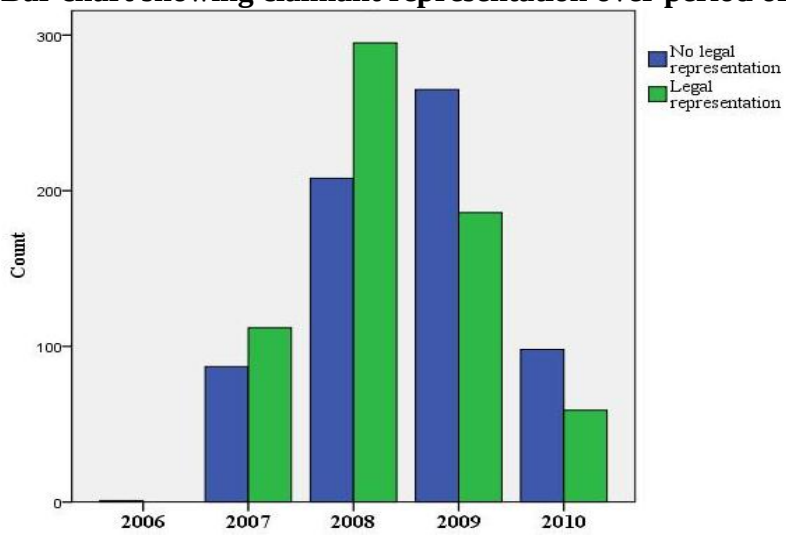
It may be that age discrimination claimants differ from other claimants in that they are less likely to obtain legal advice or that those that who pursue their claim to a full hearing and receive a judgment do so because they are not legal represented, whereas a lawyer may advise a claimant to settle or withdraw their claim. However, the ETS figures may not be a true reflection of representation rates as they appear to be distorted by a large multiple claim against British Airways of over 10,000 employees with legal representation.

A change occurred in claimant representation around the end of 2008, when claimants became more likely to not have representation. In the first 18 months of the study 59.7% of claimants had representation whilst 40.3% had none, whilst in the next eighteen months this situation was reversed, as seen in Figure 4.16. This may be because when the Regulations were first introduced claimants felt they needed more

[16] Ministry of Justice (n 3) 6. It is not apparent how this information has been gathered - a footnote in the 2009 - 2010 Report states these statistics are 'a snapshot of the information provided by claimants on 7th May 2010'.
[17] B Hayward et al, *Findings from the Survey of Employment Tribunal Applications* (DTI 2004) xix.

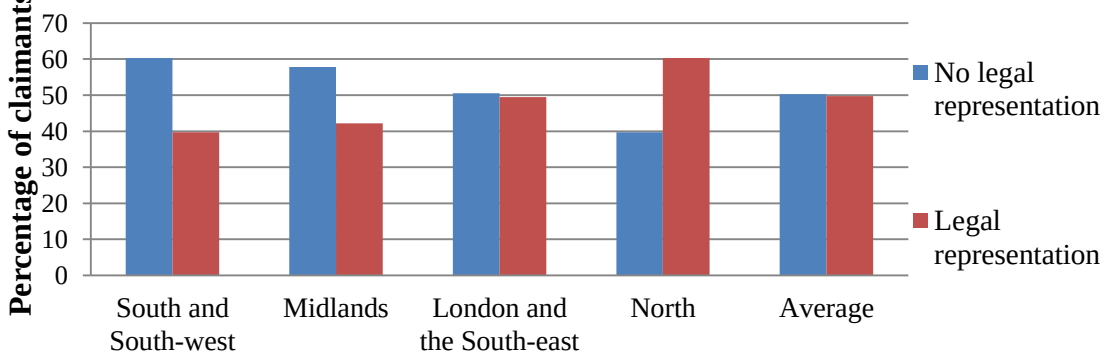
help in pursuing a claim or because, as the economic recession has deepened, claimants have not been able to afford legal representation.

Figure 4.16: Bar chart showing claimant representation over period of study



The regional pattern of representation is shown in Figure 4.17. Despite a low representation rate in Newcastle, more of those in the North had representation, which is reflected in the higher success: dismissal ratios for that region, discussed in Chapter 5.3. Those in the South and South-west had less representation than other regions – similarly reflected in their lower success: dismissal rates.

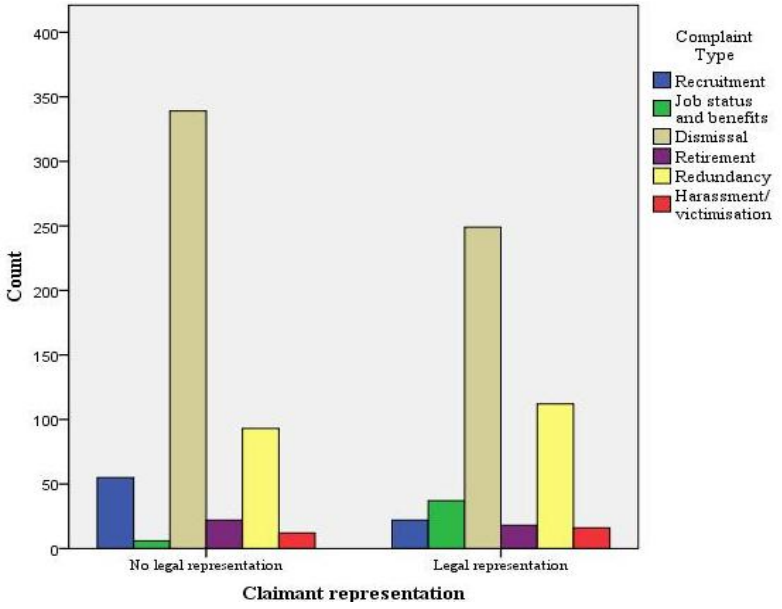
Figure 4.17: Bar chart showing percentage of claimants receiving judgment and legal representation by region



Throughout the three year and a half period a fairly constant figure of 60% of women had representation, whilst the equivalent figure for men fell from 54.5% in 2008 to 36.4% in 2009 and further to 26.7% in 2010. This fall in male representation rates accounts for the overall fall in representation numbers. In the first four months of 2010, 26.7% of men receiving a judgment on an individual claim of age discrimination had representation, compared with 61.8% of women. There was no difference in the

representation rates of those claiming they were discriminated against because they were 'young' or 'old'. Figure 4.18 shows that those claimants alleging that they have suffered less favourable treatment in recruitment, dismissal and retirement had low representation rates. In particular, 28.6% of those complaining that they had suffered discrimination in recruitment had representation, contrasting with those complaining about job status and benefits, of whom 86% had representation.

Figure 4.18: Bar chart showing the relationship between claimant representation and complaint type



4.11: Claimant occupation

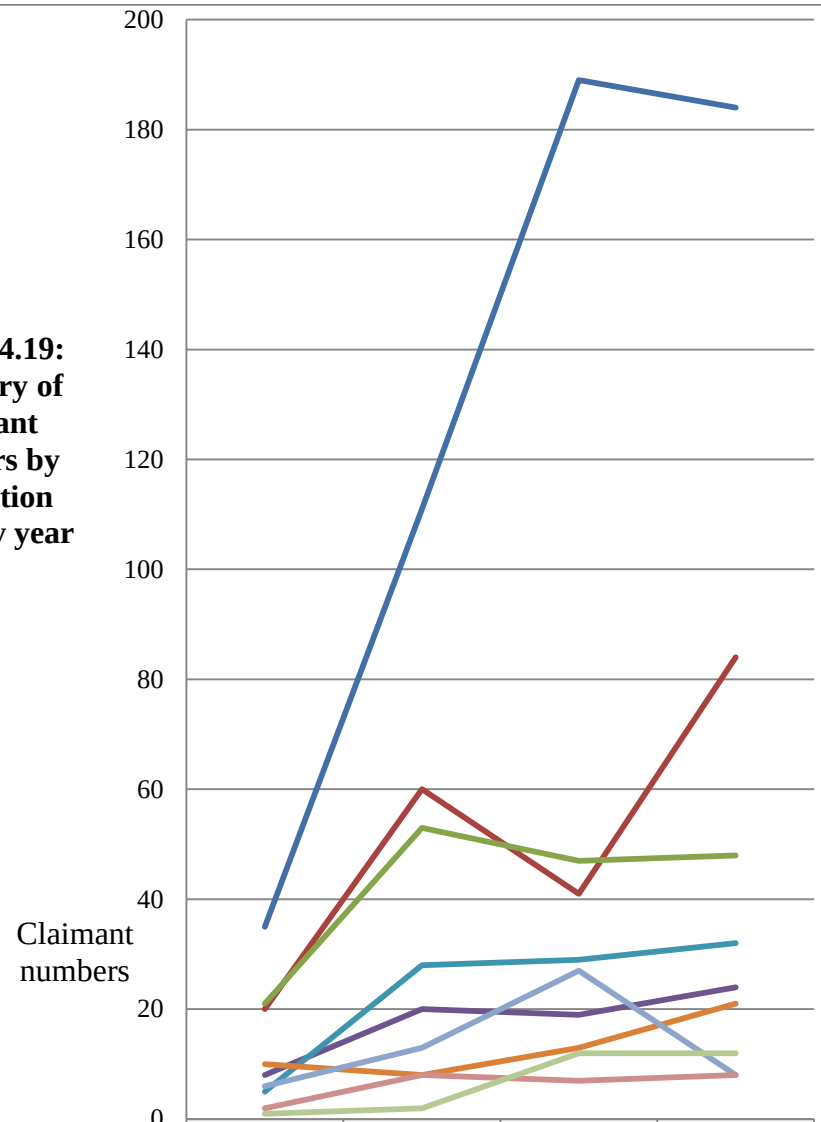
The occupation of the claimant was detailed in 903 folio reports. The employment statistics of each occupational group in the UK were obtained from the ILO[18] and the number of judgments per 100,000 workers in each sector was established.[19] The average number of judgments per 100,000 workers in all groups was 13.57, per 100,000 men was 16.57 and per 100,000 women was 10.05. As can be seen in Figures 4.19-4.20, service, sales and retail workers formed the largest claimant group; there was a substantial increase in claims from this group throughout 2008 and 2009. The lowest number of complaints came from the legislators, senior managers

[18] International Labour Organisation – Laborsta, *United Kingdom: Economically Active Population, by Occupation and Status in Employment* (2010). Figures for the 2nd quarter of 2008 were used (mid-way through period of study) to establish overall occupational group employment rate.

[19] Number of judgments re occupation group recorded × 100,000/ Total number of workers in occupation group × Total number of judgments/ Total number of judgments where occupations recorded.

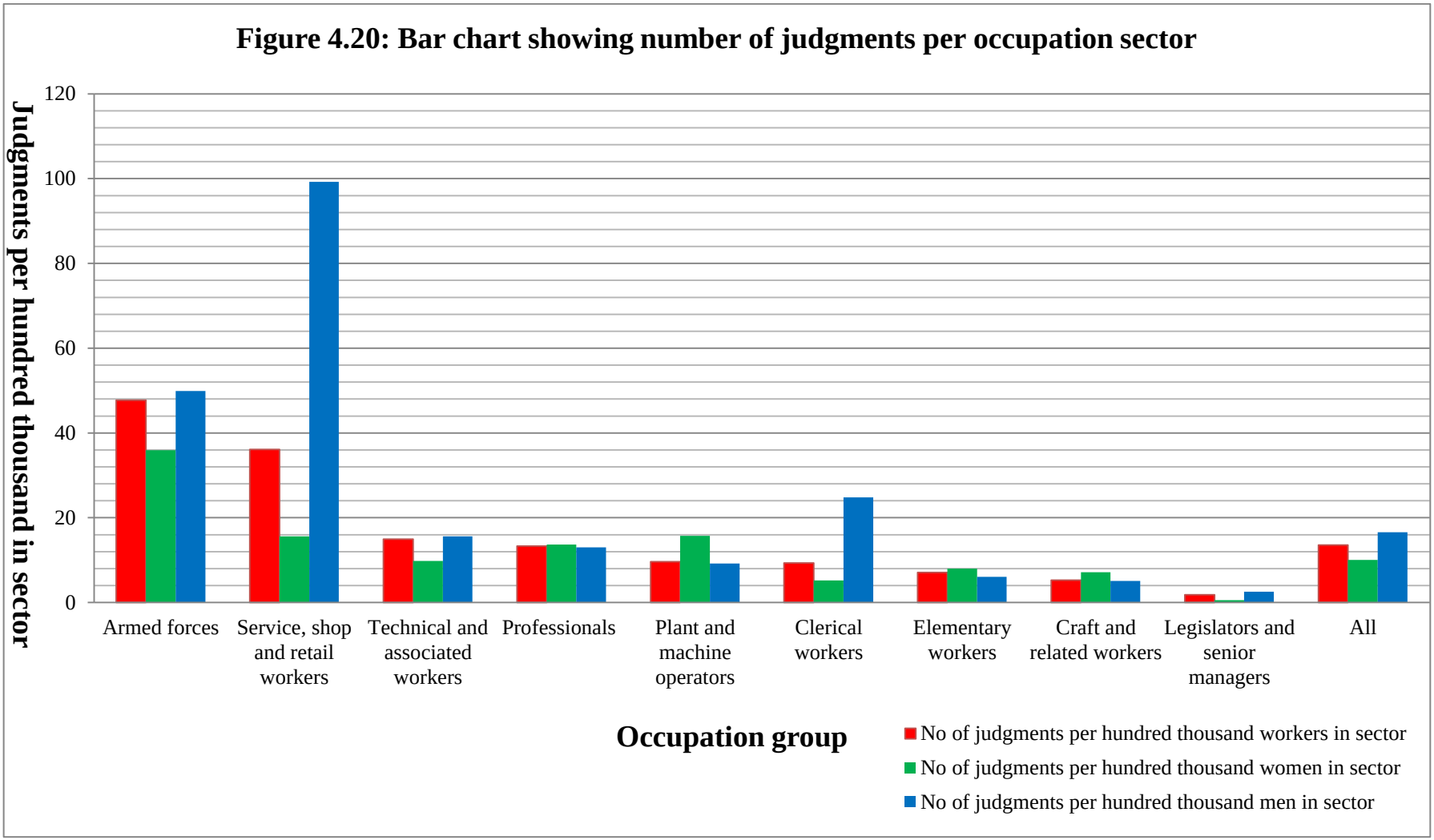
and officials group. Figures 4.21-4.22 illustrate the pattern of claimants by occupation groups, indicating a large number of professionals and associated technicians claiming in London Central and service, sales and retail personnel in London South claiming discrimination resulting in dismissal.

Figure 4.19: Summary of claimant numbers by occupation group by year



	2007	2008	2009	2010pro
Service and shop workers	35	111	189	184
Technicians	20	60	41	84
Professionals	21	53	47	48
Elementary occup.	8	20	19	24
Clerical workers	5	28	29	32
Craft and factory workers	10	8	13	21
Plant workers	6	13	27	8
Legislators, managers	2	8	7	8
Armed forces	1	2	12	12

Figure 4.20: Bar chart showing number of judgments per occupation sector



Sector occupation data from <http://laborsta.ilo.org> and <http://www.dasa.mod.uk/modintranet>.
Elementary occupations include agricultural and fisheries workers.

Figure 4.21: Bar chart showing number of judgments relating to occupational groups and complaint type

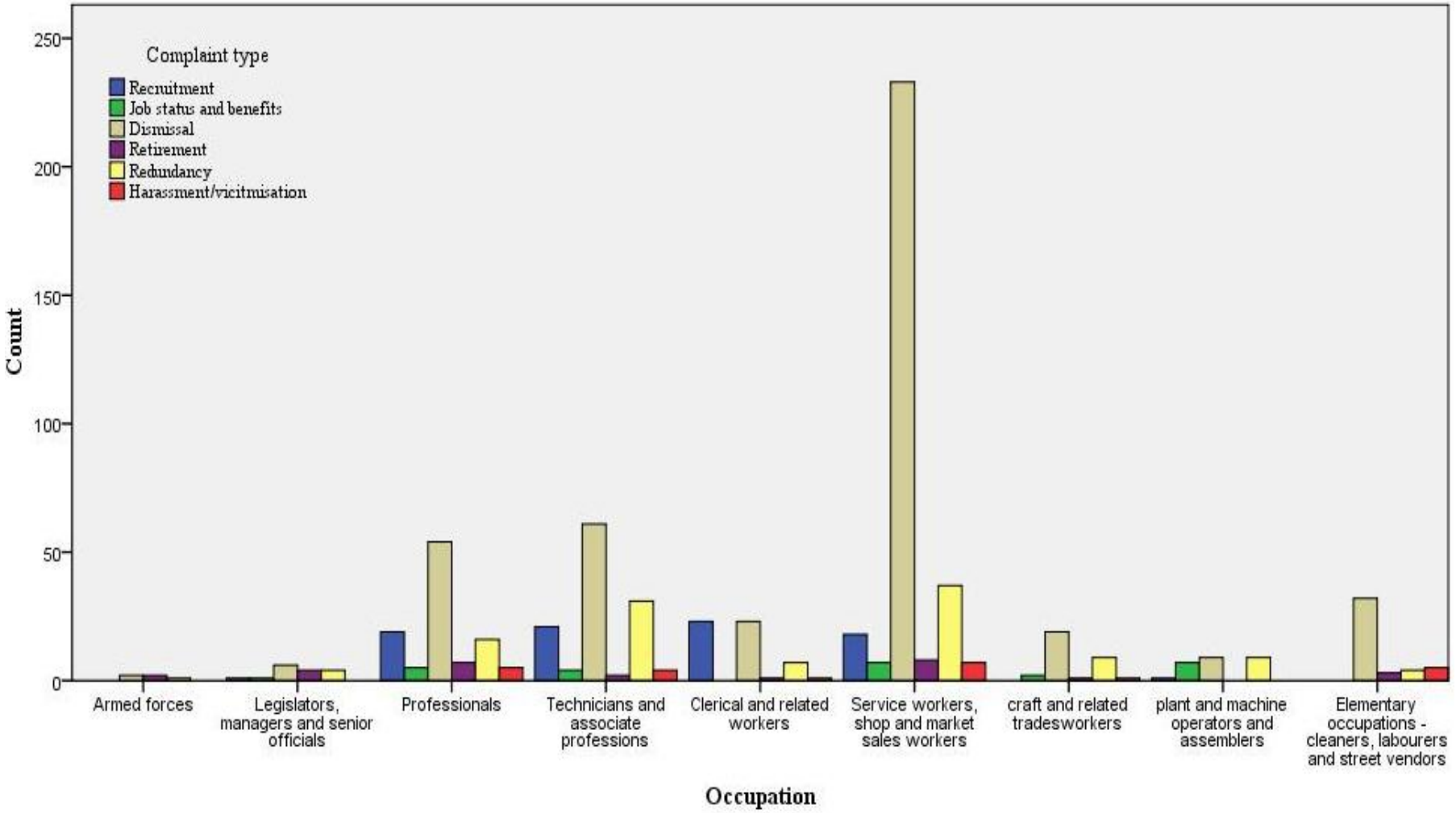
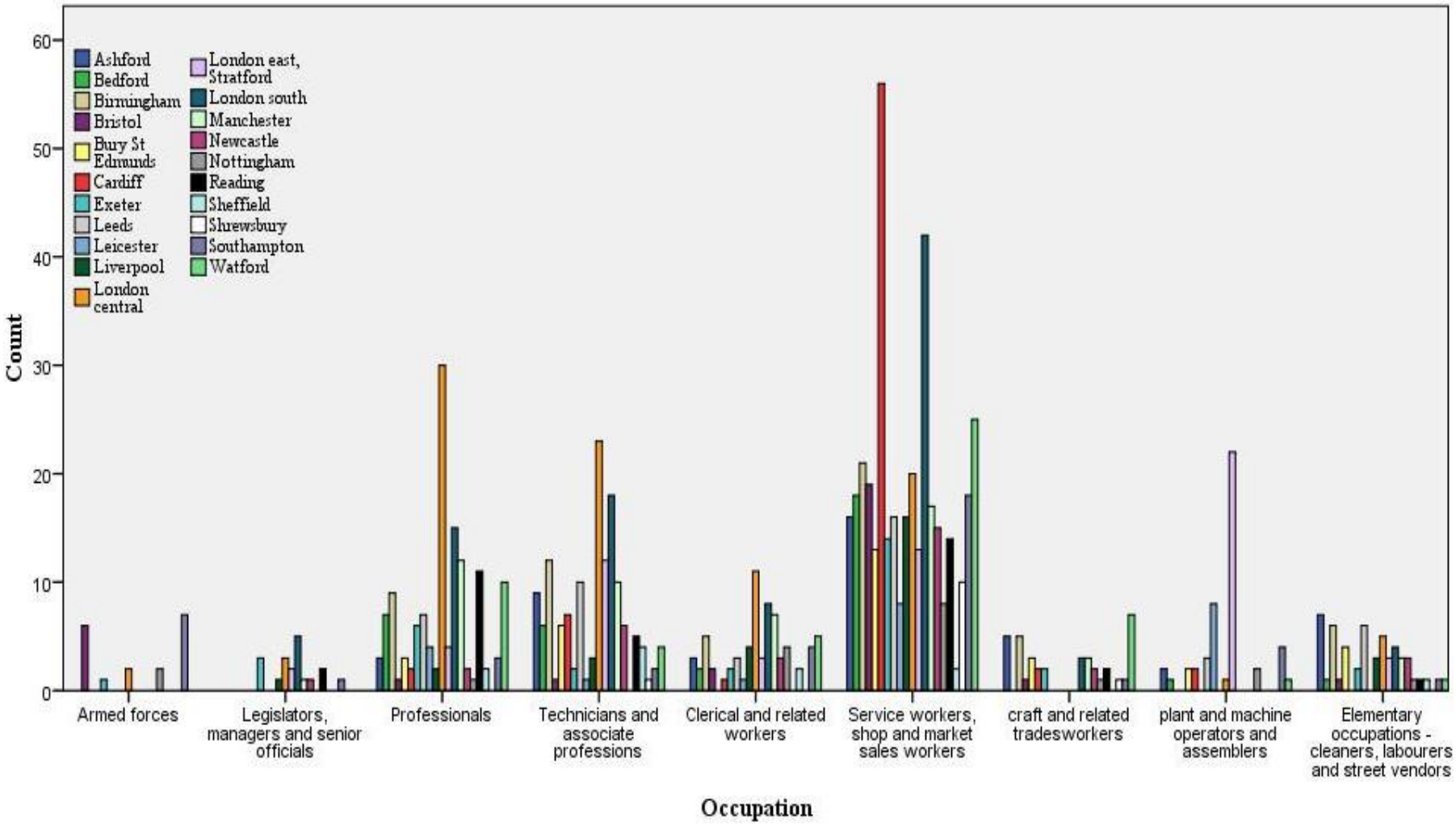


Figure 4.22: Bar chart showing number of judgments at tribunal offices by occupation



4.12: Employer characteristics

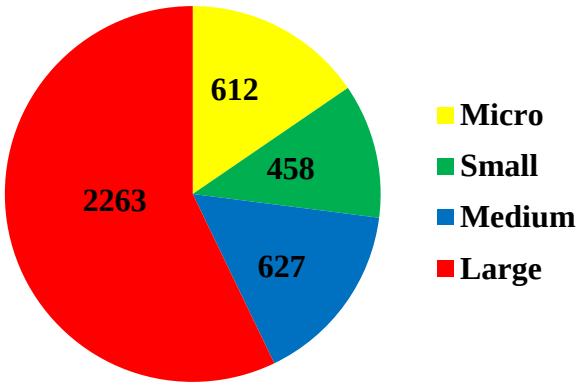
Employer activity was identified in 3964 judgments and classified using the SIC 2007 system.[20] The most frequently found employer activities are shown in Figure 4.23 and the overall pattern is shown overleaf in Figure 4.25. The relationship between employer activity and outcome is discussed in more detail in Chapter 5.6.

Figure 4.23: Table showing frequently found employer activities in judgments

Employer Activity	SIC 2007 code	Number of judgments
Administration of the State	8410	319
Hospital activities	8610	136
Postal services	5310	124
Construction of buildings	4110	101
Passenger air transport	5110	100
Higher education	8540	86
Legal services	6910	85
Employment agencies	7810	78
Sale of motor vehicles	4510	68
Secondary education	8530	58
Restaurant and food services	5610	57
Residential care	8710	54

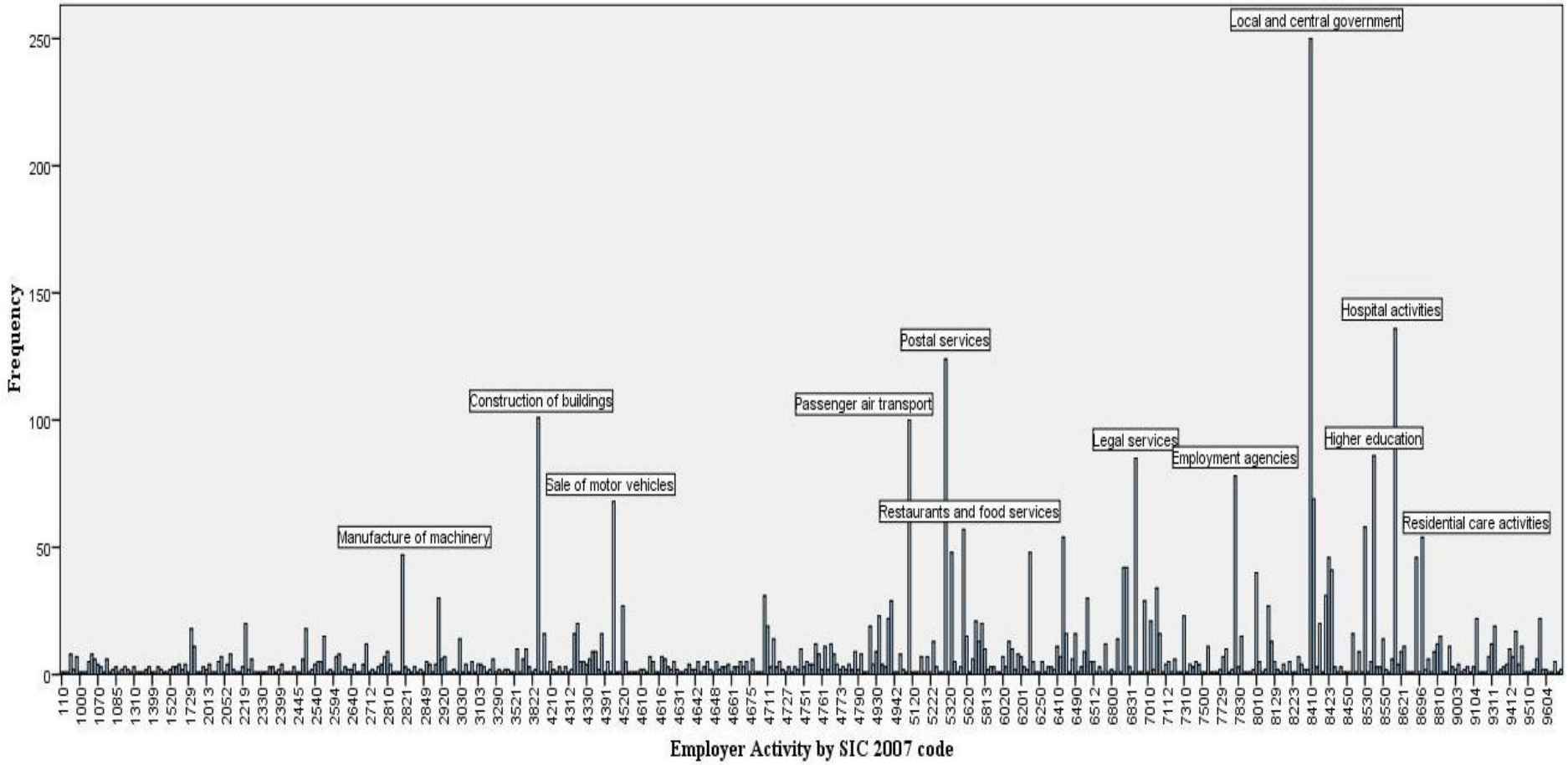
The number of workers employed by each respondent employer could be ascertained in 3960 instances. Figure 4.24 shows the frequency of employer size groups. More than half, 57.1%, were employers with over 250 employees, whilst 15.8% were medium-sized, 11.6% were small and 15.5% were micro organisations.

Figure 4.24: Pie chart showing frequency of respondent employers found in judgments, categorised by size



[20] Office for National Statistics, *UK Standard Industrial Classification of Economic Activities 2007 (SIC 2007): Structure and Explanatory Notes* (ONS 2009).

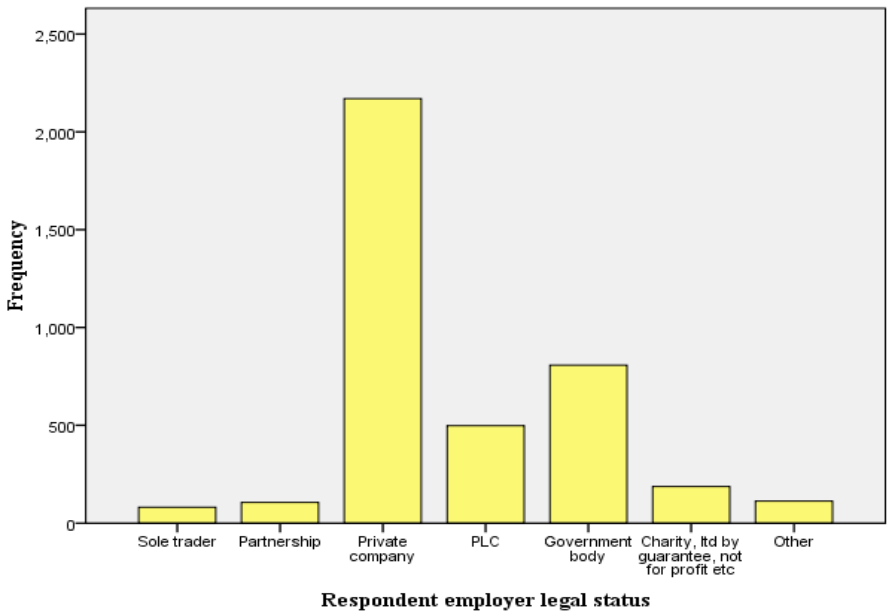
Figure 4.25: Bar chart showing frequency of respondent employer activities in 'age' judgments using SIC2007 codes



It was possible to identify the legal status of the respondent employer in 3965 judgments. Those complaining that they were discriminated against because they were young were more likely to be employed by private companies, sole traders and charities than government bodies and public limited companies. As can be seen in Figure 4.26, more than half (2170) of the employers were private companies. The Manchester Tribunal handed down the largest percentage, 8.8% (192), of judgments to private companies, although the majority were issued in the South-east. The second largest employer group was that of government bodies, with 807 judgments – a large number of these were from the London Central, London South and Watford Tribunals. Claims against government bodies were more likely to include a concurrent claim of discriminaton; over a quarter of these claimants alleged they had also suffered sex discrimination and a 100 claimed age and race or disability discrimination.

There were 106 judgments which related to respondents whose legal status was that of a partnership. The average age of workers claiming against partnerships was lower than average at 48.29 years old and a higher percentage than average was by women, 49.5%. Almost all 'partnership' age claims were concerned with dismissal, with only 1.4% relating to with recruitment. Charities and not for profit organisations were the respondent employer in 187 judgments. The London Tribunals handed down over a third (52) of these judgments and a higher percentage of these claimants than average were women (41.4%).

Figure 4.26: Bar chart showing frequency of respondent employer by legal status



The solvency of 3960 respondent employers involved in age discrimination claims could be ascertained and 353 judgments related to respondent employers who were insolvent, in administration or in a voluntary arrangement. The tribunals which handed down the largest number of these judgments were Manchester (38), London South (32) and Birmingham (31). The average age of related claimants was 51.58 years old and a lower percentage of these claimants than normal (38%) had legal representation. The majority (87%) of these employers were private companies and 51.3% employed fewer than 15 workers. The most frequently found employer activity in judgments relating to insolvent employers was that concerned with the construction of buildings (19), followed by restaurants and food services (16) and employment placement agencies (15).

The Companies Register notes that 54,387 companies were declared insolvent during the period October 2006 to April 2010.[21] The average liquidation rate as a percentage of the active register of registered companies varied throughout this period between 0.55% and 0.85%, with an average of 0.7%.[22] The percentage of respondent employers found in folio reports in the Judgment Register who were insolvent, in administration or voluntary liquidation was 8.9%. This figure indicates that employers involved in age discrimination claims were more than 10 times more likely to be insolvent than the average employer on the Companies Register.

4.13: Conclusion

Initial forecasts that age discrimination claims would quickly become the most commonly pursued at the tribunal were not well-founded.[23] Age discrimination claims over the period of study formed 1.2% of claim receipts at employment tribunals, which is a comparatively small number for a complaint that is said to have been experienced by nearly four million people in the UK.[24] Such claims as a proportion of 'all jurisdiction' claims fell over the last year of study, indicating that workers were becoming less inclined to claim about discriminating conduct on the grounds of age to

[21] Her Majesty's Government, *The Insolvency Service Annual Statistics* (2006-2011).
[22] ibid.
[23] G Vorster, 'Age Discrimination Set to Become Most Common Form of Discrimination' *Personnel Today* (8 January 2008).
[24] Commission, *Eurobarometer Special 317 - Discrimination in the EU in 2009* (Directorate General Employment, Social Affairs and Equal Opportunities 2009) 74.

the tribunal, rather than increasing as more workers become aware of the legislation. Despite age continuing 'to represent the most common ground of self-reported discrimination,'[25] fewer complained of ageist treatment to the tribunal four years after the introduction of the legislation than, for example, race or sex discrimination.[26] However, the number of age claims rose steadily over the period of study indicating that more workers felt they were being discriminated against and/or that more workers were aware that they could make claims under the new legislation, particularly following media publicity of several 'high profile' cases. The South-east and Greater London Tribunals handed down a higher proportion of claims than those in other parts of the country, particularly those in the North. The London Central Tribunal has consistently handled a large number of these claims whilst Newcastle and Leicester have always had a lower proportion than normal.

The typical claimant was a 54 year old male, with no legal representation, who was dismissed from a service, sales or retail position in a large, solvent, private company. The pattern however masks a complex situation where, for example, women, particularly female professionals, formed the largest group of claimants against public authorities, estate agencies and the legal services sector. Although judgments were found which related to claimants aged from 15 to 80 years old, the majority of claimants were aged from 52 to 62 years. Female claimants were on average five years younger than men and over a quarter of female claimants made a concurrent claim of sex discrimination, a trend which is increasing.

The number of men receiving judgment was twice that of women (66.4%: 33.6%) – this proportion was also seen when the number of women working in occupational groups was taken into account. This is in contrast to the proportion of judgments issued to the younger claimants group where more women than men received judgments, despite more young men than women employed in the workforce. It may be that older women, although consistently stating in surveys that they feel that they are discriminated against as much as older men, are less likely to make an

[25] Commission (n 24) 75.
[26] Ministry of Justice, *Employment Tribunals and EAT Statistics, 1 April 2010 to 31 March 2011* (The Stationery Office 2011) 7.

application to the tribunal following the pattern discussed by Walker et al,[27] whereas young women are more assertive in upholding their employment rights.

Legal representation was obtained by approximately half of claimants, contrary to ETS statistics for all tribunal claims. Such assistance was obtained by a consistent 60% of women over the four years, yet from 2008-2010 representation rates for men fell considerably. Individuals making claims relating to recruitment had lower representation rates (28.6%) than, for example, those making claims relating to job status/benefits (86%). Those in the South and West had lower representation rates than those in the North and this is reflected in outcome statistics discussed in Chapter Five.

Service, sales and retail workers formed the largest group of workers making a claim. These are occupations which involve contact with the public and where image and appearance may be an important factor in the role undertaken by the worker. Claims from service and sales workers rose considerably over the period of study, in contrast to a fall in claims from plant and machine operators and craft and trade workers. This reveals a pattern which differs from that found in other countries with age discrimination legislation, where white collar managers and professionals are most often found to be claimants.[28] However, claimants in the South-east and London were more likely to be from white collar occupational groups and the London Central Tribunal handed down the largest number of judgments for these workers. More than half of respondent employers were large and were private companies, although the largest number of claims was made against employers involved in local and central government.

Age discrimination is unlike other tribunal jurisdictions in that more claims are made by individuals, rather than groups of claimants. The vast majority of the 4001 claimants took action because of circumstances surrounding the termination of an individual contract of employment – involving dismissal, redundancy selection or retirement. Nearly three-quarters of those complaining of less favourable treatment in redundancy selection made a concurrent claim of discrimination, with disability most frequently cited as an additional ground of complaint. Numbers complaining of

[27] H Walker et al, 'Women's Experiences and Perceptions of Age Discrimination in Employment: Implications for Research and Policy' (2007) 6 Social Policy and Society 37.
[28] MH Schuster and CS Miller, 'An Empirical Assessment of the Age Discrimination in Employment Act' (1984) 38(1) Industrial and Labor Relations Review 64.

discrimination in recruitment, harassment and victimisation have remained low and the small number of claimants complaining of discrimination in job status and the allocation of benefits has fallen steadily.

This study has confirmed, for the first time through empirical evidence, that age discrimination claimants are mainly older individuals complaining of discrimination surrounding the termination of their employment. Yet young workers, both male and female, made a number of claims against a wide range of employers at a steady rate over the period of study and a small number of claimants also claimed they belonged to a disadvantaged 'age band'. These are new phenomena illustrating the possible emergence of claims arising because of an increase in intergenerational conflict in the workplace. The 'equal treatment' model of legislation encourages such claims, which are not seen in, for example, the USA because the ADEA does not give protection to younger cohorts. It may be that legislation which offers protection from age discrimination to all (on the same basis) may promote such conflict, whereas this may not happen with legislation which aims to ensure equal respect to individuals, by sometimes treating them differently[29] and requiring reasonable accommodation to made in order to permit this, as found in Canada.[30]

[29] S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003) 21.
[30] Canadian Human Rights Act 1985, s 2.

Chapter Five:
Quantitative Analysis - Results 2
Outcomes and Remedies

5.1: Outcome overview

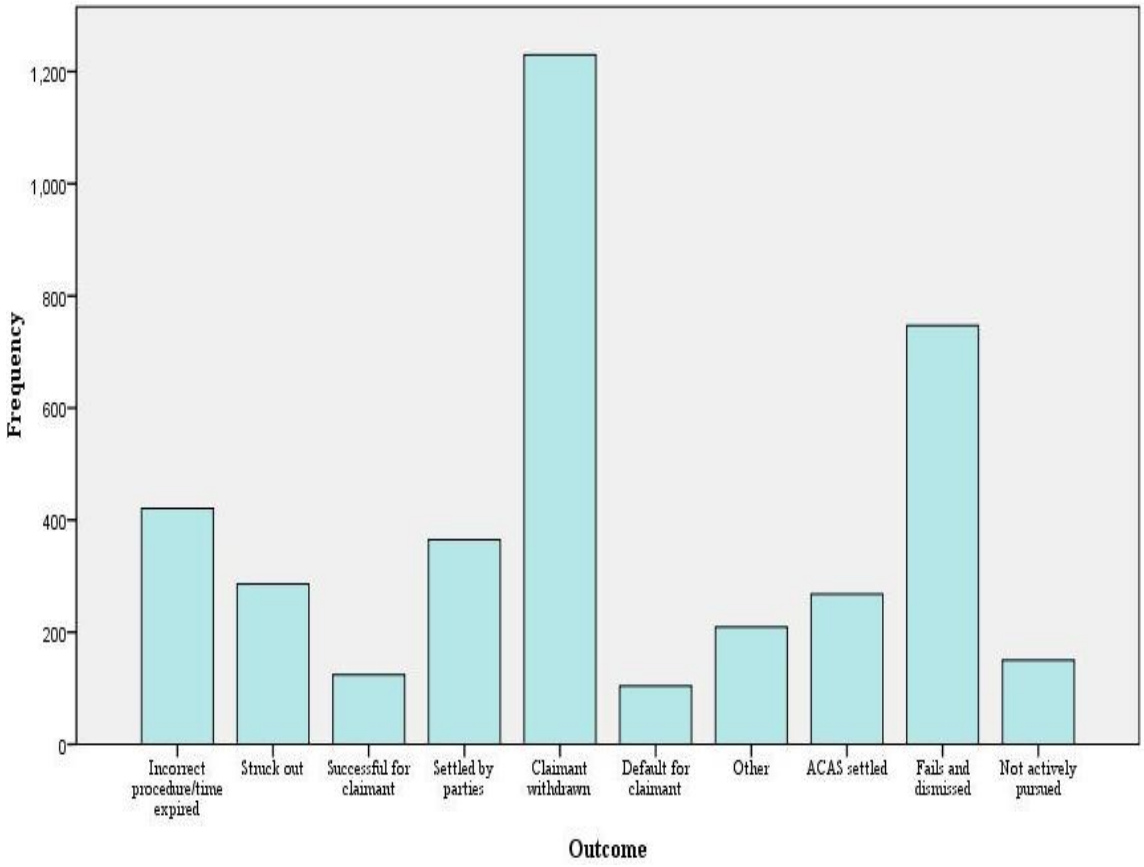
Information was obtained on the outcome of 3904 age discrimination claims from the Judgment Register, which was grouped into ten 'outcome categories' established during pilot studies. A brief outcome of each claim was found in the computerised records and where this was unclear the folio reports were used to clarify the result and to acquire details of awards given to claimants. The outcome of each judgment used for analysis was either that recorded on the computerised report or, if not recorded, the outcome which was stamped on the hard-copy report. In 97 cases the judgment was missing or had been removed from the Register as the Employment Judge deemed it fit to keep details of the judgment private[1] and these outcomes were registered as 'not known'. The recorded data is summarised in Figures 5.1 and 5.2.

Figure 5.1: Table showing outcome of 'age' claims on the Judgment Register

Outcome	Frequency	Percent
Incorrect procedure/time expired	421	10.8
Struck out	286	7.3
Successful for Claimant	124	3.2
Settled by parties	365	9.3
Claimant withdrawn	1230	31.5
Default for Claimant	104	2.7
Other	209	5.4
ACAS settled	268	6.9
Fails and dismissed	747	19.1
Not actively pursued	150	3.8
Total	3904	100.0
Not known	97	
Total	4001	

[1] Under Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Sch.1 Rule 32(2).

Figure 5.2: Bar chart showing outcome of judgments made under the age discrimination jurisdiction



The 1682 claims that were fully considered by tribunals fall into two broad categories –'successful' or 'fail' – in contrast to those withdrawn, not actively pursued or settled prior to consideration. The successful category includes the 3.2% declared successful plus the 2.7% of claims where employers failed to attend the hearing and a default award was given to the claimant. Those that failed include those struck out by tribunals, those which were considered and subsequently dismissed and those that were time-expired or had followed an incorrect procedure.

Tribunals dismissed 747 of the 3904 judgments, that is, 19.1% of claims, because they were unsuccessful after consideration. A further 286 claims, 7.3%, were 'struck out': these were usually cases which had only a slight chance of success and were not considered in as much depth as those which were 'failed and dismissed'. A further 421 claims, 10.8%, were dismissed because the claimant had not followed the grievance or claim procedure correctly. The usual reasons for this were not citing age discrimination in a grievance letter, not waiting 28 days after lodging a grievance to

make a claim or waiting longer than three months before making a claim. Surprisingly, of the 162 judgments which had followed an incorrect procedure and which contained details of representation, 96 concerned claimants who had legal representation.

Employers were significantly more likely to defend a claim successfully than claimants were to succeed if the claim was considered by the tribunal. Those which failed formed 37.24% (1454) of the 3904 judgments, whilst those which were successful formed 5.84% (228). This trend, illustrated in Figure 5.3, has increased significantly over the period of study as the number of claims has risen. The dotted linear, Excel-generated, 'all success' and 'all fail' trendlines, representing the overall trends of failure and success, have both risen as the number of judgments have increased over time. However, the number of those that were dismissed increased at a much higher rate than those successful. In the first quarter of 2010 judgments were over six times more likely to record 'fails and dismissed' results rather than 'successful'.

If the judgments which recorded a settled result are grouped with those successful, on the basis that a remedy of some nature had been perhaps obtained by the claimant, the overall 'success+settled' number rises to 861 (22.05%) – 15% less than those which failed and were dismissed. The relationship between the judgments which were 'successful+settled' and those that failed changed considerably over the period, shown in Figure 5.4. ACAS settled 6.9% (268) of claims at the hearing and 9.3% (365) were settled by the parties. The number of claims settled with the help of ACAS increased steadily until June 2007, at which point it helped settle 56 individual claims, but the number settled by ACAS decreased rapidly after this date.[2] A second peak can be seen in April 2008 when 59 claims were settled by the parties, 44 of which were a multiple claim. From September 2007 onwards the trendlines show that the number of claims failing has been greater than those settled and successful and the gap between the two has steadily widened. By April 2010 judgments recording a failed claim outnumbered those which recorded a success or settled result for the claimant by three to one.

[2] On enquiry, ACAS stated it is not aware of any changes in procedure or otherwise which would account for this decline.

Figure 5.3: Graph showing outcome of claims in 'age' judgments per month over period of study

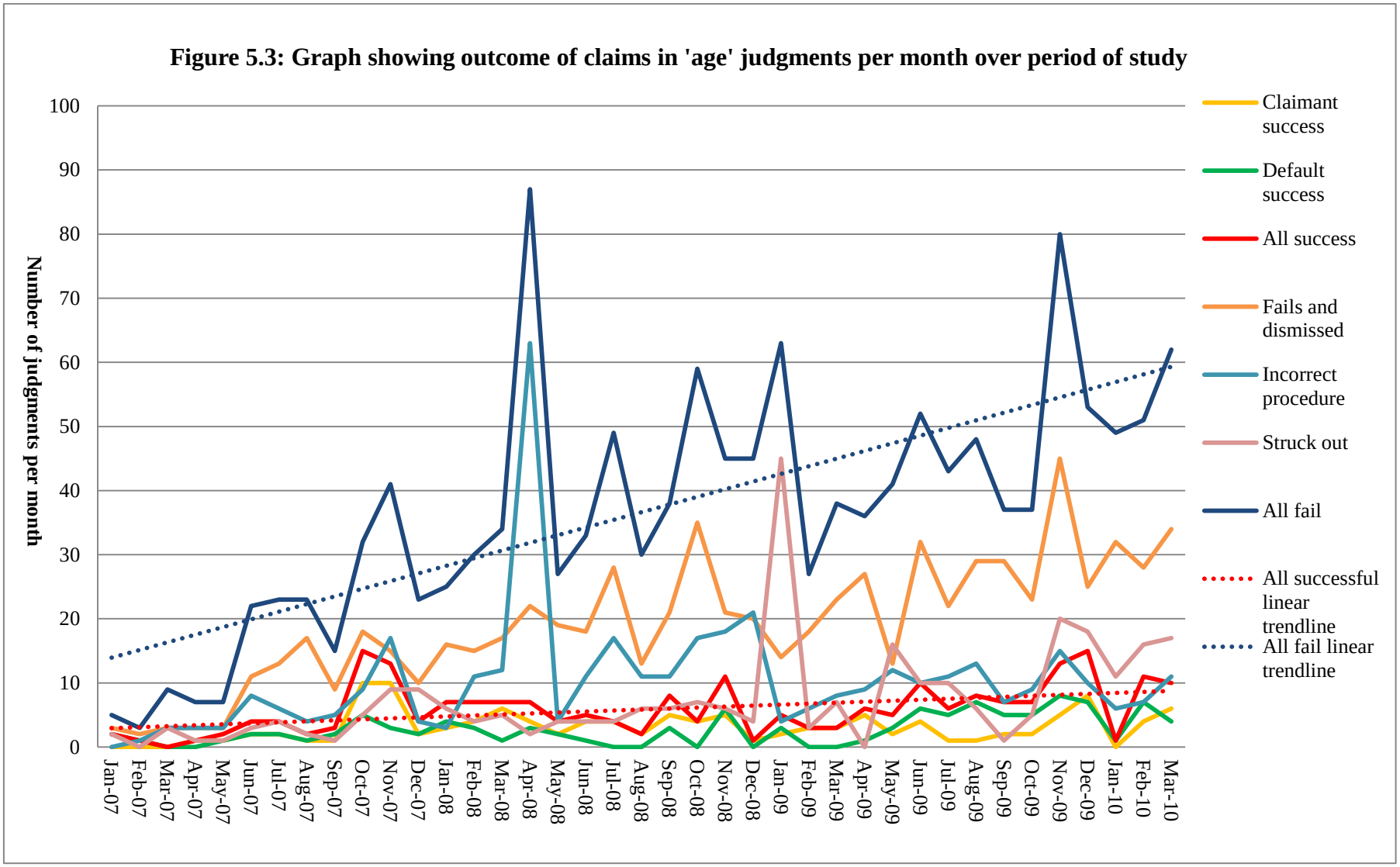
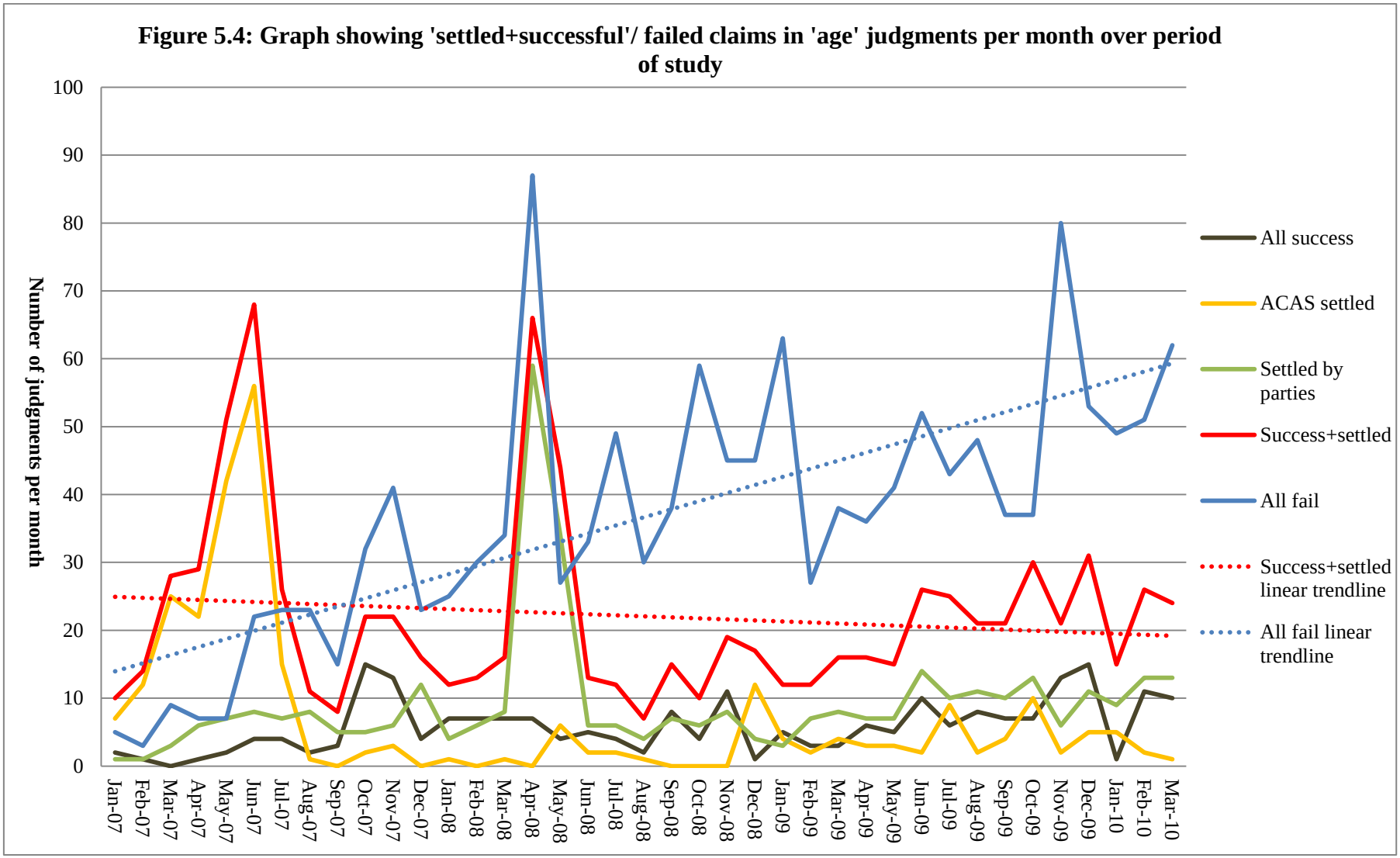


Figure 5.4: Graph showing 'settled+successful'/ failed claims in 'age' judgments per month over period of study



The largest outcome group was the ‘claim withdrawn’ category with 1230 judgments, amounting to 31.5% of the overall total. It is acknowledged that this group could include claims which it may be appropriate to include in another category. Some may have been withdrawn because they were settled, not actively pursued, or the claimant had been reinstated. However, if the tribunal was aware of the circumstances of the withdrawal, this was usually stated in the judgment report so that if, for example, a claim was withdrawn because it was settled, it normally had this description recorded and is included in the ‘settled’ category rather than the ‘withdrawn’ category.

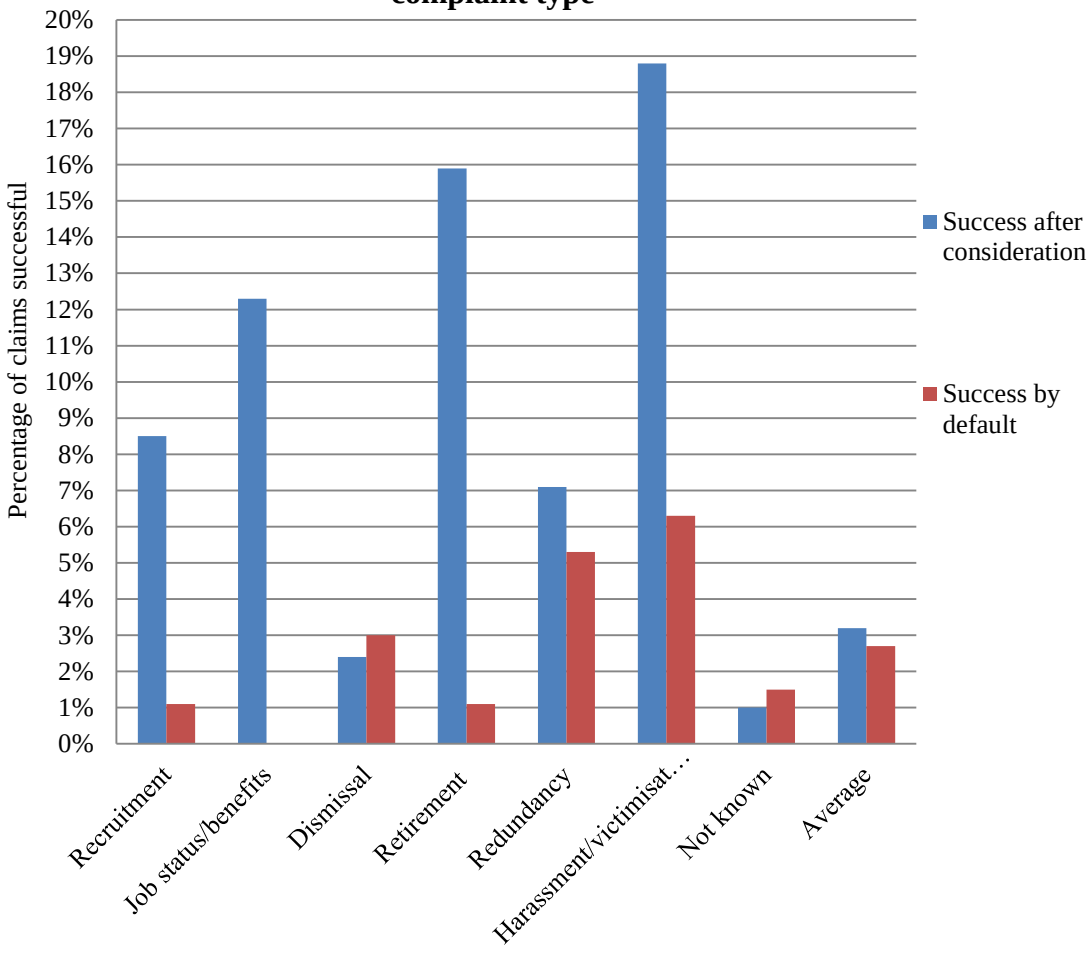
Two ratios are adopted in this Chapter for the purposes of discussion of outcomes. A ‘success: dismissal’ ratio represents the number of judgments recorded that were successful after consideration and by default compared to those that were dismissed after consideration plus those struck out or dismissed because they were time-expired or followed an incorrect procedure. The overall success: dismissal ratio was 1: 6.38, that is, for every judgment recording success for a claimant, 6.38 were dismissed. Secondly, a ‘success+settled’: dismissal ratio represents the number of judgments recorded that were successful plus those that were settled at the tribunal compared to those that were dismissed. The overall ‘success+settled’: dismissal ratio was 1: 1.69 but this had fallen to 1: 3.05 by the first quarter of 2010 as the number of settled claims decreased.

5.2: Complaint type

The outcome of a claim varied considerably according to complaint type, shown in Figure 5.5 and in the statistics in Figure 5.6. Although the total success of claims considered by the tribunal was 5.9%, claimants making complaints of harassment and victimisation were significantly more successful (25.1%) than those complaining of discrimination resulting in dismissal (5.4%). In judgments which concerned claims of age discrimination in recruitment only 4.2% of claimants followed an incorrect procedure, compared with the overall average of 10.8%, and far fewer claims were settled at the hearing with only 2.2% settled by ACAS and the parties. Although 8.4% of recruitment claims were successful, more than double the average, 52.6%, failed and were dismissed compared with the average of 19.1%. This gives the lowest claimant success: dismissal ratio and ‘success+settled’: dismissal ratio amongst

complaint types – 1: 6.88 and 1: 5.64 – respectively, indicating the difficulty of making a successful complaint to the tribunal regarding discrimination in recruitment.

Figure 5.5: Bar chart showing success of claims by complaint type



Of the 88 judgments which related to retirement, only one was not actively pursued and eight were withdrawn by the claimant. More than double the average were struck out before consideration (13.6%); this was particularly noticeable after the *Heyday*[3] judgment, an unsuccessful legal challenge to the default retirement age. Sixty were fully considered by the tribunal, with 17% proving successful for the claimant. Although this appears a higher success rate than other complaint types, with the proportion of successful judgments compared to those which are dismissed relatively high (1: 4.07), the very low number of settled claims brings the 'success+settled': dismissal ratio for retirement claims to a low value of 1: 3.59.

[3] C-388/07 *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] All ER (EC) 619, [2009] IRLR 373 (*Heyday*).

Figure 5.6: Outcome by complaint type		Recruit'mt	Job stat/ben	Dismissal	Retire/ ment	Redund ancy	Haras/ Vict/n	Not known	Total
Incorrect Procedure/ Time expired	Count	4	4	176	3	24	0	210	421
	% Outcome	1.0%	1.0%	41.8%	.7%	5.7%	.0%	49.9%	100.0%
	% comptype	4.3%	7.0%	8.6%	3.4%	6.1%	.0%	17.6%	10.8%
	% of Total	.1%	.1%	4.5%	.1%	.6%	.0%	5.4%	10.8%
Struck out	Count	8	0	178	12	12	1	75	286
	% Outcome	2.8%	.0%	62.2%	4.2%	4.2%	.3%	26.2%	100.0%
	% comptype	8.5%	.0%	8.7%	13.6%	3.1%	3.1%	6.3%	7.3%
	% of Total	.2%	.0%	4.6%	.3%	.3%	.0%	1.9%	7.3%
Successful for Claimant	Count	8	7	49	14	28	6	12	124
	% Outcome	6.5%	5.6%	39.5%	11.3%	22.6%	4.8%	9.7%	100.0%
	% comptype	8.5%	12.3%	2.4%	15.9%	7.1%	18.8%	1.0%	3.2%
	% of Total	.2%	.2%	1.3%	.4%	.7%	.2%	.3%	3.2%
Settled by parties	Count	1	1	203	2	30	1	127	365
	% Outcome	.3%	.3%	55.6%	.5%	8.2%	.3%	34.8%	100.0%
	% comptype	1.1%	1.8%	9.9%	2.3%	7.6%	3.1%	10.7%	9.3%
	% of Total	.0%	.0%	5.2%	.1%	.8%	.0%	3.3%	9.3%
Claimant withdrawn	Count	8	2	703	8	98	2	409	1230
	% Outcome	.7%	.2%	57.2%	.7%	8.0%	.2%	33.3%	100.0%
	% comptype	8.5%	3.5%	34.3%	9.1%	24.9%	6.3%	34.4%	31.5%
	% of Total	.2%	.1%	18.0%	.2%	2.5%	.1%	10.5%	31.5%
Default for Claimant	Count	1	0	61	1	21	2	18	104
	% Outcome	1.0%	.0%	58.7%	1.0%	20.2%	1.9%	17.3%	100.0%
	% comptype	1.1%	.0%	3.0%	1.1%	5.3%	6.3%	1.5%	2.7%
	% of Total	.0%	.0%	1.6%	.0%	.5%	.1%	.5%	2.7%
Other	Count	3	23	92	1	14	4	72	209
	% Outcome	1.4%	11.0%	44.0%	.5%	6.7%	1.9%	34.4%	100.0%
	% comptype	3.2%	40.4%	4.5%	1.1%	3.6%	12.5%	6.1%	5.4%
	% of Total	.1%	.6%	2.4%	.0%	.4%	.1%	1.8%	5.4%
ACAS settled	Count	1	0	157	0	26	0	84	268
	% Outcome	.4%	.0%	58.6%	.0%	9.7%	.0%	31.3%	100.0%
	% comptype	1.1%	.0%	7.7%	.0%	6.6%	.0%	7.1%	6.9%
	% of Total	.0%	.0%	4.0%	.0%	.7%	.0%	2.2%	6.9%
Fails and dismissed	Count	50	20	341	46	134	16	140	747
	% Outcome	6.7%	2.7%	45.6%	6.2%	17.9%	2.1%	18.7%	100.0%
	% comptype	53.2%	35.1%	16.6%	52.3%	34.1%	50.0%	11.8%	19.1%
	% of Total	1.3%	.5%	8.7%	1.2%	3.4%	.4%	3.6%	19.1%
Not actively pursued	Count	10	0	90	1	6	0	43	150
	% Outcome	6.7%	.0%	60.0%	.7%	4.0%	.0%	28.7%	100.0%
	% comptype	10.6%	.0%	4.4%	1.1%	1.5%	.0%	3.6%	3.8%
	% of Total	.3%	.0%	2.3%	.0%	.2%	.0%	1.1%	3.8%
Total	Count	94	57	2050	88	393	32	1190	3904
	% in Outcome	2.4%	1.5%	52.5%	2.3%	10.1%	.8%	30.5%	100.0%

The largest number of judgments related to complaints surrounding dismissal. Of these 2050 judgments, 703 were claimant withdrawn, 695 failed, 360 were settled at the hearing, whilst 110 were successful for the claimant – a lower than average proportion. This gives a success: dismissal ratio of 1: 6.32 and a 'success+settled': dismissal ratio of 1: 1.48 for such complaints. Judgments relating to job status and benefits were more likely than any other category to have an 'other' outcome, including referrals to case management meetings, further hearings or stayed awaiting additional information. The success: dismissal ratio of 1: 2.12 for harassment/victimisation judgments was higher than all other complaint types, indicating the comparative success of these claimants.

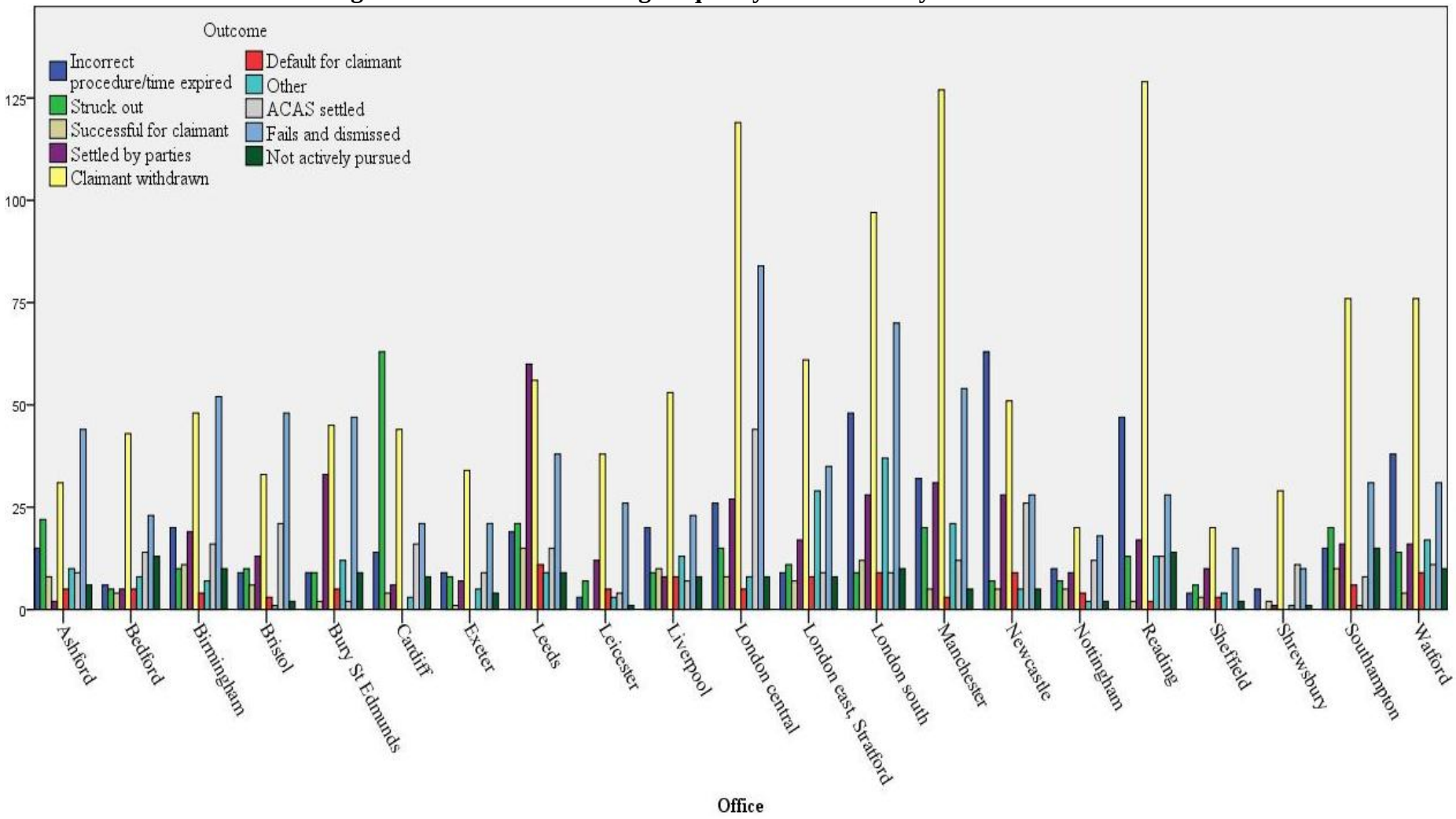
5.3: Tribunal office

Outcomes of claims varied considerably in judgments handed down by different tribunals, as shown in Figure 5.7. Claimants at Bristol had the highest percentage of judgments which recorded failed and dismissed outcomes (32.9%), whilst the lowest was at Reading (10.8%). A larger percentage of claims than normal followed an incorrect procedure at Reading (16.9%) and Watford (16.8%). The lowest percentage of incorrect applications was made at Leicester (3%, 3 claims), which was considerably lower than anywhere else in the country. Although the largest percentage of claims struck out was at Cardiff, (35.2%, 63 claims), 39 of these judgments were individual 'scandalous and vexatious' claims by Lee Frayling.[4]

No age discrimination claim was declared successful after consideration by the Leicester Tribunal and only 1% at Exeter (1 claim) and 1.6% at Shrewsbury (2 claims) were successful. On the other hand a higher percentage of judgments was declared successful at Leeds (5.9%, 15 claims) and at Liverpool (6.3%, 10 claims) than at any other tribunal. No default judgments were handed down at Cardiff, Exeter or Shrewsbury, as all respondent employers attended the tribunal hearing, but at Leicester 5.1% (5 claims) and at Liverpool 5% (8 claims) of all judgments were default judgments.

[4] Eg *Frayling v McLeod* (2009) ET 1305883/08.

Figure 5.7: Bar chart showing frequency of outcomes by tribunal office



In Leeds 23.7% (60 claims) of judgments were settled by the parties, yet at Shrewsbury only 0.3% (1 claim) and at Ashford 0.5% (2 claims) were settled in this manner. ACAS facilitated settlements in 18.3% of judgments (11 claims) at Shrewsbury and 14.4% (21 claims) at Bristol, the largest percentages found, whilst no claims were settled with their help at Sheffield and only 1.2% (2 claims) at Bury St. Edmunds. There appears to be no relationship between the location of ACAS offices and the number of judgments in which they facilitated claims. For example, there is no ACAS office in Shrewsbury where it facilitated a large proportion of claims and there is a regional office at Bury St Edmunds where ACAS was relatively unsuccessful.

Figure 5.8 shows the percentage of judgments which recorded failed outcomes plotted against the percentage of judgments which recorded successful and settled outcomes at tribunals. The largest percentage of 'failed' judgments was at Ashford, followed by Cardiff and Bristol. The largest percentage of claimants to obtain a remedy was found at Leeds and Nottingham, whilst the Liverpool, Leeds and Nottingham Tribunals handed down the largest proportion of successful judgments. The difference between the percentage of 'failed' and 'successful+settled' judgments at each tribunal is shown in Figure 5.9. At the Leeds and Southampton Tribunals this difference falls below the 'zero' horizontal axis, indicating that there were more judgments which were successful or settled than were dismissed. Ashford and Cardiff show the greatest difference between success and failure, followed by London South, Watford and Reading. Claimants at these five offices were less successful than average in their claims.

The regional pattern, illustrated in Figure 5.10, reflects that found in individual tribunals. A Pearson chi-square test, undertaken using PASW, on the relationship between outcome and tribunals grouped on a regional basis produces a result of 0.00, indicating that there is a strong, statistically significant, relationship between these variables. The difference between 'successful+settled' and failed claims in the South and West is 21.9%, in the South-east and London it is 17.99%, the Midlands 11.03% and in the North 8.91%, suggesting there is an observable north-south difference in outcome.

Figure 5.8: Graph showing percentage of failed/ successful/ successful + settled claims as a percentage of total number of 'age' judgments at each employment tribunal

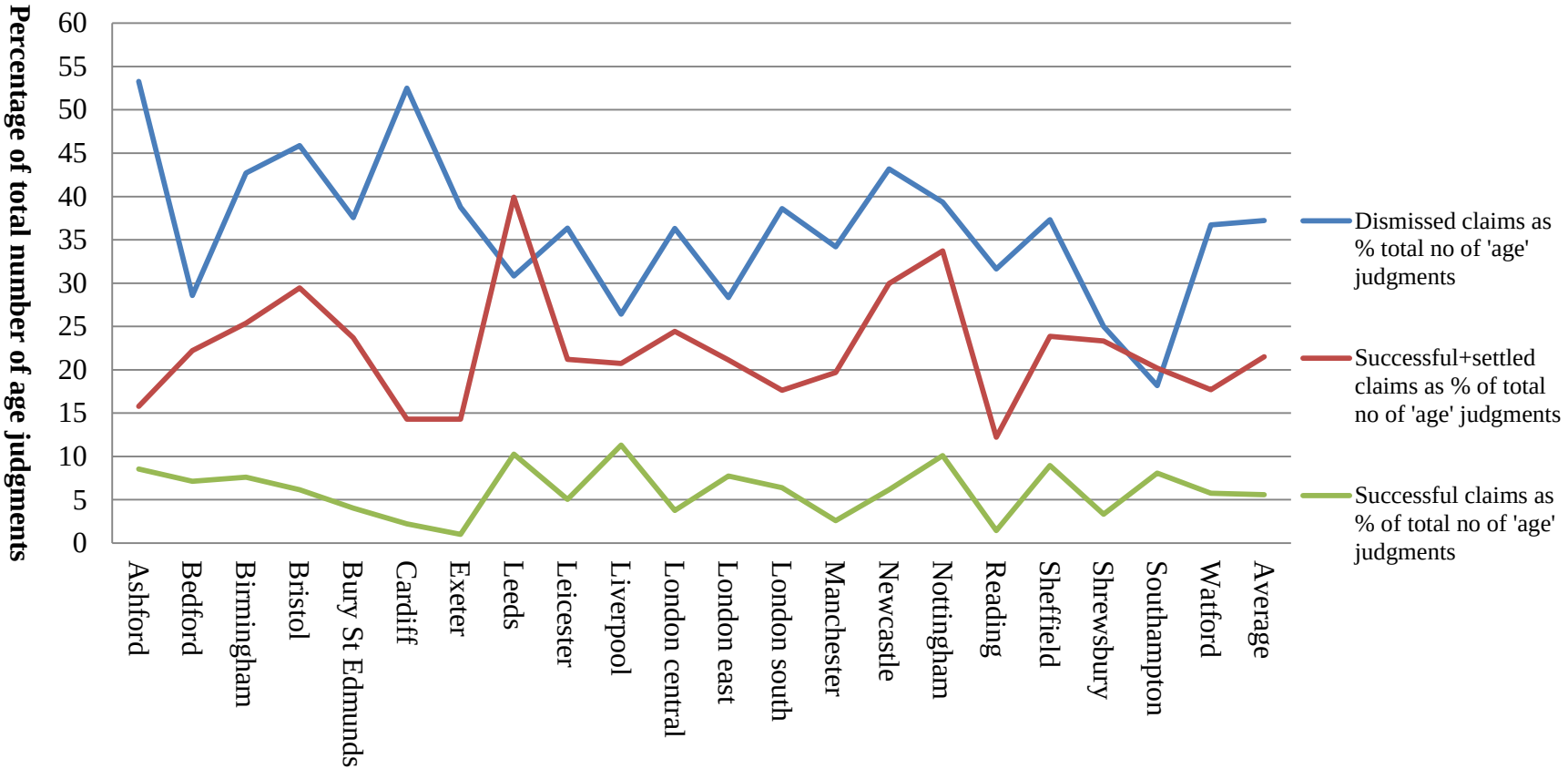
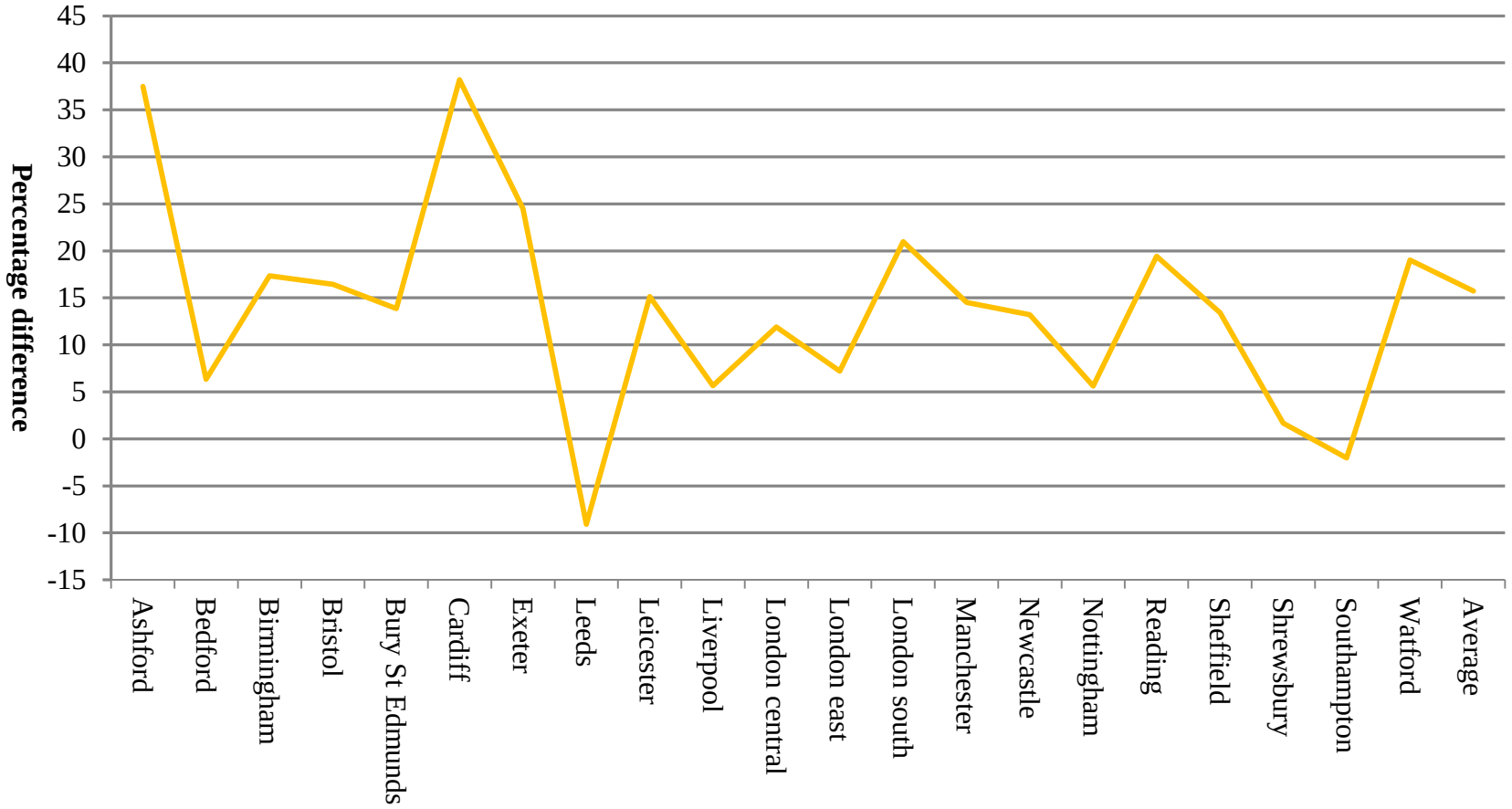
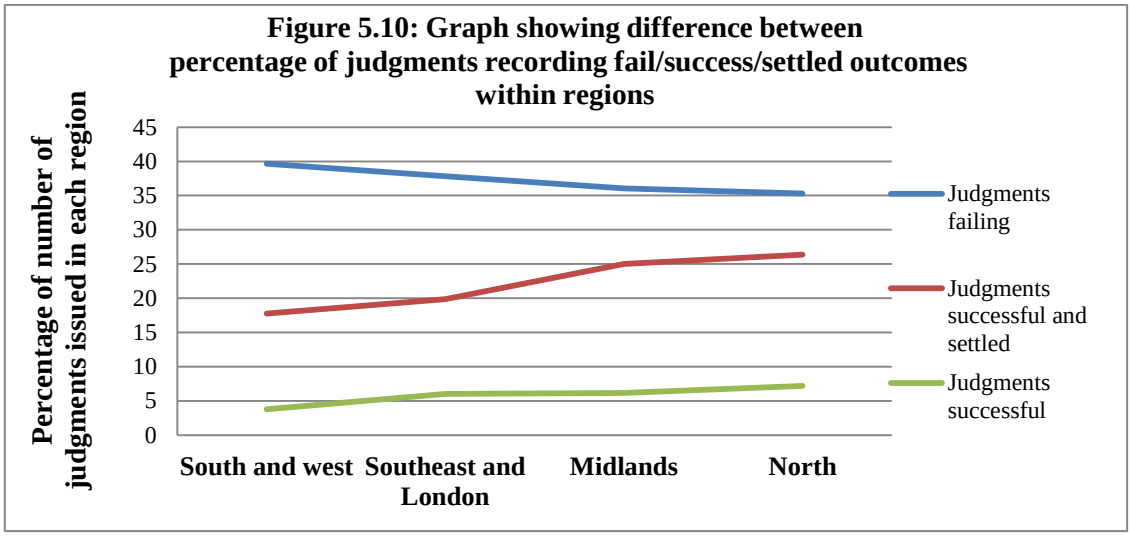


Figure 5.9: Graph showing difference between percentage of judgments successful + settled and percentage of judgments dismissed at employment tribunals





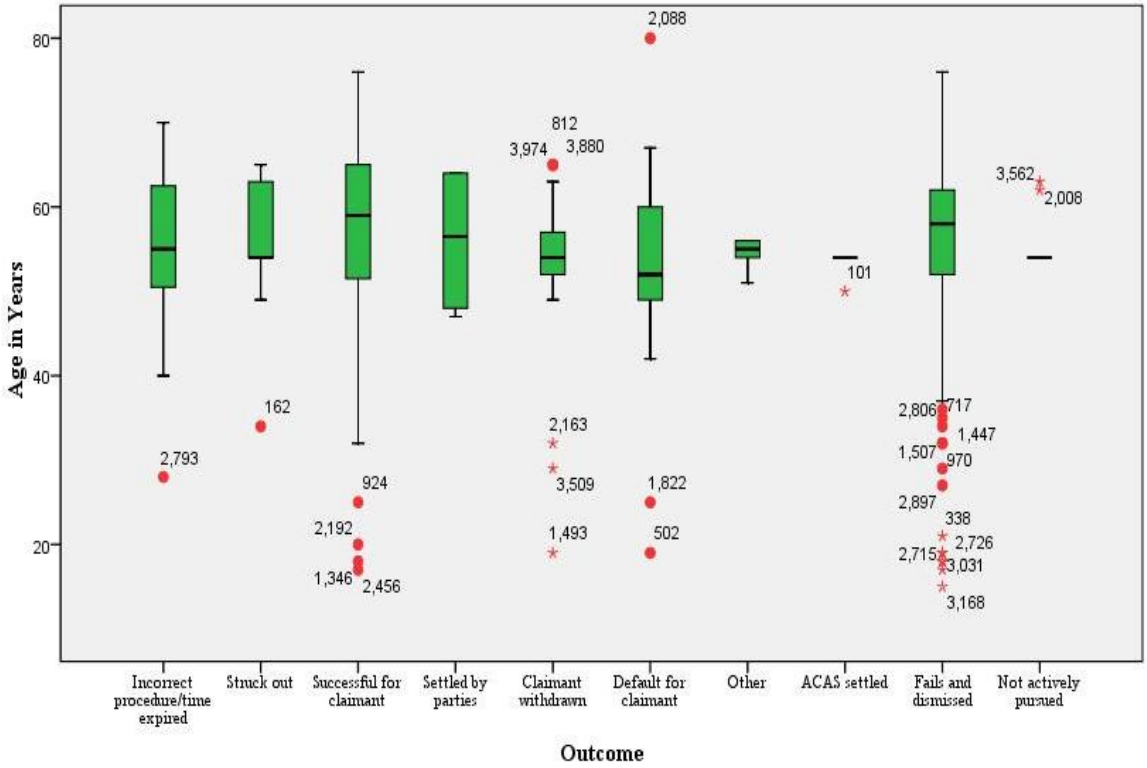
5.4: Claimant characteristics

The average age of those who were successful was 54.89 years old and that of those whose claim failed was slightly older at 55.54 years old. The box plot in Figure 5.11 illustrates the relationship between the outcome of claims and the age of the claimant. The green boxes in the box plot reveal the 25-75% percentile groups within each outcome group, whilst the outliers, represented by the red circles and stars, show claimants who fall outside of the statistical normal distribution pattern. The normal distribution group is shown within the small horizontal black lines at the top and bottom of the vertical bars. The numbers by the outliers on the box plot refer to the case identification numbers used on data collection sheets. The black horizontal lines across the green boxes mark the average age of claimants within each outcome category.

The most striking feature of the plot is the large number of red outliers present in younger age groups in the 'fails and dismissed' and 'successful' categories. These outliers represent a secondary distribution group containing workers who claimed they were discriminated against because they were 'young,' whilst those in the green boxes mainly represent those who were claiming they were discriminated against because they were 'old'. All of the workers who did not actively pursue their claim were over 57 years old indicating that younger workers were less inclined to abandon their claim once initiated. All but one of those whose claim was struck out was over 50 years old. All of those claimants in cases settled by the parties were aged within the normal

distribution group, between 50 and 63 years old, suggesting that younger workers and those over 63 were less inclined to settle.

Figure 5.11: Box plot showing relationship between outcome of claims and age of claimant



The outcome of claims made by women and men followed similar profiles, as shown in Figures 5.12 and 5.13. These bar charts were produced using data from 3944 judgments where gender and outcome were discernible. The principal difference between the sexes was that more women – 14.8% – followed incorrect procedures when submitting claims, compared to 8.5% of men. This figure is skewed by a multiple claim against Sunderland City Council by 54 women, whose initial grievance did not include a claim of discrimination on the grounds of age. Once at the tribunal women withdrew fewer claims, but 16% of claims were settled by both sexes.

The statistics show that 6.4% of female claimants were successful, after consideration and by default, compared to 5.7% of male claimants. Men formed 61.84% of the 228 who were successful, 62.19% of the 1436 who failed and 64.17% of the 628 who settled their claim. Women formed 38.16% of those successful, 37.81% of those who failed and 35.83% of those who settled. These figures give a success: dismissal ratio of 1: 6.24 for women and a very similar ratio of 1: 6.3 for men

and ‘success+settled’: dismissal ratios of 1: 1.64 for men and 1: 1.74 for women, suggesting that gender may not be a factor in the overall success or dismissal of age discrimination claims.

Figure 5.12: Bar chart showing outcome of claims by men in judgments relating to age discrimination jurisdiction

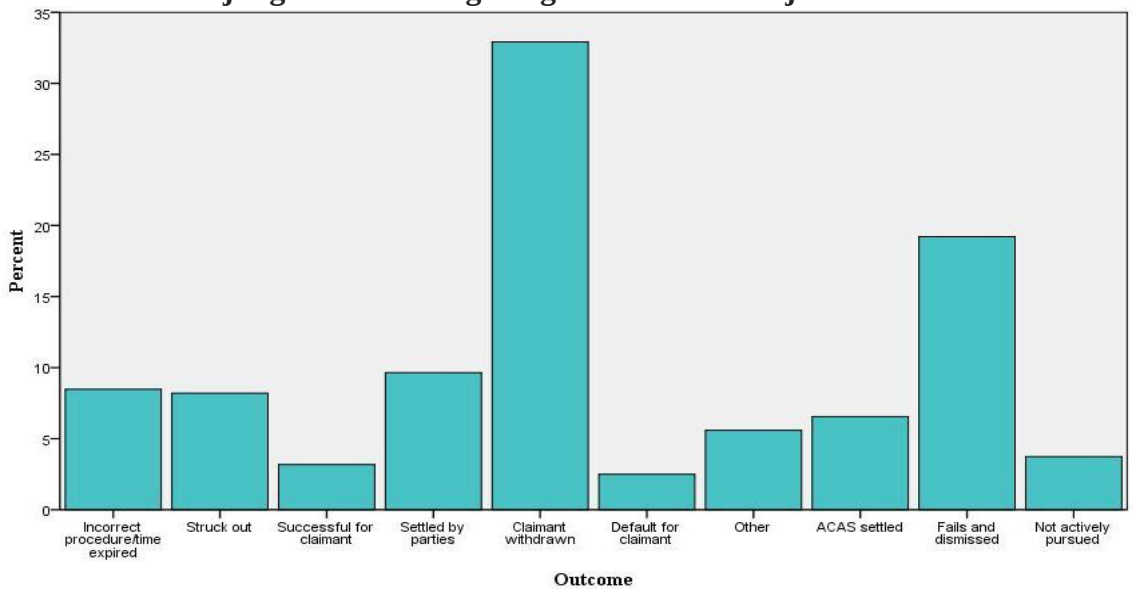
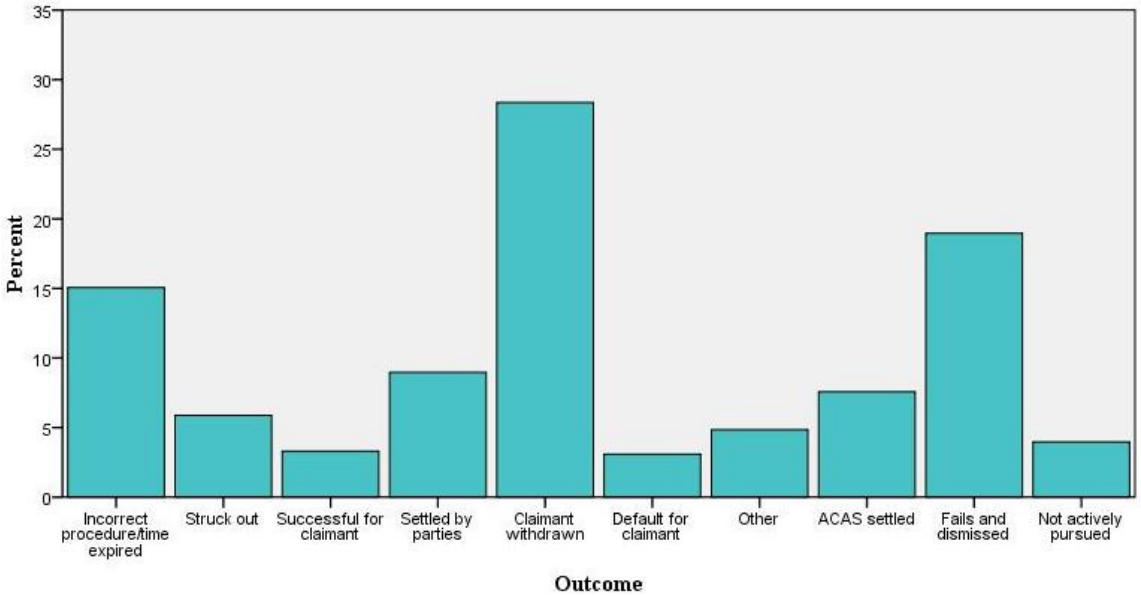


Figure 5.13: Bar chart showing outcome of claims by women in judgments relating to age discrimination jurisdiction

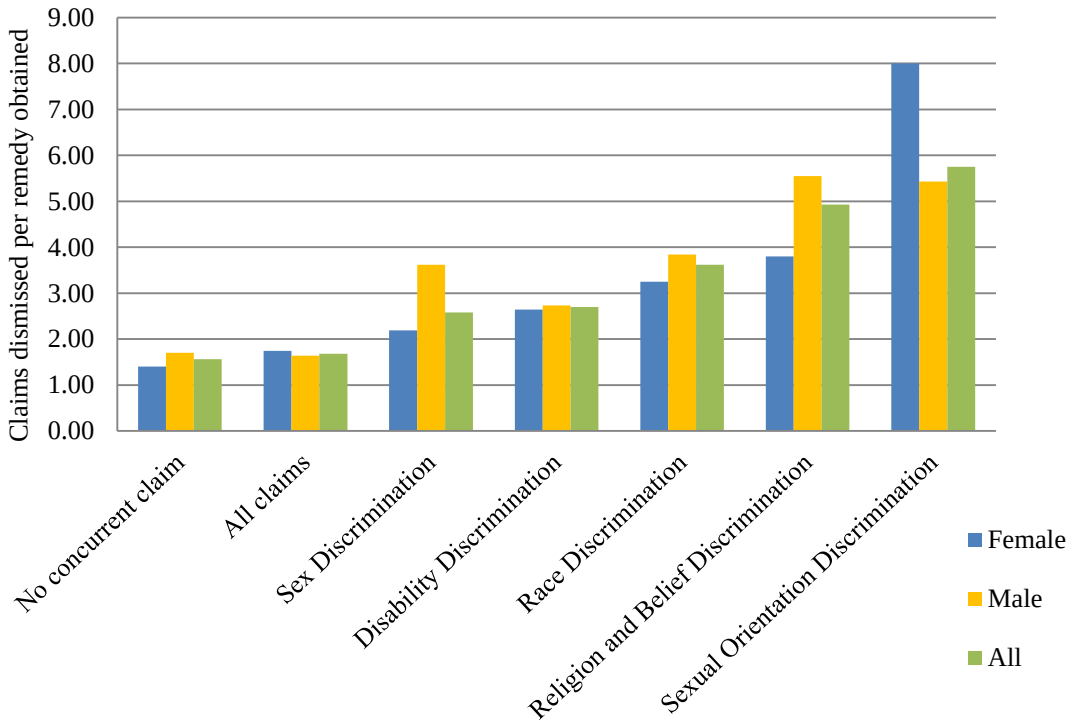


Workers who made concurrent claims of discrimination were less successful in obtaining a remedy for their complaint than those claiming under age alone. The success rate of claims with more than one additional concurrent claim was lower, with each additional ground lowering the rate further. For example, one person out of 113

claiming age, race and disability was successful after consideration and two out of 123 claiming age, sex and disability were successful. These statistics are illustrated in Figure 5.14.

Figure 5.14: Graph to show claims dismissed by tribunal per remedy obtained in judgments relating to concurrent claim/s of discrimination

A remedy is categorised as a settlement or a declaration of success



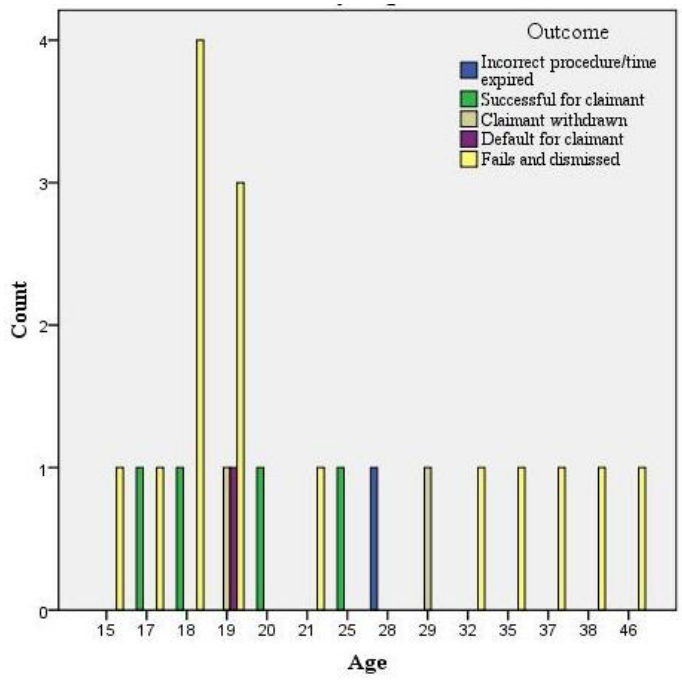
The statistics for different combinations of jurisdictions vary. For example, out of the 609 judgments with a concurrent claim of sex discrimination, 20.2% followed an incorrect procedure and 12.5% were struck out, whilst only nine were successful after consideration. Those claiming age and sex discrimination and age and race discrimination had very low success rates of 2.8% (including default judgments) whilst those claiming age and disability had a slightly higher total success rate of 3.6%, although only nine out of 507 were successful after consideration. Seven out of 505 claiming age and race discrimination were successful after consideration. Out of the 100 claimants receiving judgment on a claim on the grounds of age and sexual orientation discrimination only one person was successful, whilst 38 were struck out. No claimant was successful out of the 140 claiming discrimination on the grounds of age and religion and belief after consideration, although one received a default

judgment. Claims involving multiple jurisdictions were twice as likely (15.1%) to have followed an incorrect procedure as those made under single jurisdictions (7.7%). This usually appeared to be because one of the jurisdiction grounds was not mentioned at the grievance letter stage.

Using data obtained from 3849 judgments where gender, outcome and concurrent claims were detailed, it was found that of the 647 women making concurrent discrimination claims, 25 were successful and 104 were settled, giving a low success: dismissal ratio of 1: 10.92 and a 'success+settled': dismissal ratio of 1: 2.12. Of the 797 claims by men making a concurrent claim, 45 were successful and 106 were settled, giving a success: dismissal ratio of 1: 7.07 and a 'success+settled': dismissal ratio of 1: 2.11. Men making concurrent claims were more successful than women in obtaining a remedy after consideration but women were more prepared than men to reach a settlement, achieving a near identical overall outcome. Figure 5.14 shows that women making a concurrent claim of sexual orientation discrimination were eight times more likely to have a claim dismissed than to receive a remedy. Women not making a concurrent claim were the most successful, having a 'success+settled': dismissal ratio of 1: 1.4. Making a concurrent claim may therefore not be helpful to the claimant in obtaining a remedy, particularly if the claim is considered by the tribunal.

Outcomes for those claimants who felt they were discriminated against because they were young differed from 'all age' claims in that 11 out of the 41 judgments – 26.8% – were successful for claimants with only one of these a default judgment. This is a far better outcome than for all age claimants who had a success rate of 5.9%. Nine claims were successful for young women and only two for men, as young women were considerably more successful than men or older women. Figure 5.15 shows data obtained from the 23 judgments which detailed outcome and age for young claimants. No claimant over 25 years old was successful when claiming discrimination because they were young. No judgment for young claimants recorded a settled claim and only one claim noted that the claimant followed an incorrect procedure, suggesting that young workers are less likely to settle a claim and are more likely to follow the correct procedure than older claimants. No claim was successful in the group of 13 claimants who felt they were discriminated because they were part of a disadvantaged age band.

Figure 5.15: Bar chart showing the relationship between age and outcome in judgments concerned with discrimination against the young

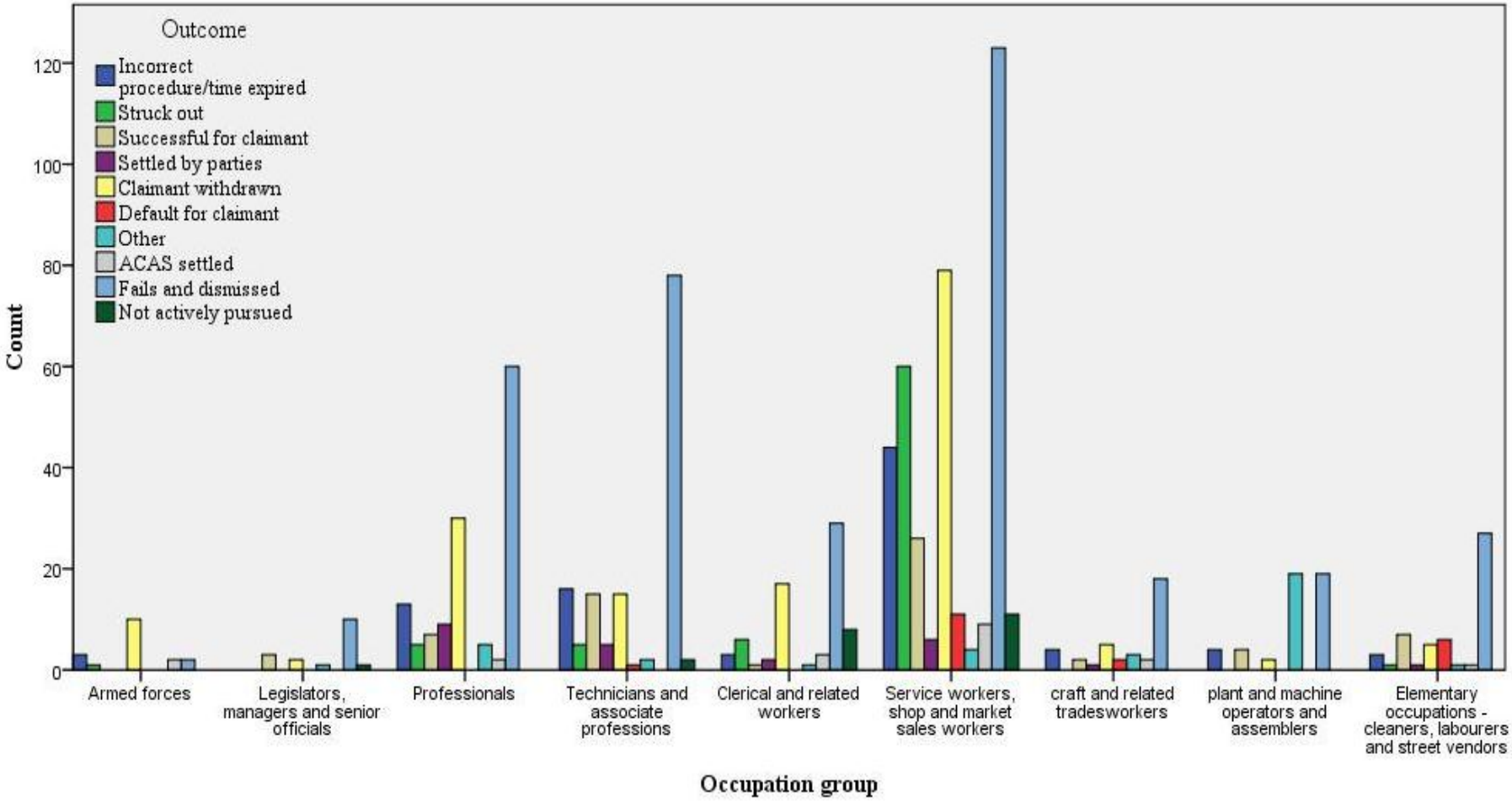


The outcome of claims relating to claimant occupational groups is shown in Figures 5.16-5.17. The average success: dismissal ratio for all claims where the occupation was detailed was 1: 6.38 and the 'success+settled': dismissal ratio was 1: 4.17. These statistics differ from those in the previous section as they relate to smaller data-sets. The most unsuccessful claimants are shown in bold type in Figure 5.16; all white collar, office-based workers were more unsuccessful than average.

Figure 5.16: Success/settled/dismissal ratios by claimant occupation group

No. of judgments where occupation group is detailed	Claimant occupation group	Success: Dismissal Ratio	'Success+Settled': Dismissal Ratio
53	Elementary workers	1: 2.38	1: 2.07
18	Armed forces	**0: 18**	1: 3
38	Craft workers	1: 5.5	1: 3.14
48	Plant and factory workers	**0: 9**	1: 3.5
903	Average	1: 6.38	1: 4.17
134	Professionals	**1: 11.1**	1: 4.3
381	Service, shop and market retail workers	1: 6.1	1: 4.36
142	Technicians	1: 6.1	1: 4.7
70	Clerical workers	**1: 38**	1: 6.3
19	Legislators, senior managers and officials	1: 3.3	**1: 6.38**

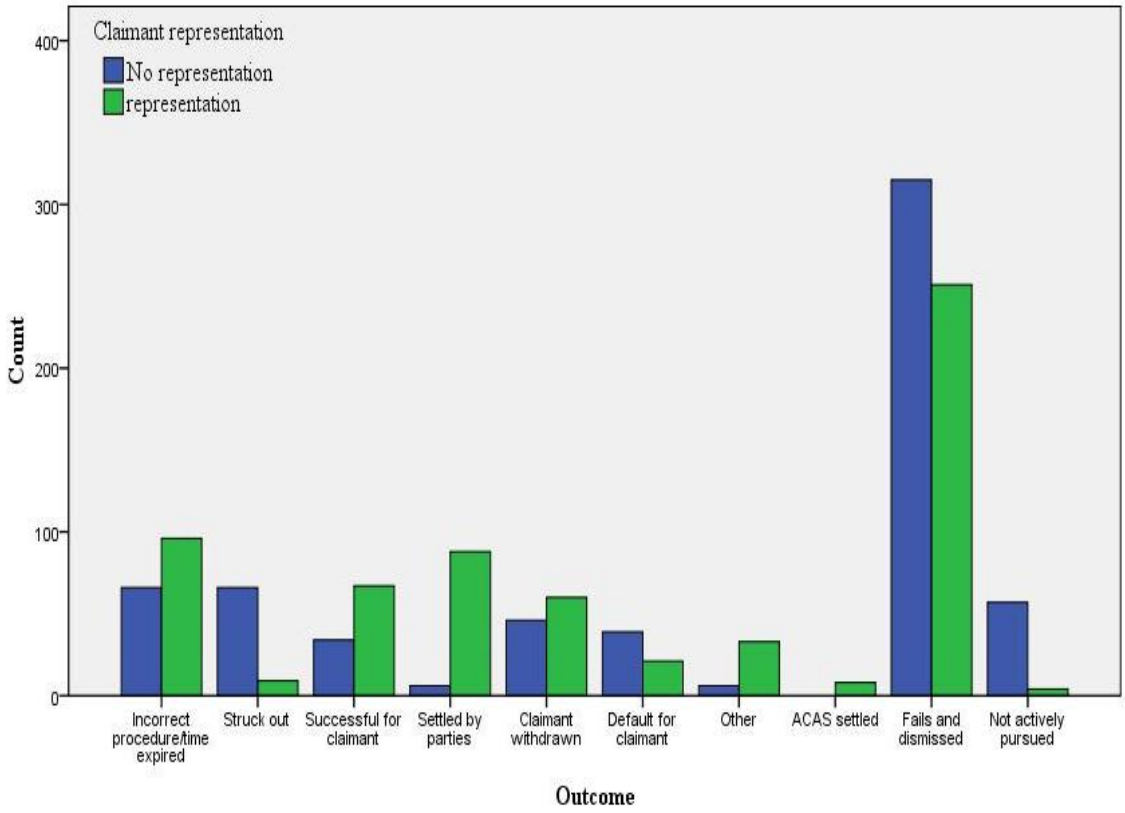
Figure 5.17: Bar chart showing relationship of outcome to occupation group



5.5: Claimant legal representation

Upon analysing data obtained from the 1272 folio reports which detailed representation and outcome, it was found there was a significant Pearson Chi-Square result of P = 0.00, highlighting a strong statistical relationship between outcome and claimant legal representation in age discrimination judgments. Claimants with legal representation were nearly twice as successful as those without, as shown in the summary bar chart Figure 5.18 and in the statistics in Figure 5.19.

Figure 5.18: Bar chart showing relationship between representation and outcome



Surprisingly, those with representation were more likely to make a claim that was either time-expired or did not follow the correct procedure. 88% of those whose claim was struck out had no legal representation. Those with legal representation were far more likely to settle with the employer at the hearing and 93.6% (88) of claimants settling their grievance had representation. No one without representation settled their grievance using ACAS but eight claimants with representation did so.[5]

[5]ACAS works primarily before the hearing occurs, as evidenced in the ETS Annual Report – Ministry of Justice, *Employment Tribunal and EAT Statistics 1 April 2009 to 31 March 2010* (The Stationery Office 2010) 5.

Figure 5.19: Table showing relationship between claimant representation and outcome

Outcome		Incorrect procedure /time expired	Struck out	Success for claimant	Settled by parties	Claimant withdrawn	Default for claimant	Other	ACAS settled	Fails and dismissed	Not actively pursued	Total
All claimants	Total count	162	75	101	94	106	60	39	8	566	61	1272
All claimants	% within all claimrep	12.7	5.9%	7.9%	7.4%	8.3%	4.7%	3.1%	0.6%	44.5%	4.8%	100.%
No representation	count	66	66	34	6	46	39	6	0	315	57	635
No representation	% within no claimrep	10.4%	10.4%	5.4%	0.9%	7.2%	6.1%	0.9%	0.0%	49.6%	9.0%	100%
No representation	% within outcome	40.7%	88.0%	33.7%	6.4%	43.4%	65.0%	15.4%	0.0%	55.7%	93.4%	49.9%
Representation	count	96	9	67	88	60	21	33	8	251	4	637
Representation	% within claimrep	15.1%	1.4%	10.5%	13.8%	9.4%	3.3%	5.2%	1.3%	39.4%	.6%	100.%
Representation	% within outcome	59.3%	12.0%	66.3%	93.6%	56.6%	35.0%	84.6%	100%	44.3%	6.6%	50.1%

Legal representation helped both sexes achieve a settlement and a declaration of success, as illustrated in Figures 5.20-5.22. Using data obtained from 759 judgments which detailed male claimant legal representation, it was found that men substantially increased their chances of obtaining a remedy by acquiring representation – achieving a 'success+settled': dismissal ratio of 1: 1.45, compared to 1: 5.63 for those without representation and a success: dismissal ratio of 1: 3.27 for those with representation and 1: 5.96 for those without. Men with representation settled 65 claims, whereas only three claims were settled by those without representation.

Figure 5.20: Summary statistics of a cross-tabulation analysis of outcome/gender/legal representation

	No in Register	Gender	No of judgments	Dismiss	Success	Settled	Succ: Dism	Succ +sett: Dism
No Rep	627	Men	423	304	51	3	1: 5.96	1: 5.63
		Women	204	140	22	3	1: 6.36	1: 5.6
Rep	630	Men	336	170	52	65	1: 3.27	1: 1.45
		Women	294	180	36	31	1: 5	1: 2.69

Women who obtained legal representation also significantly increased their chances of obtaining a remedy and over 77% of women whose claim was declared successful had such assistance. Women achieved a 'success+settled': dismissal ratio of 1: 2.69 for those with representation compared to 1: 5.6 for those without. However, the success: dismissal ratio for women with representation was 1: 5.0 and 1: 6.36 for those without, indicating that the improvement made by women was not quite as large as that achieved by men. Legal representation made more difference to the outcome of claims by men than to those by women, even though a larger proportion of women obtained representation.

The difference in outcome for men and women obtained from this data does not correspond with the analysis of all judgments discussed above in Chapter 5.4, as these statistics indicate that men were more successful than women in obtaining a remedy. This may be because it is based on a smaller sample of 1257 judgments rather than all 4001 examined. In addition, the limited records kept in the computerised Register of claims which the tribunal does not examine in detail document outcomes which differ in attributes from those more thoroughly described in hard-copy folio reports. Claims

for which there is no record of representation are more likely to be those withdrawn by the claimant (31.5% of all judgments compared to 8.3% of those with representation details), struck out or not actively pursued rather than successful. Nonetheless, a larger percentage of women (59.1%) than men (43.7%) obtained representation. Legal representation undoubtedly improves the chances of success of a claim and it may be that without such additional assistance women would be less successful than men.

Figure 5.21: Bar chart showing the outcome of claims concerning claimants with no legal representation

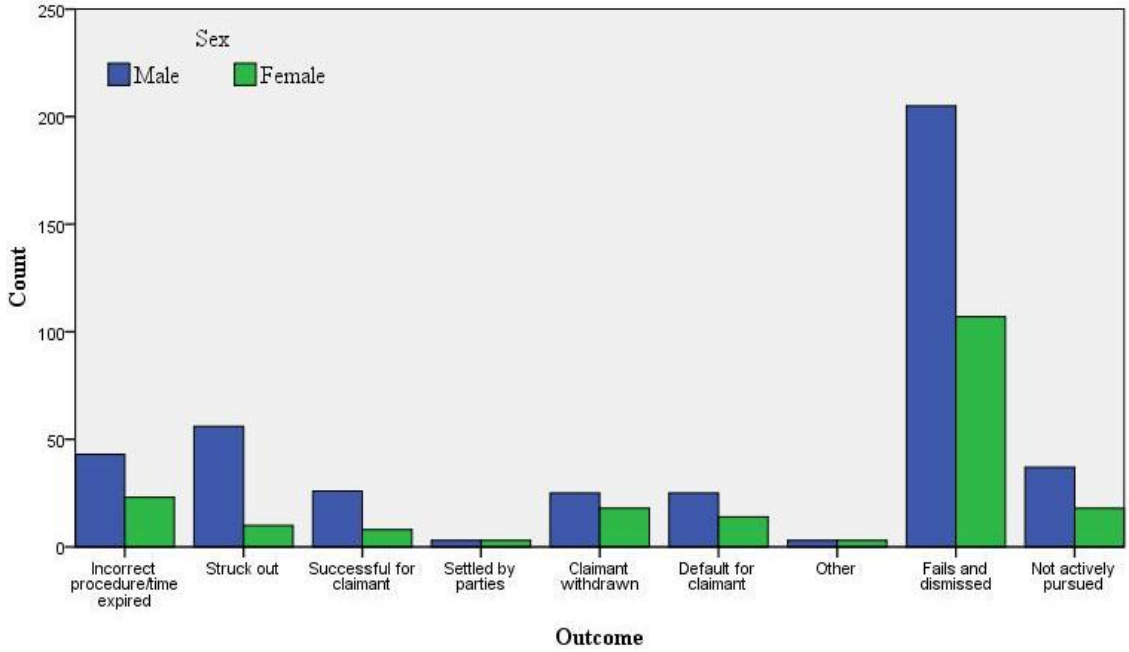
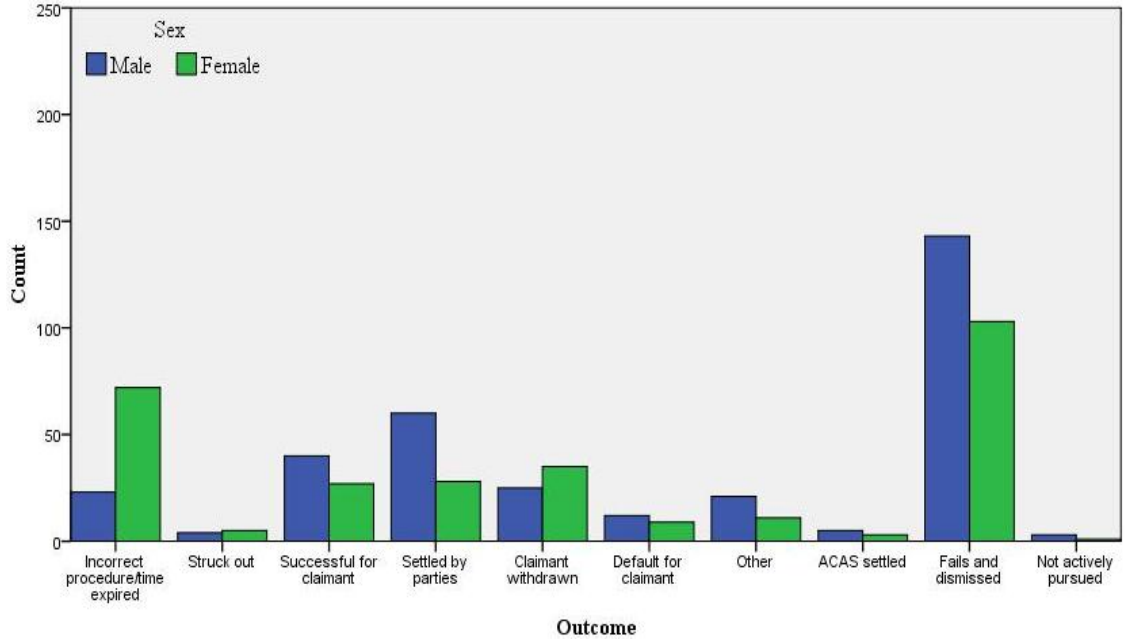
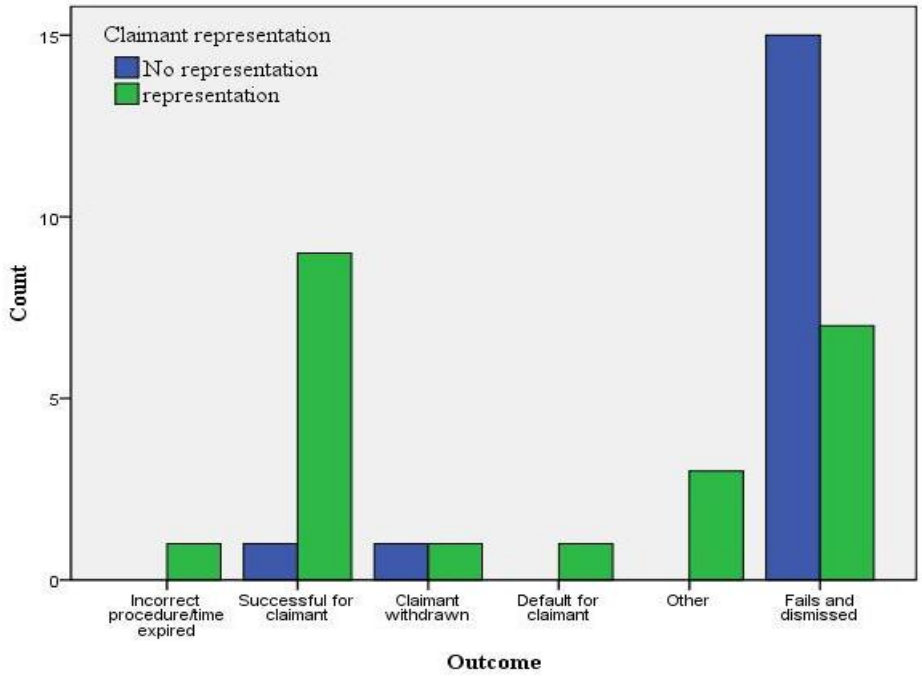


Figure 5.22: Bar chart showing the outcome of claims concerning claimants with legal representation



Legal representation also made a considerable difference to the outcome of claims made by the 'young,' as shown in Figure 5.23. Only one young claimant without representation was successful in being awarded compensation by the Tribunal.

Figure 5.23: Bar chart showing the relationship between claimant representation and the outcome of claims concerned with discrimination against the young



5.6: Employer characteristics

The frequency of respondent employer activities found in judgments where the claimant obtained a remedy is shown in Figure 5.24. Figure 5.25 presents statistics which relate to the 23 most frequently found activities of employers defending a claim of age discrimination. The most frequently found employer activity was that related to local or central government,[6] but the success: dismissal ratio of claims relating to this activity was only 1: 19.5, slightly lower than average, indicating that in the large majority of claims the claimant was not successful. The second highest employer activity was that relating to hospitals, employing 1,599,000[7] workers and although the success: dismissal ratio for this sector was 1: 10.4, 24 judgments were either settled or successful at the tribunal giving a 'success+settled': dismissal ratio of 1: 5.6 – a similar proportion to that of public administration – indicating that claimants were less successful against these large public organisations.

[6] SIC 2007 codes do not allow for the differentiation of these functions.
[7] Office for National Statistics, *Public Sector Employment* (ONS 2011) 19.

Figure 5.24: Bar chart showing frequency of activities undertaken by respondent employers in judgments recording a settled or successful outcome for claimant

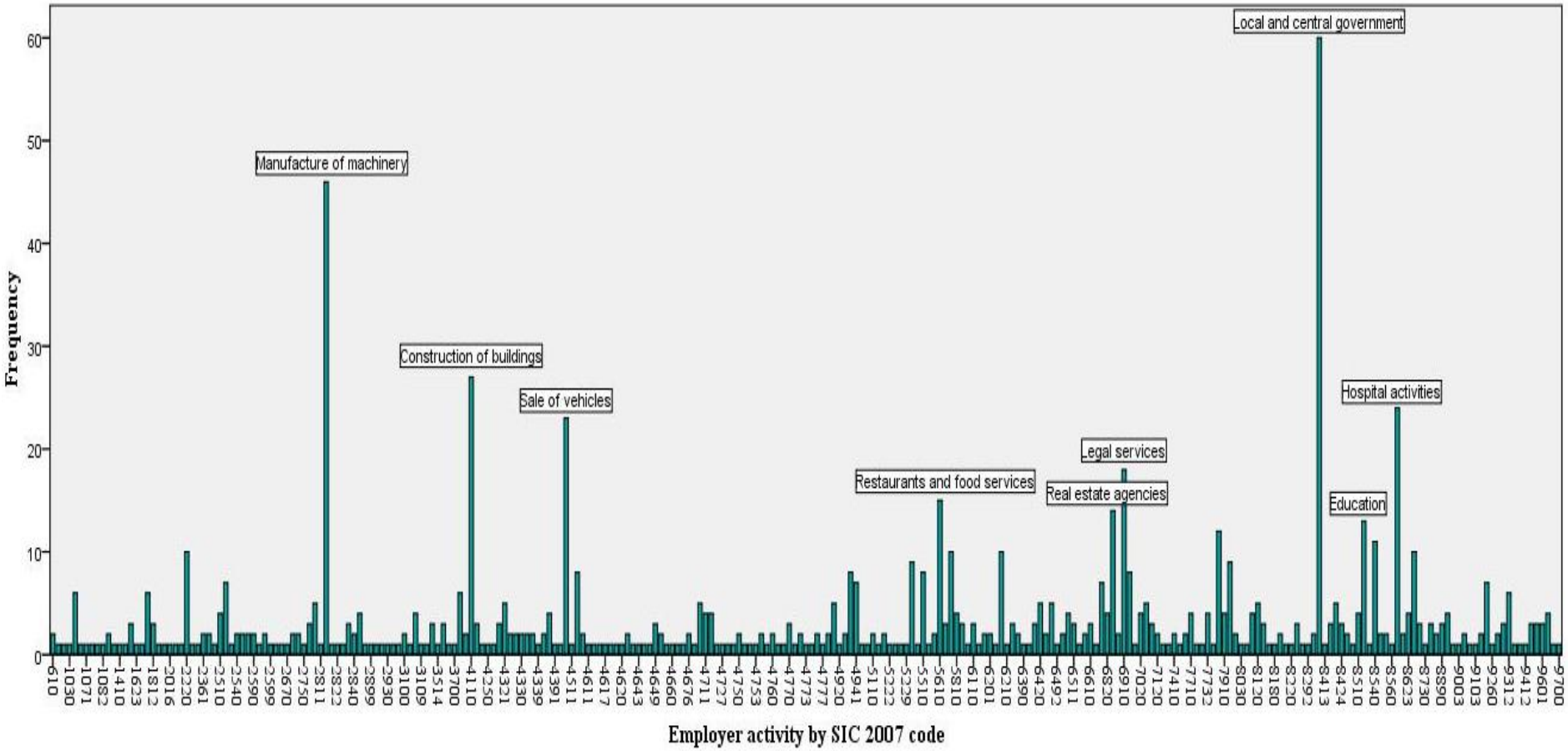


Figure 5.25: Table showing outcome of claims relating to the 23 most frequently found employer activities in judgments

For details of statistics used in calculating ratios see Appendix G

No. of judgments and outcome by Employer Activity	SIC code	Freq. of judg.	Success/ ful	Success by default	Fails and dismissed	Struck out	Incorrect procedure	Settled by parties	Settled by ACAS	Claimant w'drawn	Not activity pursued	Success: No of judgments	Success: Dismissal Ratio	Success+ settled: No of judgments
Administration of the State	8410	319	7	1	46	28	82	37	15	78	14	1:39.8	1:19.5	1:5.3
Hospital activities	8610	136	3	2	21	11	20	6	13	49	3	1:27.2	1:10.4	1:5.6
Postal services	5310	124	0	0	0	10	17	3	6	67	6	0:124	0:27	1:13.7
Construction of buildings	4110	101	4	3	4	27	5	10	10	26	1	1:14.2	1:5.1	1:3.74
Passenger air transport	5110	100	0	1	0	8	21	2	0	52	1	1:100	1:29	1:33.3
Higher education	8540	86	2	0	2	14	10	4	5	31	8	1:43	1:13	1:7.8
Legal services	6910	85	1	0	1	19	1	11	6	34	0	1:85	1:21	1:4.7
Employment agencies	7810	78	2	0	2	13	4	7	3	20	12	1:39	1:9.5	1:6.5
Sale of motor vehicles	4510	68	6	4	6	19	5	7	6	16	0	1:6.8	1:3	1:2.1
Secondary education	8530	58	4	1	4	15	7	4	4	16	0	1:11.6	1:5.2	1:4.46
Restaurant and food services	5610	57	1	5	1	11	3	3	6	11	3	1:9.5	1:2.5	1:3.8
Residential care	8710	54	0	1	0	41	0	0	0	8	1	1:54	1:41	1:54
Building societies	6419	54	2	1	2	10	5	0	0	28	2	1:18	1:5.6	1:18
IT services	6209	48	3	0	3	11	7	5	2	15	0	1:16	1:7	1:4.8
Hotels	5510	48	0	1	0	11	5	3	4	16	3	1:48	1:16	1:4
Manufacture of machinery	2820	47	0	0	0	0	0	46	0	1	0	0:47	0:0	1:1.02
Human health activities	8690	46	0	0	4	8	5	6	4	13	2	0:46	0:17	1:4.6
Judicial activities	8423	46	1	0	1	6	6	4	0	22	2	1:46	1:13	1:9.2
Real estate activities	6830	42	3	0	3	10	2	6	5	10	1	1:14	1:5	1:3
Housing assoc. activities	6820	42	0	0	0	2	13	3	1	17	1	0:42	0:15	1:10.5
Public order activities	8424	41	1	0	1	7	4	0	2	21	2	1:41	1:12	1:13.6
Private security activities	8010	40	1	4	1	10	4	1	2	9	3	1:8	1:3	1:5
All employer activities		4001	124	104	747	286	421	365	268	1230	150	**1:17.5**	**1:6.37**	**1:4.65**

Those activities with a higher success: dismissal ratio than average were those related to the sale of motor vehicles, restaurant and food services, the construction of buildings, secondary education and private security firms. Workers in these fields, if they reached the stage where the tribunal considered their claim, were far more successful than average. The highest success: dismissal ratio of 1: 2.5 was found in the restaurant sector, followed by the sale of motor vehicles sector, where one judgment was successful for every three which failed. The highest 'success+settled': dismissal ratio was found in the sale of motor vehicles sector which was 1: 2.1.

There are 188,789 workers involved in motor vehicles sales and 23 judgments recorded either a settled or successful result for the claimant, resulting in one 'remedy' achieved per 8,208 workers. The equivalent figures for other activities are shown in Figure 5.26. It is noticeable that the statistics relating to real estate agencies, the sale of motor vehicles and legal services sectors are of a different magnitude to those for other sectors, all falling below one 'remedy' per 10,000 workers.[8]

Figure 5.26:
Table showing number of workers in employer activity group per remedy obtained

Activity	Number of workers
Real estate agencies	5,714
Sale of motor vehicles	8,208
Legal activities	8,925
Judicial activities	16,528
Postal services	25,833
Higher education	29,630
Other human health activities	37,700
Secondary education (maintained sector)	56,984
Hospitals	66,625
Construction of buildings	76,622
Local and central government	94,533

Figures 5.27-5.28 illustrate the relationship between employer size and outcome. Those claiming against large employers were least likely to be successful or settle with the employer. No claims were found to be successful against sole traders after consideration but twice the normal number of employers in this group failed to attend and default judgments were more likely to be made against small employers.

[8] For source of statistics in this paragraph and Table 5.26, see Appendix G.

Figure 5.27: Bar chart showing the relationship of frequency of outcome of judgments and size of respondent employer by number of workers employed

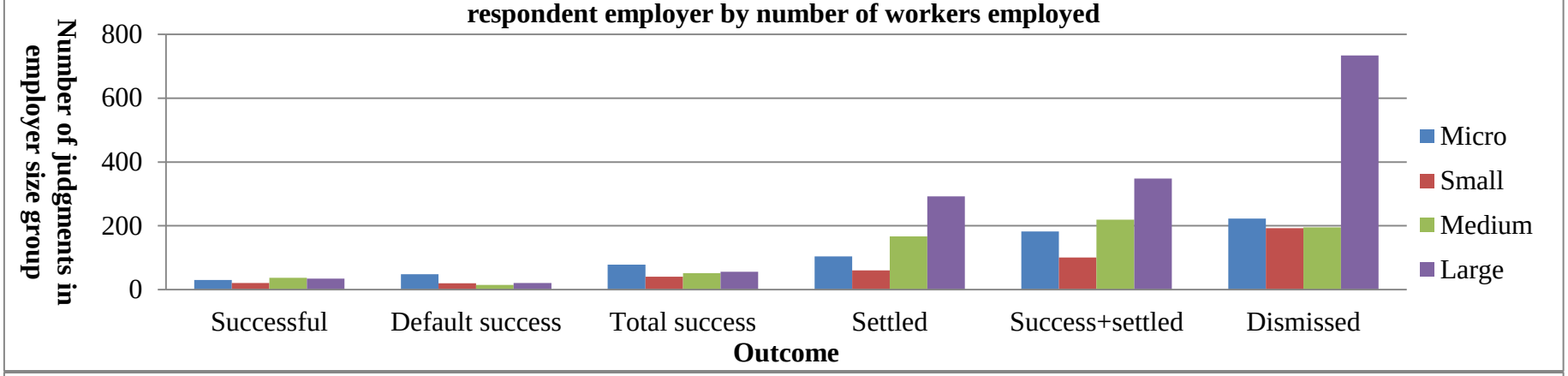
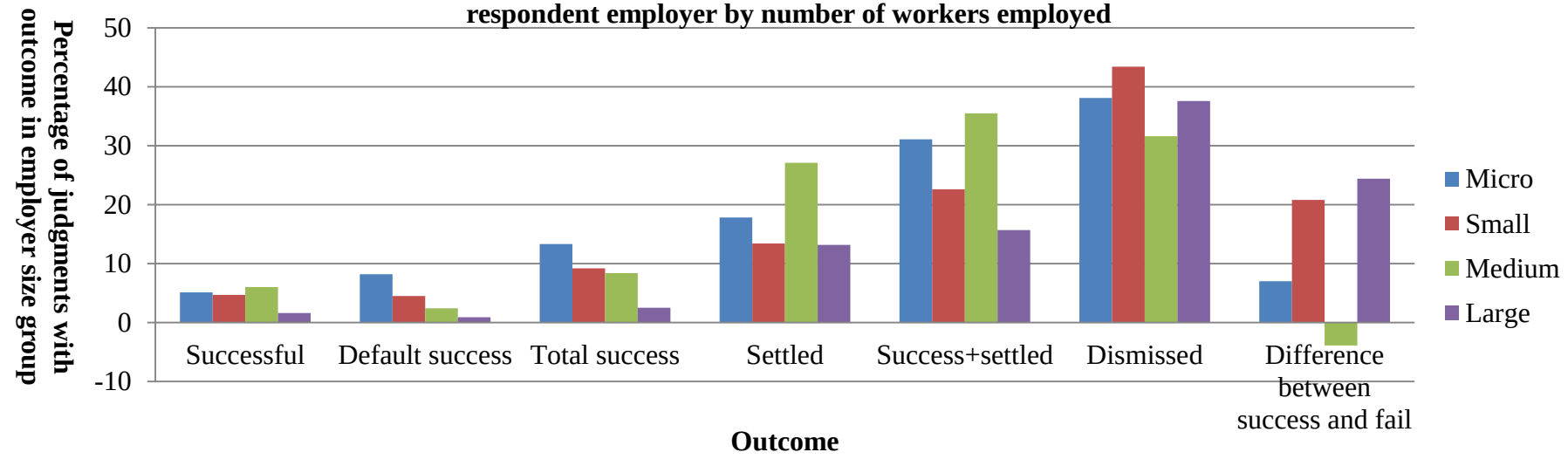


Figure 5.28: Bar chart showing the relationship between percentage of outcome of judgments and size of respondent employer by number of workers employed



Partnerships were the most likely to settle with the employee or partner, with 12.7% of judgments relating to this category recording a settlement at the hearing. More judgments concerned with insolvent employers recorded a successful outcome (19.9%) for the claimant than failed (19%) after consideration which was extremely unusual.

5.7: Remedies 1 – Compensation

A tribunal, if it found a complaint well-founded, was empowered under the Regulations to make either a declaration upholding the rights of a claimant,[9] an order requiring the respondent to pay compensation to the complainant[10] or 'a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant'.[11] On examination of folio reports it was found that compensation awards were the remedy of choice of tribunals although on a handful of occasions tribunals made a general comment that, for example, an employer's recruitment policy should be more transparent in future.[12] The following sections describe the overall compensation and injury to feelings awards given to successful claimants.

The Ministry of Justice has produced an analysis of awards it believes have been given to successful claimants by tribunals. This information bears the caveat that:

> Information presented in this report is Management Information drawn from a number of administrative sources. Although care is taken when processing and analysing the data, the detail is subject to the inaccuracies inherent in any large-scale recording system'[13] and

[9] Employment Equality (Age) Regulations 2006, reg 38(1)(a). Replaced by same wording Equality Act 2010, s. 124(2)(a).
[10] ibid reg 38(1)(b). Replaced by same wording Equality Act 2010, s 124(2)(b).
[11] ibid reg 38(1)(c). Replaced by same wording Equality Act 2010, s 124(2)(c).
[12] *Delambre v Lycée Francais Charles de Gaulle* (2009) ET 2201218/09. Employment Judge Stewart wrote to the respondent employer school board of governors and recommended a change in recruitment procedure.
[13] Ministry of Justice, *Employment Tribunal and EAT Statistics 1 April 2009 to 31 March 2010* (The Stationery Office 2010) 13.

> '[c]ompensation awarded is that of which the Tribunal is aware and entered onto IT systems.[14]

Unfortunately, as has already been pointed out in Chapter 3.3, the ETS Judgment system does not always accurately reflect the true situation. A detailed breakdown of awards taken from folio reports indicates that more awards were given than were identified by the ETS. For example, in the year 2009-2010 the ETS analysis identifies 28 awards whereas 54 awards were found recorded in the same period in folio reports in this study. The size of the awards also differs considerably, as illustrated in Figure 5.29. This discrepancy is large and may mask the true overall picture of compensation awarded by tribunals.

Figure 5.29: Table showing differing statistics relating to compensation awarded for age discrimination claims from ETS Annual Statistical Report and those found on examination of the Register

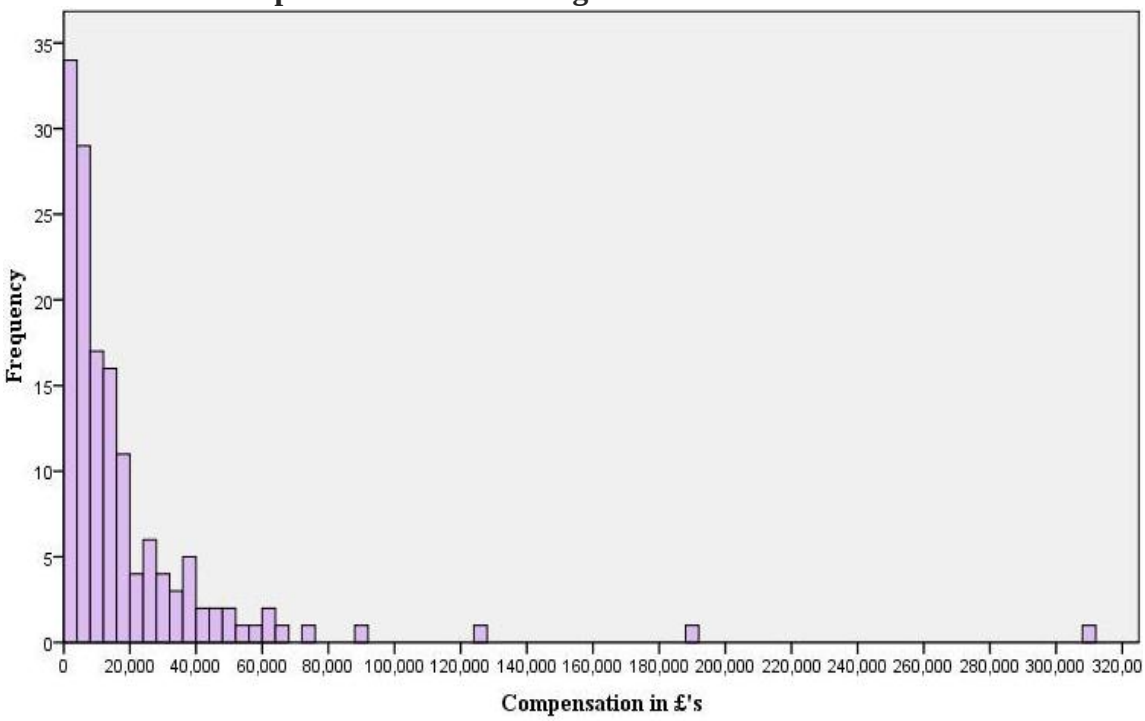
Year	Median	Mean	Maximum
ETS Reported 2007 - 2008[15]	£1,526	£3,334	£12,124
ETS Reported 2008 - 2009[16]	£3,000	£8,869	£90,031
ETS Reported 2009 - 2010[17]	£5,868	£10,931	£48,710
ETS 3 year reported average[18]	£3,464.66	£7,711.33	£50,288.33
Compensation awarded to claimants recorded on Register found in this study Oct 2006 - April 2010	£10,054.88	£19,400.89	£308,442.84

An analysis of the 149 compensation awards found shows that the mean total award was £19,400.89; the mode, the most common value, was £1,000 whilst the lowest monetary award was £241.62. The 25%-75% percentile range was £4,074.80 to £21,155.73. The histogram in Figure 5.30 illustrates the large number of awards made

[14] Ministry of Justice (n 13) 7.
[15] ibid 10.
[16] ibid.
[17] ibid.
[18] ibid.

in the lower monetary value groups. The largest group of awards, found in 34 judgments, were under £4,000; 64 awards were under £8,000, whilst 107 of the 149 examined were under £20,000. The mean award value is 'skewed' by three awards, the unusual nature of which is apparent in Figures 5.30-5.31 where they can be seen to be the only six-figure sums.

Figure 5.30: Histogram showing frequency and amount of compensation awards in age discrimination claims



The claimant in *Wooster v London Borough of Tower Hamlets*[19] was awarded the highest sum of £308,442.84 after reconsideration of his claim by the EAT. Following the issue of the remedy judgment Tower Hamlets Borough Council announced they would make an appeal and John Wooster agreed a private settlement for an undisclosed amount in order to avoid further litigation. Nonetheless the judgment remains on the Register as an award ordered by the tribunal and therefore is included in this analysis. The second highest award of £189,074.50 was given to Linda Sturdy[20] and the third highest of £124,182.27 was awarded to Thong Thiew Koh.[21]

[19] (2008) ET 3200639/07.
[20] *Sturdy v Leeds NHS Trust* (2009) ET 1803960/07.
[21] *Koh v Sainsburys* (2008) ET 23122677/08.

Figure 5.31: Scatter chart showing compensation awarded in £ for age discrimination claims from October 2006-April 2010

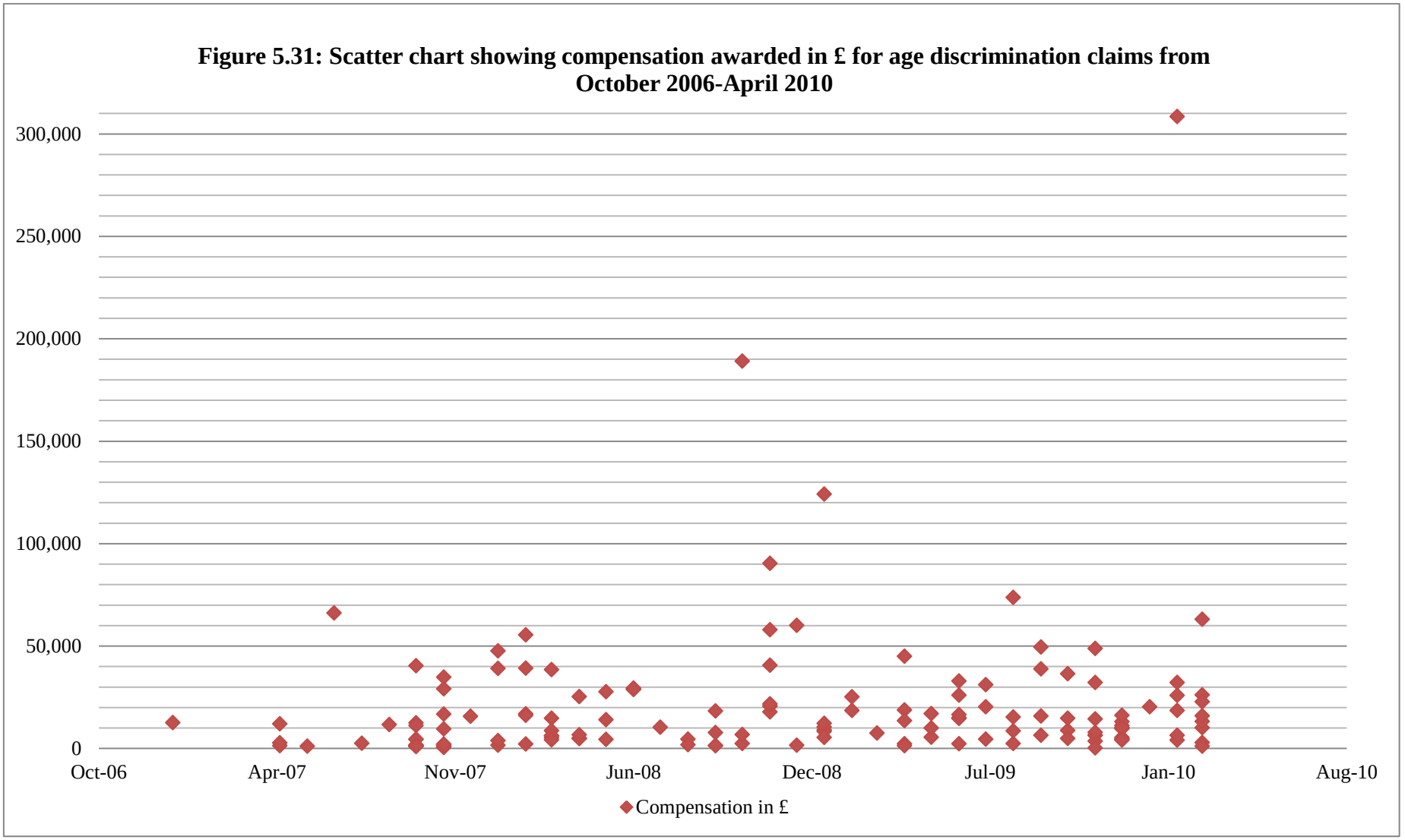
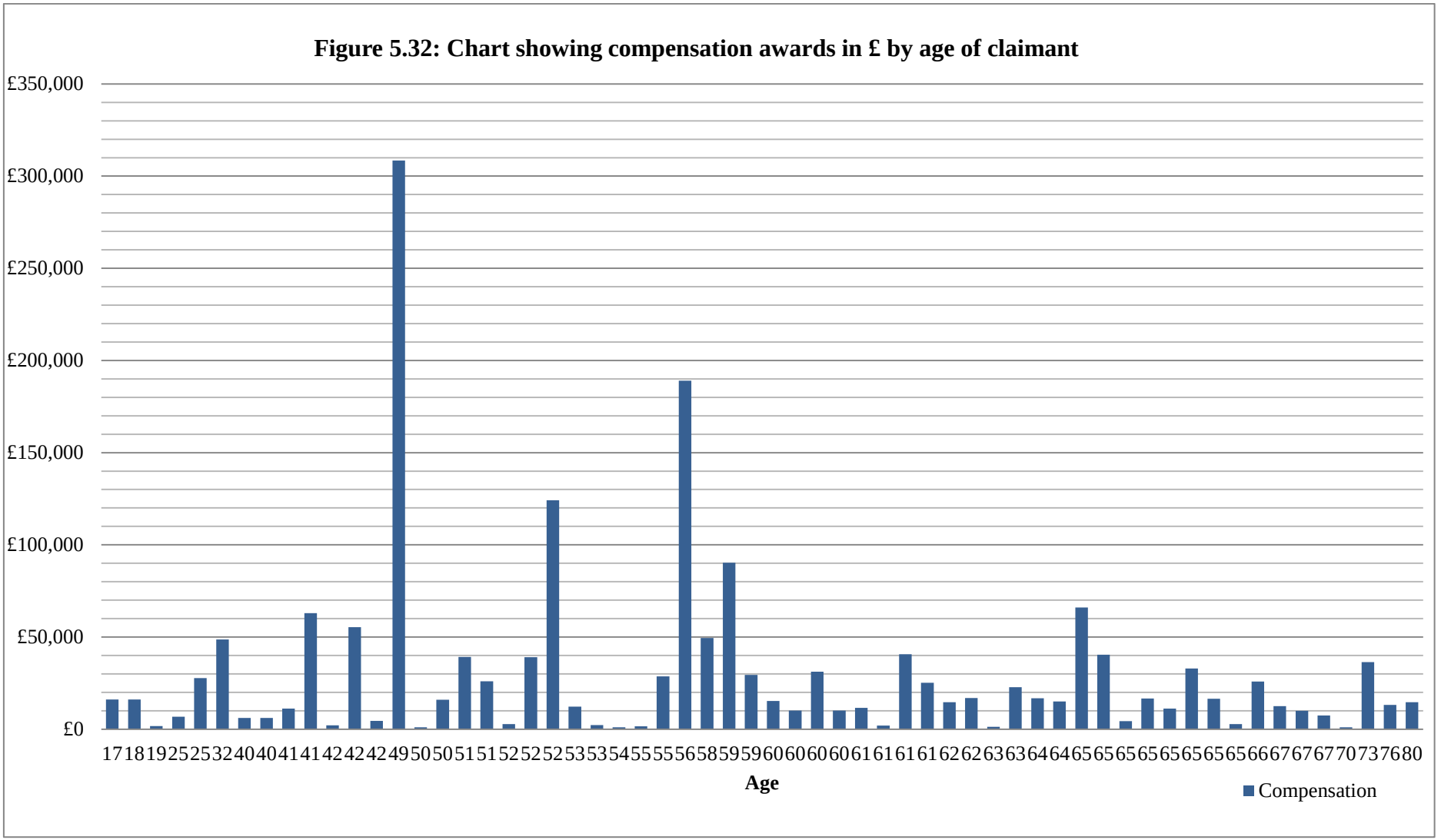


Figure 5.32: Chart showing compensation awards in £ by age of claimant



The scatter chart in Figure 5.31 shows that, apart from these three, awards have not increased over the period of study. Figure 5.32 illustrates the relationship between the age of claimants and compensation. The majority of awards were given to workers aged between 49 and 67. The three highest awards were received by those between 49 and 59.

The mean award for the South-east and London was substantially higher than the other three regions, shown in Figure 5.33. Earnings in this region are higher than in the other areas of England and Wales and compensatory awards were consequently more substantial although the difference in mean awards is more than the regional pay difference would create.[22] This may be because a large number of professionals and senior managers received judgments in this region and received awards based on their higher past and estimated future earnings.

Figure 5.33: Table showing compensation awards by region

	No. of judgments	Mean	Median	25%-75% percentile range Lower value	Higher value
South and South-west	29	£15,032.67	£7,500	£2,005.67	£19,261.97
Midlands	21	£15,261.17	£11,200	£6,575.00	£18,171.04
North	47	£15,571,36	£6,125.16	£2,224.44	£18,719.89
South-east and London	53	£26,948.09	£15,261.28	£5,607.28	£30,274.88

Details of 80 awards were found which related to successful claims by men and 45 to women. The median award to men was £13,100 and the 25-75% percentile range was £6,125 to £25,510. The median award to women was £5,171.61 and the 25-75% percentile range was £1,697 to £19,340. Women were awarded significantly smaller amounts, indicating the possible existence of a 'gender award gap,' only partly explained by higher compensatory awards given to men because they earn more than women. The gender pay gap for all employees in the UK in 2009 was 19.2%[23] but the difference in awards, particularly in median awards, is substantially larger than this pay gap would dictate.

[22] Earnings per week in 2008-2009 in the South-east and London averaged £570.50, in the North £462.30, in the South-west and Wales £447.30 and in the Midlands £456.60. Office for National Statistics, *Annual Survey of Hours and Earnings Statistical Bulletin* (ONS 2009).
[23] Office for National Statistics, *Labour Market Earnings* (ONS 2011).

Those workers with legal representation obtained significantly higher awards than those without. Figure 5.34 summarises the relationship between awards, gender and representation. Unrepresented women were given the lowest mean awards, whilst represented men received awards nearly three times higher.

Figure 5.34: Table showing relationship between compensation awarded, gender and legal representation

	Legal represe-ntation	No of judg-ments	Mean	Median	25%-75% percentile range Lower	Higher
Female	No	15	£11,059.79	£5,500	£1,500	£16,467
All	No	57	£13,885.29	£7,799.60	£4,501.60	£16,223.50
Male	No	42	£14,894.39	£10,054.88	£5,112.99	£16,589.33
Female	Yes+No	45	£15,697.90	£5,171.61	£1,697	£19,340
All	Yes+No	125	£19,400.89	£10,054.88	£4,074.80	£21,155.73
Female	Yes	30	£20,655.68	£8,499.60	£1,689.71	£26,724.65
Male	Yes+No	80	£21,739.29	£13,100	£6,125	£25,510
All	Yes	68	£27,210.49	£16,434.50	£7,537.50	£29,333.99
Male	Yes	38	£32,385.33	£18,513.44	£12,395.75	£38,636.05

Figure 5.35: Table showing relationship between compensation and complaint type

Complaint type	No. of judgments	Median	25% - 75% percentile range Lower	Higher
Recruitment	5	£7,123.46	£3,564.74	£11,181.72
Job status/benefits	6	£11,983.19	£1,000	£17,641.25
Retirement	12	£13,018.63	£1,950.25	£16,650
Redundancy	32	£16,504.39	£2.442.75	£24,520.74
Dismissal	74	£23,133.50	£5,262.65	£25,964.91
Harass/Victim	7	£36,812.40	£11,200	£48,709.79

Compensation awards for age discrimination in recruitment were lower than for other complaint types, shown in Figure 5.35. The awards for harassment and victimisation are skewed because of the high award given to Ms Sturdy, who suffered discrimination in both recruitment and victimisation. This award was included in the victimisation category rather than recruitment because the judgment stresses the

importance placed on the victimisation of Ms Sturdy when assessing the award.[24] If the award had been categorised as discrimination in recruitment the statistics for these two complaint types would be reversed, indicating a shortcoming of this type of analysis when data numbers are low.

The relatively low awards relating to retirement and job status/benefits reflects the smaller sums estimated to have been 'lost' by claimants when compared to those who suffered dismissal. Total compensation awarded by the tribunal is made up of several components and includes a basic element based on length of service and age (in itself age discriminatory). Past financial loss suffered from the time of the discriminatory act to the date of the hearing and future financial loss is assessed. This latter aspect is very difficult to evaluate and most tribunals took the view that a claimant would find another job within a few months, despite strong evidence that older workers find it difficult to find employment.[25] Consequently future financial loss elements were often low. Although compensation in discrimination is theoretically uncapped, the existence of a default retirement age of 65 effectively limited future earnings estimates for many claimants. This resulted in smaller awards as someone near retirement age is considered to have suffered no loss because they could have been fairly retired using the procedure specified under the Regulations.[26]

Details of compensation awards to ten 'young' claimants were found in the Register. The mean award was £4,785.65 which is roughly one quarter of that given to 'all age' group claimants indicating that young claimants, if successful, are unlikely to be able to recover the cost of legal representation. The 25%-75% percentile range was from £782.07 to £9,059.53, compared to £4,299.90 to £23,330.91 for 'all age' group claimants.

Compensation awards for those claiming under multiple jurisdictions were detailed in 45 folio reports and under single jurisdictions in 122 reports and are illustrated in Figures 5.36 and 5.37. The range for single jurisdiction claims was £241.62 to £308,422.84, compared to £1,250 to £57,867.83 for those made under multiple jurisdictions.

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[24] *Sturdy v Leeds NHS Trust* (2007) ET 1803960/07 [9.6] (Lee EJ).
[25] M Elsby, JC Smith and J Wadsworth, 'The Role of Worker Flows in the Dynamics and Distribution of UK Unemployment' (2011) 27(2) Oxford Review of Economic Policy 338.
[26] Now no longer applicable: Equality Act 2010, Schedule 9 and The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069.

Figure 5.36: Histogram showing compensation awards given for claims made under single jurisdiction

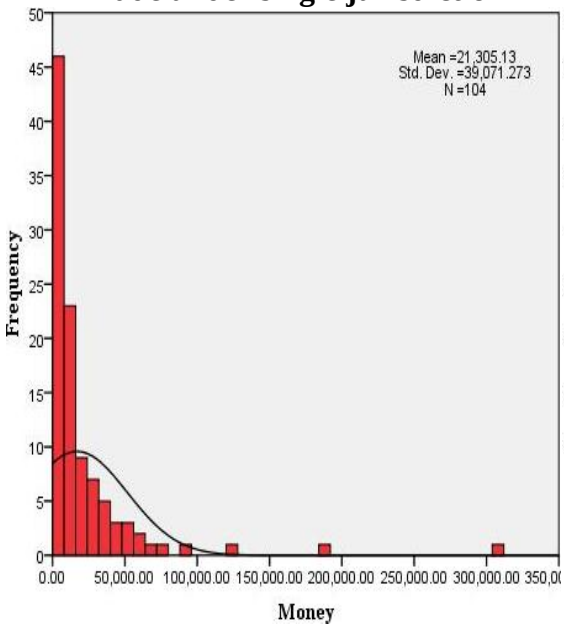
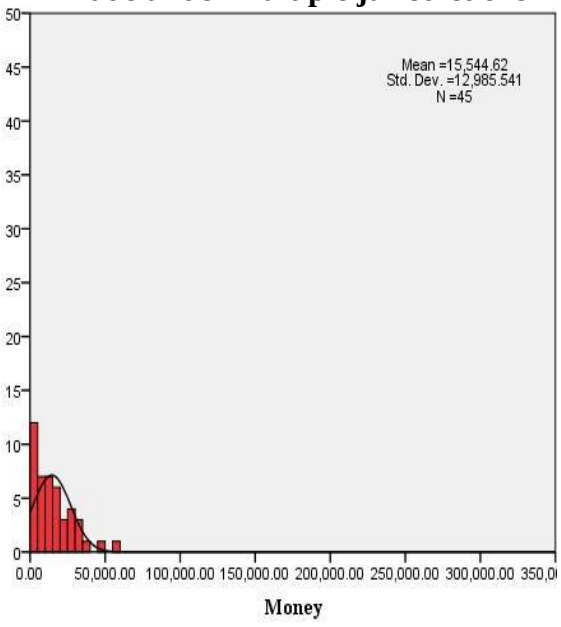


Figure 5.37: Histogram showing compensation awards given for claims made under multiple jurisdictions



Superficially these graphs appear to suggest that single jurisdiction claims were associated with higher awards, but the 25-75% percentile figures for the two types of claim are very similar demonstrating that the single jurisdiction mean figure is skewed by four large awards. The modal value for single jurisdiction claims is £1000, shown in the high number in the bar on the left of Figure 5.36, whilst that for multiple jurisdictions is £4,821.30. Although claims made under single jurisdictions produced higher awards in particular claims, the lower modal value indicates that the majority of awards were lower than those given to claims under multiple jurisdictions.

Figure 5.38 shows that there was a direct relationship between the size of the employer and compensation awarded.

Figure 5.38: Graph showing relationship between employer size and compensation awarded to claimants

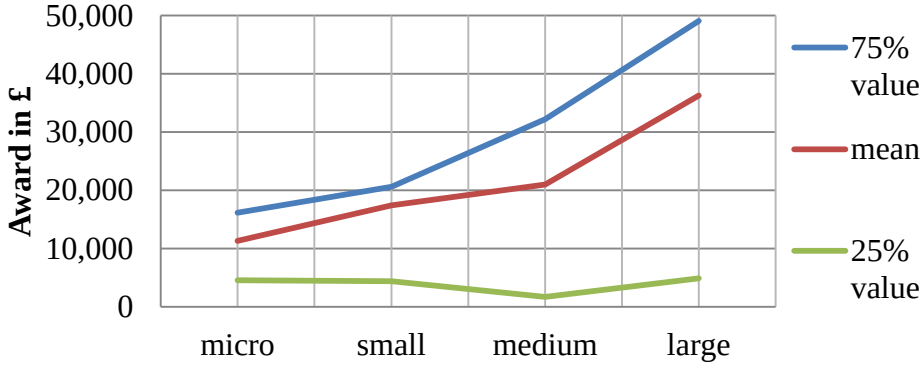


Figure 5.39: Table showing relationship between employer legal status and compensation awards

	Sole Trader	Partner/ ship	Private Co	Plc	Govt. Body	Charity	'Other' Status
No. of Judgments	6	4	114	7	8	8	1
Mean award	£9,102	£5,733	£17,012	£28,457	£56,560	£19,559	£63,000

With the exception of one very large award given to a worker employed by a business falling into the 'other' category, seen in Figure 5.39, the largest awards were given to workers employed by government bodies and plcs. Those employed by partnerships and sole traders were awarded considerably less than the mean award.

5.8: Remedies 2 – Injury to feelings awards

Almost all claimants made claims under additional jurisdictions when complaining of age discrimination, ranging from claims for unpaid holiday pay to allegations of breach of contract. The award recorded in judgments, discussed above, reflects the whole claim, rather than compensation given solely for the age component. However, the injury to feelings element of the award is directly related to the age aspect of the complaint and is not related to the earning capacity of the claimant. The 'Vento' guidelines to tribunals set out three levels of compensation for injury to feelings. These are currently: £500-£6000 for less serious cases such as an isolated incident, £6000-£18,000 for more severe cases or for acts extending over a period of time and £18,000-£30,000 for the most serious cases such as where there has been a lengthy campaign of harassment.[27] The Court of Appeal also recommended that 'awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings'.[28]

Details of 109 injury to feelings awards were found in folio reports. Ten workers were not given awards because the tribunal felt they had not suffered injury to their feelings although their claim was upheld. In *Galt v National Starch and Chemical*[29] six workers selected for redundancy were successful in their claim that an enhanced redundancy payment scheme favoured older employees but they did not receive injury

[27] *Vento v Chief Constable of West Yorkshire Police (No.2)* [2002] EWCA Civ 1871, [2003] IRLR 102 (CA). Amounts subsequently increased in *Da'Bell v National Society for Prevention of Cruelty to Children* [2009] UKEAT 0227_09_2809, [2009] IRLR 19.
[28] ibid [65] (Mummery LJ).
[29] (2007) ET 2101804/07.

to feelings awards. Linda Sturdy was awarded the highest and only award in the top Vento band of £42,037.50,[30] seen on the far right of Figure 5.40. This histogram shows that the largest monetary value group with 23 awards is £625-£1,250, followed by £0-£625 with 12 awards and £1,250-£1,875 with 11 awards. Half of the awards were under £2,500. The mean award was £3,646.80, the median £2,500 and 16 awards were at the modal value of £1,000 with nine at a secondary modal value of £1,500. The 25%-75% percentile range was £1,000 to £5,000, wholly within the lowest Vento band.

Figure 5.40: Histogram showing frequency and amounts of injury to feelings awards in judgments relating to age discrimination claims

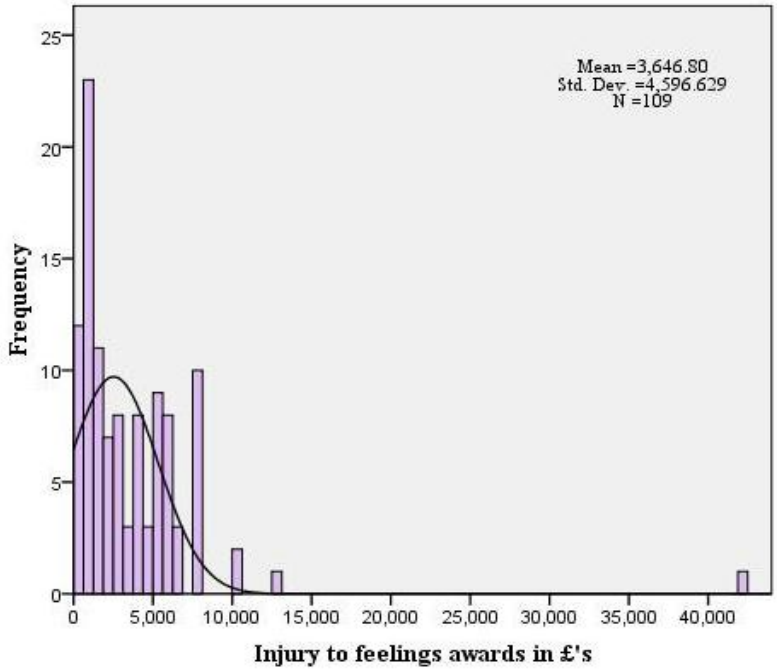


Figure 5.41: Table showing injury to feelings awarded in regions of England and Wales

	No. of judgments with injury to feelings details	Mean	Median	25%-75% percentile range	
				Lower	Higher
South & South-west	21	£2458.48	£1500	£1000	£4000
North	36	£3802.67	£1650	£768.75	£5000
London & South-east	39	£4064.34	£3065.77	£1500	£6000
Midlands	12	£4672.33	£6000	£1670.75	£6769.09

[30] *Sturdy v Leeds NHS Trust* (2007) ET 1803960/07. Award included aggravated damages of £5,700 and uplifts for failure to follow statutory procedure.

Injury to feelings awards were generally lower in the South and South-west of the country as shown in Figure 5.41. The highest awards were given in the Midlands where the mean was nearly double that given in the South and South-west.

The Register holds details of 66 injury to feelings awards given to men and 43 given to women, statistics for which are shown in Figure 5.42. The award given to Linda Sturdy distorts the mean award for women considerably and without this award the mean for represented women would be £2,963. The difference in the median awards and the 20% difference in the 25-75% percentile ranges suggest there was a 'gender award gap' relating to injury to feelings awards.

Figure 5.42: Table showing relationship between injury to feelings awards, gender and legal representation

	Legal represent -ation	No. of judgments	Mean	Median	25%-75% percentile range	
					Lower	Higher
Female	No	12	£2690.90	£2500	£1125	£3900
All	No	47	£3122.85	£3000	£1200	£5000
Male	No	35	£3270	£3000	£1200	£5000
Female	Yes+No	34	£3608	£1500	£1000	£5000
Male	Yes+No	59	£3729.20	£3125	£1237.62	£6000
Female	Yes	22	£4613.25	£1250	£0	£7500
All	Yes	46	£4629.52	£3032.88	£1000	£6400
Male	Yes	24	£4644.44	£3950	£2250	£6208.50

The mean injury to feelings awards received by those with legal representation was approximately 50% higher than those without – those with representation received £4,629.52 on average and those without £3,122.85. Women and men were given very similar mean awards if they had representation, but the figure for women is again affected by the very large award given to Linda Sturdy. Women without representation received on average £600 less than the average given to unrepresented men. This is also reflected in a lower median award value and a lower 25%-75% percentile range of awards given to unrepresented women. The four injury to feelings awards found in folio reports given to young claimants were also low – £1500, £3000, £4000 and

£5000 – all in the lower Vento band, recommended for 'less serious and one-off cases'.[31]

Those workers complaining of age discrimination with regard to job status/benefits received lower injury to feelings awards than in other complaint types, whilst those complaining about dismissal received higher awards, reflecting the gravity of the injury suffered as viewed by the tribunal. The mean figures for all complaint types fall within the lower Vento band, with the exception of harassment and victimisation, shown in Figure 5.43. As in the previous section on total awards, the sum awarded to Linda Sturdy skews the statistics for harassment and victimisation and without this award the figures for this category would be similar to those for recruitment.

Figure 5.43: Table showing relationship between injury to feelings awards, and complaint type

Complaint type	No of judgments with details	Mean	25%-75% percentile range	
			lower	higher
Recruitment:	4	£3,500.75	£1,752.75	£4,500
Job status/benefits:	6	£1,666.67	£875	£2,375
Dismissal:	56	£3,784.65	£1,007.29	£5,953.25
Retirement:	7	£2,759.37	£1,000	£6,000
Redundancy:	21	£2,915.48	£0	£5,500
Harassment/ Victimisation:	5	£11,423.50	£1,790	£24,018.75

Of the 31 awards relating to multiple jurisdiction claims, two fell into the middle Vento age band and 29 were in the lower band, as shown in Figure 5.44. The mean award was £3,781.10, whereas the equivalent figure for the 79 single jurisdiction awards found was slightly lower at £3,642.28. As found in the total compensation analysis, three awards over £10,000 given to single jurisdiction claims skew the statistics. However, the 25%-75% percentile figures for single jurisdiction claims are lower than for multiple jurisdiction claims and lend weight to the finding that although

[31] *Vento* (n 27) [65] (Mummery LJ).

multiple jurisdiction claimants were less successful, if they were successful, they were awarded more than single jurisdiction claimants.

Figure 5.44: Histogram showing injury to feeling awards relating to claims made under multiple jurisdictions

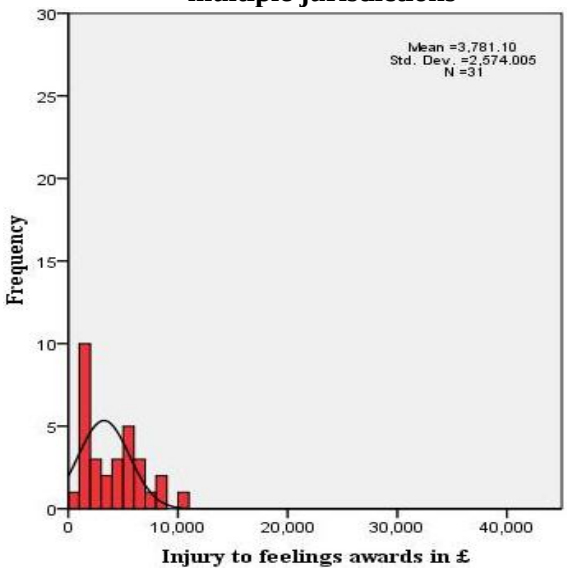
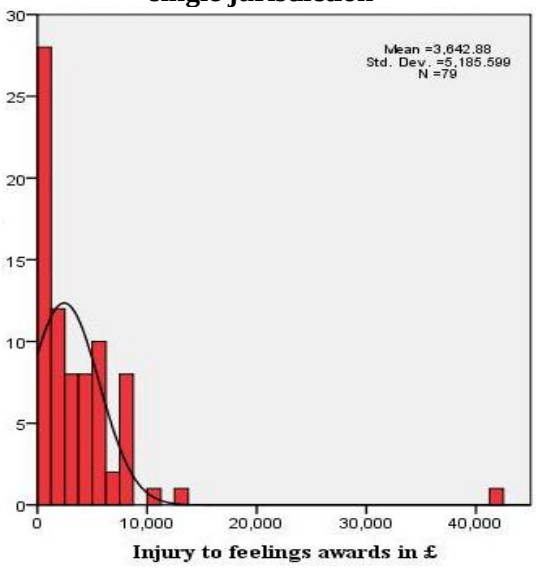


Figure 5.45: Histogram showing injury to feeling awards relating to claims made under single jurisdiction



Details of 109 injury to feelings awards relating to employer size groups were found. The awards for each employer group increased directly with the size of the organisation defending the claim, as shown in Figures 5.46 and 5.47.

Figure 5.46: Graph showing relationship between employer size and injury to feelings awards

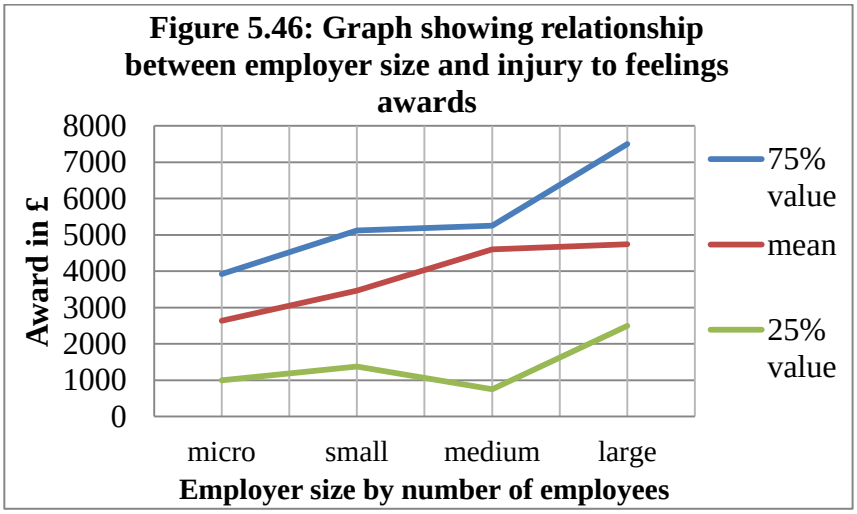


Figure 5.47: Table showing relationship between employer size and injury to feelings awards

	Large	Medium	Small	Micro
No of judgments	23	26	22	38
Mean award	£4,743.91	£4,599.06	£3,463.77	£2,634.56
25%-75% range	£2,500-7,500	£750-£5,250	£1,375-£5,125	£1,000-£3,925

The highest injury to feelings and largest proportion of middle and high Vento band awards were given to claimants taking action against government bodies, such as NHS Trusts and city councils, as shown in Figure 5.48.

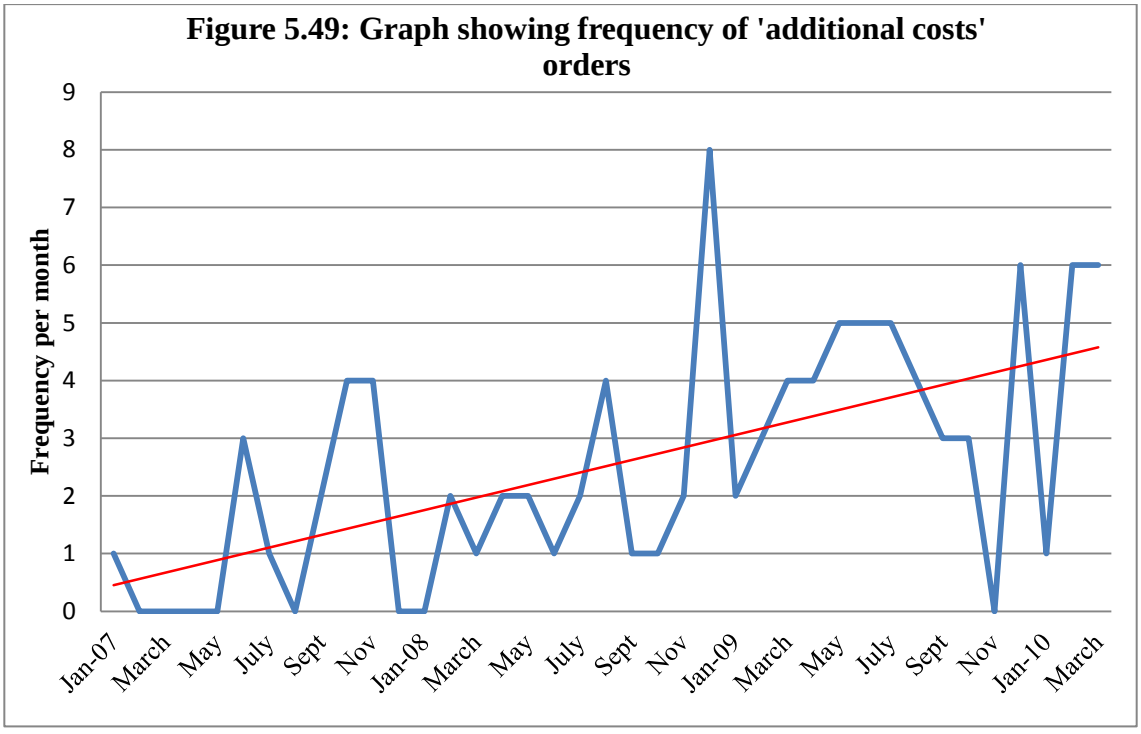
Figure 5.48: Table showing relationship between employer legal status and injury to feelings awards

	Sole Trader	Partner-ship	Private Co	Plc	Govt. Body	Charity
No. of Judgments	4	3	85	5	6	5
Mean award	£2,331	£1,412.54	£3,207.1	£4,480	£11,589	£3,755
Vento band	All low	All low	83 low 2 middle	All low	4 low 1 middle 1 high	All low

5.9: Additional costs

Additional costs were ordered to be paid by claimants in 97 judgments. The frequency of such orders rose over the period of study as the red, Excel-generated, linear trendline indicates in Figure 5.49.

Figure 5.49: Graph showing frequency of 'additional costs' orders



The mean sum the 97 claimants were asked to pay was £1,869.05, the median £635 and the modal value £250. However, the 25%-75% percentile range was £250-

£1,112.25, indicating that the average cost was distorted considerably by five large sums of legal costs paid to the employer ranging from £10,000[32] to £14,800.[33] The number of claimants paying such costs varied from none at the Exeter and Shrewsbury Tribunals, to 13 at London Central and 10 at Watford. Considerably more claimants in London and the South-east (35) were ordered to pay additional costs than in the North (22), the Midlands (20) and South and South-west (20). However, the average additional cost was higher in the South and South-west – more than six times higher than those in the North, shown in Figure 5.50.

Figure 5.50: Table showing additional costs paid by claimants by region

	No. of judgments with additional costs	Mean	Median	25%-75% percentile range Lower value	Higher value
North	22	£493.31	£453	£250	£677.53
Midlands	20	£1418.40	£714	£553.50	£1158.75
London & South-east	35	£2182.65	£862.50	£217	£1832
South & South-west	20	£3284.20	£413.85	£250	£8545.97

5.10: Conclusion

Much information relating to the outcome of age claims has been elicited in this study for the first time allowing conclusions to be drawn from a base-line of certainty rather than speculation. The most striking fact to emerge from the findings is that success rates for claimants were extremely low with only 3.2% declared successful if a claim of age discrimination was considered by a tribunal. However, a significant number of claims were settled at the hearing resulting in 37% of claimants obtaining a declaration of success or a settlement. Nonetheless the proportion of successful claims became steadily lower over the period whilst the number of claims increased and the percentage of claimants obtaining a remedy of some nature in the first quarter of 2010 fell to 24.4%.

Claims were spread fairly evenly throughout the country but success rates varied in the regions, with workers in the North more successful than those in the South and South-west. Claimants in Leeds were more successful than those in other tribunals

[32] Payment awarded to group of employers in 39 claims, *Frayling v McLeod* (2009) ET 1305883/08.
[33] Employer's costs in *Hampton v Lord Chancellor* [2008] IRLR 258, (2007) ET 2300835/07.

whilst no claimant was declared successful out of the 103 ‘age’ judgments handed down by the Leicester Tribunal. Those claimants complaining of less favourable treatment in recruitment were particularly unsuccessful. Those making an additional claim of discrimination were up to eight times less likely to be successful than those making age discrimination claims alone, with women claiming sexual orientation discrimination in addition to age least successful, reflecting the difficulty that those making such claims had in finding evidence to substantiate each part of their claim. Each additional claim of discrimination reduced the likelihood of success further, illustrating the problems that those alleging that they had suffered multiple discrimination faced when trying to obtain a remedy.

Legal representation made a substantial difference to the outcome of a claim. Women relied on legal representation more than men but despite this their success rates were very similar to that of men and without this additional help their success rates would possibly be lower. Those with legal representation were twice as successful as those without assistance. Surprisingly, they were also more likely to follow an incorrect procedure but this may be because some claimants obtained legal assistance as they suspected they had made an error. Several claimants who had followed an incorrect procedure but hoped the tribunal would find it just and equitable to extend the time-period found they had additional costs awarded against them in a punitive manner.

The least successful occupational group at the tribunal were the 70 claimants from the clerical worker group where no one was successful after consideration and seven were ordered to pay additional costs. Claimants in elementary occupations, particularly cleaners and construction workers, were the most successful. The outcome for men and women within occupation groups differed considerably. Female estate agents and lawyers and men involved in the sale of motor vehicles were typically successful claimants. No women who were members of plant, machine and assembly worker and craft and related worker groups were successful, either after consideration or by default.

Respondent employers were frequently large organisations concerned with public administration, yet success rates against these bodies were low. The activities of employers most often found to have unlawfully discriminated against workers – those

connected with motor sales and estate agencies – were involved in a competitive world selling high value property in a recession, and a higher proportion than average were insolvent, indicating that discriminating conduct may be more likely when financial stress is placed upon an employer.

If a claimant was successful the compensation awarded was usually low and often would not have covered legal costs. Women received lower compensation awards than men indicating the existence of a 'gender award gap,' visible also in injury to feelings awards. Most injury to feelings awards were in the lower Vento band as tribunals felt the injury was in the 'less serious' category and some successful claimants received no award, a practice recommended 'to be avoided'[34] by the Court of Appeal. Claimants acting as part of a group received injury to feelings awards which were on average less than half that of individual claimants. There was inconsistency in injury to feelings awards given between the regions, with claimants in the South and South-west given far lower awards and asked to pay substantially higher additional costs compared to those in the Midlands and North. Compensation awarded was in direct proportion to the size and legal status of the employer indicating that tribunals were taking into account the apparent ability of the respondent to pay rather than the actual injury suffered by the claimant.

The outcome of claims made by the young differed considerably from those made by older workers. These claimants were more successful, followed the correct procedure, were less likely to have their claim struck out and were unwilling to withdraw or settle their claim. Young women received a larger proportion of judgments and were more successful than young men. However, compensation awards to the young were on average one quarter of those given to older workers, with injury to feelings awards low and young claimants were not likely to cover the cost of legal representation when given an award. All of those who felt part of a disadvantaged age band were unsuccessful. The pattern revealed by this study is therefore one of increasingly low success rates, small compensation awards and inconsistent regional patterns, linked to a claim procedure which many workers found difficult to navigate. The following Chapters seek to find an explanation for this emerging pattern by means of a qualitative investigation of tribunal judgments.

[34] *Vento* (n 27) [65] (Mummery LJ).

Chapter Six:
Folio Reports 1 – Establishing a Claim

6.1: Introduction

This Chapter explores the problems that claimants had in establishing that they had suffered age discrimination. All of the 1682 folio reports which concerned an age discrimination claim which was successful, failed or struck out were examined for this part of the study. The hard-copy folio reports in the Judgment Register reveal details of the implementation and interpretation of the Regulations by employment tribunals. The majority of reports, particularly of those claims which had been time-expired, struck out or settled, but for which a judgment was made, contained a single sheet and gave no details of the claim, contrary to the requirements of the 2004 Regulations.[1] However, several hundred reports contained sufficient information to throw light on the decisions made by tribunals and appellate courts.

6.2: Jurisdiction

Many claimants failed in their application to the tribunal because they could not establish that the tribunal had jurisdiction to hear the claim. This was usually because they were found not to be an employee, had exceeded the time-limits or were outside the territorial jurisdiction of the tribunal.

6.2.1: Employee status

Employment was defined very broadly in the Age Regulations[2] but some claimants found it difficult to establish their employee status, as in *Kuncharalingam v Word by Translations*[3] where a 60 year old interpreter was found not to be an employee but a contract worker and ordered to pay £862.50 costs to the respondent. The youngest claimant found on the Register, a 15 year old newspaper delivery boy,

[1] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Schedule 1 para 30(6).
[2] Employment Equality (Age) Regulations 2006, reg 2(2): 'employment' means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions (such as 'employee' and 'employer') shall be construed accordingly. Replaced by Equality Act 2010, s 83(2)(a).
[3] (2007) ET 3201663/07.

failed in his claim of age discrimination in *Bebbington v Sturry News*[4] because he had no 'mutuality of obligation'[5] with the respondent and therefore was not an employee. However, in *Pinnock v BDL Group Ltd*[6] the claimant's contractual document specifically stated that he was self-employed and the respondent asserted that the tribunal had no jurisdiction. The Employment Judge found that the claimant had always turned up for work for over 15 years as a plasterer, had never hired a substitute and so was an employee. He stressed it was important to look at the 'realities of the relationship'[7] in deciding whether to establish jurisdiction and the claimant was allowed to continue with his claim.

In some instances workers, although not found to be employees, were able to rely on another provision within the Regulations. For example, in *Train v DTE Business Advisory Services Ltd*[8] the claimant tried to show he was an employee and failed, but was able to show that he was a partner and able to rely on Regulation 16. Several claims failed because the worker could not correctly identify their employer: this would have been evident from a Section 1[9] statement if the claimant had received one. *Thatcher v Homes in Havering*[10] and *Cooper v BA plc*[11] both concerned claimants who were found not to be employees of the respondents, but were sub-contractors from other agencies, highlighting the complexity of the modern employment relationship.

6.2.2: Time limits

As discussed in Chapter 5.1, 421 age claims were dismissed over the period of study because the claimant had not submitted a grievance at the correct time, had failed to wait 28 days for a response to the grievance before making an application or had failed to make their application within three months of the alleged discriminating conduct. The factors the tribunal take into account when considering whether to extend the time-period are:

[4] (2009) ET 1101938/08 (Salter EJ).
[5] ibid (Salter EJ citing *Carmichael v National Power plc* [1999] UKHL 47, [1999] 1 WLR 2042 (Hoffmann LJ)).
[6] (2007) ET 3300353/07.
[7] Quoting the precedent discussed in *Gunning v Mirror Group Newspapers Ltd* [1986] 1 WLR 546.
[8] [2009] UKEAT 0201_08_0601.
[9] Employment Rights Act 1996, s 1.
[10] (2009) ET 3203224/08.
[11] (2009) ET 3303226/08.

> the reasons for and the extent of the delay; whether the claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed and; the merits of the claim.[12]

In addition Sir Thomas Morison stated in the EAT that a 'tribunal must balance all the factors which are relevant … Reasonable awareness of the right to sue is but one factor.'[13]

Tribunals rarely used their discretion to allow claims to progress if the claim procedure had not been followed correctly. Although a tribunal has the power to extend time periods if it is thought 'just and equitable',[14] this was found to occur only eight times over the period of study. This is in contrast to the numerous times when employers failed to respond to a tribunal's communications, had a default judgment ordered against them and were then given a further opportunity to have the claim reconsidered.[15] However, many claims were considerably out of time, for example, in *Fryett v Suncrust Bakery*[16] the claim was eleven months out of time and in *Norris v Etern IT*[17] the claim was over a year out of time. On seven occasions a claimant was ordered to pay the respondent's costs as the tribunal felt the claimant could have submitted in time; for example, in *John v DHL Excel Supply Chain*[18] the claimant was ordered to pay £1000 towards the employer's costs as it was felt he had wasted the tribunal's time in making a time-expired claim.[19]

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[12] The Limitation Act 1980, s 33.
[13] *Mills v Marshall* [1998] UKEAT 528_97_1102, [1998] ICR 518.
[14] Employment Equality (Age) Regulations 2006, reg 42(3): A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so. Replaced by Equality Act 2010, s 123(b).
[15] As in *Cooke v Barn Brasserie* (2008) ET 1500335/08 and *Beetham v Duchy Catering* (2008) ET 2102031/08.
[16] (2008) ET 1501483/08.
[17] (2009) ET 1501495/08.
[18] (2009) ET 1201092/08.
[19] Other such instances – *Stratford v Corporate Event Services Ltd* (2009) ET 1400934/09, claimant ordered to pay £250; *Williams v Glendale Managing Services* (2009) ET 2702556/08, claimant ordered to pay £400; *Harn v Premier Direct Group* (2007) ET 2505723/07, claimant ordered to pay £360; *Altoft v RBS* (2007) ET 2601401/07, claimant ordered to pay £2000; *Doyle v Ernst & Young LLP* (2009) ET 2300667/09, claimant ordered to pay £500; *Cain v Priory FFEC Group* (2009) ET 1400915/09, claimant ordered to pay £250.

There was usually one of three reasons for a time-expired claim to be presented. Firstly, workers were uninformed of their employment rights and of the need to follow the grievance and disciplinary procedure precisely. In *Joseph v Veolia Environmental Services*[20] the Employment Judge commented that the claimant was 'ignorant of the law' about time limits, but found it was not just and equitable to extend the time-period despite the fact that the claimant was clearly unaware of his rights, a factor said by the EAT to be taken into account.[21] Several claimants received inaccurate advice from advisors, such as Citizens Advice Bureaux or Trade Union officials. Tribunals accepted this as a reason to extend time twice, but on numerous occasions did not. Employment Judge Ryan, in *Freehan v Rolls Royce,* extended the time-period because it was 'understandable'[22] that inaccurate advice taken from a Trade Union advisor should be accepted by a claimant as correct. In *Boorman v Steifel Labs*[23] an unrepresented claimant brought evidence to show he had used guidance from the Help the Aged web-site, an IDS Brief on Age Discrimination and a textbook written by James Davies,[24] all of which indicated that the time-limit could be extended and Boorman thought this would apply to him. The tribunal thought it just and equitable to extend the time-period, although they refused to do so when a claimant who was a solicitor brought similar evidence in *Tomlinson v Isis Computer Software.*[25]

Several claimants were eager to press on with their claim and did not wait 28 days after submitting their grievance before making an application, as in *Annonio v Alitalia.*[26] Irrespective of the merits of their case, all of these claimants had their applications dismissed by tribunals, who rigorously applied the authority established in *Basingstoke Press Ltd (In Administration) v Clarke*[27] that 28 clear days must pass before a claim is lodged. This could presumably be checked at an earlier stage than at the full hearing and a pre-hearing inspection of such factual matters would save both parties time and money.

[20] (2009) 2303224/09.
[21] *Mills* (n 13).
[22] (2007) ET 2140025/07 [4.5].
[23] (2008) ET 2700466/08.
[24] Partner in employment law specialists Lewis Silkin.
[25] (2008) ET 2312661/08.
[26] (2007) ET 2700038/07.
[27] [2007] UKEAT 0375_06_0901, [2007] ICR 1284.

Secondly, some employees did not realise within the three month period that they had suffered age discrimination, particularly in recruitment cases where the interview and selection process may have taken considerable time. For example, *Buraik-Hume v Co-operative Group*[28] concerned a worker who was a refused a loan to attend a NVQ course which would have enabled her to obtain promotion. She did not raise a written grievance within the time period as she did not realise for several weeks that the decision may have been influenced by age. These 'delayed recognition' reasons were not accepted as a basis for extension of time by the tribunal in any claim.

A written letter of complaint must actually specify that the claimant feels discriminated on the grounds of age, a factor several claimants overlooked. In *Arakelyan v Nicholas Ltd*[29] the claimant wrote several letters of complaint to the employer expressing her dissatisfaction at her treatment by her manager. As she did not specifically say her complaint concerned 'age discrimination' the letter did not suffice for the purposes of the Regulations. Claimants who felt they had suffered discrimination on multiple grounds often did not mention all of their complaints in their grievance letter, perhaps omitting age.[30] A tribunal has power under the Employment Tribunals Rules of Procedure[31] to allow age to be added to a claim which had not initially included it but no instances were found in folio reports where it was thought fit to do so.

Thirdly, in some cases a claimant used a lengthy employer internal grievance procedure and found they were unable to submit within three months. Tribunals, citing the authority established in *Robinson v Post Office* where the EAT recognised that 'an employee who awaits the outcome of an internal appeal … must realise that he is running a real danger',[32] did not find this a legitimate reason to allow a time extension, as in *Matthews v Land Securities plc.*[33] Similarly in *Sellwood v B & Q plc*[34] the claimant waited until the grievance procedure had finished before making his

[28] (2007) ET 2404806/07.
[29] (2009) ET 3301185/08. Claimant ordered to pay £150 costs because of failure to correctly make grievance.
[30] Eg *Dunne v The Legal Practice* (2008) ET 3301441/08 – claimant also claimed sex and disability discrimination but was not allowed to proceed with age; *Pullinger v University of Kent* (2007) ET 1102944/06 – claimant also claimed sex discrimination but was not allowed to proceed with age.
[31] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, Schedule 1 Rule 10 and *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650.
[32] UKEAT 1209_99_1207, [2000] IRLR 804 [35] Mr Justice Lindsay.
[33] (2008) ET 2203748/07.
[34] (2008) ET 3302196/07.

application but the time limit was not extended as the tribunal thought it could have been presented within the time period.

The precedent established in *Robinson* appears to encourage workers to make a claim before the grievance procedure has been exhausted, which may in itself affect the outcome of a grievance. This runs counter to advice given to employees who are encouraged to fully explore all internal methods of obtaining a remedy for their grievance before making a claim.[35] The procedural time-restriction may aggravate the situation, forcing the worker to choose between continuing to negotiate along a non-litigious route or making a claim to the tribunal to avoid being time-barred. The leap that a worker must take when deciding to give up negotiation and make a claim to the tribunal is a pivotal point in a workplace dispute and it is unfortunate that a worker is compelled to choose which path to follow because of a statutory time-limit.

6.2.3: Territorial issues

Jurisdiction was problematical in some age claims because of a 'territorial' issue – either the employer or the worker was not based in Great Britain. The complex nature of employment today requires workers to be flexible with regard to their place of work. Some may be sent abroad for periods on placements whilst overseas workers may be sent to Great Britain whilst employed by an overseas registered company. The EU encourages the freedom of movement of workers between member states and requires that such 'freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states as regards employment, remuneration and other conditions of work and employment'.[36]

An employment tribunal has jurisdiction to hear matters concerning an employer if 'the respondent … carries on business in England and Wales'.[37] The Regulations could be relied on by a claimant alleging age discrimination if the employee:

> 10 (1) (a) does his work wholly or partly in Great Britain; or
> (b) does his work wholly outside Great Britain and para (2) applies
> (2) (a) the employer has a place of business at an establishment in

[35] Department of BIS, *How to Resolve a Problem at Work* (The Stationery Office 2011).
[36] EU Treaty, Article 45(2).
[37] Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, reg 19(1).

Great Britain;

(b) work is for the purposes of the business carried on at that establishment; …

(3) The reference to 'employment' in paragraph (1) includes—

(b) employment on an aircraft or hovercraft only if the aircraft or hovercraft is registered in the United Kingdom.[38]

The tribunal must consider whether the employee is completing duties at least 'partly' in Great Britain, using the principles set out in *Lawson v Serco*[39] where it was held that the employee should fall into one of three categories to establish reliance on UK employment legislation. These categories are firstly, the worker living and working in Great Britain, secondly, the employee who moves around, including outside the country and thirdly, employees who work outside the UK for a British company. The decision in *Lawson v Serco* has been thrown into doubt[40] as many employees do not fall neatly into these categories and, in any event, the requirement in Regulation 10 to show that an employee works 'partly' in Great Britain is a much less rigorous requirement than that discussed in *Lawson v Serco*, which insists that the worker be 'based' in Great Britain. In theory therefore, this requirement should have enabled claimants under the Regulations to establish more easily that they are an employee in Great Britain than under other employment legislation.

In *Abrams v Gartner Ltd*[41] however, a research director was found to have worked more in the USA than the UK over the past year and was therefore not 'based' in England, although the requirement to work here 'partly' appears to have been satisfied, indicating that the tribunal required a stricter test than the legislation actually demanded. The requirement was clearly not satisfied in *Washington v British Council*[42] where a teacher employed by the British Council was found to carry out her duties wholly in Bahrain and as her employer was not based in Bahrain, but Britain, she had no claim in that country. Other employees, although working wholly in the

[38] Employment Equality (Age) Regulations 2006, reg 10. No equivalent clause in Equality Act 2010.
[39] [2006] UKHL 03, [2006] ICR 250.
[40] *Harvey on Industrial Relations and Employment Law* (Issue 215, 2011) 1110 – 'There is still a considerable degree of uncertainty over the territorial limits.' L Merrett, 'The Extra-Territorial Reach of Employment Legislation' (2010) 39(4) ILJ 381.
[41] (2008) ET 2700668/08.
[42] (2009) ET 2203833/08.

UK, found that their employer was 'based' elsewhere. In *Saliba v Premier Research Group*[43] the tribunal held that the respondent, despite employing a worker living and working in England, was registered and mainly based in Switzerland and the tribunal had no jurisdiction to consider the claim. It is therefore apparent that some workers found they were unprotected as their individual employment circumstances left them 'falling' between two countries and without an appropriate forum for their complaint.

The Court of Appeal found in 2011 in *British Airways plc v Mak*[44] that workers based in Hong Kong were entitled to have their age discrimination claim heard because the aircraft that they worked on were registered in Great Britain. This claim involved workers who lived in Hong Kong and were forced to retire at 45 years old whereas similar BA British-based employees were allowed to continue working. Mak signed her contract of employment on a 2 day training course in England and her employment was held to be 'partly' in England because she had an eighty-five minute stopover in England on flights from and to Hong Kong. Mummery LJ found that as the stop-over 'was a regular and crucial part of her role, which she could not have done without'[45] this was sufficient to satisfy the requirement that she work 'partly' in this country.

This finding is in stark contrast to that of a claim by two 55 year old pilots based at Heathrow in *Mcllory v Cathay Pacific Airways.*[46] This claim also concerned involuntary retirement, but the tribunal found that it had no jurisdiction to hear the claim because the aircraft piloted by the claimants were registered in Hong Kong, as precluded by Regulation 10.[47] Mcllory was unprotected by the Regulations because his employer chose to register the aircraft elsewhere, yet overseas workers such as Mak are protected by the legislation. Mcllory lived in the UK and paid his taxes and national insurance to the UK government, factors said to be important in *Halliburton v Ravat*.[48] Denning LJ in *Todd v British Midland Airways*[49] held that 'a man's base is the place where he should be regarded as ordinarily working'[50] but the rule in

[43] (2009) ET 2701983/09.
[44] *British Airways plc v Mak* [2011] EWCA Civ 184, [2011] ICR 735.
[45] ibid [50] (Mummery LJ).
[46] (2008) ET 2701058/08.
[47] Employment Equality (Age) Regulations 2006, reg 10(3)(b).
[48] [2012] UKSC 1, [2012] ICR 389.
[49] *Todd v British Midland Airways* [1978] ICR 959.
[50] Ibid [964].

Regulation 10 regarding aircraft registration negates this finding. Ironically the circumstances of one of the claimants, Croft, in *Lawson v Serco* were very similar to that discussed in *Mcllory* as they concern a pilot based at Heathrow, employed by Cathay Pacific. Croft was found to be based in 'quite manifestly, London'[51] by Lord Hoffmann, yet Mcllory was denied this status under the Regulations.

The claimant must have been in Great Britain 'at the time when he applies for or is offered the employment'[52] and tribunals were rigorous in applying this provision. For example, in *Neary v Service Childrens Education*,[53] where the claimant complained of unfavourable treatment in recruitment, the tribunal found it had no jurisdiction because he was temporarily not resident in UK at the relevant time – he had ended his letter of application 'yours sincerely from sunny Germany' without realising that this would lead to repercussions. This illustrates the failure of the legislation to regulate discrimination across the EU. The Directive states that in the field of employment 'any direct or indirect discrimination based on … age … should be prohibited throughout the Community'.[54] Nonetheless the Regulations permitted discrimination of workers such as Saliba and Mcllory, both living and working in Great Britain, and Neary, applying for a post from Germany but within the EU.

It is important to define territorial jurisdiction as otherwise claimants with no substantive connection with Great Britain could claim protection from discrimination law handed down by Parliament, but Regulation 10 allowed inconsistencies to occur which left workers unprotected and was surely not intended. In addition, if each member state of the EU has similar requirements to that of the UK, only discrimination which occurs within member states will be proscribed whilst that which occurs across member states of the Community will not be prohibited. The Equality Act 2010 does not have an equivalent definition of territorial jurisdiction to that in the Age Regulations and the Explanatory Notices to the Act provide: 'As far as territorial application is concerned … the Act leaves it to tribunals to determine whether the law applies, depending on for example the connection between the employment relationship and Great Britain'.[55] The Equality Act was enabled in order to simplify

[51] *Lawson* (n 39) [33].
[52] Employment Equality (Age) Regulations 2006, reg 10(2)(c)(i).
[53] (2009) ET 2202984/08.
[54] Framework Directive, Recital 12.
[55] Explanatory Notes to the Equality Act 2010, para 15.

discrimination provisions rather than create further problems. But the contradictory decisions apparent in *Abrams v Gartner Ltd*[56] and *Washington v British Council*[57] over the interpretation of a claimant 'partly' working in a particular country suggest that giving overall responsibility to tribunals may lead to more inconsistent decisions. This perhaps indicates that parties to such a claim may expect further uncertainty.

However, the Court of Appeal has recently considered the territorial jurisdiction of employment law in *Duncombe v Secretary of State for Children, Schools and Families*[58] and *Ministry of Defence v Wallis.*[59] In *Wallis*, a sex discrimination case, Lord Justice Mummery upheld the supremacy of European Union law and asserted:

> It is the function of the national courts to interpret the statutory provisions of domestic law, so far as it is possible to do so, to be compatible with the Directive … Domestic courts are required to disapply incompatible provisions of domestic law to the extent necessary to give effect to the directly enforceable rights derived from the Directive.[60]

Lord Justice Elias agreed that 'whichever system of law within the European Union is the appropriate state law to apply, either it gives effect to the EU right when appropriately construed, or it must be disapplied to the extent that it does not'.[61] In future therefore claimants within the European Union are more likely to be able to rely on the tribunal to find it has jurisdiction to hear their age discrimination claim, although those whose claim involves a connection with a country outside of the EU may still have a problem finding an appropriate forum for their complaint.

6.3: Discriminatory treatment

Once a claimant establishes that the tribunal has jurisdiction to hear their claim he/she has to show that they have suffered less favourable treatment on grounds of age

[56] (2008) ET 2700668/08.
[57] (2009) ET 2203833/08.
[58] [2011] UKSC 36, [2011] IRLR 840.
[59] *Ministry of Defence v Wallis* [2011] EWCA Civ 231, [2011] ICR 617.
[60] ibid.
[61] ibid [52].

– described in the Regulations as direct discrimination,[62] indirect discrimination,[63] victimisation,[64] being given instructions to discriminate[65] and harassment.[66] Direct and indirect discrimination were defined as follows:

> Regulation 3(1)
> For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if—
>
> (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—
>
> (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
>
> (ii) which puts B at that disadvantage, and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.[67]

O'Cinneide and Hepple have suggested that 'age-based' factors lead to findings of direct discrimination whilst 'age-linked' factors lead to indirect discrimination.[68] For example, advertisements specifying a particular age group may be direct discrimination. On the other hand, tribunals have to consider whether neutral characteristics such as being 'experienced,' 'youthful' or 'mature' could imply an age link which is indirectly discriminatory. Vacancies only advertised on the internet may be susceptible to claims of indirect age discrimination as there is a link between age

[62] reg 3(1)(a).
[63] reg 3(1)(b).
[64] reg 4.
[65] reg 5.
[66] reg 6.
[67] Replaced by Equality Act 2010, ss 13, 19.
[68] B Hepple, 'Age Discrimination in Employment' in S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003); C O'Cinneide, 'Age Discrimination' in N Bamforth, M Malik and C O'Cinneide, *Discrimination Law: Theory and Context – Text and Materials* (Sweet & Maxwell 2008) 1132.

and computer use as 92% of 25-44 year olds use computers compared with 31% of those aged 65 and over.[69]

6.3.1: Shifting the burden of proof

The claimant must first prove facts from which the tribunal could conclude that the respondent has committed an act of discrimination against the claimant and if successful the burden of proof then shifts to the respondent to prove that he did not commit that act. The Court of Appeal in *Igen Ltd v Wong*[70] set out guidance on requirements to be fulfilled in establishing a case of discrimination and this was reiterated in the Regulations:

> Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent –
>
> (a) has committed against the complainant an act …;
>
> (b) …. the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.[71]

The difficulty that most claimants had in making a successful claim was trying to shift the burden of proof by providing such facts because evidence of age discrimination is often intangible and undefined. Yet in *Madarassy v Nomura International plc*[72] the Court of Appeal held that it is:

> not sufficient for the complainant to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicates the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.

[69] Office of National Statistics (2009) *Internet Access, Households and Individuals* (ONS 2009) 2.
[70] [2005] EWCA Civ 142, [2005] IRLR 258.
[71] Employment Equality (Age) Regulations 2006, reg 37(2). Replaced by Equality Act 2010, s 136.
[72] *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867.

> 'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence … such as a difference in status, a difference in treatment and the reason for the differential treatment.[73]

This requirement proved challenging for very many age discrimination claimants as they could usually point to a difference in age and treatment but could not find the third factor – a 'reason for the differential treatment' or an additional factor which would shift the burden of proof. If, as much research indicates, age discrimination is a function of implicit, unconscious, stereotypical ageist attitudes held, yet denied by the discriminator, there often will be no tangible evidence.[74]

The type of additional factual evidence provided by claimants varied from indications of statistical differences between age groups to discriminatory comments or language, lack of transparency, discriminatory selection criteria and questions concerning age. The claimant in *Richold v Signature Industries*[75] was told by his manager that the 'company needs young blood' and he was subsequently made redundant whilst others who were younger were not. He produced evidence to show that 51.3% of the workforce was over 50 years old but 70% of those being made redundant were over 50. This selection of evidence (a remark, statistics, a difference in treatment and a difference in age) was insufficient to turn the burden of proof as the tribunal felt there were 'certainly no inferences pointing to age discrimination'.[76] Statistical evidence was only accepted as significant by tribunals when it was submitted alongside, or to back up, other evidence of age discrimination, unless the tribunal felt it was overwhelming.[77] The 60 year old claimant in *Oakley v Cannock Chase Council*[78] brought statistical evidence to show that those in the 50-60 year old age group were more than six times likely to be selected for redundancy by the Council than those in the 30-40 year old group but the tribunal felt that 'statistical

[73] ibid [56-57] (Mummery LJ).
[74] LA Rudman, AG Greenwald, DS Mellott and JLK Schwartz, 'Measuring the Automatic Components of Prejudice: Flexibility and Generality' (1999) 17(4) Social Cognition 437, 438.
[75] (2009) ET 230291/09.
[76] *Richold v Signature Industries* (2009) ET 230291/09 [48].
[77] Overwhelming statistical evidence which shifted burden of proof was provided in *Mercer v Halton Borough Council* (2009) ET 2101198/09 and *Hamilton v Kelly Services Ltd* (2009) ET 2405474/08 – Statistics showed 153 people under 41 were taken on by employer in a 2 year period but only 4 were over 41.
[78] (2007) ET 1307523/06.

evidence is of marginal relevance as there is no evidence to indicate a policy of discrimination'.[79] It was this broader evidence of a policy of discrimination that claimants had particular difficulty in providing.

In *Court v Dennis Publishing Ltd*[80] the kind of evidence that is necessary to reverse the burden of proof was discussed. Court, aged 55, was an advertising promotions director with five colleagues who were under 31. He was made redundant and the five younger employees kept on following the appointment of a new 37 year old chief executive and he subsequently submitted a claim to the tribunal of direct and indirect age discrimination. The tribunal concluded there was sufficient evidence to reverse the burden of proof as Court cited three additional factors to support his claim. Firstly, the employer publicly advocated a philosophy that young people were good for business and three-quarters of his employees were under 30.[81] Secondly, those not chosen for redundancy were all more than 20 years younger than Court and the new manager was 22 years younger. Further, if six people were selected for possible redundancy and five were under 30, the statistical likelihood was that the one chosen would be young.

Court provided a variety of evidence which undoubtedly helped his case but in many instances claimants could only point to a difference in age and treatment which was insufficient. A lack of evidence provided by claimants sometimes appeared to frustrate tribunals. In *Bennett v DSG International*[82] the tribunal was very critical of the employer in a judgment relating to a claim by a 62 year old liaison manager who had worked for Currys for 45 years. He was selected for redundancy yet had no evidence to show age played a part in his selection apart from a difference of treatment and age. The tribunal felt it 'manifestly lacking that an employer of the size and administrative resource of the employer could not have found him another job'[83] but we 'are not here to be sentimental, we are here to apply the law'[84] and found the claim unsuccessful.

[79] *Oakley v Cannock Chase Council* (2007) ET 1307523/06 [93.6] (Gorag EJ).
[80] (2007) ET 2200327/07.
[81] Espoused in his book – F Dennis, *How to Get Rich* (Ebury Press 2006).
[82] (2008) ET 1806697/07.
[83] *Bennett v DSG International* (2008) ET 1806697/07 [5.4] (Fletcher EJ).
[84] ibid [5.8].

Written evidence provided the most convincing support for a claim, whether it was a hand-written letter,[85] a print-out of an e-mail[86] or a facebook page.[87] Where evidence constituted disputed, disparaging, ageist remarks without substantiating proof the tribunal had to weigh up whether, on the balance of probabilities, the remarks had been made and whether they had a connection with the discriminatory treatment.[88] For example, in *Uppal v Anuyu Hair and Beauty Ltd*[89] it was alleged that ageist remarks were continually made about the claimant but the tribunal preferred to believe the employer who denied making the comments.

The existence of some remarks was not disputed but the 'ageist' intent was contested. A comment that a manager was 'in need of a young blonde' was found to be 'a saucy comment' [90] and did not represent ageist views. Where the remarks were not made by the person responsible for the unfavourable treatment this was insufficient to reverse the burden of proof. In *Gosling v IGS Lottery Management Ltd*[91] derisory remarks concerning the claimant's age were made by another employee rather than the person responsible for the dismissal and the claim was therefore unsuccessful. In *Holmes v AMC New Homes*[92] a 62 year old site manager was dismissed after being referred to frequently as 'old boy' and an 'old git'. The tribunal found the comments were age-related and the employer apologised at the hearing but there was no 'evidence that the dismissal was connected with the remarks'[93] so the burden of proof was not reversed.

The task of proving that a claimant had suffered discrimination on multiple grounds was even more challenging than for those claiming under a single jurisdiction and is reflected in the low success rates for such claimants as shown in the statistical analysis in Chapter 5.4. The legislation required tribunals to consider each suspect ground independently and claimants often failed to produce comprehensive evidence relating to each element. No consideration was given to the possible compound or intersectional effect of multiple discrimination and evidence was 'split' between the

[85] *Martin v SS Photay & Associates* (2007) ET 1100242/07.
[86] *Wooster v London Borough of Tower Hamlets* [2008] UKEAT/0441/08, (2008) ET 3200639/07.
[87] *Williams v Mistral Telecom Ltd* (2009) ET 1806715/09.
[88] Discussed in *Mohammed v Jigsaw Insurance Marketing (Birmingham) Ltd* (2009) ET 1304895/09.
[89] (2007) ET 2300751/07.
[90] *Salmon v Birch Corp Ltd* (2008) ET 1202679/07.
[91] (2008) ET 2327709/08.
[92] (2007) ET 1100543/07.
[93] *Holmes v AMC New Homes* (2007) ET 1100543/07 [7] (Barry EJ).

concurrent claims, resulting in weaker arguments for the individual claims. In numerous multiple discrimination claims no evidence was produced for the age element of the claim which was dismissed by the tribunal without discussion. For example, in *Chweidan v J. P. Morgan*[94] a hedge fund manager complaining of age and disability discrimination concentrated on providing evidence relating to the disability claim. The evidence given in support of the disability claim was specific and overt whereas that for age appears to have been more difficult to acquire. The tribunal commented that with regard to the age claim the 'tribunal has inadequate information from which to draw conclusions'.[95] The age claim potentially could have resulted in a very large award and the claimant was represented by both Counsel and solicitor, yet lack of evidence prevented a full consideration of the claim at the hearing.

6.3.2: Recruitment

In cases which concerned recruitment it was extremely difficult to find evidence that would reverse the burden of proof. Lack of transparency concerning the number and age of applicants and employees hindered numerous claims. *Marks v News Shopper*[96] concerned a 51 year old 'cold caller' who was not asked to an interview, whilst two comparators aged 21 and 41 were. He was ordered to pay employer costs of £900 because he produced no evidence to show age discrimination played a part in the decision apart from a difference in age and treatment, illustrating the punitive approach taken by some tribunals.

Several claims surrounded the wording of job advertisements. No judgments were found which related to a specific age group stipulated in an advertisement and which may have constituted direct discrimination. However, the EAT agreed with the tribunal in *Canadian Imperial Bank of Commerce v Beck*[97] that the use of the word 'younger' in a job specification was sufficient to turn the burden of proof and may constitute direct discrimination. The term 'over-qualified' was equated with a high-earning capacity rather than age by the tribunal in *Fletcher v West Horsley Dairy Ltd*.[98] As Fletcher was thought to be over-qualified, the tribunal agreed with the

[94] (2008) ET 2201954/08.
[95] ibid [6.17] (Carstairs EJ).
[96] (2007) ET 1100342/07.
[97] UKEAT 0141_10_2408, [2011] 2 CMLR 3.
[98] (2009) ET 2327891/08.

employer that he was unsuitable for a position at the dairy and his claim was unsuccessful. In *Rains v The Commission for Racial Equality*[99] the terms 'senior' and 'over-qualified' were considered. Rains was recommended for a position at the Commission for Racial Equality by an agent who said he may be 'too senior' for the post. The Commission's interviewer felt that Rains was 'over-qualified' and did not have the relevant case-experience. The tribunal referred to the Irish case of *Noonan v Accountancy Connections*[100] where the court felt that 'senior' could be a reference to age and was sufficient to establish a prima facie case. However, as the term 'too senior' was used by the agent, not the respondent, and that as 'over-qualified' could apply to any age group, the tribunal found that Rains had not suffered indirect or direct age discrimination.

In *Lyons v Leeds NHS Trust*,[101] a claim heard at the Leeds Tribunal where claimant success rates were higher than at any other tribunal, a 40 year old applicant for a customer service position was successful in his claim when he was informed after the interview that he was 'over-experienced'. The tribunal recognised that 'an older candidate for employment is more likely to be over-experienced than one younger'[102] and also discussed other factors taken into account at the interview such as 'team-fit' and 'keenness' for which Lyons scored poorly. It was held that the inclusion of these factors was indirectly discriminatory 'because of subjective generalisations that older candidates are less likely to possess those characteristics than younger ones'.[103] This finding was unusual however, as most tribunals took the view that such age-neutral factors were not discriminatory and perhaps reflects a tribunal which is more sympathetic to claimants.

Numerous claims were concerned with potentially indirectly discriminatory requirements for workers to have a particular number of years' experience. These included those made by two 'serial litigants' who made repeated claims that job advertisements were indirectly discriminating. Both litigants took their claims to the EAT but were unsuccessful. In *Keane v Goodman Masson Recruitment*[104] a 51-year-

[99] (2007) ET 2306496/06.
[100] (2003) EE/2003/254.
[101] (2008) ET 1803471/07.
[102] *Lyons v Leeds NHS Trust* (2008) ET 1803471/07 [5.10.8 iii] (Elgot EJ).
[103] ibid [4.18] (Elgot EJ).
[104] (2008) ET 2202489/07.

old accountant applied for at least 20 positions that were advertised by a recruitment agency as being suitable for a recently qualified accountant with two to three years' experience.[105] She claimed the advertisements were indirectly discriminatory as older workers usually were not recently qualified and often had more experience. Keane failed in her all of her claims as it was felt she did not seriously intend to take up such a position but was using the claim process to highlight the problems of older workers. *Berry v Reed Employment*[106] was one of several unsuccessful claims made by Berry to highlight advertisements which specified a requirement for a school-leaver or newly qualified worker. Most of Berry's claims were withdrawn before a hearing but he appealed to the EAT against the decisions in four judgments.[107] Mr Justice Underhill dismissed Berry's claims as he felt Berry did not seriously intend to take any of the positions, warning that litigants making such claims would be liable to pay respondent costs.[108]

It is clear that the Regulations did not provide a remedy for those who believed that particular job advertisements were age discriminatory and felt that their age would exclude them from consideration for the position. The Regulations relied, as the Equality Act 2010 relies, upon an individual not in the requisite specified age band going through the whole process of selection, despite the advertisement indicating that their particular age or amount of experience was not required or would be disadvantageous, which seems unlikely. An unusual exception to this was seen in *Rainbow v Milton Keynes Council*[109] where a 61 year old claimant with 34 years' experience unsuccessfully applied for a job that was advertised as suitable for someone in the 'first five years of their career'. The tribunal found that she suffered indirect discrimination as someone in her age group was liable to be disadvantaged as they were not likely to be in the 'first five years of their career'. Most applicants would be deterred from applying for the position upon reading that they would be unsuitable yet the model of legislation relies upon an unfunded, individual litigant taking such action.

[105] 12 claims relating to Keane were found on the Judgment Register.
[106] (2008) ET 1400236/08.
[107] *Berry v Recruitment Revolution* [2010] UKEAT 0190_10_0610.
[108] ibid [29].
[109] (2008) ET 1200104/07.

The questionnaire procedure set out in the legislation was utilised by many claimants who lacked evidence to prove they had suffered discrimination as they were able to ask for information to assist them in assessing whether or not they had a claim.[110] Regulation 41 states:

> if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within eight weeks of service of the questions or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.[111]

Evidence was found in several folio reports that questionnaires were not returned to claimants yet tribunals did not draw an inference of discrimination. For example, in *Keane v Goodman Masson Recruitment Services Ltd*[112] one of the respondents, Robert Walters plc, failed to return the questionnaire sent to them by Ms Keane under Regulation 41 asking for information on the age of candidates for a position. The tribunal admitted that because of this failure it did not know the ages of the eleven comparators put forward by Ms Keane but was not prepared to find an inference that an unlawful act had been committed. A 55 year old bookshop salesman in *Black v The Travel Bookshop*[113] failed to shift burden of proof because of lack of evidence as his employer would not supply the age and salaries of other staff, 'pleading confidentiality of employees'.[114] A questionnaire served on Network Rail failed to reveal information relating to the ages of those that applied for an apprentice scheme and those who were selected in *Baskaran v Network Rail*[115] without explanation. The tribunal dismissed the claim as it found that without this information it had no prospect of success, yet the fault lay with the respondent, not the claimant.

The truthfulness of evidence given in questionnaires by employers was thrown into doubt in some claims but tribunals did not always find this led to an inference of

[110] Employment Equality (Age) Regulations 2006, reg 41. Replaced by Equality Act 2010, s 138.
[111] ibid, reg 41(2)(b).
[112] (2008) ET 2202489/07.
[113] (2008) ET 22051087/06.
[114] *Black v The Travel Bookshop* (2008) ET 22051087/06 [7] (Sigsworth EJ).
[115] (2010) ET 2204449/09.

discriminatory conduct. In *Fraser v Healthcare Commission*[116] the employer answered a questionnaire served under Regulation 41. The first question asked how many of the Commission's employees were over 60 years old. They replied that 288 out of 751 were over 60, yet only nine were in reality. The name of the member of staff involved in the interview process and the number and age of those short-listed was also incorrect. Despite this the tribunal found that the burden of proof did not shift to the employer.

This reflects the manner in which Mr Justice Underhill, President of the Employment Tribunal, dismissed an incomplete questionnaire in the EAT in *Deer v Walford and Oxford University.*[117] He commented that 'there are no special rules of law about what inferences should be drawn from unsatisfactory answers to the statutory questionnaire'[118] as if 'they were simply the result of a busy man failing to give the questionnaire the attention it deserved, or to appreciate the extent of his obligations, that might be reprehensible but it would not by itself justify any inference of an intent to victimise'.[119] Nonetheless claimants placed in this situation have no means by which to further determine 'the reason for the difference in treatment'[120] and marginalising the significance of a questionnaire can create real difficulties for the claimant in establishing their case.

The ECJ considered the amount of information that a discrimination claimant should expect to be given by a respondent employer in *Meister v Speech Design Carrier Systems GmbH*.[121] Meister asked for information concerning the successful applicant for a position which she had unsuccessfully applied for. Although the ECJ found that she had no right to have access to the successful candidate's file they did find that an employer's refusal to grant access to information may be a factor to take into account in the context of establishing facts from which the burden of proof may be reversed. They held that a national court should ensure that 'such a refusal is not liable to compromise the achievement of the objectives pursued by Directives'.[122] The refusal of an employer to supply information to a claimant is vital, particularly in

[116] (2007) ET 2200145/07.
[117] *Deer v Walford and Oxford University* [2010] UKEAT 0283_10_2004.
[118] ibid [43] (Underhill LJ).
[119] ibid [40].
[120] *Madarassy* (n 72) [57] (Mummery LJ).
[121] C-415/10 *Meister v Speech Design Carrier Systems Gmbh* [2012] Eq LR 602.
[122] ibid para 42.

recruitment cases, and the refusal to supply a questionnaire must surely affect the achievement of the objectives of the Framework Directive if an employer can avoid responsibility for discriminating treatment by merely refusing to cooperate.

6.3.3: Particular disadvantage

In claims of indirect discrimination the claimant must show that she/he has suffered 'particular disadvantage' when compared with other persons due to the imposition of a provision, criterion or practice applied equally to persons not of the same age group.[123] 'Age group' was defined very broadly in the Regulations as 'a group of persons defined by reference to age, whether by reference to a particular age or a range of ages'.[124] In all but a handful of judgments in the Register there was no discussion concerning the age of the relevant comparator as tribunals were prepared to accept wide[125] and narrow[126] age bands as providing the correct pool for comparison. Nonetheless the EAT found in *Abn Amro & Royal Bank of Scotland v Hogben*[127] that an age difference of nine months was insufficient and a claim of indirect discrimination failed in *Lyall v Welwyn Hatfield Council*[128] because the comparator was only two years younger than the claimant – a 49 year old comparator was kept on whilst the 51 year old claimant was selected for early retirement. In *Patel v Pepisco*[129] the tribunal accepted two comparative groups, one older and one younger than the claimants.

Tribunals were sometimes not supplied with evidence that showed that an age group had been placed at a particular disadvantage as claimants unfortunately expected that the tribunal would base its judgment on stereotypical assumptions. The claimant in *Kowalik v Robert McBride Ltd*[130] was dismissed because she could not operate new machinery installed on the factory line. She claimed a requirement of 'skill with computers' put persons of her age at a particular disadvantage but produced no evidence to substantiate this. The employer produced evidence to show older

[123] Employment Equality (Age) Regulations 2006, reg 3(1)(b). Replaced by Equality Act 2010, s 19.
[124] ibid reg 3(3)(a). Replaced by Equality Act 2010, s 5.
[125] All workers over 30 years old, *McLean v Forum Law* (2010) ET 1501006/10.
[126] Workers 62-64 years old, *Patel v Pepsico* (2008) ET 1900562/08.
[127] *Abn Amro Management Services Ltd & Royal Bank of Scotland v Hogben* [2009] UKEAT 0266_09_0111.
[128] (2008) ET 1200729/08.
[129] (2008) ET 1900562/08.
[130] (2009) ET 1805562/08.

workers than Miss Kowalik had been able to operate the machinery and the tribunal felt she held a stereotypical attitude which could not be substantiated. Similarly, in *Warlow v ZEAG(UK) Ltd*[131] a 64 year old engineer was selected for redundancy on the basis of a matrix with six factors, one of which was computer skills and he received a lowest score for this. He suggested to the tribunal that older people would find it more difficult to master computer skills but his assumption was rejected.[132]

A similar belief was seen in *Pendrich v David Lloyd Leisure*[133] where a swimming teacher asked to use a computerised booking system claimed that workers of her age were placed at a disadvantage because they were less likely to be able to use computers. The respondent surprisingly agreed with this supposition but asserted that the requirement was a 'proportionate means of achieving a legitimate end, namely the introduction of a computerised marketing system'.[134] However, the tribunal found the claim unsuccessful because it 'heard no evidence that persons of the claimant's age group (55 and over) were put at a particular disadvantage' as Ms Pendrich appears to have merely invited the tribunal 'to assume that this age group would be less able to use computers than persons of younger age groups'.[135]

This type of problem was plainly manifest in *Perry v Royal Mail.*[136] Perry made an unsubstantiated complaint that older workers were more likely to be ill and that a 'disciplinary absence procedure' discriminated against them. In response the Royal Mail produced data which showed that younger workers were ill more often and took more time off work than those over 55 years old and the claimant was unsuccessful.

The particular disadvantage that a claimant near retirement suffered as a result of a requirement to hold a degree was considered by the tribunal and appellate courts. The tribunal found in *Homer v Chief Constable of West Yorkshire Police*[137] that a requirement to hold a degree was a provision, criterion or practice for the purposes of Regulation 3(1)(b). Homer could not obtain a degree before his retirement because of his age and as he was prevented 'from accessing the financial benefits of increased

[131] (2009) ET 2300799/09.
[132] *Warlow v ZEAG(UK) Ltd* (2009) ET 2300799/09 [54] (Zuke EJ).
[133] *Pendrich v David Lloyd Leisure Ltd* (2009) ET 1100177/09.
[134] ibid [37] (Druce EJ).
[135] ibid.
[136] (2009) ET 1810379/08.
[137] (2007) ET 1803238/07.

remuneration and status' he felt he had suffered a particular disadvantage.[138] The Chief Constable appealed to the EAT where it was found the requirement applied to all employees without a degree, whatever their age, in precisely the same way and it was no more difficult for someone aged 60-65 to obtain the qualification than someone younger. Homer had undoubtedly suffered a disadvantage, but it was not a 'particular disadvantage' as workers in younger age groups might find themselves in a similar position. Judge Elias stated that as all employees were required to have a degree, in principle it is not:

> more difficult for an older than a younger person to acquire the degree. The need for a degree does of course impose a barrier, but it is a barrier which applies to all alike. It is not one which is affected by age ... the requirement has nothing to do with age discrimination and everything to do with the consequence of age.[139]

Homer appealed. The Court of Appeal agreed with the EAT in finding that the inability to acquire a higher salary and status was a disadvantage, but all age cohorts were equally subject to the requirement so Homer was not suffering a 'particular disadvantage'. It was the result of his impending retirement rather than a consequence of age discrimination. Mummery LJ stated that:

> the particular disadvantage results from stopping work before being able to obtain the qualification for appointment. In those circumstances the same result would follow for persons in the comparator age group who also stopped working before qualifying, so that there would be no inequality that was the result of the impact of the law degree provision on age.[140]

In theory, Lord Justice Mummery is correct. But in reality, those in younger age groups would probably not retire before graduating if they decided to study for a degree. Homer's circumstances were quite different to those in younger age groups as

[138] *Homer v Chief Constable of West Yorkshire Police* (2007) ET 1803238/07.
[139] *Chief Constable of West Yorkshire Police v Homer* [2008] UKEAT 0191_08_2710 [2009] IRLR 262 [36-41].
[140] *Homer v Chief Constable of West Yorkshire Police* [2010] EWCA Civ 419, [2010] IRLR 619 [48].

he could not comply with the requirement at all. Very few judgments after 2009 which concerned potentially indirect discriminatory requirements recorded success for the claimant. However, the Supreme Court re-examined the decision in 2012 and disagreed with the Court of Appeal. Lady Hale SCJ emphasised in her judgment that Homer had no choice but to suffer a disadvantage whereas those younger did and referred the claim back to the tribunal for consideration of the justification of the requirement.[141] In future therefore claimants may find it easier to show that have suffered such a disadvantage.

A very similar requirement to possess a degree was discussed in *McCluskey v Edge Hill University*.[142] The tribunal found as fact that McCluskey would have been appointed to a position of university tutor if she possessed a degree. Drawing on its own knowledge, the tribunal found that older workers are statistically less likely to have a degree than those younger. It was 'self-evident'[143] therefore that the claimant was at a particular disadvantage.[144] Although the Supreme Court has reconsidered *Homer*, these two cases illustrate the inconsistency with which tribunals and courts addressed the problem of indirect age discrimination. The facts of the two cases are distinguishable yet have parallel themes and the judgments reveal very different approaches to assessing particular disadvantage. For example, in *Hume v Dover District Council*[145] a 54 year old accountant complained that the withdrawal of a health benefit was indirectly age discriminatory as he would find it harder to obtain health insurance than a younger person. The tribunal found that as it was withdrawn for all employees the particular disadvantage suffered by Hume was a consequence of his age, not age discrimination.[146]

However, an extremely similar complaint which considered the removal of a health insurance benefit was considered in *Swann v GHL Insurance Services*.[147] The tribunal found that this would have been direct discrimination, rather than indirect

[141] *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] IRLR 601 [15].
[142] (2008) ET 2405206/07.
[143] *McCluskey v Edge Hill University* (2008) ET 2405206/07 [31] (Chapman EJ).
[144] McCluskey nonetheless failed in her claim because the tribunal found the requirement was justified as a proportionate means of obtaining a legitimate aim, discussed in Chapter 7.4.2.2.
[145] (2009) ET 1100843/08.
[146] ibid [26.1] (Sage EJ).
[147] (2008) ET 2306281/07.

discrimination, but there was 'a divergence of view'[148] between tribunal members over whether it could be objectively justified. Not only did tribunals disagree over the interpretation of the phrase 'particular disadvantage,' some could not even agree over the distinction to be made between indirect and direct discrimination. A report by the Employment Lawyers Association stated that 83% of their members felt that tribunals apply inconsistent approaches when handling claims, which is evidenced in these cases.[149]

6.3.4: Redundancy selection

Redundancy selection is a very challenging process for an employer needing to retain the most productive staff whilst treating employees in a transparent and fair manner. Using 'last in, first out' and length of service selection criteria, which are linked to age, constitutes using a 'provision, criterion or practice' which may indirectly discriminate against younger workers, contrary to Regulation 3(1)(b). Selection of older workers because they are near to retirement age may be less favourable treatment on the basis of age, contrary to Regulation 3(1)(a). In the period studied in this research tribunals considered 408 cases where claimants felt that their redundancy selection constituted discrimination on the grounds of age. The judgments broadly fell into two categories – those which concerned individuals who felt they suffered direct discrimination on grounds of age and those which concerned redundancy selection procedures and matrices, which may have been indirectly discriminatory. Most respondent employers denied the redundancy selection was made on the grounds of age but a small number of claims concerned selection procedures that included criteria found to be age-related and which employers claimed were objectively justified as a proportionate means of achieving a legitimate aim.[150] Four judgments concerned claimants who were able to show that, whilst their initial redundancy selection was fair, they had been treated differently to younger workers after selection. For example, in *Troman v Colliers of Birmingham*[151] the employer did not try to find Troman alternative employment and the tribunal found that a younger employee would have been treated differently.

[148] ibid [36] (Taylor EJ).
[149] J Owers, 'Job dissatisfaction' *Law Society Gazette* 6 (London 29 July 2010).
[150] Employment Equality (Age) Regulations 2006, reg 3(1). Objective justification is discussed in Chapter 7.4.
[151] (2008) ET 1305211/07.

Claimants arguing that a selection procedure was unfair because it was not transparent were able to use this as a third and 'additional' piece of evidence, along with the difference of status and treatment, and found it easier to turn the burden of proof than in other type of complaints. For example, in *Molloy v Pressure Coolers*[152] a 60 year old bench fitter was able to show a difference in age of 25 years between those not made redundant and himself, a difference in treatment in that he was selected and they were not and, additionally, that the employer carried out no consultation or transparent selection process – these three were sufficient to reverse the burden of proof which the employer could not discharge.

In all judgments examined as part of this study tribunals found that a redundancy selection process was lawful if a matrix contained 'last in, first out' or length of service as one of a number of criteria and if consultations were carried out with employees during the selection process. Selection matrices which contained subjective criteria, giving the employer discretion to award points as he wished, were also found lawful[153] unless demonstrable inaccuracies were exposed.[154] In *Inchcape v Symonds* the EAT held that 'once an element of subjectivity is put into the criteria, it is not for the employment tribunal to substitute its view as to what the scores should have been'.[155] If therefore an employer holds a stereotypical view that older workers do not have initiative, enthusiasm or an appropriate attitude and this is reflected in a matrix score, it is likely to be found lawful.

Selection criteria within a redundancy matrix system were discussed in *Holland v Zeag(UK) Ltd*[156] Holland, a 64 year old car-park pay-machine engineer, was selected for compulsory redundancy following a downturn of 50% in new orders. No consultation took place with the staff in the development of the selection matrix, which included computer literacy, hardware skills, location, software management skills, customer focus and adherence to company procedures. The tribunal found that although the selection criteria were reasonable there was a lack of consultation and transparency in the selection process. However, Holland failed to provide the tribunal

[152] (2009) ET 1101328/09.
[153] (2010) ET 1101891/09 – Redundancy selection matrix included attitude, communication skills, effort, initiative, length of service, attendance, disciplinary record, performance.
[154] Employment Rights Act 1996, s 98(4).
[155] *Inchcape Retail Ltd v Symonds* [2009] UKEAT 0316_09_0312 [28] (McMullen J).
[156] (2008) ET 23242081/08.

with ‘basic’ evidence that showed those not selected for redundancy were younger and they were therefore ‘unable to conclude on the evidence that the respondent had adopted a deliberate policy of replacing its older engineering staff with younger employees’.[157]

This illustrates the importance of providing sufficient evidence to support a claim (and asking the correct questions using the questionnaire procedure), which was lacking in many cases concerning redundancy selection, particularly where claimants were unrepresented. Nevertheless self-representation was successful in straightforward cases. In *Killa v Electronic Motion Systems Ltd*[158] 59 year old Killa, an electronics engineer, was made redundant with immediate effect following a first consultation meeting. No objective criteria whatsoever were applied in the selection process which was therefore found contrary to Regulation 3(1)(a).

6.3.5: Harassment

Harassment is ‘a common aspect of age discrimination’[159] and was prohibited by Regulation 6:

> (1) For the purposes of these Regulations, a person (‘A’) subjects another person (‘B’) to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of
>
> (a) violating B’s dignity; or
>
> (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.[160]

Judgments reveal that claims of harassment were usually based upon ageist remarks. Only one judgment recorded physical harassment associated with age

[157] *Holland v Zeag(UK) Ltd*(2008) ET 23242081/08 [48] (Hall-Smith EJ).
[158] (2008) ET 1605121/08.
[159] M Reid, *Age Discrimination in Employment Issues Arising in Practice* (Lecture to the Academy of European Law, Trier 2003) 14.
[160] Employment Equality (Age) Regulations 2006, reg 6. Replaced by Equality Act 2010, s 26.

discrimination – this claimant was pushed around, elbowed and had his glasses knocked off.[161] Typical comments which older claimants found offensive were 'having one foot in the grave … past her sell-by date,'[162] 'old boy … old git … senile,'[163] 'past it,'[164] 'you should be in an old people's home,'[165] 'pensioner,' 'silly, old, mentally, defective man,'[166] 'granddad,'[167] 'you belong in a graveyard'[168] and 'old codger'.[169] Younger workers were offended by being referred to as 'childish'[170] and 'stupid little girl'.[171] These phrases were interpreted as age discriminatory by some tribunals yet dismissed as 'banter' by others – in these instances the comments may have been unwanted but were found insufficient to violate dignity. For example, in *Vallely v Whitbread Group plc t/a Brewers Fayre*[172] Ms Vallely, aged 54, claimed that a fellow 61 year old employee said to her 'it is easy to forget things at our age'. The tribunal dismissed her claim of harassment finding that this was just a 'common-or-garden comment' in which she referred to her own shortcomings rather than Ms Vallely's.

Inferences about age also offended and violated the dignity of some claimants. In *Kessell v Passion for Perfume Ltd*[173] comments about possible deafness and poor eyesight were interpreted by the tribunal as age-related and were held to constitute harassment as the comments severely undermined the employee's confidence and caused her significant distress. In *Acheampong v National Car Parks Ltd*[174] it was suggested that the claimant, a 42 year old car park support officer, may be unable to defend an attempt to steal from the pay machines. His line manager asked 'life begins at 40, what do you say about that?' which was interpreted by Acheampong as a

[161] *Bould v Acme Jewellery Ltd* (2009) ET 1302983/09.
[162] *Hall v H & M Ltd* (2008) ET 26017861/08.
[163] *Hamilton-Smith v Pendragon Motor Group Ltd* (2008) ET 2602816/07.
[164] *Smy and Gibbons v MCB Roads Ltd* (2008) ET 1100000/08, also in *Murphy v M & A Leyden Ltd* (2010) ET 1203103/09.
[165] *Durgacharan v IKEA Ltd* (2008) ET 3302018/07.
[166] *Bould v Acme Jewellery Ltd* (2009) ET 1302983/09 [25].
[167] *Nimmo v Marina d'Or-Loger SA* (2009) ET 2200250/09.
[168] *Lukasik v ICSI Enterprise Team Support Services Ltd* (2009) ET 3302202/08.
[169] *Babani v The Zone International Group* (2009) ET 3202210/09.
[170] *Armstrong v Argyles Solicitors* (2009) ET 1306282/08.
[171] *Kajla v Secretary of State for the Home Department* (2009) ET 1307797/09.
[172] (2007) ET 2500249/07.
[173] (2007) ET 1700345/07.
[174] (2007) ET 2202209/07.

'suggestion that his life had not begun at 40'.[175] After a request to work day-shifts his line manager replied that it was not good for him 'at his age and with children' to be doing night work. The tribunal found these comments had 'the purpose or effect of violating Mr. Acheampong's dignity'.[176]

Harassment also took place via e-mail. In *Lambert v BAT Ltd*[177] a fellow employee of BAT sent an e-mail to Lambert, aged 56, entitled 'Perks of being over 50' with 15 statements such as 'kidnappers are not very interested in you … you can live without sex but not your glasses … and … things you buy now won't wear out'.[178] Mr Lambert's claim for harassment was time-expired and therefore unsuccessful but the tribunal found that the e-mail amounted to unwanted conduct which had the effect of violating his dignity. Tribunals held that the comments had to be directly related to the claimant, rather than referring to generalised stereotypes about age. Yet generalised ageist comments can be perceived as offensive and create an intimidating or hostile environment, as precluded in Regulation 6(1)(b). For example, the 18 year old claimant in *Vaughan v S & GM Bryden*[179] was asked 'not to behave like a petulant and delinquent teenager' which she felt constituted harassment. The tribunal disagreed as it felt 'this could be asked of anyone, whatever their age'.[180]

Several claimants had difficulty showing they found the alleged conduct 'unwanted' because they did not object to ageist comments at the time they were made. Samuels has described the tendency of workers to 'underplay' conflict in the workplace in order to minimize the impact of disputes by reacting in a passive manner and not complaining about harassment at the time it occurs.[181] Yet if a complaint is not made at the time of the harassment it may not be obvious that the worker objects to the conduct. In *Peters v Personal Financial*[182] a manager emailed an assistant on holiday and told her 'you have left a legacy of senior moments' and that he was 'on Alzheimer's alert'. After several more emails she replied 'Are you saying it's time I

[175] *Acheampong v National Car Parks Ltd* (2007) ET 2202209/07 [64].
[176] ibid [65] (Taylor EJ).
[177] (2008) ET 3100897/08.
[178] ibid [3.14] (Chudleigh EJ).
[179] (2009) ET 3101870/09.
[180] *Vaughan v S & GM Bryden t/a Oakdene Residential Home* (2009) ET 3101870/09 [30] (Emerton EJ).
[181] H Samuels, 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive' (2004) 12(2) Feminist Legal Studies 181, 203.
[182] (2007) ET 1701042/07.

retired as I have not been around to defend myself'.[183] Her claim of harassment failed because it was not apparent that she objected to the comments at the time they were made.[184]

6.4: Exemptions

The numerous exemptions contained within the Regulations enabled employers to use more age-based criteria than permitted in equivalent equality legislation, although the exemption for the default retirement age (DRA) has been removed.[185] An exemption was provided in that if age was a 'genuine and determining occupational requirement'[186] and it was 'proportionate to apply that requirement'[187] it was not unlawful to use age as a discriminating factor. The government expected there will 'be very few cases where age is genuinely a requirement'[188] and indeed this was only found to have been discussed in four judgments.[189] Other exemptions covered acts required for national security[190] and under statutory authority,[191] positive action,[192] the National Minimum Wage (NMW)[193] enhanced redundancy pay,[194] benefits linked to seniority[195] and occupational pension schemes.[196]

Discriminatory age limits specified under statutory authority, such as those in the New Deal programmes,[197] are therefore only challengeable through a reference to the ECJ. One such discriminatory age limit, relating to a training scheme, was discussed in *Spyrka v The Club Company Holdings Ltd*[198] where an employer stated to an older claimant that 'it was strictly correct to say that it was cheaper to train young

[183] *Peters v Personal Financial* (2007) ET 1701042/07 [12] (Hollow EJ).
[184] ibid [29].
[185] The Employment Equality (Age) Regulations 2006, reg 30. Repealed by Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069.
[186] ibid reg 8(2)(a). Replaced by Equality Act 2010, Schedule 9 s 1(1)(a).
[187] ibid reg 8(2)(b). Replaced by Equality Act 2010, Schedule 9 s 1(1)(b).
[188] Department of Trade and Industry, *Equality and Diversity: Age Matters* (2003) para 9.13.
[189] *Evans v CAA* (2008) ET 201672/07; *Mcllory v Cathay Pacific Airways UK Ltd* (2008) ET 2701058/08; *Baker v National Air Traffic Services Ltd* (2009) ET 2203501/07; *Amoah v Senator Security Services Ltd* (2009) ET 2301977/09.
[190] The Employment Equality (Age) Regulations 2006, reg 28. Replaced by Equality Act 2010, s 192.
[191] ibid reg 26. Replaced by Equality Act 2010, s 191.
[192] ibid reg 29. Replaced by Equality Act 2010, s 158, s 159.
[193] ibid reg 31. Replaced by Equality Act 2010, Schedule 9 ss 11, 12.
[194] Employment Equality (Age) Regulations 2006, reg 33. Replaced by Equality Act 2010, Schedule 9 s 13.
[195] ibid regs 32 and 34, repealed and replaced by the Equality Act 2010, Schedule 9 s 10.
[196] ibid Schedule 2 Part 2. Replaced by Equality Act 2010, Schedule 9 s 16.
[197] The New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217 and the Social Security Amendment (New Deal) Regulations 1998, SI 1998/1274.
[198] *Spyrka v The Club Company Holdings Ltd* (2009) ET 1102011/08.

people because grants were available'.[199] The tribunal found that the comment was 'extremely unfortunate, not to say thoroughly injudicious'[200] but nevertheless found that age played no part in the non-selection of the claimant.

6.4.1: The National Minimum Wage

The NMW, which constitutes direct discrimination on the grounds of age, was permitted under the exemption contained in Regulation 31.[201] The NMW perpetuates the idea that the young should be paid less, even if undertaking the same work as an older worker. A person under 21[202] cannot be paid more than the adult minimum rate if a comparable person over 21 is being paid more than the young worker, as the age differential is not exempt. On the other hand, if the younger person is paid less than the adult minimum rate the age differential falls into the exemption.[203] This encourages employers to pay those under 21 no more than the adult rate even if they wish to reward good workers.

The government's rationale behind the lower rates for young workers in the NMW is that:

> the minimum wage should be set at a lower rate for young people because the evidence shows that they are more vulnerable in the labour market and the threat of unemployment (and the associated damage it causes) is greater for young workers.[204]

The aim of the even lower rate for 16-17 year olds is 'to afford very young workers some protection from poverty pay, while maintaining the incentives for 16-17 year olds to remain in education'.[205]

The discriminatory nature of the NMW caused problems for a small number of claimants at the tribunal who found that employers would rather pay a lower wage to

[199] ibid [7] (Barry EJ).
[200] ibid [15].
[201] Replaced by Equality Act 2010, Schedule 9 s 11, s 12.
[202] Aged 22 at the time of the cases examined as part of this study.
[203] Employment Equality (Age) Regulations 2006, reg 31(1)(b). Replaced by Equality Act 2010, Schedule 9 s 11(1)(b).
[204] Department for Business, Innovation and Skills, *National Minimum Wage: Low Pay Commission Report 2011* (Cm 8023, 2011) 67.
[205] Department for Business, Enterprise and Regulatory Reform, *Government Economic Evidence to the Low Pay Commission* (The Stationery Office 2007) 31.

younger workers than those entitled to the adult rate of pay. The preference of employers to take on younger workers who can be paid less has been highlighted by Heyes and Grey. They have described how employers 'responded to the minimum wage by … replacing older workers with younger workers: The same number of people are employed, but they get paid less'.[206] This occurred, for example, in *Kent v Krazy Kidz*.[207] Kent, aged 25, was told by the play centre's manager 'I have been trying to get rid of you because you're old staff'[208] and 'I would rather have employed 16-year-old girls working for £4.00 an hour doing the same job that you are at £5.35'.[209] The tribunal found it reasonable that Kent found this offensive and she received compensation of £27,667. The employer in *Kent v Krazy Kidz* wanted to take advantage of the lower wage he could lawfully pay to younger workers and the expression of this desire led to his discrimination of an older worker. This claim highlights the paradox contained within the exemptions included in the Regulations – they permit discriminatory conduct which is authorised by the legislature whilst at the same time endeavouring to achieve equal treatment.

6.4.2: Retirement and the Age Regulations

The vast majority of the 88 claims concerned with retirement issues and examined as part of this study were directly related to the DRA. Compulsory retirement of an employee at a specific age is direct discrimination on the grounds of age but was lawful provided an employer followed the procedure in Schedule 6 of the Regulations. This required an employer to give the employee between six months' and one year's notice of the intended date of the retirement.[210] Subsequently the employee, had a right to request not to be dismissed[211] which had to be considered by the employer.[212] Although the procedure was modelled on the right to request flexible working the employer did not have to give any reason for refusal. The employer was required to hold a meeting with the employee to discuss the request but was allowed to

[206] J Heyes and A Gray, 'Small Firms and the National Minimum Wage: Implications for Pay and Training Practices in the British Private Service Sector' (2004) 25(3) Policy Studies 209, 223.
[207] (2008) ET 2701208/07.
[208] *Kent v Krazy Kidz* (2008) ET 2701208/07 [17].
[209] ibid [20].
[210] Employment Equality (Age) Regulations 2006, Schedule 6 para 2.
[211] ibid para 5.
[212] ibid para 6.

forego this 'provided he considers any representations made by the employee'[213] but was not required to provide any evidence of consideration. This enabled a very easy dismissal of the employee request to be made and the employer retained absolute discretion in deciding whether to insist on an employee's retirement. Retirement that did not fall under the exemption, for example that of a partner as in *Seldon v Clarkson Wright & Jakes*,[214] had to be objectively justified as a proportionate means of achieving a legitimate aim.[215]

The exemption with regard to the DRA was subject to campaigns for its removal by several organisations including the Employers Forum on Age,[216] Age Concern and Help the Aged (now AgeUK). A challenge in the High Court, known as the *Heyday*[217] case, was successful in drawing attention to the discriminatory nature of the DRA. After a reference to the ECJ, Mr Justice Blake in the *Heyday* case stated that if:

> there had been no indication of an imminent review, I would have concluded … that the selection of age 65 would not have been proportionate. It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations.[218]

This statement expressed the view that the provision could not be justified and was therefore unlawful in September 2009, yet the DRA remained in force until October 2011 when it was subsequently abandoned.[219]

The 15 successful claims in the Judgment Register relating to retirement were those where the employer had not followed the procedure correctly, usually because the employee had been given insufficient warning of their retirement. The exemption

[213] ibid [7(5)].
[214] [2012] UKSC 16, [2012] ICR 716, [2010] EWCA Civ 899, [2011] 1 All ER 77, [2008] UKEAT 0063_08_1912, [2009] 3 All ER 435, (2007) ET 1102751/07.
[215] Objective justification is discussed in Chapter 7.4.
[216] Employers Forum on Age.
[217] C-388/07 *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] All ER (EC) 619, [2009] IRLR 373 (*Heyday*).
[218] ibid [718].
[219] Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069.

in Regulation 30 applied to retirements on or after the 65th birthday of the claimant and tribunals interpreted the requirements of the legislation strictly. In *Plewes v Adam Pork Produce Ltd* [220] the normal retirement age in the company was the day before the employee's 65th birthday – Plewes' dismissal one day too early was found to be direct age discrimination which could not be justified.

A very strict approach was also taken with regard to employee requests to continue working. Almost all of the unsuccessful 59 claims concerned with retirement were those where either the claimant had not followed the claim or 'right to request' procedure correctly or where it was found that the employer had followed the Schedule 6 procedure correctly and the retirement was lawful. In *Holmes v Active Sensors Ltd*[221] Holmes, an assembly technician, was told on 24th October 2006 that he must retire when he reached the age of 65 on 24th November 2006. On 25th October, Holmes asked in writing if he could continue working until January 2007 but his employment was terminated. The tribunal found, as his request did not specifically mention that it was being made 'under Schedule 6, para 5(3),' which specifies that a 'request must be in writing and state that it is made under this paragraph,' it was not a valid request and the employer was under no obligation to consider it.

Tribunals were apologetic to those claimants who proceeded with a claim concerned with retirement which was heard after the *Heyday*[222] decision but before the abandonment of the DRA. In *Andrews* and *Crumpton v Amersham and Wycombe College*,[223] considered after the *Heyday* decision, two 65 year olds who did not want to retire were told with clear regret by Employment Judge Metcalf 'I have to apply the law as it currently is, not as it might become'.[224] Claims concerned with retirement made under the Equality Act 2010 will undoubtedly centre on the capability of the claimant and the objective justification of retirement provisions, as discussed in *Seldon.*[225]

[220] (2007) ET 2600842/07.
[221] (2007) ET 1000214/07.
[222] *Heyday* (n 217).
[223] *Andrews v Amersham and Wycombe College* (2010) ET 1200318/08 and *Crumpton v Amersham and Wycombe College* (2010) ET 1200496/08.
[224] ibid [6].
[225] *Seldon* (n 214). Discussed in Chapter 7.1.4.3.

6.4.3: Enhanced redundancy payments

Workers are often offered enhanced redundancy payments in order to encourage them to take voluntary redundancy or early retirement. If the redundancy payment scheme followed the standard formula used in the statutory redundancy scheme it fell under an exception which permitted age discriminatory schemes.[226] If the scheme used a different formula the employer was required to demonstrate the scheme was a proportionate means of achieving a legitimate aim. For example, in *Randall v London Borough of Croydon*[227] a 38 year old Learning and Development Officer complained that his payment was calculated using a multiplier of 3 years, whilst his 48 year old job-sharer with the same length of service received a much higher payment because it was calculated using a multiplier of 5. His claim was unsuccessful because the payment scheme mirrored the statutory redundancy scheme and the exception in Regulation 33 applied.

6.5: Conclusion

This chapter has discussed the many problems that claimants found when they made a claim of age discrimination. The complicated nature of the modern employment relationship, where workers are contracted to other employers, made it difficult for some to establish that they were protected by the legislation. A small number found that they were unprotected by the Regulations because of territorial jurisdictional restrictions – these also hindered the achievement of the objective of the Framework Directive as discrimination across member states was not proscribed. It was apparent when examining judgment reports that many claimants were ignorant of their employment rights, time limits and the importance of following the grievance procedure correctly. There is a clear need for workers to be given employment advice in order that they can avail themselves of their rights.

The problems inherent in age legislation, discussed in Chapter 1.7, surrounding the difficulty in establishing 'age equality' for some cohorts whilst disadvantaging others, were evident in the judgments. Conflict in the workplace was apparent in numerous judgment reports where tension had arisen between generations who were

[226] Employment Equality (Age) Regulations 2006, reg 33. Replaced by Equality Act 2010, s 61 and the Equality Act (Age Exceptions for Pension Schemes) Order 2010, SI 2010/2133.
[227] (2007) ET 2301693/07.

treated lawfully but unequally, for example, where workers were complaining that they had received smaller redundancy payments than colleagues who were younger[228] or older.[229] The various exemptions in the Regulations allowed employers to lawfully utilise age discriminatory criteria in many aspects of working life, ranging from providing benefits to those with long service to paying lower wages to the young.

Evidence of inconsistent and contradictory interpretations of the legislation by tribunals was apparent. For example, interpretation of the phrase 'particular disadvantage' appeared to challenge tribunals in several judgments. A less demanding approach was also seen in cases of harassment, where it was found that ageist comments had to be directed to the claimant rather than creating an offensive environment, and in redundancy selection, where a criterion indirectly linked to age was found lawful if it was used with other criteria. Evidence could also be seen of unsympathetic tribunals which were usually unwilling to hear a claim if it was incorrectly made or out of time whilst employers were often given the opportunity to submit evidence when a default judgement had been made against them. This imbalance represents a substantial barrier for those seeking redress for their complaint – a difference in treatment by tribunals that is itself discriminatory.

Claimants often found it difficult to establish a claim of age discrimination because they were ill-prepared rather than because their claim had little merit. Numerous claimants came to the tribunal with insufficient evidence to support their claim. Those suffering multiple discrimination had concomitant evidential problems and repeatedly failed to garner information in support of their age claim because they concentrated on other grounds. Claimants could usually point to a difference in treatment and age but many could not find an additional factor, required by tribunals following *Madarassy v Nomura*[230] in order to reverse the burden of proof, because such evidence was often intangible, indistinct or difficult to find, particularly in recruitment cases. The questionnaire procedure did not help claimants in several cases as tribunals refused to find an inference of discrimination when they were not returned, or even more surprising, when they were untruthful, further demonstrating the disparity of treatment of parties by tribunals. As discussed in Chapter Two,

[228] *Loxley v BAE Land Systems* [2008] UKEAT 0156_08_2907, [2008] IRLR 853.
[229] *Randall v London Borough of Croydon* (2007) ET 2301693/07.
[230] *Madarassy* (n 72).

evidence indicates that discrimination takes place particularly in recruitment, yet claimants in recruitment found it almost impossible to substantiate their assertions of unfair treatment. As Rudman has found that age discrimination resulting from the '*application* of implicit biases' which 'may be nonconscious'[231] such evidence may be often unattainable. This lack of tangible evidence is a major hurdle that many age discrimination claimants simply cannot overcome, highlighting a major flaw in the use of legislation to challenge age discrimination.

[231] LA Rudman, 'Social Justice in our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias' (2004) 17(2) Soc Justice Res 129, 134.

Chapter Seven:
Folio Reports 2 – Response and Outcomes

7.1: Introduction

As discussed in Chapter Six, once the burden of proof has shifted to the respondent employer in a claim of age discrimination, the tribunal 'shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act'.[1] This Chapter explores the responses that employers made when discharging this burden of proof and reflects upon the awards given to successful claimants if the burden was not discharged. In the vast majority of 'age' judgments it was found that the employer denied discriminatory treatment. In a minority of cases the employer did not deny differential conduct but sought to prove that the treatment was objectively justified as a proportionate means of achieving a legitimate aim. The judgment reports examined as part of this study reveal inconsistent and often contradictory interpretations of the legislation and a significant power imbalance between the two parties.

7.2: Capability and performance

The most usual response by employers to an allegation of age discrimination, once the burden of proof had been reversed, was to deny that the alleged treatment related to the age of the claimant but was a response to his/her capability or performance.[2] In the majority of instances the assessment of the capability of older workers to perform their work centred upon the general competence of the claimant. For example, the claimant in *Howlett v BT plc*[3] was found to have been dismissed on 'grounds of inefficiency arising from unsatisfactory performance'[4] rather than on the grounds of age. In *Mott MacDonald v Rivken*[5] Counsel for the employer stated that the unrepresented claimant had 'failed to demonstrate interpersonal skills, intuitive knowledge … the claimant's presentation was not to standard … the claimant lacked

[1] Employment Equality (Age) Regulations 2006, reg 37(2). Replaced by Equality Act 2010, s 136.
[2] Eg *Chambers v Latium Plastics* (2009) ET 2405069/08.
[3] (2008) ET 3202835/08 and also discussed in *Beasley v Transport for London* (2007) ET 2200505/07.
[4] *Howlett v British Telecommunications plc* (2008) ET 3202835/08 [1] (Scannell EJ).
[5] [2010] UKEAT 0488_10_0803.

motivation and demonstrated an unwillingness to consider an alternative view'.[6] In the face of such personal criticism many claimants had no response.

However, employers were more likely to cite more specific instances of poor performance of younger workers rather than generalised criticism of the claimant. For example, in *Westby v Cyber Checkout Ltd*[7] it was found that a 19 year old customer services assistant was dismissed because she did not answer the telephone within 3 rings and was found sending personal emails when there was still work to be done rather than because she was young. The 36 year old claimant in *Hill v Parenta Group Ltd*[8] was found to have been dismissed because she took breaks outside the allotted time rather than because she was older than most of the other workers.

In cases where safety was an issue the employer's view of the lack of capability of the claimant was always accepted by the tribunal without question. For example, in *Houghton v Moorland School*[9] a 74 year old school mini-bus driver was seen driving through a red light by the school head-master and was immediately dismissed. The tribunal found that age was not the reason for his dismissal, but his ability to drive safely. Similarly a truck driver in *Baxter v TNT (UK) Ltd*[10] was seen driving with the shutter door of his vehicle left open and dismissed from his position. He claimed he was dismissed on the grounds of age but the tribunal felt the incident showed he had a disregard for safety.

Tribunals normally required evidence from the respondent in support of their assertions to rebut the burden of proof. However, the EAT held in *Seldon v Clarkson Wright & Jakes*[11] that we 'do not accept the submissions of the appellant, and indeed repeated by the Commission, that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer'.[12] The Court of Appeal in *Seldon* went as far as to suggest that evidence should be produced by the claimant to rebut the respondent's assumption, rather than insist that the respondent

[6] ibid [6].
[7] (2008) ET 1201083/07.
[8] (2010) ET 1102441/09.
[9] (2007) ET 2401572/07.
[10] (2007) ET 2403797/07.
[11] *Seldon v Clarkson Wright & Jakes* [2008] UKEAT 0063_08_1912, [2009] 3 All ER 435.
[12] ibid [73] (Elias LJ).

produce evidence to support their case, despite the fact that it should be the respondent's duty to discharge the burden.[13]

Indeed, several claimants were able to rebut the employer's evidence by coming to the tribunal with solid evidence of their own or by producing references. In *Hussain v Live Nation*[14] a tribunal observed, when considering the dismissal of a house manager at the Bristol Hippodrome by two younger members of staff that it had:

> never seen such a wide ranging selection of witnesses who were willing to attend to heap praise on a claimant. The level and range of this support has quite properly influenced us in assessing the evidence of the respondent's witnesses.[15]

In *Williams v Luminair Leisure Ltd*[16] an employer claimed he dismissed a 42 year old disc jockey because night-club attendances were falling as the claimant's music choices were becoming 'stale and complacent'[17] rather than because of the his age. Williams was able to rebut this by producing evidence that showed attendances had fallen at all night-clubs in the area. Similarly in *Wilkinson v Springwell Engineering Ltd*[18] the employer dismissed an 18 year old and stated that her dismissal was because her work was error-ridden not because she young. She was able to bring a copy of the accounts that she had worked on to the tribunal and only 2-3 errors were found out of the 80 figures per week she entered which was described as 'modest'.[19] The tribunal concluded the employer believed that 'there exists a link between age and capability'[20] and found Wilkinson's dismissal was on the grounds of age.

Clear, transparent selection procedures undoubtedly helped employers defend claims. Large employers in particular used such procedures and were able to discharge the burden of proof by doing so. In *Ferguson v Anglia Water Services*[21] a 52 year old complained that she was not selected as a senior data management scientist because of

[13] *Seldon v Clarkson Wright & Jakes* [2010] EWCA Civ 899, [2011] 1 All ER 77 [40] (Sir Mark Waller).
[14] *Hussain v Live Nation* (2008) ET 1401186/07.
[15] ibid [11] (Sara EJ).
[16] *Williams v Luminair Leisure Ltd* (2009) ET 1806146/09.
[17] ibid [24] (Cox EJ).
[18] *Wilkinson v Springwell Engineering Ltd* (2007) ET 2507420/07.
[19] ibid [10] (Drake EJ).
[20] ibid.
[21] (2007) ET 1500997/07.

her age. The employer presented a comprehensive breakdown of marks given in the selection process which included an online personality profiling test and an aptitude test. The claimant's score was 191, whilst the 28 year old successful candidate scored 195, indicating that it was the ability of the claimant, not her age, which had influenced the selection process.

Where capability was an issue the presentation of the case by the claimant at the hearing had a substantial effect on the outcome. Factual evidence and more intangible qualities were assessed in a 'credibility contest' with the reliability of the employer and employee at the heart of the judgment. Comments in judgments show that the demeanour of the claimant, the consistency of the evidence and the manner in which the claimant handled their complaint (including the diarising of events), both in the workplace and at the hearing, were aspects that were taken into account. If the claimant seemed unsure or hesitant in their answers this may have been taken as reflecting uncertainty in decision-making at work. For example, in *Mattin v Clacton Family Trust*[22] an 18 year old care assistant failed in her claim because it was found she was dismissed because of her 'capability and incompetence'.[23] The judgment noted how she sat at the back of the room looking with 'complete disinterest' with:

> her head on a male friend's shoulder whilst her mother sat at the front with her solicitor giving instructions … When she gave evidence she did so in a similarly disinterested way and from time to time when she was unable to answer questions put to her she told us that her mother had told her what to say but that she had forgotten … it has, in our judgment a distinct bearing upon the application.[24]

In *Lewis v Magmatic Ltd*[25] a discussion centred on whether the claimant was suitable for a position and the employer thought that at times the claimant went off 'the point of the question' sometimes. Employment Judge Carstairs commented that, when giving evidence, 'he did on occasion wander away from the question asked'[26] and subsequently found age did not play a part in the recruitment process. Judgment

[22] (2009) ET 1501312/08.
[23] ibid [45] (Cole EJ).
[24] ibid [5].
[25] (2010) ET 1402231/09.
[26] ibid [3.13].

reports indicate that the hearing became a proving ground for the personal qualities of the claimant and those without representation were at a distinct disadvantage.

7.3: Comparators

In numerous judgments employers discharged the burden of proof by introducing a comparator of a similar age to the claimant who was treated differently, providing evidence to show that the employer did not discriminate on the grounds of age.[27] For example, in *Nutt v Tim Samways & Sporting and Historic Car Engineers Ltd*[28] the tribunal found the claimant's selection for redundancy was not on the grounds of age as three of the other seven employees not selected were the same age as the 56 year old claimant. Similarly in *Richards v Gladedale SE Ltd*[29] a 60 year old sales consultant selected for redundancy was unsuccessful because another 60 year old was not selected and in *Charlish v Mref Trade Co*[30] it was found that, as another employee aged 70 was kept on, the employer did not discriminate against a dismissed 60 year old housekeeper at Brandon Hall Hotel on the grounds of age.[31] In *Black v Northumbrian Agencies and Distributors*[32] the employers presented evidence that, having selected a 54 year old for redundancy, they had retained two employees aged 64 and 70. The tribunal accepted this as evidence that the employer did not discriminate on the grounds of age. Folio reports indicate that large employers were more readily able to provide such a comparator who, with very few exceptions, was accepted as evidence that the employer did not discriminate on the grounds of age.

7.4: Objective justification

Age is unusual amongst suspect grounds in equality legislation in that it is possible to objectively justify direct discrimination. As observed above, most respondent employers denied discriminatory conduct at the tribunal but in a number of cases they claimed, sometimes as an alternative defence, that their treatment was

[27] As in *Awotwi v Kudos Hospitality* (2009) ET 2202462/09 and *Cooke v Barn Brasserie* (2008) ET 1500335/08 (older workers as comparators); *Kosseris v Fitchratings Ltd* (2009) ET 2201630/08 (younger worker as comparator).
[28] (2010) ET 2703154/09.
[29] (2010) ET 3202984/08.
[30] (2008) ET 1305082/07.
[31] Similar cases: *Woods v Knowsley Housing Trust* (2008) ET 2101890/08; *Laight v SCOPE* (2008) ET 1303354/07; *Eastman v Inchcape Architects* (2008) ET 1900973/07; *Santes da Silva Gama v Brazilian Naval Commission in Europe* (2009) ET 2300044/09.
[32] (2007) ET 2505343 /07.

discriminatory but was objectively justified. Article 6 of the Framework Directive provides that:

> Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are 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.

This was transposed in the Age Regulations as:

> 3(1) a person ('A') discriminates against another person ('B') if
>
> (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
>
> (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but
>
> (i) puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
>
> (ii) puts B at that disadvantage,
>
> and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.[33]

The Directive's phrase 'appropriate and necessary' was transposed as 'proportionate', whilst 'legitimate aim' is not circumscribed using any examples. The objective justification defence in the Regulations, criticised as 'wide and uncertain',[34] therefore fell into two sections – firstly, the discriminatory treatment must have a legitimate aim, and secondly, proportionate means must be used to achieve the aim.

[33] Replaced by Equality Act 2010, ss 13, 19.
[34] Union of Shop, Distributive and Allied Workers, *Response to Equality and Diversity: Coming of Age. The DTI Consultation on the Draft Employment Equality (Age) Regulations 2006 SI 2006/1031* (2005) <http://www.berr.gov.uk/files/file25499.doc> accessed 4 October 2012.

7.4.1: Legitimate aims

7.4.1.1: Introduction

The government preferred to take an open interpretation to 'legitimate aims' when transposing the Framework Directive, not producing a 'restrictive and prescriptive list'[35] and 'legitimate' is not defined in the legislation. The EAT has insisted that:

> equality laws are not designed to determine for companies what might be appropriate objectives. A business which places considerable weight on environmental or charitable objectives, even if they do not believe that they have only direct business benefit, can pray these in aid as legitimate aims.[36]

Consequently employers may attach weight to their own objectives in establishing a legitimate aim and are able to cite, not only broad aims such as 'business needs,' 'considerations of efficiency' and 'facilitation of employment planning,'[37] but also those that do not even have any direct business effect. In *Seldon v Clarkson Wright & Jakes* the Court of Appeal found that 'an aim intended to produce a happy work place has to be within or consistent with the government's social policy justification for the Regulations'[38] and in *Rolls Royce plc v Unite the Union* the ability to select employees for redundancy in a 'peaceful manner'[39] was sufficient as a legitimate aim.

The legitimate aim is able to be established ex post facto as 'a discriminatory measure may be justified by a legitimate aim other than that which was specified at the time when the measure was introduced'.[40] Conversely, it has been asserted that a 'legitimate aim is not the same thing as a current business need' but it could have been a need at the time the discriminatory action was initiated.[41] In other words, the employer has the right to declare an aim that was either important at the time the

[35] Department of Trade and Industry, *Equality and Diversity: Coming of Age – Consultation on the draft Employment Equality (Age) Regulations 2006* (The Stationery Office 2005) 4.1.5.
[36] *Seldon* (n 11) [67] (Elias J).
[37] M Sargeant (2006) 'The Employment Equality (Age) Regulations 2006: A Legitimisation of Age Discrimination in Employment' 35 ILJ 209.
[38] *Seldon* (n 13) [22] (Sir Mark Waller).
[39] *Rolls Royce plc v Unite the Union* [2009] EWCA Civ 387, [2009] IRLR 576.
[40] *Seldon* (n 13) [28] (Sir Mark Waller).
[41] *Rolls Royce* (n 39) [159] (Arden LJ).

discriminatory conduct was initiated or has become relevant in the following period, giving extremely wide latitude.

Legitimate aims may in themselves accept the legitimacy of ageism. For example, one of the government's suggested legitimate aims is 'the recruitment and retention of older people'[42] – it is hard to see how this is not discriminatory to younger age groups. Using the Framework Directive for guidance, it is apparent that age quota systems[43] and age-based selection and reward procedures[44] are acceptable, notwithstanding the goal of 'equal treatment'.[45] Equal treatment of all generations cannot occur when age-based criteria form the raison d'être of legitimate aims, highlighting the shortcomings of the goal. The tension that can arise between generations with regard to employment is very apparent when examining aims connected to redundancy, recruitment and retirement ages. Indeed, the ECJ[46] and the Supreme Court[47] have considered this issue when examining the need for default retirement ages and confirmed that the need to distribute employment between the generations is a legitimate aim and can be achieved by forcing older workers to retire.

The Directive gives other suggestions for legitimate aims such as employment policy, labour market and vocational training objectives.[48] In *MacCulloch v ICI*[49] the EAT proposed that an aim of encouraging turnover and preventing blockage in the employment system by tempting older workers to leave could be a legitimate aim as this was an employment policy objective.[50] The Directive was intended to encourage the continued employment of older workers, not to tempt them away with early withdrawal payments, indicating that legitimate aims can even be contrary to the intentions of the Directive. There is surely a distinction to be made between appropriate employment policy objectives and those that may be contrary to the intentions of the Directive itself.

[42] Department of Trade and Industry (n 35) 4.1.17.
[43] Framework Directive, Article 6(1)(a).
[44] ibid Article 6(1)(b).
[45] ibid Article 2(1).
[46] C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] All ER (EC) 961; C-45/09 *Rosenbladt v Oellerking Gebaudereinigungsgesellschaft mbH* [2011] 1 CMLR 32.
[47] *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] ICR 716.
[48] Framework Directive, Article 6(1).
[49] *MacCulloch v Imperial Chemical Industries plc* [2008] UKEAT 0119_08_2207, [2008] ICR 1334.
[50] ibid [17].

A vital question which should be addressed is whether employers are required to have social and employment factors at the heart of justification of discriminatory treatment. The ECJ has held that 'Article 6(1) … imposed on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification.'[51] The Court of Appeal interpreted this as underlining the 'distinction between justification of the legislation which either renders lawful or unlawful the actions of an employer or a firm, and those actions themselves as contemplated by the legislation'[52] and whilst legislation had to 'be justified by reference primarily to social and employment policy choices, it did not follow that any particular employer or firm, seeking to justify the enforcement of a retirement age, also had to establish such an aim'.[53] Thus whilst the justification of discriminatory treatment provided for in legislation must satisfy a high standard of proof, it does not follow that employers must satisfy this rigorous standard. This interpretation gives the employer more flexibility in setting out his objectives as it appears that aims do not have to be closely related to social and employment policies.

In the consideration of *Heyday*[54] at the ECJ, Age UK complained that the justification defence, including the phrase 'legitimate aim,' failed to comply with the duty of legal certainty as it transposed the Framework Directive in 'a vague and general way' and 'the failure to identify what the social aims were results in a situation where the private interests of the employer can be permitted to usurp the policy-making role of the state'.[55] After the reference for a preliminary ruling, Mr Justice Blake concluded that the government was afforded a broad measure of discretion in transposing the Directive but concentrated in his judgment on the legitimate aim of the default retirement age rather than addressing the issue of employers' aims. However, he offered contradictory guidance to that proffered in *Seldon* and stated that the:

[51] C-388/07 *R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] All ER (EC) 619, [2009] IRLR 373 (*Heyday*).
[52] *Seldon* (n 13) [17] (Sir Mark Waller).
[53] ibid.
[54] *Heyday* para 51.
[55] ibid para 291, Issue 2 (iv).

> private employer is not afforded the wider margin of discretion in the application of the regulation that the state is[56] … the individual employer would have a more rigorous task in justifying particular practices or treatment in reliance on the social aim.[57]

This conflicting view on whether the aim should be rigorously examined for its 'social' content led to inconsistent decisions at the tribunal. Some tribunals felt that there must be a social aim, although most did not. If an employer has to put forward social and employment policy reasons supporting a legitimate aim more age discrimination claims made to the tribunal would succeed as most employers had only private, financial reasons with which to justify their discriminatory conduct in the judgments examined as part of this study.

7.4.1.2: Legitimate aims and 'cost plus'

The government has asserted that 'discrimination will not be justified merely because it may be more expensive not to discriminate'.[58] This may be difficult to differentiate from justification based on 'business needs' as ultimately all employers have costs at the heart of their business needs. The ECJ reaffirmed in 2010 that 'rigorous personnel management is a budgetary consideration and cannot therefore justify discrimination'[59] and although it referred to a sex discrimination case there has been no definitive assertion that age discrimination should be treated differently to sex. In *Cross v British Airways*[60] the court indicated that an 'employer seeking to justify a discriminatory provision, criterion or practice cannot rely solely on considerations of cost. He can put cost into the balance however, together with other justifications if there are any'.[61] This has often been interpreted as the 'cost-plus' rule, indicating that cost alone cannot form the basis of legitimate aims.

However, Mr Justice Underhill, President of the Employment Tribunal, in the EAT in *Woodcock v Cumbria PCT*,[62] although clearly stating that 'the avoidance of cost is not in itself a legitimate aim,' went on to contradict that, saying:

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[56] ibid para 92.
[57] ibid para 97.
[58] Department of Trade and Industry (n 35) 4.1.16.
[59] C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* [2010] IRLR 631.
[60] *Cross v British Airways* [2005] UKEAT 0572_04_2303, [2005] IRLR 423.
[61] ibid [72] (Mr Justice Burton).
[62] *Woodcock v Cumbria PCT* [2010] UKEAT 0489_09_1211, [2011] ICR 143.

> we find it hard to see the principled basis for a rule that such considerations can never by themselves constitute sufficient justification or why they need the admixture of some other element in order to be legitimised. The adoption of such a rule, it seems to us, tends to involve parties and tribunals in artificial game-playing – 'find the other factor' – of a kind which is likely to produce arbitrary and complicated reasoning.[63]

He went on to find in *Woodcock* that 'cost saving' alone was sufficient to form a legitimate aim. This suggests that in claims of age discrimination the 'plus' in the 'cost-plus' rule has been abandoned. If cost is the only factor involved in a workplace decision this may mean older workers find themselves lawfully discriminated against as employers trying to make cost savings may target those most highly paid. Older workers are often paid more than younger workers because they have been in a position for a longer period, gaining valuable experience and may be on higher salary scales than those younger. The precedent established in *Woodcock*, confirmed by the Court of Appeal,[64] is now being used as a precedent in other types of discrimination claims for the fact that cost alone can suffice to justify a discriminatory policy.[65]

Mr Justice Underhill has since reasserted that cost-saving in redundancy selection is a legitimate aim.[66] In *Land Registry v Benson* a group of 50-54 year old workers were not selected for early retirement rather than those older or younger because 'the most costs would be saved'.[67] It was found that it 'is (to put it no higher) legitimate for a body such as the Appellant, like any business, to seek to break even year-on-year and to make redundancies in order to help it do so where necessary'.[68] Hard-pressed employers, especially in times of recession, may find themselves proposing an aim based on costs alone, but the uncertainty surrounding this may lead

[63] ibid [32] (Underhill J).
[64] *Woodcock v Cumbria PCT* [2012] EWCA Civ 330, [2012] IRLR 491.
[65] *Cherfi v G4S Security Services Ltd* [2011] UKEAT 0379_11_2405, [2011] Eq. L.R. 825 [45] (Reid J). A claim made under Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 3.
[66] *HM Land Registry v Benson* [2011] UKEAT 0197_11_1002, [2012] IRLR 373.
[67] ibid [17].
[68] ibid [34].

to appeals to higher courts, as in *Pulham v London Borough of Barking and Dagenham.*[69]

In *Loxley v BAE Systems*[70] the EAT declared that preventing workers close to retirement receiving a financial 'windfall' by awarding them reduced redundancy payments was a legitimate aim. In *Kraft Foods UK Ltd v Hastie*[71] the EAT followed the decision in *Loxley* and held that a similar provision which prevents workers 'recovering more than they would have been entitled to earn had the employment continued is necessarily justifiable whether the amount of the windfall is large or small'.[72] However, in an apparently contradictory statement the EAT insisted that such a scheme depends upon length of service rather than being compensatory – 'an employee is entitled to payment even if he or she walks into an equally well-paid job the next day and suffers no loss of earnings at all'.[73] Mr Justice Underhill admitted this approach appeared to be an 'anomaly' but found that the compensatory element was sufficient to allow justification.

Those older workers who have been made redundant and desire to continue working past the age of sixty-five will find it very difficult to find work, especially in the current recession, yet their expected loss of remuneration will be larger than those who had expected to retire at 65 or earlier. The 'windfall' may accurately reflect the amount that such employees would have expected to receive had they continued to work and indeed evidence was given to the court in *Kraft* that many employees chose to work for that company after their 65th birthday and 'were normally permitted to do so'.[74] The EAT found this fact 'immaterial, unless he (Hastie) had a legal right to work beyond that age' and it will be interesting to see how the tribunals and courts approach this issue now the DRA has been abandoned. The effect of this continued age discrimination against older workers, permitted by the exception in Regulation 30 of the 2006 Regulations,[75] is glaringly illustrated in this judgment. Workers who are

[69] *Pulham v London Borough of Barking and Dagenham* [2009] UKEAT 0516_08_2810, [2008] IRLR 184.
[70] *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] UKEAT 0156_08_2907, [2008] IRLR 853.
[71] [2010] UKEAT 0024_10_0607, [2010] ICR 1355.
[72] ibid [23] (Underhill J).
[73] ibid.
[74] ibid [22].
[75] Employment Equality (Age) Regulations 2006, reg 30. Replaced by Equality Act 2010, Schedule 9 s 13.

younger and obtain a new job quickly may also receive a 'windfall' yet there is no suggestion that their enhanced payment should be reduced.

A similar type of 'windfall' was discussed by the ECJ. In *Ingeniørforeningen i Danmark v Region Syddanmark*[76] a 63 year old's job severance allowance was refused because he was entitled to a substantial pension. The ECJ, although concluding the treatment was not proportionate, felt that it was a 'legitimate aim' to prevent an 'allowance from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension'.[77] However, in *Bilka-Kaufhaus GmbH v Weber von Hartz,*[78] in the context of sex discrimination, the ECJ held that a legitimate aim must 'correspond to a real need'.[79] Denying workers a 'windfall' hardly seems to 'correspond with a real need.' Does an employer really 'need' to deny an employee a payment he/she would otherwise receive but for age? Moreover, younger workers who receive enhanced redundancy payments and obtain alternative work soon after also receive windfalls. These 'windfalls' were only concerned with cost, indicating again that cost alone can determine a legitimate aim in age discrimination claims.

The ECJ was asked to consider this issue directly in *Fuchs and Köhler v Land Hessen*[80] in 2011. Fuchs was a state prosecutor in Land Hessen forced to retire at 65 as part of a cost-saving measure. The German national court asked 'Does an interest in saving budgetary resources and labour costs … represent a legitimate aim within the meaning of Article 6(1)?'[81] It received the reply that 'while budgetary considerations can underpin the chosen social policy of a Member State and influence the nature or extent of the measures that the Member State wishes to adopt, such considerations cannot in themselves constitute a legitimate aim within the meaning of Article 6(1) of Directive 2000/77'.[82] The ECJ's judgment, criticised as 'verging on incomprehensible,'[83] concentrated on the aim of the legislation rather than the aim of

[76] C-499/08 *Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark* [2010] Eq LR 345.
[77] ibid para 44.
[78] 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110.
[79] ibid para 36.
[80] Joined Cases C-159/10 and C-160/10 *Fuchs and Köhler v Land Hessen* [2012] ICR 93.
[81] ibid para 28(1) Question 2.
[82] ibid para 74.
[83] D Barnett, *Compulsory Retirement Age: ECJ Judgment* (London 1 July 2011).

an individual employer and was inconclusive although this seems to suggest that cost alone cannot form a legitimate aim.

7.4.1.3: Legitimate aims in judgment reports

The lack of definitive guidance on the meaning of 'legitimate' led to inconsistent interpretation of the Regulations by tribunals and indeed, in one folio report found on the Register Employment Judge Hodgson stated that 'It is unclear to us what exactly is meant by 'legitimate' in the legislation'.[84] Nonetheless tribunals found in many claims from as early as 2007 that cost alone could form the basis of acceptable aims. In *Bloxham v Freshfields Bruckhaus Deringer*[85] the reform of a pension scheme at a legal firm, instigated to save the firm money, was held as legitimate with little discussion.

However, in a handful of cases cost reasons alone were found not legitimate. In *Patterson v Merseyside Police Authority*[86] the tribunal found that a pension plan which benefitted older but not younger workers did not have a legitimate aim as it was solely concerned with saving the Police Authority money. Employment Judge Creed found the justification was flawed as there was no 'other legitimate reason advanced' apart from cost. In *Rainbow v Milton Keynes Council*[87] the council's decision to employ someone with a maximum of five years' experience solely on the grounds of cost (as the recruit could be placed on a lower salary scale) was found unlawful. The tribunal stated that 'if cost is going to be put forward as a justification for otherwise discriminatory practice, the evidence should be such that the respondent was more or less compelled to take the discriminatory decision for costs plus reasons. That was not the quality of the evidence in this case. A legitimate aim was not established'.[88]

Similarly in *Hurry v DEFRA*[89] the tribunal found that DEFRA, in refusing Hurry's application to take voluntary redundancy because it was 'not affordable' at her age, put forward an aim that was purely determined by cost and as the court was 'bound by *Cross*'[90] they found that it was not legitimate. DEFRA asked the tribunal to distinguish the case from *Cross*, arguing that *Cross* was concerned with sex

[84] *Baker v National Air Traffic Services Ltd* (2009) ET 2203501/07 [7.5].
[85] (2007) ET 2205086/06 [121] (Ryan TC).
[86] (2009) ET 2106251/08.
[87] *Rainbow v Milton Keynes Council* (2008) ET 1200104/07.
[88] ibid (Smail EJ).
[89] ibid.
[90] *Hurry v DEFRA* (2008) ET 2200762/08 [7.3.2] (Charlton EJ); *Cross* (n 60).

discrimination and that in an 'age context economic factors were more likely to feature'.[91] However, Employment Judge Carlton insisted he was 'not prepared to make a distinction between sex and age in terms of economic considerations in a defence of justification'[92] and the claimant succeeded.

Several aims were accepted by tribunals with little discussion or empirical evidence provided by the employer in support of their legitimacy. Some claims concerned employees who were objecting to the removal of pension, pay or holiday schemes which benefited a particular age group and were being abandoned by the employer because they were thought to contravene the Regulations. In these instances the aim of complying with the Regulations was accepted without question.[93] Tribunals also found legitimate all aims based on security concerns. For example, the dismissal of a 74 year old security guard was justified by the aim of 'maintaining the security of government buildings'[94] as was the need to 'avoid industrial unrest' by bringing 'about an orderly and satisfactory closure' of a manufacturing site.[95]

Aims which concerned health and safety were always accepted as legitimate without evidence. A tribunal found that the dismissal of a dental surgery cleaner was justified by an aim which was ensuring that the dental surgery was cleaned to a high standard in order to reduce the risk of infection.[96] In *Baker v National Air Traffic Services Ltd*[97] it was held an aim 'to ensure existing safety processes and systems are not compromised … must be a business need and therefore is a legitimate aim'.[98] Similarly in *Evans v CAA*, withdrawing licences to helicopter pilots over 60 was justified by an aim 'to protect the fare paying public'.[99] Yet the ECJ in *Prigge, Fromm and Lambach v Deutsche Lufthansa AG,*[100] interpreting the Directive very strictly, found that 'air traffic safety does not constitute a legitimate aim'[101] because it is not a

[91] *Hurry* (n 90) [7.3.2], Counsel for Defra, Mr Gilroy.
[92] ibid.
[93] *Sharma v Millbrook Beds Ltd* (2007) ET 3100922/07 [64] (Guyer EJ); *Patel v Pepsico* (2008) ET 1900562/08.
[94] *Amoah v Senator Security Services Ltd* (2009) ET 2301977/09.
[95] *Galt v National Starch and Chemical Ltd* (2008) ET 2101804/07 (Reed EJ).
[96] *Martin v SS Photay & Associates* (2007) ET 1100242/07 (Wallis EJ) (although dismissal was found not a proportionate means of achieving this).
[97] *Baker v National Air Traffic Services Ltd* (2009) ET 2203501/07.
[98] ibid [7.37] (Hodgson EJ).
[99] *Evans v CAA* (2008) ET 2201672/07 [6.3] (Carstairs EJ).
[100] C-447/09 *Prigge, Fromm and Lambach v Deutsche Lufthansa AG* [2011] IRLR 1052.
[101] ibid para 84.

social policy objective 'such as those related to employment policy, the labour market or vocational training'.[102] Much more difficult to understand is the paternalistic aim described in *Fryett v Suncrust Bakery* concerning an employee's well-being as she approached 65. The tribunal found the bakery's requirement that Fryett take early retirement was a result of an acceptable legitimate aim of maintaining the 'health and welfare'[103] of the claimant.

Employers often put forward a number of legitimate aims to justify their conduct. In *Williams v Mistral Telecom*[104] a requirement that an employee be over 18 was justified by three aims. Firstly, the employer did not want workers under 18 wandering around Leeds City centre after 7.00pm, secondly they did not want to breach the Working Time Regulations by asking someone under 18 to work over the statutory maximum for their age and thirdly the rest of the workforce would be upset if someone under 18 was treated more leniently because their age necessitated it. These three aims were dismissed. The tribunal noted that there were many unaccompanied 17 year olds in Leeds city centre after 8 o'clock, that it should be possible to allow an employee to work less than the 40 hours per week statutory maximum and if the other workers were told it was not lawful for him to work more hours it would probably not upset them. None of the aims, although based on health and safety and compliance with the law, were therefore found legitimate.

In the field of education 'maintaining quality standards in education and training'[105] was cited as an aim in several cases. In *Evans v Middleborough College* a requirement that applicants produce certificates showing their qualifications was justified by an aim of ensuring 'staff had adequate standards of literacy and numeracy'.[106] The requirement that staff involved in a reorganisation at Stafford College show that they had 'recent business experience' was justified by the need 'to maintain a skill set' for lecturers.[107] This aim was unquestioned by the tribunal, yet no evidence was given to support the proposition that recent experience was part of a

[102] ibid para 81. The measure in question, a requirement that Lufthansa pilots retire at 60, did not fall under Article 2(5) of the Framework Directive, which allows derogations that are necessary for public security and protection of health, either because other 'national and international legislation fixes that age at 65' (para 83).
[103] *Fryett v Suncrust Bakery* (2008) ET 1501483/08 [72] (Laidler EJ).
[104] *Williams v Mistral Telecom Ltd* (2009) ET 1806715/09.
[105] *Edwards v Governing Body of Manor High School* (2007) ET 2406342/06.
[106] (2007) ET 2516136/06 [20] (Malone EJ).
[107] *Foster v Stafford College* (2008) ET 1301144/07 [5.24].

necessary skill set for lecturers. The dismissal of a swimming teacher who could not use a computer to record the swimming lessons she gave was justified by the aim of 'increasing efficiency,'[108] which although a clear business need, does appear to be one solely based on cost and private concerns.

When examining the aim of a discriminatory action the tribunal looks at the effect of the whole scheme rather than the effect on the individual claimant because it is the aim of the action that is being examined not the effect on the individual.[109] This was stressed in *Seldon v Clarkson Wright & Jakes*[110] where it was held that legitimate aims are achieved by applying general policies which must be justified and the individual is then treated in accordance with the policy or rule. Seldon, a partner in a firm of solicitors, was refused the opportunity to continue working part-time past the age of 65 and claimed that he had suffered direct discrimination on the grounds of age. Had Seldon been an employee and the firm followed the procedure set out in Schedule 6 of the Regulations[111] the dismissal would have been automatically fair for the purposes of the Employment Rights Act 1996 but as a partner this procedure did not apply.

Clarkson Wright & Jakes stated it had six legitimate aims. Three were found not acceptable – 'ensuring that there is a turnover of Partners such that any Partner can expect to become Senior Partner … enabling and encouraging employees and Partners to make adequate financial provision for their retirement and … protecting the Partnership model in that, if equity Partners could not be forced to retire at 65 but employees could be, it would be preferable to keep lawyers as employee or salaried partners rather than Partners'.[112] The tribunal thought three aims legitimate. Firstly – the aim of retaining associates by offering partnership opportunities after a reasonable period was thought acceptable, the tribunal citing Mummery LJ who, in the Court of Appeal, stated that maintaining expectations for younger employees was a legitimate policy objective.[113] Secondly, facilitating workforce planning was an acceptable employment policy aim. Thirdly, an objective of maintaining a more congenial and

[108] *Pendrich v David Lloyd Leisure* (2009) ET 1100177/09.
[109] Discussed in *MacCulloch* (n 49) [33-34].
[110] *Seldon* (n 13) [59].
[111] Now contained in the Equality Act 2010, Schedule 9 and Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011, SI 2011/1069.
[112] *Seldon v Clarkson Wright & Jakes* (2007) ET 1102751/07 [51-54].
[113] *Secretary of State for Trade and Industry v Rutherford* [2005] ICR 119.

supportive culture within the firm – the 'collegiality' factor – was legitimate. These three were felt to be good business aims which encouraged associates to stay within the firm enabling the partnership to have a good strategy for growth.

These aims were confirmed as legitimate by the Supreme Court[114] which relied on the ECJ judgment in *Rosenbladt* where it was held that 'guaranteeing workers a certain stability of employment and, in the long term, the promise of foreseeable retirement, while offering employers a certain flexibility in the management of their staff … is thus the reflection of a balance between diverging but legitimate interests.'[115]

Ease of 'succession planning' was often cited as a reason for requiring workers to retire at particular ages and some tribunals accepted this as a legitimate aim, whilst others did not. In *Hampton v Lord Chancellor*[116] an aim of planning for succession of younger appointees, who might then proceed to the more senior levels of the judiciary, was accepted as a legitimate aim. On the other hand, in *Martin v Professional Game Match Officials*[117] which concerned the lawfulness of a rule which required football referees to retire at 48, the tribunal insisted that the legitimate aim must have a social and employment policy requirement. It held that, although football was a national pastime with significant public interest, that succession planning for younger referees did not have either a social or employment requirement.[118] The tribunal thought that '[w]e do not consider that the primary aim of the respondent is capable of meeting the social policy requirement … It seems to us to be purely private to the business'.[119]

This narrower interpretation of the legislation by a first-instance tribunal is not evident in decisions in higher courts although has been seen in some judgments of the ECJ.[120] It clearly deviates from the approach seen above in *Hurry* where the need to reduce cost, a private business aim, was accepted as legitimate. It is apparent that the uncertainty over the definition of legitimate and the open-ended transposition of the Framework Directive by the UK has led to first-instance tribunals making inconsistent and sometimes contradictory decisions. The uncertainty as to whether succession

[114] *Seldon* (n 47).
[115] *Rosenbladt* (n 46) para 68.
[116] (2007) ET 2300835/07.
[117] *Martin v Professional Game Match Officials Ltd* (2010) ET 2802438/09.
[118] ibid [7.6] (Rostant EJ).
[119] ibid [7.9].
[120] Eg *Prigge* (n 100).

planning is a legitimate aim is reflected in the finding that, when questioned, only one out of 157 employers said they planned to use it in justifying a specific retirement age following the abolition of the default retirement age.[121]

7.4.2: Proportionate means

7.4.2.1: Introduction

A test of proportionality is applied to the discriminatory conduct, which the Directive described as needing to be 'appropriate and necessary'.[122] The ECJ set out the classic test to consider when assessing proportionality in discrimination cases in *Bilka-Kaufhaus v Weber Von Hartz*[123] which is that the measures must 'correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end'. The pattern seen in age discrimination cases in the USA, Canada and Ireland is that a strict standard of proportionality is required, backed by statistical evidence,[124] of 'reasonable necessity, not reasonableness'.[125] This is similar to the rigorous manner in which the ECJ applied the standard in *Mangold v Helm*[126] where it found the test to be applied was whether the measure was 'objectively necessary to the attainment of the objective'. This has been described as the 'least restrictive means'[127] test and is a three stage process. Firstly an objective evaluation is undertaken to assess the business need asserted, secondly, an assessment is made of whether the provision, criterion or practice is appropriate and thirdly, consideration is given as to whether the application is necessary with a view to achieving the objectives pursued.

However, it has been emphasised in cases concerning other types of discrimination in the UK that a reference to 'necessary' means 'reasonably necessary'.[128] This was reiterated by Lord Justice Pill in 2005 when, in giving judgment in the Court of Appeal in *Hardy & Hansons plc v Lax,*[129] he stated that a tribunal or court had 'to make its own judgment, upon a fair and detailed analysis of

[121] 'Xpert Retirement Survey' *Personnel Today* (31 May 2011).
[122] Framework Directive, Article 2(2)(b)(i).
[123] *Bilka-Kaufhaus* (n 78).
[124] *Ontario Human Rights Commission v Etobicoke* [1982] 1 SCR 202 [212] (McIntyre J).
[125] *Western Airlines v Criswell* 472 US 400 (1985) [472] (Justice Stevens).
[126] C-144/04 *Mangold v Helm* [2005] ECR I-9981 paras 65-66.
[127] D Cabrelli, 'The Hierarchy of Differing Behavioural Standards of Review in Labour Law' (2011) 40 ILJ 146, 168.
[128] *Rainey v Greater Glasgow Health Board* [1987] ICR 129 [142] (Keith LJ).
[129] *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] ICR 1565.

the working practices and business considerations involved, as to whether the proposal is reasonably necessary'.[130] The House of Lords held in *Barry v Midland Bank*[131] that applying proportionality necessitates establishing an objective balance between the disparate effect of the measure and the needs of the business – the more serious the impact on individuals, the more convincing the justification must be. In *Seldon v Clarkson Wright & Jakes* the EAT confirmed that the balancing act is to be made between the reasonable needs of the undertaking and the discriminatory effects of the measure rather than on the impact on a particular worker.[132]

The government has stated that the discriminatory conduct must contribute to the pursuit of the legitimate aim, it must be weighed against the discriminatory effects and if another measure can be used instead it should be seriously considered.[133] If, for example, individual performance assessments can be used rather than using an age proxy, they should be seriously considered.[134] The test used in the UK courts appears similar to that required in the disability case *Collins v Royal National Theatre*, where the lack of a 'genuine examination'[135] proved fatal to the employer. Nonetheless in *Chief Constable of West Yorkshire Police v Homer* Mr Justice Elias stressed that concrete evidence was not always necessary but justification may be established 'by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions'.[136]

Not only have UK courts found that cost alone can constitute a legitimate aim, it can also form the basis of proportionate means if evidence can be provided to show that the measure was necessary. If a measure is vital for financial reasons it is also clearly appropriate and therefore justifiable. In the sex discrimination case *Redcar and Cleveland Borough Council v Bainbridge*,[137] the Court of Appeal considered that cost alone was sufficient upon which to base an assertion of necessity. Mummery LJ stated that we:

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[130] ibid [32].
[131] [1999] UKHL 38, [1999] IRLR 581 (Nicholls LJ).
[132] *Seldon* (n 11).
[133] Department of Trade and Industry (n 35) [4.1.20].
[134] Discussed in the Canadian case *O'Brien v Ontario Hydro* (1981) 2 CHRR D/504 (Ont Bd Inq).
[135] [2004] EWCA Civ 144, [2004] IRLR 395 [38] (Sedley LJ).
[136] *Chief Constable of West Yorkshire Police v Homer* [2008] UKEAT 0191_08_2710 [2009] IRLR 262 [48].
[137] *Redcar and Cleveland Borough Council v Bainbridge; Middlesbrough Borough Council v Surtees* [2008] EWCA Civ 885, [2008] IRLR 776.

> accept that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could not do other than it did and that it was justified in putting the need to cushion the men's pay reduction ahead of the need to bring the women up to parity with the men. But we do not accept that that result should be a foregone conclusion. The employer must be put to proof that what he had done was objectively justified in the individual case.[138]

In *Loxley v BAE Systems*[139] the EAT held that when considering proportionality it would also be significant that a collective agreement with a Trade Union supported the employer's justification. Mr Justice Elias cited the analysis given in *Palacios de la Villa v Cortefiel Servicios SA*[140] where the ECJ asserted that the fact that retirement rules had been collectively agreed was a relevant consideration when determining whether treatment is proportionate, but added that the action must still be subject to critical analysis. Indeed the ECJ in *Rosenbladt* noted that collective agreements allowed a balancing act to be undertaken by those (that is, the workers and the employer together) who were well-placed to understand the diverging interests apparent in 'the overall situation in the labour market concerned, but also of the specific features of the jobs in question'.[141]

This view was taken in *Seldon v Clarkson Wright & Jakes*[142] (which concerned a partnership) by the Court of Appeal where it was held that 'it is a legitimate consideration that a rule of this kind has been agreed by parties of equal bargaining power'[143] and in the EAT where it was suggested that employers may be able to protect their position by showing that they had tried to reach a settlement with all concerned.[144] A Trade Union has significant bargaining power but it would be doubtful if an agreement with a small representative group of workers would have sufficiently 'equal' bargaining power with an employer. However, even if

[138] ibid [175] (Mummery LJ).
[139] *Loxley* (70) [44].
[140] Case C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2008] ECR I-8531 [2008] All ER 249; Reiterated in *Rosenbladt* (n 46).
[141] *Rosenbladt* (n 46).
[142] *Seldon* (n 13).
[143] ibid [30] (Sir Mark Waller).
[144] *Seldon* (n 11) (Elias J).

discriminatory treatment is agreed by the majority of staff it must still be shown that proportionate means were used in achieving that aim. It was held in *Pulham v London Borough of Barking and Dagenham*[145] that in the absence of evidence that alternatives to the discriminatory conduct were considered 'union negotiation is a factor of little or no weight in deciding whether the outcome reached struck a proportionate balance'.[146]

The findings in *Rolls Royce v Unite*,[147] although not a case considered by a tribunal or the EAT, give guidance on proportionality when considering a length of service criterion in a redundancy selection matrix. Rolls Royce sought a ruling on whether such a criterion was lawful as it may indirectly discriminate against younger workers. The company unsuccessfully appealed against the High Court's decision that the criterion could be objectively justified. Lady Justice Arden in the Court of Appeal thought the length of service criterion proportionate because it had been negotiated as part of a collective agreement, there were several other criterion in the matrix, it was a better solution than a 'last in first out' criterion and older workers would have more difficulty finding jobs than those younger.[148] Lord Justice Wall held that:

> the 'proportionate means' is in my judgment amply demonstrated by the fact that the length of service criterion is only one of a substantial number of criteria for measuring employee suitability for redundancy, and that it is by no means determinative. Equally, it seems to me, the length of service criterion is entirely consistent with the overarching concept of fairness.[149]

On the other hand Lord Justice Aikens thought that a length of service criterion was not age discriminatory as it applied to all employees, whatever their age,[150] following the line of reasoning given in *Homer*.[151] Selection for redundancy based on length of service is likely therefore to be found lawful if that criterion is one of a number of factors and has been collectively agreed, rather than being 'necessary' as the normal test would dictate.

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[145] *Pulham* (n 69).
[146] ibid [41] (Underhill LJ).
[147] *Rolls Royce plc* (CA) (n 39).
[148] ibid [162] (Arden LJ).
[149] ibid [100] (Wall LJ).
[150] ibid [142] (Aikens LJ).
[151] *Homer* (n 136) [35] (Mr Justice Elias).

However, the courts in *Rolls Royce v Unite*[152] went further and found that a length of service criterion in a redundancy selection also 'falls squarely'[153] within the exception contained in the Age Regulations for service related benefits.[154] Benefits which are based on length of service given to reward loyalty and commitment help employers retain experienced staff but may be considered indirectly discriminatory as younger workers may be placed at a disadvantage because they are less likely to have long service. The Framework Directive specifically accepts this type of benefit as objectively justifiable[155] and the Regulations contained an exemption for service related benefits:

> Regulation 32:
>
> (1) … nothing in Part 2 or 3 shall render it unlawful for a person A, in relation to the award of any benefit by him, to put a worker B at a disadvantage when compared with another worker C, if and to the extent that the disadvantage suffered by B is because B's length of service is less than that of C.
>
> (2) Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).
>
> (3) In calculating a worker's length of service for these purposes, A shall calculate (a) the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision making).[156]

[152] *Rolls Royce plc v Unite the Union* [2009] 1 CMLR 17, [2008] EWHC 2420 (QB).
[153] ibid [16] (Sir Thomas Morison).
[154] The Employment Equality (Age) Regulations 2006, reg 32. Replaced by Equality Act 2010, Schedule 9 s 10.
[155] Framework Directive, Article 6(1)(b).
[156] The Employment Equality (Age) Regulations 2006, reg 32(3).

The employer has discretion to reward only 'some' of his workers in Regulation 32(2) and in the method of calculation of length of service for each individual employee.[157] Regulation 32 has been described as being 'employer-centric'[158] as it allowed most age-related benefits to continue past five years as the employer could decide, for example, to base the calculation on the amount of time an employee has been doing a specific task and a new five year period could begin many times throughout each employee's working-life. After this period it must have 'reasonably' appeared to the employer that the benefit fulfilled a business need, which is a very weak standard of justification.

Sir Thomas Morison in the High Court in *Rolls Royce v Unite*[159] gave an expansive interpretation of the meaning of 'benefit' in Regulation 32 in that:

> the words are general. In a redundancy selection matrix it seems to me clear that to give points for long service does confer on the employee concerned a benefit ... To remain in employment whilst others lose their jobs would properly be described as a benefit. To have the benefit of long service is a normal use of language.[160]

The Court of Appeal agreed that 'a length of service criterion is plainly capable of constituting a 'benefit' within Reg. 32'.[161] This very broad interpretation conflicts with the notion that exceptions to the legislation are normally strictly construed. As a 'benefit,' falling under Regulation 32, employers may easily be able to defend such a provision, as long as it 'reasonably appears' to fulfil a business need. As such, they will be able to continue to discriminate in 'favour' of older workers in redundancy selection procedures, offering them an early exit from work, contrary to the intentions of the Framework Directive which was intended to promote their employment.

This interpretation considerably expanded the scope of Regulation 32 and created two different tests of justification of discriminatory treatment, introducing further uncertainty and inconsistency into the application of the Regulations.

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[157] ibid reg 32(3)(a).
[158] *Rolls Royce* (CA) (n 39), [167] (Arden LJ).
[159] *Rolls Royce* (QB) (n 152).
[160] ibid [16] (Sir Thomas Morison).
[161] *Rolls Royce* (CA) (n 39), [103] (Wall LJ), [150] (Aikins LJ).

7.4.2.2: Proportionate means in judgment reports

Tribunals had a mixed approach to the examination of proportionate means – some were rigorous in their use of the tests and assessment whilst others were not. In *Bloxham v Freshfields Bruckhaus Deringer*[162] the claimant was able to establish that he had been directly discriminated against but his partners demonstrated that they had used proportionate means in achieving their legitimate aim of reducing the cost of a pension scheme for younger partners.[163] In considering the proportionate means used the tribunal felt that the measure was justified as 'no alternative less discriminatory solution could be conceived'.[164] Freshfields produced 17 bundles of evidence showing that it had consulted widely on alternative measures although most respondent employers could not show such diligent investigations.

Consultation with the workforce, whether through a union or directly with employees, helped employers justify discriminatory measures in a number of claims. For example, it was found in *Bloxham v Freshfields Bruckhaus Deringer*[165] that a collectively agreed discriminating provision was more likely to be objectively justified and therefore lawful[166] and in *Syratt v Gate Gourmet*[167] a selection matrix which included length of service as a criterion had been agreed with the union so was therefore thought 'reasonable and lawful'.[168]

Constructive and comprehensive consultation with employees was not undertaken in *Sharma v Millbrook Beds*,[169] although the employer had met with a union representative to try to solve the problem of a potentially discriminatory bonus scheme. Millbrook's action of terminating employment agreements and asking staff to sign new contracts with a new bonus structure was found not to be a proportionate response to the problem of an age discriminatory bonus scheme because discussions with staff had not been comprehensive. The tribunal was 'not satisfied that there was any serious or any consideration at all [of] other methods of seeking a solution to the

[162] *Bloxham v Freshfields Bruckhaus Deringer* [2007] Pens LR 375, (2007) ET 2205086/06.
[163] ibid [94] (Ryan EJ).
[164] ibid [129].
[165] ibid.
[166] ibid. Discussed in *Loxley* (n 70) [42]; *Palacios de la Villa* (n 140) [53]; reiterated in *Rosenbladt* (n 46).
[167] (2009) ET 2300984/09.
[168] ibid [40] (Gumbiti-Zimato EJ).
[169] (2007) ET 3100922/07.

respondent's problem'.[170] It suggested that 'the respondent could have consulted with the entire workforce, could have sought agreement to the change in the terms, could have indicated that if change was not accepted then steps would have to be taken to achieve to what amounted to a unilateral variation in contract'.[171] The new bonus structure may well have been the most suitable solution to the problem but the employer could not show it had sought to find an alternative.

In *Hampton v Lord Chancellor*[172] the Lord Chancellor defended discriminatory treatment by claiming that Recorders were subject to a retirement age of 65 in order to allow younger recorders to gain sufficient experience of varied cases to enable them to qualify as judges. The tribunal found that as a feasible alternative existed, that is, ensuring list arrangements allocated varied cases amongst those in the 'pool', the retirement age was not proportionate. By not making an examination of the alternative solutions which would be non-discriminatory the Lord Chancellor was found to have unlawfully discriminated against Hampton.

Foster v Stafford College[173] concerned a redundancy selection matrix criterion of 'recent and relevant business experience'. Foster claimed indirect discrimination as it was harder for him to satisfy this apparently neutral provision by virtue of his age as he had worked at the college for many years. A tribunal felt that although Stafford College had reached agreement with a trade union this was not relevant because the measure was not necessary. It thought that by 'allowing him to attend a one week placement after his provisional scoring the legitimate aim would have been achieved and the claimant would have scored maximum marks on this criterion and thereby avoided dismissal'[174] so the treatment was not proportionate. The overriding consideration was that the necessity of the measure should be established.

The proportionate means used must achieve the legitimate aim of the employer. In *Galt v National Starch and Chemical Ltd*[175] the employer had 'consulted extensively with a Trade Union which had never raised any objection to their course of

[170] ibid [47] (Guyer EJ).
[171] ibid [65].
[172] [2008] IRLR 258, (2007) ET 2300835/07.
[173] *Foster v Stafford College* (2008) ET 1301144/07.
[174] ibid [5.27] (Cocks EJ).
[175] (2008) ET 2101804/07.

action'[176] but the company's enhanced redundancy scheme was not introduced in order to achieve their legitimate aim of closing down the site peacefully. The tribunal found that the Trade Union, although consulted, was in any event unlikely to object to the scheme as it was more generous than the statutory scheme. The new scheme did discriminate against employees under 40 years old, but would not necessarily reduce the possibility of unrest and the company had not 'consciously addressed'[177] the discrimination. The consultation, although extensive, did not address the discriminating conduct precisely.

Proportionality was also discussed in *Martin v SS Photay & Associates*[178] where a 70 year old worker was dismissed as her employer felt she had fallen into a high risk category for health and safety. The employer obtained no medical evidence about Martin's health nor discussed her performance or health at any time and had 'assumed' a 70 year old was no longer capable of carrying out her job. The tribunal decided that it was not proportionate to dismiss an employee without detailed investigations.

These six cases show that some tribunals were rigorous in carrying out an objective balancing act and demanding that consultations with staff were undertaken, that alternatives were considered and that the treatment was reasonably necessary before a discriminatory measure was introduced. However, in numerous other cases the tribunal was less meticulous. In *Fadairov v Freshfields Bruckhaus Deringer*[179] the 41 year old claimant had extensive experience in legal work and felt a requirement that a paralegal must have completed the Legal Practice Course (LPC) was indirectly discriminatory. He complained that older workers were less likely to have completed an LPC as in the past it was a course that only aspiring solicitors undertook, rather than paralegals. Freshfields claimed that passing the LPC was an essential criterion as the worker had to have a good grounding in the law. The tribunal found that to require a suitably qualified worker was a legitimate aim and that the criterion was proportionate. Nevertheless, it is not apparent why the tribunal thought it 'reasonably

[176] ibid [22] (Reed EJ).
[177] ibid [18].
[178] (2007) ET 1100242/07.
[179] (2009) ET 2200157/09.

necessary' as alternative qualifications were available and other screening criteria did not appear to have been considered by the respondent.

The requirement for up-to-date qualifications was a problem for several older claimants as successive generations appear to give more weight to new educational criteria rather than older qualifications by which to measure competence. The 52 year old claimant in *Evans v Middlesbrough College*[180] could not prove he possessed the required qualifications for a teaching position. The employer insisted that applicants produce certificates for GCSE's and 'A' level's to show they had adequate standards of literacy and numeracy. Evans claimed that older applicants would be less likely to have certificates, as he had lost his several years previously, but the tribunal found that requiring proof by way of certificates was a proportionate means of achieving their aim without evidence that the College had considered alternative means of ensuring that teachers had adequate standards.

McCluskey v Edge Hill University[181] concerned a 59 year old retired head-teacher who applied for a position as associate tutor at Edge Hill University. She had 37 years' experience in teaching, including 'extensive management experience in education'.[182] She was unsuccessful in her application because the University maintained that a requirement to hold a degree was an essential prerequisite for the position. The B.Ed degree was not introduced until 1968, a year after McCluskey had begun her teaching course. Accordingly, she made a complaint of indirect age discrimination to the tribunal on the basis that the requirement to possess a degree put her at a particular disadvantage.

Both parties agreed with the tribunal that the test for proportionality should be consistent with that discussed in *Hampson v Department of Education and Science*[183] - that ''justifiable' requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'.[184] The tribunal felt the discriminatory effect on the claimant was unfavourable but it was thought possible that she would have been able to get a similar post at another university, as not all universities insisted on graduate status. She could also convert

[180] *Evans* (n 99).
[181] (2008) ET 2405206/07.
[182] ibid [8(e)].
[183] [1990] 2 All ER 25.
[184] *McCluskey* (n 181) [9] (Chapman EJ) citing *Hampson* (n 183) (Balcombe LJ).

her qualification into a degree, by means of additional study, and reapply. On the other hand the University was found to need 'external credibility with the Quality Assurance Agency for Higher Education, and to have a fully flexible cohort of potential staff qualified to discharge the full range of responsibilities in the ... academic contract'.[185]

The tribunal found that the needs of the University outweighed the discriminatory effect of the condition and the requirement was a proportionate means of achieving a legitimate aim and justifiable. Yet this requirement was not 'reasonably necessary' as the tribunal recognised that other universities did not insist on graduate status and Edge Hill could have introduced other measures which would have allowed the recognition of equivalent qualifications and experience.

The objective balancing act should be made between the reasonable needs of the employer and the discriminatory impact of the condition, as discussed in *Seldon.*[186] The tribunal considered the effect on McCluskey, but did not examine the impact on others in her position or on the realisation of the objectives of the Framework Directive. Lady Hale SCJ in *Homer* in the Supreme Court felt that it was the impact of the provision on the claimant or affected group, not the broader effect that was to be justified[187] although Lord Hope SCJ indicated that the effect of the discrimination on 'others may, however, have a bearing on the issue of justification when it is looked at more broadly'.[188] Numerous other applicants may have been discouraged from applying for a job at the University. Whilst *McCluskey* concerns an individual claim of indirect discrimination, anti-discrimination legislation is based upon the need to address public policy concerns such as the attainment of social cohesion and the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force. Discriminatory policies which might lead to inter-generational conflict and a breakdown of social inclusion do not lend themselves to being considered proportionate. They hinder cohesiveness and devalue the experience of older workers, excluding them from the workforce, thereby preventing the attainment of the objectives of the Framework Directive. This consideration must surely add weight to the assessment of the impact of the condition.

[185] ibid [42].
[186] *Seldon* (n 11) (EAT) [58] (Elias J) and (n 13) (CA) [36] (Sir Mark Waller).
[187] *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15, [2012] IRLR 601 [23].
[188] ibid [31].

Requirements for varying periods of 'experience' led to several claims of age discrimination which were sometimes found proportionate without rigorous examination. One of the respondent employers, Aspect Finance, in *Keane v Goodman Masson Recruitment Services Ltd*[189] justified their aim of recruiting a 'recently qualified accountant' by stating that 'someone with too much experience may become bored with the role with the result that they would have to continue recruiting'.[190] No evidence was provided by the employer to support their claim that someone with less than two years' experience would be less likely to become bored, or that someone with more experience would become bored. Employment Judge Lewzey found without discussion that Aspect Finance had demonstrated they used a proportionate means of achieving a legitimate aim and it is not apparent that any objective balancing exercise was carried out.

In claims where public safety was concerned tribunals always found discriminatory treatment proportionate and justified, sometimes without convincing evidence to show the conduct was necessary. In *Evans v Civil Aviation Authority (CAA)*[191] the claimant was a helicopter pilot prevented from flying when he reached his 60th birthday. The CAA produced evidence to show the policy was not out of step with the majority of other countries and suggested there was an increased risk of pilots over the age of 60 suffering from 'sudden cardiovascular incapacitation.' The tribunal relied on guidance on the approach to be taken on proportionality given in the human rights case *R (Begum) v Governors of Denbigh High School*[192] and held that it 'would be inappropriate for a court, lacking the experience, background and detailed knowledge of the decision-maker, to seek to overrule the decision-maker's judgment on matters which fall particularly within its expertise'.[193] Using the guidance given in *Begum* transfers weight to the employer's position on the proportionate means and virtually removes the responsibility of the assessment from the tribunal. However, the tribunal made it clear that they were unhappy with the evidence for justification which was:

[189] (2008) ET 2202489/07.
[190] ibid [66] (Lewzey EJ).
[191] (2008) ET 2201672/07.
[192] [2007] 1 AC 100 (HL).
[193] *Evans* (n 99) [5.9.4] (Carstairs EJ) quoting *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [2006] 2 All ER 487 [34] (Bingham LJ).

> only one page of an incapacity study which was, in effect, a literature review. This suggested something approaching a lack of rigour by the respondent in its work in an area which is likely to affect more pilots if more wish to carry on working beyond the age of 60 and the tribunal hopes this will be addressed in the future.[194]

Despite this lack of evidence the tribunal was prepared to find the action proportionate, perhaps indicating a lack of rigour on its own behalf. They could, for instance, have insisted that further evidence was obtained or asked whether the CAA had considered alternatives such as regular medical investigations to ensure pilots were not at risk of incapacitation. However, when tribunals carry out their balancing exercise of weighing the discriminatory impact against the legitimate aim, if the aim is sufficiently important, the emphasis on the proportionate means seems to be less demanding.

This selection of ten decisions taken from the Judgment Register shows that the strict standard of assessing proportionate means found in Ireland, USA and Canada and in the ECJ in other types of discrimination cases was not adhered to in age discrimination claims in first instance tribunals in England and Wales. Although some tribunals used the rigorous three-stage, least restrictive means test, ensuring that the treatment was appropriate and necessary, others were less demanding in their assessment and were prepared to find that discriminatory measures, utilised with little consultation with employees, consideration of alternatives or evidence that the means were reasonably necessary, were lawful.

Claims where proportionality was an issue were more likely to be the subject of appeals, particularly when tribunals had not undertaken detailed investigations into the financial aspects of discriminatory conduct. In *MacCulloch v ICI*[195] the EAT referred a claim back to the tribunal because of its failure to show a 'considered recognition of the degree of difference in the payment made to the claimant and to her comparator'.[196] In *Pulham v London Borough of Barking and Dagenham*[197] the EAT referred a claim back to the tribunal because it had inadequately assessed the financial

[194] *Evans* (n 99) [6.24] (Carstairs EJ).
[195] *MacCulloch* (n 49).
[196] ibid [40] (Elias J).
[197] ibid [46] (Underhill J).

implications of a discriminatory bonus payment scheme and the details of a local authority's budget proposals. The EAT in *Loxley v BAE Systems*[198] thought the tribunal had failed to analyse detailed financial information about the various benefits paid by the employer and sent it back to be reheard. They found 'nowhere in the decision is there any assessment of what his pension would be, or how that related to the redundancy payments'.[199] No assessment was made of the disparate financial impact on the individual but this was a complex case and it may be that tribunals need more help in such investigations as the fiscal consequences of some measures are very complicated.

7.5: Compensation awards

As indicated in Chapter 5.7, compensation awards for successful claimants were usually low and often did not cover the cost of legal representation. The size of awards varied considerably both between and within tribunals. For example, *Beatham v Duchy Catering*[200] and *Sears v Tarleton Council*[201] concerned 65 year old workers who were not informed of the right to continue working under Schedule 6.[202] Both claims were heard at the Liverpool Tribunal but were in front of different panels. Beatham received £16,497 whilst Sears received £2,106. The Tribunal in *Beatham* allowed a £6,000 injury to feelings award and an award for future loss, whilst in *Sears* an injury to feelings of award of £2,000 was given and no sum for future loss as the Tribunal felt the employee could have been retired fairly with the employer paying no salary if the correct procedure had been used (as could Beatham). The facts of these two cases were very similar yet the outcome for the claimants, although both successful, was very different.

Tribunals awarded low amounts of compensation to successful claimants who were near the former default retirement age as they assumed that the worker would retire at 65, despite assertions that they would have carried on.[203] A typical award was £241.62 which was ordered in *Chivers v Monmouthshire County Council*[204] when the

[198] *Loxley* (n 70).
[199] ibid [34] (Elias J).
[200] (2009) ET 2102031/08.
[201] (2009) ET 2103485/09.
[202] Employment Equality (Age) Regulations 2006, SI 2006/1031.
[203] As in *Amoah v Senator Security Services Ltd* (2009) ET 2301977/09.
[204] *Chivers v Monmouthshire County Council* (2009) ET 1607432/09.

employer retired the claimant without complying with the statutory procedure in Schedule 6. This award compares starkly with that given in *Plewes v Adams Pork Products,*[205] one of the very few cases where a period of work past 65 was included in the calculation. Plewes was a 65 year old factory operative who received £40,332.70 compensation, including £7,500 for injury to feelings. He stated that 'he was fit and willing to work'[206] and wanted to continue for 'at least another three years'[207] and both his line manager and supervisor expressed the view that they would need him for another five years.[208] Yet the tribunal estimated he would work for another 66 weeks and based his compensation on that length of time because 'of the increasing likelihood of ill-health'.[209] Plewes expressed his despair at being 'left on the scrap-heap,' feeling 'totally deflated' and said the discrimination had been 'devastating' as 'he had financial worries due to the uncertainty over his future'.[210] His injury to feeling was articulated expertly by his Counsel (although no additional evidence was given in support of his claim). The fact that the employer was large, with '1600 employees and a dedicated personnel department'[211] was taken into account when assessing the award. This large award illustrates the difference legal representation can make to a claim, although if Plewes had been unsuccessful his financial worries would have been substantially worse.

Those making a claim related to discrimination in recruitment typically received low awards. In order for such a claimant to obtain an award for future financial loss they must show firstly that they would have obtained the position if not for the age discrimination. This appears to have been very difficult for some claimants as even if they showed they had been unlawfully discriminated against in the selection process this did not necessarily mean they could prove they would have got the job. Secondly, the tribunal had to make an assessment of the length of time the claimant might take in obtaining an alternative position and most took a very optimistic view of the job market. For example, in *Frost v David Harber Ltd*[212] the employer, who was found to

[205] (2007) ET 2600842/07.
[206] ibid [5.7] (Blackwell EJ).
[207] ibid [5.5].
[208] ibid.
[209] ibid [5.7].
[210] ibid [7.5].
[211] ibid [7.4].
[212] (2010) ET 2703446/09.

have unlawfully discriminated on the grounds of age, stated that in any event he would not have given the job to the claimant and the tribunal estimated the claimant would get another position very quickly. The claimant denied this would be possible as he had been unemployed for some time but no award was given for future financial loss. Few judgments were found where the tribunal thought that a claimant would find it difficult to obtain another job and award substantial future loss, yet unemployment statistics suggest this would often be a problem.

Some awards were very low in relation to the loss suffered by the claimant and may not constitute a sufficient penalty to deter employers from discriminating. For example, in *Parfett v John Lamb Partnership*[213] a 65 year old director was paid a £7,000 discretionary bonus whereas his 41 and 50 year old colleagues received large six-figure sums. He resigned, claiming age discrimination and a breakdown of mutual trust and confidence. The Tribunal found there 'was no reasonable or potentially fair reason for the lack of a bonus'[214] as the respondents merely stated there was no problem with his performance and presented no evidence. Parfett was awarded £66,065 which included £29,799 loss of earnings and a £5,000 injury to feelings award as it was felt this was 'a less serious case'.[215] The respondent therefore saved a substantial sum by discriminating against Mr Parfett as the compensation did not match the loss he claimed he had suffered.

If an employer is faced with an expensive redundancy, pension or wage bill that can be saved by discriminating on the grounds of age, then the law does not adequately protect the employee from such discrimination. Large sums of money were saved by employers in several cases, in particular, in *Woodcock v Cumbria PCT*[216] and *Wooster v Tower Hamlets Borough Council*.[217] For such employers there is no deterrence to discriminatory conduct as required by the Framework Directive. Article 17 of the Directive states that Member States 'shall lay down the rules on sanctions … which may comprise the payment of compensation to the victim and must be effective, proportionate and dissuasive'. If the compensation ordered to be paid by an employer

[213] (2007) ET 2301498/07.
[214] *Parfett v John Lamb Partnership* (2007) ET 2301498/07 [28] (Lester EJ).
[215] ibid [36].
[216] *Woodcock* (n 62).
[217] (2008) ET 3200639/07.

is lower than the sum saved by discriminating against an employee this will be neither effective nor dissuasive.

Injury to feelings awards, discussed in Chapter 5.8, usually fell into the lower 'Vento' band. Tribunals sometimes gave no award whatsoever, contrary to advice given in the Court of Appeal. The recommendation in *Vento v Chief Constable of West Yorkshire Police*, currently representing the guidance that tribunals use in assessing such damages, is that 'in general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings'.[218] Yet in *Galt v National Starch and Chemical Ltd* Tribunal Chairman Reed found that 'we did not consider that the adoption of these measures was the source of any sort of upset or concern to the claimants. In those circumstances we considered it was appropriate to make no award to represent injury to feelings'.[219] The six claimants felt sufficiently 'injured' to make a claim to the tribunal and went to the expense of being represented by both counsel and solicitor. Their legal costs in bringing their claim, which was successful, surely outweighed their awards which ranged from £437.38 to £1,977.24.

Workers often found it difficult to produce evidence of their injury to feelings. In *Wellecomme v TFGS Construction*[220] the Tribunal handed down a default judgment finding that the claimant had been treated less favourably on grounds of age when selected for redundancy. He was awarded loss of past and future earnings of £2,700 and asked for an injury to feelings award as being out of work had put him under 'considerable stress'. The Tribunal Chairman (sitting alone) stated 'I make no separate award for injury to feelings in this case as the claimant's simple contention that he suffered from stress does not assist me in quantifying an award for injury to feelings'.[221] Similarly the claimant in *Kaur v The Council for Asian People*[222] said 'she was shocked by her dismissal' and claimed she had suffered stress as a result but because she had no further evidence was awarded £1,750 and no injury to feelings award.

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[218] [2002] EWCA Civ 1871, [2003] IRLR 102 [65] (Mummery LJ). Updated in *Da'Bell v National Society for Prevention of Cruelty to Children* [2009] UKEAT 0227_09_2809, [2009] IRLR 19.
[219] (2008) ET 2101804/07.
[220] (2007) ET 23002087/07.
[221] *Wellecome v TFGS Construction* (2007) ET 23002087/07 [Gumbiti-Zimuto TC].
[222] (2009) ET 303072/07.

However, substantial medical evidence of the effects of discriminatory conduct was provided in *Koh v Sainsburys Supermarkets Ltd*[223]. Koh was a 52 year old branch manager who was stereotyped as 'past it' by her regional manager. Before the discriminatory treatment occurred she was described as 'fit, active and played a lot of sport' and had 'an excellent health record and no mental health issue whatsoever'.[224] At the hearing she produced evidence from her GP and consultant psychiatrist that she suffered acute stress reaction as a consequence of the discrimination, resulting in anxiety attacks for up to twice a day with tearfulness, loss of confidence and an inability to cope.[225] She was prescribed Diazepam and sleeping tablets and suffered from 'a severe depressive disorder,'[226] 'sleeplessness, nausea, tearfulness, loss of self-confidence, panic attacks, loss of appetite and weight'.[227] She had been unable to get another job as she found that 'jobs are few and far between in the current economic climate'.[228]

The Tribunal awarded Koh £7,500 by way of injury to feelings, inclusive of aggravated damages, 'since we find that her feelings were considerably injured by the comments and contributed significantly to her feelings of anxiety, depression and very low self-esteem, placing the award in the lower half of the middle of the Vento band'.[229] The harassment of Ms Koh was 'a continued campaign for a number of months,'[230] and her mental health was severely affected yet the Tribunal did not find this was a serious case of discrimination in the context of injury to feelings.

In another instance, *Bould v Acme Jewellery Ltd*,[231] the serious harassment of a claimant continued over a two year period and included significant physical abuse along with daily humiliations by other employees, such as being elbowed, having his glasses knocked off, nuisance phone-calls and being subjected to verbal abuse every day both inside and outside the workplace. He was awarded an injury to feelings award of £10,000 yet this was a very serious case and a lengthy campaign. This

[223] *Koh v Sainsburys Supermarkets Ltd* (2009) ET 2312267/08.
[224] ibid [8] (Stacey EJ).
[225] ibid [9], [13].
[226] ibid [11].
[227] ibid [9-10].
[228] ibid.
[229] ibid [41].
[230] ibid [28].
[231] *Bould v Acme Jewellery Ltd* (2009) ET 1302983/09.

pattern of low awards was seen consistently at all tribunal offices throughout the period of study.

7.6: Conclusion

The judgments examined in this study reveal that the majority of respondent employers faced with discharging the burden of proof in a claim of age discrimination asserted, unsurprisingly, that age played no part in their treatment of the claimant. As 'the *application* of implicit biases may be nonconscious'[232] it may be that employers are simply not aware that they have been age discriminatory. Numerous employers discharged the burden of proof by providing a comparator – the 'token' older worker – who was used to show that the employer did not discriminate on the grounds of age. This was particularly noticeable with employers who had a large number of employees covering a wide age-span and this is in part responsible for the lack of claimant success against large employers highlighted in Chapter 5.6.

In many instances the capability of the claimant often became the focus of the tribunal and most claimants were unprepared to conduct a defence of their own competency to carry out their work. Although the task of discharging the burden of proof should have been carried by respondents, in reality claimants often needed to produce evidence to counter accusations of lack of capability and show that they were able to carry out their work. It would be beneficial to claimants to receive impartial advice which is needed at an early stage in the procedure, explaining the process and the type of evidence they will need to garner to conduct such a defence. These findings support those of Peters et al who found that race discrimination claimants felt 'relatively unprepared for their case'[233] and who suggested that more advice should be given at an early stage of a claim advising claimants of the details of the process. The imbalance between the parties once again came to the fore, as it was apparent that some employers possessed far more evidence than the claimants relating to the capability of the worker in the form of personnel files and documented statements from workers who were still employed by the respondents.

[232] LA Rudman, 'Social Justice in our Minds, Homes and Society: The Nature, Causes and Consequences of Implicit Bias' (2004) 17(2) Soc Justice Res 129, 134.
[233] M Peters; K Seeds and C Harding, *Findings from the Survey of Claimants in Race Discrimination Employment Tribunals Cases* (ERRSeries No 54, DTI 2006) 38.

The interpretation of the legislation by tribunals did not favour the claimant. Employers using the defence of justification for discriminatory conduct found that tribunals allowed them extremely broad scope in establishing their legitimate aims, which apparently may be determined ex post facto. There was a lack of certainty concerning the validity of aims based solely on cost and/or with no social or employment objective although most tribunals appeared to accept these without discussion. Closer scrutiny was given to the proportionate means used to achieve the legitimate aim but if the employer could show they had considered alternatives to the conduct and could show they had consulted with their workers/colleagues, as in *Seldon v Clarkson Wright & Jakes*,[234] it was likely the tribunal or court found it justified. Some tribunals did not make a strict examination or balancing assessment of the proportionate means and were inconsistent with the rigour with which they approached this assessment. Those that carried out an objective balancing act between the needs of the employer and the discriminatory impact of the condition did not necessarily look at the overall impact of the discriminating conduct as in *McCluskey v Edge Hill University*.[235] This wide latitude given to employers towards justification and lax approach to interpretation of the legislation by tribunals is not conducive to the creation of an environment where age discrimination is deemed unacceptable. Indeed, this attitude is likely to allow the perpetuation of discrimination as it does not permit an effectual deterrent.

Legal representation made a significant difference to the quality of a claimant's application and legal representatives certainly helped attain success and higher compensation awards. Many claimants were uncertain how to provide evidence of their injury to feelings and legal representation helped significantly in this regard, but unfortunately tribunals generally gave low awards which often would not have covered the cost of such assistance. Overall compensation awards were low and inconsistently assessed. Awards varied considerably for claims which appear very similar, not only between different tribunals but within the same tribunal office with different panel members. The sums that were awarded barely seem to be sufficient compensation for the injury suffered by claimants whose application was successful.

[234] *Seldon* (n 47).
[235] (2008) ET 2405206/07.

Injury to feelings awards were low, even in cases where discrimination appeared serious and had carried on for a long period of time. Some successful claimants were given no injury to feeling awards whatsoever, contrary to guidance given by higher courts, yet clearly claimants' 'feelings' had been injured sufficiently for them to make a claim to the tribunal. Moreover the size of compensation awards is insufficient to form a deterrent; some employers may find that it is financially advantageous to discriminate and face a claim of discrimination at the tribunal. The Directive requires sanctions to be 'effective, proportionate and dissuasive'[236] – manifestly this is not being achieved at the moment. Not only does the legislation, with its weak underlying structure and numerous exceptions, 'legitimise'[237] age discrimination but the interpretation and implementation of the Regulations by tribunals is inconsistent and ineffectual. The result is a mandate for employers to continue age discriminatory conduct.

[236] Framework Directive, Article 17.
[237] M Sargeant, 'The Employment Equality (Age) Regulations: A Legitimisation of Age Discrimination' 35(3) (2006) IJL 209.

Chapter Eight:
Discussion and Concluding Remarks

8.1: Introduction

This Chapter explores the findings of the qualitative analysis in the light of significant factors which arose from the quantitative analysis and provides a conclusion to this study. The most notable factor that emerges from both analyses is that few claimants alleging they had suffered age discriminatory treatment were successful after the consideration of the claim by a tribunal. It may be that the conclusion to be drawn from this is that age discrimination is not a significant problem in England and Wales – that more claimants would be successful if they had actually suffered unjustified, unfavourable treatment. But the findings of the qualitative study reveal the many problems that claimants had in following the application procedure, finding substantiating evidence and facing inconsistent and contradictory interpretations of the legislation by tribunals. When this is coupled with the knowledge that there is a large body of work which shows that many employees feel they have suffered age discrimination,[1] this leads more readily to the conclusion that the legislation is not an adequate mechanism by which such workers could obtain redress for age discriminatory treatment. This is the result of a combination of a model of anti-discrimination legislation which relies on individual fault-finding and an inflexible and less than exacting interpretation of statutory provisions by the judiciary.

In order to achieve the objectives of the Framework Directive, discussed in the Introduction, the legislation has to broadcast a message is to society that age discrimination is no longer tolerable. A legislative process which depends upon an aggrieved individual to bring a claim must not be too complex or challenging, must produce fair and consistent results and must provide adequate compensation if potential claimants are not to be discouraged from engaging in that process. If the process is ineffectual in providing redress and sanctions fail to act as a deterrent there is no resulting pressure on employers to moderate their behaviour. No message is being

[1] Eg AgeUK *How Ageist is Britain?* (Age Concern England 2005) 4; S Long, 'An Investigation into the Extent of Age Discrimination in the UK Labour Market' (PhD thesis, University of East Anglia 2004).

sent to society that ageism is being challenged by the judicial process in any meaningful manner and the legislation fails to challenge the ageist conduct which it seeks to address.

The results discussed in this thesis show that the legislation and judicial process adopted in England and Wales has failed to mount a challenge to age discrimination by providing an effective deterrent. The proportion of unsuccessful claims over the period of study increased steadily and in the first quarter of 2010 the number of claims which failed was over six times that of those successful. The examination of folio reports reveals two reasons for this increase. Firstly, judicial interpretation of the legislation became progressively less rigorous. Tribunals after 2008 followed the precedent set at the Court of Appeal in *Homer*,[2] finding that potentially indirectly discriminating provisions had consequences due to age rather than age discrimination; they also increasingly accepted legitimate aims which were based on 'cost alone' reasons as justification of discriminatory treatment, in the manner seen in *Woodcock*.[3] Secondly (and more noticeably), employers became more likely to successfully defend a claim. As discussed in Chapter Seven, this was often achieved by an employer challenging the capability, conduct or credibility of the claimant or by producing a comparator to show they did not discriminate on the grounds of age. This reverses the traditional role of a comparator; although the existence of a comparator is normally essential in establishing that a claimant has suffered less favourable treatment, many employers cited the more favourable treatment of a comparator – a 'token' older person – as evidence they did not discriminate on the grounds of age.

This Chapter discusses a number of issues which emerge from the analyses of judgments as highly significant. These include the inconsistency of tribunals and the interpretation of the legislative provisions regarding justification, the inadequate remedies given to claimants, the difficulty in reversing the burden of proof and the problems of the claimant – including the power differential between the two parties, the particular issues of women and those suffering multiple discrimination and the role of legal representation. A review of these issues provides insight into the effectiveness of the interpretation and implementation of the legislation. The applicability of a

[2] *Homer v Chief Constable of West Yorkshire Police* [2010] EWCA Civ 419, [2010] IRLR 619. Discussed in Chapter 6.3.3.
[3] *Woodcock v Cumbria PCT* [2012] EWCA Civ 330, [2012] IRLR 491, [2010] UKEAT 0489_09_1211.

reasonable adjustments solution to age discrimination is reflected upon and the appropriateness of an equal treatment model of legislation is considered. The Chapter closes with suggestions for further research and proffers final conclusions.

8.2: The Tribunal

The importance of the aim of eliminating inequality within the European Community is stressed in the Recitals to the Directive,[4] yet claimants faced inequality of treatment by employment tribunals. A pattern of inconsistency of interpretation of the legislation was found, with tribunals not 'treating like cases alike',[5] a fundamental concept of the common law system of England and Wales. Without consistency an individual is unable 'to regulate his conduct'[6] and 'a distinct and active first principle of law'[7] is abandoned. Nonetheless the qualitative analysis shows that inconsistency occurred at every stage in the consideration of a claim – from establishing jurisdiction, to the consideration of evidence, reversing the burden of proof, the consideration of justification of discriminatory conduct and the awarding of compensation.

There was substantial variation in the success rates and compensation awarded by tribunals for claims which appeared to have very similar facts. The finding that all but one of those whose claim was struck out without meaningful consideration was over 50 years old may even suggest that tribunals were less prepared to treat seriously the claims of older workers whereas they gave more deliberation to claims of those who were younger, perhaps indicating intrinsic ageist assumptions by the tribunals and even raising the spectre of institutional ageism. In recommending that tribunals be given 'considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case,'[8] Lord Justice Mummery appears to have given tribunals a license to act in a manner inconsistent with the underlying principles of the Framework Directive, which requires consistency and equality of treatment.

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[4] Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation [2000] OJ 2000 L 303/16 (the Framework Directive), eg Recitals 2, 3, 4.
[5] *Matadeen v Pointu* [1999] 1 AC 98 [109] (Hoffmann LJ).
[6] *Silver v UK* (1983) 5 EHRR 347 para 2(c).
[7] J Coons, 'Consistency' (1987) 75 Cal L Rev 60.
[8] *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] IRLR 102 [65].

Claimants in the South and South-west were the least successful, received the lowest overall compensation and injury to feelings awards and were ordered to pay substantially higher additional costs than claimants in other regions (up to six times higher than those in the North). Two tribunals – Southampton and Leeds – adjudged more claims successful than were dismissed but the Leicester Tribunal failed to find any of the 103 age claims it heard successful. It seems likely that the cause of local and regional variations in outcome is the inconsistent approach of individual tribunals. If this is correct, it is a significant indictment of the quality of the training and guidance available to tribunal members. Hepple at al[9] advised against the adoption of specialised tribunals trained to deal solely with discrimination claims as many applications included other jurisdiction claims such as unfair dismissal and it was observed during data collection in this study that this situation still prevails. But it may be that as the tribunal process has become more adversarial and the legislation more complex, that training for tribunal members needs to be more rigorous in both depth and frequency.

Tribunals were not aided by the loose definition of terms in the Regulations. Tribunals must be allowed judicial discretion to deal with individual cases based on the facts before them but the legislature needs to define terms accurately in order for consistent results to emerge. The transposition of the Framework Directive left open the construal of many aspects of the legislation to first instance tribunals, leading to considerable variation. For example, if the legislation defined the phrase 'legitimate aim' more consistent interpretation could be achieved. As Joanne Owers, Chair of the Employment Lawyers Association, pointed out 'employment law should be drafted carefully – not sloppily – with the intention of it being clear to employees and employers when they are operating within the law. This is not the case at present'.[10]

The consistency of decision-making by employment tribunals has been a concern for a number of years. The Woolf Report in 1995 highlighted that it is 'essential for there to be consistency in decision making throughout the country, at each local centre and at every level of the judiciary. This will require judicial training and guidance to ensure that there is consistency of approach'.[11] The Leggat Report in 2001 stressed the

[9] B Hepple, M Coussey and T Choudhury, *Equality: A New Framework Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing 2000) 87.
[10] J Owers, (2011) 'Time for an End to Quick Fixes' *Law Society Gazette* 8 (London 27 October 2011).
[11] Woolf LJ, *Access to Justice, Final Report to the Lord Chancellor* (The Stationery Office 1996) Chapter 1 (33).

importance of 'consistency of decision-making'[12] by tribunals but the Gibbons Report confirmed that the 'judgments of different tribunal chairs appear to many to give employment tribunals a reputation for inconsistency and that reduces the confidence of users in the system'.[13] The Employment Tribunal System Steering Board (ETSSB) stated in 2010 that 'there is potential unfairness resulting from inconsistent application of practice and procedure across the system'.[14] They reported:

> anecdotal concerns about the treatment by some judges of cases involving mainly though not exclusively discrimination issues…that certain judges were known for deciding cases one way (e.g. in favour of claimants) and others the other way … but … where there is suspicion of bias, there is the opportunity to appeal the decision.[15]

This study provides robust, statistical support for these anecdotal concerns. The ETSSB has recommended that a five year review should be carried 'of all discriminations cases' which 'should look for any patterns that might suggest a particular bias towards the claimant or towards the respondent, and/or towards or against a particular type of case'.[16] This recommendation was made against the advice of the President of the Employment Tribunal who felt a review was not warranted as no evidence had been presented which related to the outcome of cases at the various local centres.[17] It should be stated that, although this study presents evidence of inconsistencies, no evidence of actual bias in folio reports was apparent, but contradictory interpretations of the legislation and a lack of rigorous scrutiny of facts were documented. Data was not gathered which related outcome to individual tribunal members although a considerable number of judgments were handed down by employment judges sitting alone, rather than as part of the normal three-person panel – a practice said to be 'not recommended' by Lady Smith in the EAT.[18]

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[12] A Leggatt, *The Review of Tribunals – One System, One Service* (The Stationery Office 2001) Overview Chapter, 12.
[13] M Gibbons, *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (London, Department for Trade and Industry 2007) paras 4.20-4.21.
[14] Ministry of Justice, *Minutes of ETSSB Meeting Held on 4 March 2010* (2010) 2.
[15] Department of Business, Innovation and Skills, *The Employment Tribunal System Steering Board Report on Consistency* (31 March 2010) para 5.83.
[16] ibid Recommendation 8, 10.
[17] ibid paras 5.94-5.99.
[18] *McCafferty v Royal Mail* [2012] UKEAT 0002_12_1206 [37].

8.3: Justification of discriminatory practices

Age discrimination legislation in England and Wales allows business needs to be balanced against the equality principle in the justification of otherwise discriminatory practices and requirements. The provision of the defence of justification to all types of age discrimination limits the effect of the legislation considerably and the interpretation of the justification defence is a measure of the importance that the judiciary gives to the notion of age equality. The ECJ has, at the time of writing, considered twelve age discrimination cases in order to give guidance to national courts as they seek to clarify what is acceptable with regard to justification of age discriminatory policies. Nine of these references were considered in the Grand Chamber formation and five of them were adjudicated in 2010. The ECJ has developed two strands of proportionality tests – a loose balancing act carried out on collectively bargained and involuntary retirement from the workplace provisions and a more rigorous 'appropriate and necessary' test which it has applied to all other types of age discriminatory conduct which does not involve exit from the workforce.

The Directive witnessed a symbiotic relationship between economic concerns and social justice – having dual aims of protecting the needs of the individual and encouraging older workers to remain in the workforce. Yet in the UK some tribunals appeared to have lost sight of these aims and did not apply the test for justification in a rigorous manner. Dickens has pointed out that the interpretation of 'justifiable' and the relative weight given to 'fairness' with regard to 'efficiency' has varied over the past thirty years and is a measure of the consideration that the judiciary extends to employers in periods of economic difficulty.[19] The ease with which justification was established by numerous employers in age discrimination claims shows that the judiciary feels considerable sympathy for employers in the current economic climate.

The UK government insisted when the Regulations were introduced that 'the test of justification will not be an easy one to satisfy. The principle remains that different treatment on grounds of age will be unlawful: treating people differently on grounds of age will be possible but only exceptionally and only for good reasons'.[20] However, the

[19] L Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45(3) British Journal of Industrial Relations 463.
[20] Department of Trade and Industry, *Equality and Diversity: Coming of Age - Consultation on the draft Employment Equality (Age) Regulations 2006* (The Stationery Office 2005) para 4.1.13.

examination of folio reports revealed tribunals felt that 'exceptional' circumstances occurred relatively often. A bias towards business needs seen in tribunals, where an employer's convenience outweighed the equality principle, appears to display judicial deference to economic and political pressures rather than concern over the application of the tests carefully developed by the ECJ.

This is also evident in the establishment of precedents by the EAT and Court of Appeal which show that legitimate aims can be broad, need little social or public policy content, can be based on cost determinants alone and that proportionate means do not have to be necessary, but only 'reasonably necessary'. In *Western Airlines v Criswell* the Supreme Court in the USA has stated the test for justification in an age discrimination claim should be a strict one of 'reasonable necessity,' not 'reasonableness',[21] yet in first instance tribunals in England and Wales an employer's convenience was often the overriding parameter. 'Reasonably necessary' does not equate to 'exceptional' and is much weaker than the requirement specified in Article 2(b) of the Framework Directive which states that the means of achieving the legitimate aim should be 'appropriate and necessary'.

Justification which permits age discrimination is acceptable whenever it is based on clearly identified aims benefiting society as whole, such as social inclusion and meeting special needs. But employers using the defence of justification for discriminating conduct found they had extremely broad scope in establishing their aims and not all tribunals made a strict examination or balancing assessment between the proportionate means and the discriminatory treatment. If an employer showed alternatives to the conduct had been considered and the workforce had been consulted it was highly likely that the tribunal found the behaviour proportionate, irrespective of whether the measures were 'necessary' as is required by the Directive.

There was a lack of certainty concerning the validity of aims based solely on cost and/or with no social or employment objective but following the decision in *Woodcock*[22] they were likely to be accepted. Older workers can be dismissed because of the higher salaries or pensions they incur as it is company economics, not age, that is the determining factor in the dismissal – 'the cost, not age defence'. Employers therefore wishing to save money by discriminating against older workers – and they

[21] 472 US 400 (1985) paras 83-155 (Justice Stevens).
[22] *Woodcock* (n 3).

are the workers most likely to earn more as they have progressed along salary scales – may find it relatively easy to justify such treatment although even if they cannot the low levels of compensation awarded may not act as a deterrent.

The requirement that an individual retires at a particular age is 'age discrimination *par excellence*',[23] yet the broadness of the justification test has been used to permit such enforced dismissal. The decision of the Supreme Court in *Seldon*[24] that 'promoting intergenerational fairness' could be a legitimate aim sanctions the forced retirement of individuals despite the removal of the default retirement age – allowing the rights of those younger to take precedence over those older. Lord Hope SCJ in *Seldon* asserted that there 'is a public interest in facilitating and promoting employment for young people, planning the recruitment and departure of staff and the sharing out of opportunities for advancement in a balanced manner according to age'[25] and he felt that a fixed retirement age achieves this balance. However, this assertion ignores the whole purpose of age discrimination legislation and simply serves to perpetuate the institutionalised discrimination that the legislation was intended to eliminate.

The Framework Directive intended to promote the interests of all generations with its insistence on equal treatment, rather than sacrificing the interests of older workers as discussed in Chapter 1.7. If older workers are allowed to continue to work past normal retirement age, younger cohorts would in any case receive equal treatment eventually in benefiting equally by being allowed to work until they deemed it appropriate, rather than at a particular age. Forcing individuals to retire at a fixed age is not 'putting into effect in the member states the principle of equal treatment'[26] nor is it paying 'particular attention to supporting older workers, in order to increase their participation in the labour force';[27] indeed, it is legitimising the enforced withdrawal of older workers from the labour force – achieving the opposite of the Framework Directive's aims.

[23] LM Friedman, 'Age Discrimination Law: Some Remarks on the American Experience' in S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003) 192.
[24] *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] 2 CMLR 50, [67] (Lady Hale SCJ).
[25] ibid [73] (Lord Hope SCJ).
[26] Framework Directive, Article 1.
[27] Framework Directive, Recital 8.

8.4: The Claimant

The quantitative analysis shows that the characteristics of those making age discrimination claims in England and Wales differ from those making claims in other countries, particularly those in the USA. Service and sales workers form the majority of claimants in this country, rather than white collar, professional workers, and far fewer claimants are successful here than in the USA where up to a third are adjudged successful by the courts.[28] However, the majority of claimants were in the 52-62 year age group, following the pattern found in longitudinal studies of age discrimination claims in other countries.[29] Claimants differed from those involved in other jurisdiction claims in England and Wales as nearly 90% were individuals alleging unfavourable treatment rather than claiming as part of a group.

Two secondary claimant age clusters were found; one containing workers aged 18-25 who claimed they were discriminated against because they were 'young' and another aged 39-42 who claimed they were suffering unfavourable treatment because of the allocation of job benefits or redundancy payments. Individuals aged 15-24 are 'five times more likely than those aged 65 or over and about twice as likely as any other age group, to report age discrimination'[30] yet only 7% of judgments were handed down to such claimants, indicating perhaps a lack of desire to be involved in an adversarial process. The characteristics of young claimants who were prepared to make a claim differed considerably from those of older workers. They were more likely to follow the correct procedure and more likely to actively pursue their claim whilst young women made as many claims as young men and were more successful than young men. Their claims were, almost without exception, concerned with irrational stereotypical attitudes towards the young and the discriminatory treatment was usually denied by the employer with no attempt made to justify it.

The 'middle-aged' 39-42 year old group is not one which has been highlighted as being particularly subject to age discrimination; indeed Gee et al found this group were

[28] MH Schuster and CS Miller, 'An Empirical Assessment of the Age Discrimination in Employment Act' (1984) 38(1) Industrial and Labor Relations Review 64.
[29] GC Gee, EK Pavalko and JS Long, 'Age, Cohort and Perceived Age Discrimination: Using the Life Course to Assess Self-reported Age Discrimination' (2007) 86(1) Social Forces 265.
[30] A Marsh and M Sahin-Dikmen, *Discrimination in Europe* (Report B, Policy Studies Institute 2002) 15.

the least likely to report age discrimination.[31] This cohort has no history of disadvantage and does not appear in need of remedial support so is not obviously a legitimate suspect group, as discussed in Chapter 1.5. Nonetheless the equal treatment format of legislation leads to this type of claim and intergenerational conflict can occur as comparison is made between cohorts. Tribunals had little sympathy with these claimants, finding the disadvantageous schemes justifiable, and none was successful.

In previous studies of claimants in race, disability and sex discrimination cases it was found that many claimants were unsuccessful, although the success rates were substantially higher than those of age discrimination claimants.[32] The findings of Aston et al,[33] Konura[34] and Hawley[35] are supported by the results of this study. All three studies concluded that the tribunal system favoured the respondent because 'they had more experienced legal teams, more financial resources and a greater number of witnesses'.[36] Indeed, the power imbalance between the two parties was striking. The most frequently found respondent employer activities were local and central government, hospital activities and educational establishments and over half of respondent employers had more than 250 employees. Success rates against such employers were low. The folio reports reveal that large employers were able to defend claims more easily because they usually had clear equality and recruitment policies which provided evidence to support their decision-making. This upholds the hypothesis of Saridakis et al 'that firms that have procedures and follow them are more likely to win than those firms that do not'.[37]

In addition, large employers could show that they had other employees of ages which demonstrated they did not discriminate on the grounds of age and used counsel and in-house legal teams who, over the period of study, clearly became more experienced in defending the claims. For example, no claim was successful against the

[31] Gee et al (n 29) 281.
[32] Eg Disability discrimination claimants had 37% success rate - O Konura, 'A Judicial Outcome Analysis of the Disability Discrimination Act: A Windfall for Employers?' (2007) 22(2) Disability & Society 187.
[33] J Aston, D Hill and ND Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (ERRSeries 55, Department of Trade and Industry 2006).
[34] Konura (n 32).
[35] K Hawley, 'A Balancing Act? Ambiguity and Coherence in the Equal Pay Law' (PhD thesis, University of Warwick 1984).
[36] Aston (n 33) 86.
[37] G Saridakis, S Sen-Gupta, P Edwards and DJ Storey, 'The Impact of Enterprise Size on Employment Tribunal Incidence and Outcomes: Evidence from Britain' (2008) 46(3) British Journal of Industrial Relations 469, 493.

Royal Mail, the employer most often found defending an age claim, mentioned in 53 judgments, nor in any of the other 71 claims against other employers in the postal services industry, such as the Post Office.

Many claimants found the legal framework very difficult to navigate and even lawyers making a personal claim found it complex – not one of the 24 lawyers making a personal claim was successful at the hearing and several had followed an incorrect procedure. A large number of claimants failed to observe the specified time-limits, follow the grievance process or include age in their original complaint. The uncompromising approach by tribunals to claimant failure to follow the correct procedure contrasts starkly with the accommodation given to employers who had default judgments reversed if they had not attended the hearing. Claimants who asked for an extension to the time-period allowed within which to submit a claim, because they felt it was just and equitable, were as likely to have additional costs awarded against them for wasting the tribunal's time in making a late complaint as to be given extra time.

Tribunals required adherence to the grievance procedure by the claimant from a very early stage in a dispute which sometimes necessitated the claimant obtaining legal help in drafting the grievance letter. Imposing an arbitrary three-month limit on dispute resolution may force some claimants to turn to litigation before they would otherwise want to do. An employer receiving a legally drafted complaint may feel it appropriate to respond with a legally composed defence and an opportunity for conciliation is lost as the two sides become polarised. The grievance procedure may take several weeks to complete and the reluctance by tribunals to extend time periods in situations where the three month statutory period has been exhausted further intensifies the pressure for the dispute to be become litigious. Hepple et al[38] proposed that the time limit be extended from three to six months in 2000, but their astute recommendation was not accepted. Tribunals already have the power to extend the time-period, if it is thought just and equitable, but they are unwilling to do so, following the uncompromising precedent established in *Robinson v The Post Office.*[39] A more flexible approach by tribunals to time-limits would be more compatible with the government's desire to 'support and

[38] B Hepple et al, (n 9) Recommendation 48, 103.
[39] [2000] UKEAT 1209_99_1207, [2000] IRLR 804.

encourage parties to resolve disputes earlier … to try and preserve the working relationship between employer and employee'.[40]

Claimants often did not understand, not only the law and the procedure, but what happens and what is required at the hearing. The government consultation in 2011 on the reform of employment tribunals declared that 'the balance of employer and employee rights is in favour of employees; action is needed to deter and deal with weak and vexatious claims'.[41] However, no evidence was found in this study that the tribunal system was being used by vexatious claimants seeking to take advantage of employers – on the contrary, employees were at a clear disadvantage. This finding supports that of 'tribunal judges and members, representative lawyer groups, and other public sector/advisory bodies … [who] questioned the analysis in the consultation paper that the system was quite so 'plagued' by a flood of weak and vexatious cases'.[42]

Claimants need more support and information when faced with discriminating treatment at an early stage in the claim process so that they do not make basic errors in the procedure. Some could not show they had employee status or even identify the relevant employer. A small number of judgments revealed that the tribunal did not have jurisdiction to hear the complaint because of territorial restrictions, with workers falling between fora. Workers who are abroad when the discriminatory act occurs, work partly abroad or for an overseas registered employer may fail to find an appropriate forum for their complaint. Not only is this unfair for these workers but it also hinders the achievement of the objective of the Directive as discrimination which occurs across member states within the EU is not proscribed.

If the claimant succeeded in reversing the burden of proof most respondents asserted that age played no part in their treatment and the credibility, conduct and capability of the claimant often became the focus of the tribunal. When capability was being assessed it was usually based upon evidence from the claimant alone considered against several witnesses still employed by the respondent, often possessing more information relating to the claim than the claimant. Many claimants appear to have been unprepared to conduct a defence of their own capability yet this was crucial to the success of the claim.

[40] Department for Business, Innovation and Skills, *Resolving Workplace Disputes* (BIS 2011) 2.
[41] ibid 16.
[42] ibid 23.

Credibility was often discussed in folio reports and was assessed using 'hard' factors, such as the consistency of statements, witness support and reports of conduct, and 'soft' factors, such as the disposition and demeanour of the claimant at the hearing, where they may be under stress caused by an adversarial situation and which might not be a reflection of their normal persona. These findings support those of a 2006 study of race discrimination claimants which found that claimants were personally subjected to critical examination in the hearing.[43] The assessments made of individual character by the tribunal often dealt with sensitive and personal issues. Hints of vagueness, exaggeration, distortion or defensiveness by a claimant, including any belief that they were subject to conspiracy, were highlighted in folio reports and reflected unfavourably on claimant credibility. Claimants who made concurrent claims of discrimination often suffered in this regard and were sometimes regarded as 'over-sensitive'.

This study supports the findings of Aston et al that claimants 'perceived a significant risk to their current employment status and future career prospects' and suffered 'emotional and physical stresses already experienced through the act(s) of unfair discrimination … compounded by the stresses associated with presenting themselves and their case for judgement'.[44] For example, in *Paton v Abakhan*[45] the claimant suffered a panic attack both on the way to and at the hearing. For the majority of claimants who have paid for legal representation they will be personally 'out of pocket' having gone through this stressful process. Claimants even faced punitive additional costs if they had not followed the procedure correctly or if their evidence was insufficient, a practice supported by the EAT in 2012 in *Topic v Hollyland.*[46] This poses an additional risk for unrepresented claimants who may find it difficult to know if their case is legally misconceived. If this risk and stress is considered in relation to the low probability of success and level of compensation, claimants need to be very certain that they want to make an application to the tribunal as the experience is unlikely to be rewarding.

[43] M Peters, K Seeds and C Harding, *Findings from the Survey of Claimants in Race Discrimination Employment Tribunals Cases* (ERRSeries No 54, DTI 2006).
[44] Aston et al (n 33) 172.
[45] (2009) ET 2901444/08.
[46] *Topic v Hollyland* [2012] UKEAT 0523_11_1903.

The number of claimants making a concurrent claim of discrimination increased as a proportion of all claims over the period of study and 38% of claimants made such claims in 2009-2010; most of these claims were made against large employers involved in public administration, education and hospital activities. Claimants making concurrent claims were particularly unsuccessful, with no worker successful after consideration out of the 140 claiming age and religion and belief discrimination and only one successful out of the 100 claiming age and sexual orientation discrimination.[47] Each additional ground of complaint lowered the success rate further, supporting Fredman's observation that the 'more a person differs from the norm, the more likely she is to experience multiple discrimination, the less likely she is to gain protection'.[48]

The decision in *Bahl v The Law Society*,[49] where it was held that an employment tribunal could not consider the effect of a combination of race and gender discrimination, has resulted in those claiming that they encountered multiple discrimination finding it very difficult to obtain a remedy.[50] The more complex the claimant's identity, the more difficult it seemed to be to find firm evidence of each type of discrimination they had suffered, indicating that this legislation, with its reliance on finding evidence for each separate ground, is not adequately addressing the needs of claimants suffering multiple discrimination. Indeed this approach, which separates elements of a person's identity into 'suspect' categories, has been criticised as causing adverse psychological effects in victims of discrimination as it further isolates them from the norms expected by society.[51] As one of the Directive's aims was to address the inequalities due to 'multiple discrimination'[52] it would appear that the UK legislation is particularly unsuccessful in achieving this aim.

This study supports the work of Rosenthal and Budjanovcani who found that 'tribunals look with suspicion on proliferating claims, likely viewing them as a tactic, thereby weakening the credibility of the claimant … Tribunals tend to punish multiple

[47] Discussed in Chapter 5.4.
[48] S Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 European Anti-Discrimination Law Review 13, 14.
[49] [2004] EWCA Civ 1070, [2004] IRLR 799.
[50] Government Equalities Office, *Equality Bill: Equality Impact Assessment* (The Stationery Office 2009) 45.
[51] D Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 Canadian Journal of Women & Law 37, 59.
[52] Framework Directive (n 4), Recital 3.

claims rather than reward them'.[53] Rather than accepting the particular problems that those suffering from multiple discrimination face, some tribunals felt that such claimants were 'difficult'. The credibility of the claimant is central to a discrimination claim and any such disadvantageous assumption adversely affects the success of the claim.

In *Kleist*,[54] a reference to the ECJ on a claim of age and sex discrimination, Advocate-General Kokott pointed out that direct age discrimination is capable of justification (and a claim therefore more likely to fail) whereas direct sex discrimination is not and although the case could be 'examined in the light of the prohibition on age discrimination … this would, however, not be overly helpful'.[55] The court proceeded to fully consider the sex discrimination claim but not that of age, finding that Kleist had suffered sex discrimination. The implicit suggestion given by an Advocate-General at the ECJ was that claimants should consider not making a multiple claim including age because of the likelihood that the age claim may fail, whereas another suspect ground claim may succeed. It is apparent that, as age is at the bottom of the hierarchy of suspect grounds, claimants should consider carefully the contribution an age claim makes to a claim of multiple discrimination as it may reflect upon their credibility. The recognition that it may be advisable for those claiming multiple discrimination to drop their age claim in favour of other suspect grounds exemplifies the inadequacy of the legislation in addressing the problems of those with complex identities.

The largest group of workers making a concurrent claim were women claiming age and sex discrimination. The particular problems of older women suffering age and sex discrimination have been highlighted in high profile tribunal claims[56] and the results of this study show that over three times more women than men claim they have suffered such discrimination. A 2007 survey by Moore found 'for women over the age of 50, entering or re-entering the labour market is more difficult because of age … The specific impact of age in older women's working lives appears to be more

[53] P Rosenthal and A Budjanovcanin, 'Sexual Harassment Judgments by British Employment Tribunals 1995–2005: Implications for Claimants and their Advocates' (2011) 49 British Journal of Industrial Relations 236.
[54] C‑356/09 Kleist v Pensionsversicherungsanstalt [2010] All ER (D) 37.
[55] ibid, Opinion of AG Kokott, para 27.
[56] *O' Reilly v British Broadcasting Corporation* EW Misc 1 (ET 2200423/2010).

intangible'.[57] Women making a concurrent claim found it more difficult to obtain evidence to reverse the burden of proof, because of the 'intangible' nature of such discrimination. Consequently the success of these claims was very low, highlighting again the ineffectiveness of the legislation in providing redress for such claimants. For example, out of the 384 women who made a claim of age and sex discrimination only six were successful after consideration by the tribunal (1.65%) whereas 3.3% of women claiming age discrimination alone were successful.

Women made fewer age claims than men, despite research which demonstrates that they suffer at least as much age discrimination in the workplace than men.[58] One-third of claimants were female – there were 10.05 judgments per 100,000 women in the workforce and 16.57 judgments per 100,000 men. This is virtually identical to the proportion found in race discrimination judgments in a study completed in 2009 indicating that women are less likely than men to make a claim to the tribunal in gender-neutral discrimination claims.[59] The success and success+settled rates of claims for women were extremely similar to those of men suggesting that gender may not be a factor in the overall success of age claims at the tribunal. However, significantly more women obtained legal representation which was extremely advantageous to claimants and it may be that without additional assistance the success rate for women would be lower than that of men.

These statistics show that considerably fewer women are successful claimants in England and Wales than in other countries, such as in the USA, where women win up to 64% of claims that they initiate, compared to 29% of claims by men.[60] Women claimed against a narrow band of employer activities, mainly those involved in local and central government, and the success of large employers in defending claims may be reflected in the number of successful claims of women. Very few claims were made by women in the legislators, managers and senior officials group where the number of

[57] S Moore, 'Age as a Factor Defining Older Women's Experience of Labour Market Participation in the UK' (2007) 36(3) Industrial Law Journal 383, 384.
[58] C Villosio, D DiPierro, A Giordanengo, P Pasqua and M Richiardi, *Working Conditions of an Ageing Workforce* (European Foundation for the Improvement of Living and Working Conditions 2008) Table 6; S DeArmond, M Tye, PY Chen, A Krauss, DA Rogers and E Sintek, 'Age and Gender Stereotypes: New Challenges in a Changing Workplace and Workforce' (2006) 36 Journal of Applied Social Psychology 2184; JM Kalavar, 'Examining Ageism: Do Male and Female College Students Differ?' (2001) 27(6) Educational Gerontology 507.
[59] A Brown and A Erskine, 'A Qualitative Study of Judgments in Race Discrimination Employment Cases' (2009) 31 Law & Policy 142, 147.
[60] Schuster and Miller (n 28) 71.

judgments per 100,000 female workers was 0.56 – extremely low, whilst the number of judgments per 100,000 male workers was 2.53 – also very low, but nearly five times the figure for women. This may indicate that for exceptional individuals age discrimination is not as a significant problem as for less skilled workers who received a higher number of judgments following the pattern seen throughout history and discussed in Chapter 1.2. On the other hand, female lawyers received a noteworthy 78.79 judgments per 100,000 workers and male lawyers received 55.13 judgments per 100,000 workers. By comparison, accountants were handed 8.06 judgments per 100,000 workers – indicating that the legal profession may have a particular problem with age discrimination although it must be acknowledged that lawyers are more likely than other professionals to be aware of the legislation and therefore make a claim.

Contrary to Ministry of Justice statistics for all jurisdictions, more than half of age discrimination claimants had no legal representation over the period of study. There was a strong, statistically significant relationship between the outcome of claims and legal representation – those with legal representation were twice as successful as those without. This is contrary to the findings of a qualitative study of race discrimination judgments by Brown and Erskine in 2009 which found that 'there was no obvious relationship between success and representation'[61] although their study was based on a smaller group of one hundred judgments chosen on the basis of the amount of information contained in the folio reports. This result also differs from a study by Latreille et al in 2005 which found that the impact of representation on applicants was exclusively 'in raising the level of compensation received by clients'[62] as not only did compensation increase but the chance of overall success was higher.

There was also a direct relationship between representation and injury to feelings awards, with those who were represented given awards on average twice the size of those given to unrepresented claimants. Representation made a highly significant difference to the number of claimants reaching a settlement at the hearing. This supports the findings of Latreille et al which established that representatives performed

[61] Brown and Erskine (n 59) 147.
[62] PL Latreille, JA Latreille and KG Knight, 'Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives' (2005) 34(4) Industrial Law Journal 308, 329.

an important conciliation role, 'persuading applicants to settle where their typically extensive experience leads them to expect a less favourable outcome at tribunal'.[63]

Evidence was found in judgments that those who were self-represented did not understand the detail that is required in assembling evidence to substantiate their claim. The presence of legal advisors redressed the asymmetric power relationship between the two parties. Represented applicants are at a clear advantage but no legal aid is available to support those who cannot afford assistance. The EAT has recently stressed 'the importance of competent legal advice at the right stage' because of 'the difficulties faced by litigants in person' … 'Provision of basic legal help to unrepresented litigants is important in the interests of the efficiency and economy of the justice system for the public, as much for its accessibility to the individual parties'.[64] Yet many cannot afford such assistance which is needed at an early stage in the procedure.

The legislation is based upon an individualized, adversarial private law model which relies on workers who are prepared to enforce their rights against many obstacles and who have an awareness of rights, a willingness to enter a litigious process and possessing good evidence, yet the UK government has not provided appropriate claimant legal support for such a mechanism. The provision of an impartial claim advisor who could check claim forms at an early stage to see if the grievance procedure had been followed and time-limits observed would help claimants to understand from an early stage if they are likely to be successful. Advice on following the correct procedure, naming the correct employer and gathering acceptable and appropriate evidence would be invaluable for many claimants as well as saving the tribunal time spent on ill-founded claims.

A particularly low number of claimants complaining of discrimination in recruitment had legal assistance (28.6%), yet these workers appeared to face the greatest evidential difficulty in establishing their claim and would have benefitted from advice. However, the low compensation paid to such claimants (due to factors involved in estimating loss, discussed in Chapter 7.5) may deter claimants from obtaining advice because of the cost. Although contingency fee arrangements extend access to justice to those who cannot otherwise afford it, Johnson and Hammersley have described the tendency of legal advisors to avoid contingency fee arrangements with claimants likely

[63] ibid 317.
[64] *Price v Surrey County Council* [2011] UKEAT 0450_10_2710 [59] (Carnwath LJ).

to be involved in 'low value'[65] cases, that is, those where the compensation is likely to be low. Legal advisors therefore may be reluctant to take age claims on a conditional fee agreement basis, particularly those concerning recruitment and retirement, as they may not recoup their fees. Although legal representatives make a significant difference to outcome and compensation, by redressing the power imbalance and using their skill in negotiating settlements, claimants and legal advisors need to weigh very carefully the efficacy of using representation in age discrimination claims as the relatively high cost of legal assistance may well negate the value of any award.

8.5: Remedies

The ECJ in *Von Colson v Land Nordrhein-Westfalen*[66] stressed that sanction for discrimination cases must 'guarantee real and effective judicial protection and have a real deterrent on the employer',[67] yet remedies for age discrimination claimants in England and Wales failed to meet these stipulations. The low awards were particularly insufficient to form a real deterrent in cases where the employer stood to save money by discriminating against older, highly paid employees. The majority of compensation awards for age discrimination claims were under £8,000 and many would not have covered claimant legal costs. Legislation which relies on individuals to identify fault must recompense the claimant fairly and, at the very bare minimum, seek to cover the cost of representation.

Tribunals usually found that discrimination on the grounds of age did not cause substantial injury to feelings even where it had carried on for a long period of time and the effects were serious.[68] Only one award was in the higher 'Vento' band whilst some claimants received no award, contrary to judicial guidance that this practice may result in tribunals being thought not to be making a 'proper recognition of injury to feelings'.[69] This reflects the ambivalent attitude to ageism discussed in Chapter 1.5 and a belief that ageism is not really damaging, yet the impact on individuals was sometimes considerable. When assessing compensation no tribunal thought that the claimant would find it difficult to find work within a few months, despite high

[65] J Johnson and G Hammersley, *The Influence of Legal Representation at Employment Tribunals on Case Outcome* (ERRSeries No 84, DTI 2005) 10.
[66] 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891.
[67] ibid para 23.
[68] As in *Koh v Sainsburys* (2008) ET 23122677/8.
[69] *Vento* (n 8) [65] (Mummery LJ).

unemployment rates in the period of study, and the element intended to cover loss of future earnings was usually low. Even Ms Koh, who suffered long term mental and physical effects as a result of discrimination, was expected to obtain a similar position to that which she had lost within a short period. [70] Yet Perry and Freeland have produced convincing evidence that those subjected to age discrimination suffer a fall in confidence and their 'employability depreciates at a rapid rate.'[71]

Compensation was the remedy of choice for tribunals, who were reluctant to use the alternatives of a declaration of rights or a recommendation for action, despite numerous critical remarks about respondent's practices. Unsurprisingly, no judgments were found which ordered what many claimants really want as a remedy – reinstatement to their former position. Otto Kahn-Freund has blamed the unwillingness of tribunals to impose reinstatement on:

> the power of a legal shibboleth … the ancient doctrine that a contract of employment cannot be specifically enforced against either side because … the rule of mutuality demands that if no such order can be made against the employee, it cannot be made against the employer either.[72]

Recommendations may form the basis for real change in ageist conduct in the workplace rather than retrospective remedies. The Equality Act 2010 extends the power of tribunals to make recommendations which benefit persons other than the claimant,[73] whereas under the Regulations the recommendations were directed solely to the parties to the claim. The Equalities Review has recommended that employers should be given guidance and feedback following a discrimination case 'to make sure that they change their practices for the better'[74] and this may encourage fairer practices in the future. However, the single judgment which was found to make

[70] *Koh* (n 68).
[71] J Perry and J Freeland, *Too Young to Go: Mature Age Unemployment and Early Retirement in NSW – Implications for Policy and Practice* (Committee of Ageing 2001) 9-10.
[72] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) The Modern Law Review 1, 24.
[73] Equality Act 2010, s 124(3)(b).
[74] Equalities Review, *Fairness and Freedom: The Final Report of the Equalities Review* (The Stationery Office 2007) 119.

recommendations in addition to compensation was subject to an appeal, indicating the employer's reluctance to accept judicial interference in their freedom to contract.[75]

A 'gender award gap' was found in both overall and injury to feelings awards, indicating that the Directive's goal of eliminating inequalities between men and women[76] was not even being achieved at the tribunal. It is highly ironic that the judiciary, whilst implementing discrimination legislation, may be discriminating by awarding different amounts of compensation to men and women, over and above that which would be expected from the gender pay gap. There is a possibility that the difference in overall compensation awards may be a result of additional claims made by men relating to other jurisdictions, about which information was not gathered as part of this research and which boosted the total amount. Nonetheless this did not appear to be the case from folio reports, which revealed a very similar pattern of claims by men and women.

The difference in injury to feelings awards given to men and women is not dependent upon occupation or earnings but relates directly to the injury thought to be suffered by claimants and it is apparent that tribunals felt women suffered less than men experiencing discriminatory treatment. As women made proportionally more claims relating to harassment, which were associated with the highest injury to feelings awards, and proportionally fewer claims relating to recruitment, associated with low awards, this result is even more surprising as it would be expected that this would lead to women receiving higher average awards than men. The failure to compensate equally for injury to feelings may be regarded as a further aggravation of the inequalities between men and women that the Framework Directive was intended to address, as clearly stated in Recitals 2, 3 and 4 and in many other EU legislative provisions.

The Equality Act 2010 gives power to impose auditing duties on employers which will 'require employers to publish information relating to … the pay of male and female employees'[77] and compensation awards need monitoring in a similar manner. The Tribunal Service should be required to publish the sex of claimants in relation to

[75] *Lycée Francais Charles de Gaulle v Delambre* [2011] UKEAT 0563_10_0504, [2011] Eq LR 948. Tribunal recommended new recruitment procedure and training in equality and diversity for management.
[76] Framework Directive, Recitals 2, 3, 4.
[77] Equality Act 2010, s 78.

the awards given under different jurisdictions, making this information transparent and taking any necessary action to address the award disparity.

Young claimants were given overall and injury to feeling compensation awards which were on average one quarter of that given to 'all age' claimants. This may be a reflection of the attitude, discussed in Chapter 1.5, that a deserving suspect group should have suffered 'systemic disadvantage'[78] and be 'relatively powerless'[79] and young workers may not be recognised as needing protection from age discrimination. Tribunals perhaps felt that young suffer less from ageist treatment as they are able to view their situation as temporary whereas older workers suffer more because they fear their working life is ending.[80] This approach is supported by Garstka et al who found that age discrimination harms psychological well-being in all claimants but positive group identification by young age-cohorts partially alleviates this effect whereas older workers have a negative view of their own cohort resulting in more serious injury to feelings.[81]

As compensation was directly related to the size and legal status of the employer this indicates awards were based on the apparent ability of the employer to pay rather than the actual injury suffered by the claimant. Both the young and old deserve compensation which reflects the actual level of injury suffered, irrespective of the size of the employer, or the age or sex of the claimant. Effective legislation requires effective sanctions and adequate remedies. Hepple et al state that 'individuals should be free to seek redress for the harm they have suffered as a result of unlawful discrimination, through procedures which are fair, inexpensive and expeditious, and that the remedies should be effective'.[82] Article 17 of the Directive insists that 'the payment of compensation to the victim must be effective, proportionate and dissuasive'. Nonetheless the awards given to age discrimination claimants are low, not acknowledging that age discrimination can cause as much injury as other types of discrimination, reflecting the ambivalent attitude to age as a suspect ground discussed in Chapter One.

[78] C Sunstein, 'Three Civil Rights Fallacies' (1991) 79 Cal L Review 751.
[79] N Thompson, *Anti-Discriminatory Practice* (Palgrave Macmillan 2001) 33.
[80] C Duncan, 'The Dangers and Limitations of Equality Agendas as Means for Tackling Old-Age Prejudice' (2008) 28 Ageing & Society 1145.
[81] T Garstka, MT Schmitt, NR Branscombe and ML Hummert, 'How Young and Older Adults Differ in Their Responses to Perceived Age Discrimination' (2004) 19(2) Psychology and Aging 326.
[82] B Hepple et al (n 9) Recommendation 2, 26.

8.6: Evidential problems - the burden of proof

A persistent theme emerged from the examination of folio reports that claimants could not produce enough evidence to turn the burden of proof to the employer. Moreover, when the burden of proof was reversed tribunals did not require the respondent to show that their explanation was true, only that it was plausible. Evidence that claimants faced 'silence'[83] when age was discussed or that a claimant's age was brought up in discussions about workforce planning was dismissed as being part of normal working life by employers: this is inevitably true but claimants could often produce no other tangible evidence that they were discriminated against. Claims of harassment were far more successful (25.1%) than other types of claim (5.7%) because evidence of this type of discrimination is far more visible than other manifestations.

Those in elementary occupations had a significantly higher success rate than individuals in more skilled occupations such as professionals. It may be hypothesised that tribunals implicitly expect higher status groups to be able to challenge stereotypical attitudes independently in the workplace whereas less skilled workers may find this more difficult. It has also been suggested that elementary workers have a higher credibility threshold than skilled workers and this may act to their advantage.[84] However, the folio reports reveal that elementary workers were more successful simply because they were more able to find firm evidence to support their claim, whereas managers and professionals appeared to face less overt forms of discrimination. Respondent employers and colleagues of less skilled workers appeared to be more open about discussing age which allowed claimants to substantiate their complaint in the form of witness statements or written evidence.

The overwhelming majority of age discrimination claims (over 90%) involved workers at the termination of their employment. This finding confirms Friedman's assertion that age discrimination legislation is concerned primarily with redress 'for wrongful discharge'.[85] Although the Directive aims to encourage older workers back into the workplace 'in order to increase their participation in the labour force'[86] the UK legislation appears particularly unsuited to address the difficulties of those who suffer

[83] Although a substantiated 'deafening silence' was sufficient in *Chappell v Vital Resources* (2007) ET 1301251/07.
[84] Rosenthal and Budjanovcani (n 53).
[85] Friedman (n 23) 184.
[86] Framework Directive, Recital 8.

discrimination in recruitment, despite a body of work which shows that this is a significant problem.[87] Not only were very few recruitment claims (3.4% of all age claims) taken to the tribunal, those that did were particularly unlikely to be successful because of the lack of availability of evidence relating to other job applicants which would reverse the burden of proof. This supports the OECD's[88] and Neumark's opinion that age discrimination legislation is 'ineffective with regard to hiring older workers'[89] and demonstrates that other tactics are needed to monitor discrimination in recruitment. For example, the Equality and Human Rights Commission (EHRC) could play a more investigative, pro-active role in the recruitment practices of public organisations by means of random audits and, if thought appropriate in some circumstances, demand justification of hiring and short-listing decisions.

The EHRC currently has a general duty to exercise its functions with a view 'to encouraging and supporting the development of a society in which people's ability to achieve their potential is not limited by prejudice or discrimination'.[90] They have power to conduct an investigation and produce a report[91] pertinent to its functions which the tribunal 'may have regard to'[92] but does not need to 'treat it as conclusive.[93] Yet no claims were found in the Register which discussed assistance, intervention or reports undertaken by the EHRC. Two claimants, Keane and Berry, made multiple unsuccessful claims which highlighted age discriminatory advertisements for positions for which they were apparently too old.[94] Both failed in their claims because the tribunals concluded that they did not seriously intend to take up employment with the respondent employer, yet they both vehemently denied this. Mr Justice Underhill in the EAT referred to Keane's CV which contained 'factual and typographic errors' indicating 'a lack of care inconsistent with a genuine desire to obtain these jobs'.[95]

[87] G Shen and B Kleiner, 'Age Discrimination in Hiring' (2001) 20(8) Equal Opportunities International 25; T Cox and SM Nkomo, 'Candidate Age as a Factor in Promotability Ratings' (1992) 21 Public Personnel Management 197; JN Cleveland and LM Shore, 'Self and Supervisory Perspectives on Age and Work Attitudes and Performance' (1992) 77 Journal of Applied Psychology 469.
[88] OECD, *Ageing and Employment Policies – 'Live Longer, Work Longer'* (OECD 2006) 99.
[89] D Neumark, *Reassessing the Age Discrimination in Employment Act* (2008) <http://www.socsci.uci.edu/~dneumark/2008_09_adea.pdf> accessed 4 October 2012.
[90] Equality Act 2006, s 3.
[91] ibid s 16.
[92] ibid s 17(1)a.
[93] ibid s 17(1).
[94] *Keane v Investigo* [2009] UKEAT 0389_09_1112; *Berry v Recruitment Revolutions* [2010] UKEAT 0190_10_061.
[95] *Keane* (n 94) [34].

This, he felt, showed she did not actually want the jobs, had therefore not suffered a detriment and consequently failed in her claim. The advertisements were undoubtedly indirectly age discriminatory but no claimant was available to successfully challenge their content and a lacuna exists in the legislation with regard to this type of unfavourable treatment. The UK needs a more pro-active ECHR with additional resources to bring this type of claim of discrimination in recruitment on behalf of those discouraged from even applying for a position but who currently have no voice in the tribunal process.

Riach and Rich postulated that applicants making a claim of discrimination in recruitment were very unlikely to be able to find evidence due to the sometimes 'dishonest'[96] attitude of employers and a lack of information relating to other applicants. The questionnaire procedure contained within the legislation is an invaluable process by which the claimant can obtain information, especially in recruitment claims, and is crucial to the evidential basis of alleged treatment.[97] In *Igen v Wong* it was stressed that 'the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure'.[98] However, new guidance was given in 2008 on inferences to be drawn in cases where a questionnaire was not returned or was incomplete in *D'Silva v NATFHE*.[99] Mr Justice Underhill stated that he had:

> observed a tendency in discrimination cases for Respondents' failures in answering a questionnaire, or otherwise in providing information or documents, to be relied on by claimants, and even sometimes by tribunals, as automatically raising a presumption of discrimination. That is not the correct approach. Although failures of this kind are … matters from which an inference can be drawn, that is only 'in appropriate cases'; and the drawing of inferences from such failures … is not a tick-box exercise.[100]

[96] P Riach and J Rich, *An Experimental Investigation of Age Discrimination in Hiring in the English Labour Market* (Bonn Institute for the Study of Labor 2007) 20.
[97] Employment Equality (Age) Regulations 2006, reg 41. Replaced by Equality Act 2010, s 138.
[98] [2005] EWCA Civ 142, [2005] IRLR 258, Annex: Guideline 13.
[99] [2008] UKEAT 0384_07_1203, [2008] IRLR 412.
[100] ibid [38].

This guidance resulted in no inference of discrimination being drawn by some tribunals when faced with an unreturned or, even more surprisingly, an incorrectly completed questionnaire. The status of the questionnaire has been re-examined by the government and it has announced that it will be removed, despite considerable opposition.[101] Yet without evidence claimants cannot demonstrate there was a difference in age and treatment. An applicant for a job vacancy has no means of knowing the age and number of other applicants without such a procedure. As the government is committed 'to improving the employment opportunities for older workers,'[102] it needs to further address discrimination in recruitment as the increased opportunities may not translate into employment. The questionnaire process is a vital tool with which to address this problem. Not only should the process be retained, it should be re-evaluated. A reasonable approach may be that if a questionnaire is not returned the employer must be able to demonstrate that there is a valid reason for such a failure – without an explanation the burden of proof should automatically be reversed.

The evidence required to reverse the burden in discrimination cases has been subject to confusing descriptions in the past. In 1988 Lord Justice May in *Noone v NW Thames RHA* thought that if 'there is a finding of discrimination and of difference of race and then an inadequate or unsatisfactory explanation by the employer for the discrimination, usually the legitimate inference will be that the discrimination was on racial grounds'.[103] In 1992 the Court of Appeal held that it 'is important to bear in mind that it is unusual to find direct evidence of racial discrimination … a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination'.[104] The circular premise in these cases that 'a finding of discrimination' would lead to a 'finding of discrimination' is particularly unhelpful.

However, in *Madarassy v Nomura* it was established that a claimant needs to show 'a difference in status, a difference in treatment and the reason for the differential treatment'.[105] Most age claimants could usually point to a difference in age and

[101] HC Deb 16 October 2012, vol 551, col 230 (Enterprise and Regulatory Reform Bill (Programme) No 2).
[102] HL Deb 1 June 2009, vol 711, col WA18 (Financial Services Secretary to the Treasury).
[103] [1988] ICR 813.
[104] *King v China Centre* [1992] ICR 516 [528] (Neill LJ).
[105] *Madarassy v Nomura* [2007] EWCA Civ 33, [2007] ICR 867 [57] (Mummery LJ).

treatment but could not find the required additional factor to reverse the burden of proof because such evidence was often intangible. Tribunals were reminded by the Court in the sex discrimination case *Igen v Wong* that:

> it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.[106]

If direct evidence is 'unusual' and employers are not prepared to even acknowledge 'to themselves' that they have discriminated against a worker it is clear that claimants face an uphill battle to 'find the reason for the differential treatment' and present it in a tangible form to the tribunal. The employer's denial of discriminating conduct reflects Greenwald's, Nosek's and Rudman's research, discussed in Chapter 1.3, which shows that 'the application of implicit biases may be nonconscious'.[107] Ageism is an implicit response and the 'hallmark of implicit prejudice is that it operates without individuals' conscious awareness'.[108] This situation is further hampered by the reaction that many claimants initially made to the alleged discrimination. A number of studies have found that workers react passively in response to discriminatory treatment in order to minimise the injury.[109] A confrontational response would be more likely to produce clear evidence but is avoided because the victim feels in the weaker position and may fear retribution.[110]

Lord Justice Underhill, President of the Employment Tribunal, has described how, in the consideration of a claim, that an act is rendered discriminatory:

> by a discriminatory motivation, i.e. by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is

[106] *Igen* (n 98) Annex: Guideline 3.
[107] LA Rudman, 'Social Justice in our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias' (2004) 17(2) Soc Justice Res 134.
[108] LA Rudman, AG Greenwald, DS Mellott and JLK Schwartz, 'Measuring the Automatic Components of Prejudice: Flexibility and Generality' (1999) 17(4) Social Cognition 437.
[109] F Butera and JM Levine (eds), *Coping with Minority Status: Responses to Exclusion and Inclusion* (CUP 2009).
[110] Pothier (n 51) 64.

> not always an easy inquiry … it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive.[111]

The 'mental process' at the heart of the reason of an employer in a discrimination case can be speculated about, but it is something that may not be overtly demonstrated, despite an employee suspecting that ageism may lie behind the action. Nonetheless, the legislation requires the claimant to produce tangible evidence of discrimination.

Foucault has described how 'le regard',[112] the gaze or measured look, is at the centre of power relationships, such as those which exist between employers and employees and which often build up over time. The employee/employer relationship may have been affected by a multitude of minor incidents which led to the alleged treatment, none of which can be evidenced. If ageism is, according to Terror Management Theory, the result of deeply, but unconsciously, held inbuilt tendencies buffering thoughts of our mortality, the sub-conscious feelings behind the 'gaze' may be quietly but strongly held.[113] Providing evidence to a tribunal of the mental processes of an employer who has discriminated in such circumstances may be impossible.

Ageism is 'persistent,'[114] more 'stubbornly-held'[115] and 'resistant to change'[116] than other suspect prejudices because age continues to be accepted as a differentiating factor and thus is implicitly 'socially-condoned'.[117] Such structural ageist attitudes have 'become part of the rules of institutions, govern the conduct of social life and blend imperceptibly into everyday values and attitudes'.[118] Using the principles set out by the judiciary to reverse the burden of proof in *Madarassy v Nomura*,[119] a sex discrimination case, and in *Igen v Wong*[120], a sex and race discrimination case, without

[111] *Amnesty International v Ahmed* [2009] UKEAT 0447_08_1308, [2009] IRLR 884 [34].
[112] M Foucault, *The Birth of the Clinic* trn by AM Sheridan, (Tavistock 1973).
[113] A Martens, JL Goldenberg and JA Greenberg, 'Terror Management Perspective on Ageism' (2005) 61(2) Journal of Social Issues 223; JA Greenberg (ed), *Handbook of Experimental Existential Psychology* (Guilford Press 2004).
[114] Greenberg (n 110) 272.
[115] TD Nelson, 'Ageism: Prejudice Against Our Feared Future Self' (2005) 61(2) Journal of Social Issues 215.
[116] A Cuddy, M Norton and S Fiske, 'This Old Stereotype: The Pervasiveness and Persistence of the Elderly Stereotype' (2005) 61 Journal of Social Issues 265, 276.
[117] Nelson (n 115) 208.
[118] S Scrutton, 'Ageism' in E McEwen (ed), *Age: The Unrecognised Discrimination* (Age Concern 1990) 21.
[119] *Madarassy* (n 105).
[120] *Igen* (n 98).

recognition that ageism is more 'pervasive'[121] and a more difficult prejudice to substantiate, the failure of a greater proportion of age claims is surely inevitable.

If, as discussed in Chapter 1.3, 'the strength of ageist responses is much greater than on the basis of racism, ethnic grouping or gender'[122] a more substantive legislative response than currently exists may be needed to address the problem. The results of the quantitative analysis also show that the legislation needs to address the imbalance between young and old claimants – the young are more successful at the tribunal whereas the capability of older claimants was more open to attack. Claimants of all ages are entitled to equal protection with other age cohorts but the problems of older workers are not being addressed by this legislative format.

Ageism is more closely related to disability discrimination than racism and sexism. The purpose of both disability and age discrimination is to allow individuals the opportunity to do things that they are capable of doing, whilst challenging negative stereotypical perceptions of their ability. Age may affect an individual's ability to carry out tasks in a similar manner to a disability, for example, the young may not be old enough to possess a heavy goods vehicle licence or those older may lack the muscle strength to do physical work. Terror Management Theory postulates disability discrimination is a manifested fear of the deterioration of our bodies and indeed, the fear that we may become disabled may be less intense than the almost certain knowledge that we will become old, indicating that the anxiety buffer initiated in ageist conduct may be more intense. As such it would be more appropriate to use the same model of legislation as exists in disability discrimination. Moreover this requirement would partly address the problem of the hierarchical nature of suspect grounds found in European and domestic legislation. Inconsistently the Directive places no requirement on employers to make reasonable adjustments for all suspect groups, as it does for disability discrimination but by at least adopting this requirement in age as well as disability the imbalance would be partly addressed.[123]

A 'reasonable adjustments' model of legislation may therefore be an apposite format to counter-act age discrimination. Once a claimant has demonstrated that a difference in treatment and age has occurred and shown that a provision, criterion or

[121] Cuddy et al (n 116) 270.
[122] KA Ranganath and BA Nosek, 'Implicit Attitude Generalization Occurs Immediately, Explicit Attitude Generalization Takes Time' (2008) 19 Psychological Science 249.
[123] Framework Directive, Article 5.

practice puts a 'person at a substantial disadvantage in relation to a relevant matter in comparison with persons'[124] as a result of his/her age then it should be the employer's duty 'to take such steps as it is reasonable to have to take to avoid the disadvantage'.[125] The reasonableness of the adjustment could be consideration of whether the measures in question 'give rise to a disproportionate burden to an employer'[126] or 'impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost'.[127] Undue or disproportionate should not mean inconvenient or awkward.

The emphasis would turn to what would be reasonable for the employer to do in order to prevent the disadvantage occurring, rather than on the claimant to show the mental process behind the employer's action. For example, in *Homer*[128] and *McCluskey*[129] the requirement for an academic degree that two public bodies insisted upon could have been substituted by equivalent qualifications or experience as this is a reasonable adjustment that could have been made. The 40 years' experience of each of the two claimants would be recognised as having intrinsic worth if there was a requirement to make reasonable adjustment. Riach and Rich suggest that this approach is only suited for workers such as Terence Homer who are 'in jobs which they have already been doing'.[130] However, this would exclude job applicants such as Sue McCluskey, for whom a reasonable adjustment is just as appropriate.

The aim of equality legislation is to encourage the recognition of 'people's different needs, situations and goals and remove the barriers that limit what people can do and can be'.[131] A reasonable adjustments format would more readily attain this aim as it would afford those of differing ages the possibility of differential treatment which would facilitate their equal opportunity to participate in the workplace. In Canada this legislative format is used over all suspect grounds in all aspects of life and the adoption of this type of provision in the UK would enable individuals to receive acknowledgement of their particular needs whilst respecting their abilities.

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[124] Equality Act 2010, s 20(3) (Provision applying to Disability Discrimination).
[125] ibid.
[126] Framework Directive, Recital 21.
[127] Canadian Human Rights Act 1985, s 2.
[128] *Chief Constable of West Yorkshire Police v Homer* [2012] UKSC 15, [2012] WLR(D) 122. Discussed in Chapter 6.3.3.
[129] *McCluskey v Edge Hill University* (2008) ET 2405206/07. Discussed in Chapter 7.4.4.2.
[130] Riach and Rich (n 96) 23.
[131] Equalities Review (n 74) 123.

A pro-active requirement to make adjustments in order to combat age discrimination may produce results but would require a massive change in attitude towards ageism by UK political parties, all of which decry ageism but none of which support policies to address the problem more aggressively. The government has rejected the proposal of the application of a reasonable adjustment format to age discrimination legislation as burdensome[132] and the prohibition of ageist conduct has become de-prioritised in the current economic climate. The reform of the employment tribunal system proposed by the UK government[133] seems to be concerned with preventing claimants from making an application in order to save costs rather than ensuring that individuals obtain a remedy for their complaint, deterring discriminatory conduct and achieving true equality. Nevertheless demographics show that the population is ageing rapidly and without more positive methods of addressing age discrimination and encouraging older individuals to stay economically active the shortfall in pensions and rising health and social security costs will cause increasingly difficult fiscal problems.

8.7: Equal treatment

The Regulations are unusual in that they are age-neutral – they seek to protect all age cohorts, rather than a discrete group which shares a particular quality as in other equality legislation. Over the life course most will benefit or suffer from factors that affect different ages, although certain age cohorts may have particular problems or opportunities. This problem is at the heart of the paradox contained within the Regulations – labour market conflicts exist between all age groups and whilst one age group benefits from a provision it may also serve to disadvantage another. Swift commented on the introduction of the Regulations that 'there is no consensus, or even leading view as to what equality requires for the purposes of age discrimination'[134] and this situation still prevails, plainly illustrated in the inconsistent and contrary judgments found in the Judgment Register. It was apparent in several judgment reports that inter-generational conflict in the workplace was created where workers were lawfully treated unequally, for example, where some had received smaller redundancy

[132] Department for Communities and Local Government, *A Framework for Fairness: Proposals for an Equality Bill for Great Britain* (Discrimination Law Review 2007) para 4.40.
[133] Department of BIS (n 40) 6.
[134] J Swift, 'Justifying Age Discrimination' (2006) 35(3) Industrial Law Journal 232.

payments than colleagues who were younger[135] or older, despite have similar length of service[136] or had received a different minimum wage.[137]

The reliance on the notion of equal treatment in the legislation means that differences that do occur as a result of age are not easily addressed and tribunals found the balance between competing age cohorts was very difficult to assess. As Lord Mance SCJ pointed out in *Homer*, an 'exception for Mr Homer personally, or a general exception for employees within four or five years of retirement age, could have discriminated unjustifiably against such younger employees on grounds of age'.[138] The Equalities Review stated that the objective of equality legislation is to achieve an equal society and attempted to define it as such:

> An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish. An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.[139]

Legislation aimed at achieving formal equality runs counter to this framework and does not recognise the needs of different cohorts. The stereotypical assumptions which are held about different age groups are sometimes based on facts; for example, older people normally have shorter periods left in the workforce and the young are likely to have less experience in the workplace. The measures discussed in Chapters 1.6 and 2.2 which have been recommended to help workers fulfil their capabilities throughout the age continuum and may help remove negative age stereotypes – the provision of education and training for particular age-cohorts and in-work benefits, such as flexible working and reduced national insurance contributions – conflict with the underlying principle of equal treatment.

The dependence of the legislation on age-neutrality has meant that some employment practices which had operated to the benefit of older workers have been

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[135] *Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] UKEAT 0156_08_2907, [2008] Pens LR 353.
[136] *Randall v London Borough of Croydon* (2007) ET 2301693/07.
[137] *Kent v Krazy Kidz Ltd* (2008) ET 2701208/07.
[138] *Homer* (n 128) [36] (Lord Mance SCJ).
[139] Equalities Review (n 74) 6.

abandoned. Although positive action to compensate for disadvantage was permitted under Regulation 29,[140] several judgments in the Register were concerned with the removal of measures designed to redress problems that particular age groups encounter as employers felt they would be unlawful under the legislation. In *Sharma v Millbrook Beds Ltd*[141] the employer feared additional pension payments to those over 50 could not be objectively justified and removed the uplifts. In *Patel v Pepsico*[142] the traditional practice of allowing older workers to 'taper down' over a period of years so that they could adjust to retirement (a practice recommended in many studies as beneficial to workers[143]) was abandoned because the employer thought it contravened the legislation as it discriminated against younger workers. An unsuccessful challenge by Patel and others to the removal of the phased-retirement benefit resulted in a costs award of £5,000 against the claimants by an unimpressed tribunal at Leicester.

Unfortunately in striving for equality for all ages, policies which were intended to help problems faced by particular age groups are now thought unlawful – a bizarre negation of the rationale of the Directive which stressed 'the need to pay particular attention to supporting older workers'.[144] This finding supports Macnicol's and Duncan's theories,[145] which expound the view that age discrimination legislation will harm, rather than support, the interests of older individuals. Rather than face the possibility of a claim at the tribunal employers have understandably merely removed measures which may have been either justifiable under Regulation 3 as being a proportionate means of achieving a legitimate aim, or fallen into the exemption in Regulation 29 which permits positive action. Lord Hope SCJ succinctly described respondent employers as 'not a social service'[146] and indeed, why would employers take positive action to compensate for disadvantage without appropriate incentives at a time of recession when their main concern is increasing profitability? Unfortunately the legislation has produced a defensive attitude in employers so that positive action to address cohort disadvantage is *dis*couraged rather than *en*couraged. This is of serious

[140] Replaced by Equality Act 2010, ss 158, 159.
[141] (2007) ET 3100922/07.
[142] (2008) ET 1900562/08.
[143] PF Noble and E Harper, 'Phased Retirement for Trying Times' (2009) 36(1) Employment Relations Today 17.
[144] Framework Directive, Recital 8.
[145] Discussed in Chapter 1.7.
[146] *Seldon* (n 24) [75] (Lord Hope SCJ).

concern to those who believe the UK's advance to a fourth generation of equality legislation will produce a new era of positive measures to address discrimination.

8.8: Further work

As Lady Hale SCJ pointed out in the first age discrimination case heard in the Supreme Court – 'We all have a lot of learning to do'[147] with regard to age discrimination. It is believed that this study is the first large-scale analysis of age discrimination judgments in England and Wales and as such has filled a significant gap in the literature and advanced understanding of how age discrimination legislation operates in reality. This research has uncovered several new, disturbing phenomena surrounding age discrimination claims, such as a gender award gap and the difficulties that those suffering from multiple discrimination encounter when making a claim. As this research has quantified the characteristics and nature of claims made at the tribunal, numerous issues emerge as subjects for further research, for example, why women and the young make fewer claims than older men and are more likely to rely on legal representation. The gender award gap may also exist in other jurisdictions and further research needs to be undertaken to investigate why it is occurring and whether this inequality is widespread.

The regional pattern of judgments handed down from tribunals shows that more age claims were heard in the South and South-east, particularly in London Central and London South, Ashford and Watford and fewer judgments were handed down in the North. Other jurisdiction applications did not appear to show this regional pattern although this study did not analyse data relating to individual jurisdiction types, such as race discrimination or breach of contract, merely the overall number of other jurisdiction applications. It seems unlikely that these regional variations are a function of differences in employer conduct, but more research needs to be undertaken to establish whether there are regional differences in ageist conduct, knowledge of the legislation or willingness to make a claim. The review of tribunal bias recommended by the ETSSB,[148] if carried out, may throw light on the variation shown in the outcome of claims in different tribunal offices. Further research into the relationship between

[147] *Homer* (n 128) [27] (Lady Hale SCJ).
[148] Discussed in Chapter 8.2.

claim outcome and tribunal membership in terms of number, gender and age may also be beneficial.

An extended longitudinal study would provide some understanding of whether these outcomes and trends are continuing and are either a response to a new piece of legislation in a previously unregulated area or represent a respondent sympathetic reaction by tribunals in a period of economic recession.

8.9: Concluding remarks

The aim of this thesis has been to assess whether the Employment Equality (Age) Regulations 2006 and the subsequent Equality Act 2010 have been effective mechanisms by which to address age discrimination in the workplace and achieve the dual objectives of the Framework Directive of enabling equal treatment and encouraging the active participation of older citizens in the workplace.[149] The conclusions drawn in this Chapter are that the legislation enacted in this country is not an effective mechanism to challenge such discrimination, nor will it achieve the objective of encouraging older citizens to participate in the workplace. The insistence of the Directive upon an objective of achieving 'equal treatment' unearthed, or sometimes created, conflicts of rights between the young and old and tribunals struggled to differentiate between the rights of workers of different ages. As tribunals did so, the underlying aim of encouraging older workers to participate in the workforce was disregarded. A further aim of the thesis has been to shed light onto this 'unknown' territory by uncovering the features of age discrimination claims, parties and outcomes. These attributes have been described for the first time in Chapters Four to Seven, thus developing our knowledge and understanding of the characteristics, interpretation and application of 'age' legislation.

Barnard feels that the Framework Directive 'provides a valuable vehicle to ensure a change in attitude towards the employment of older workers'[150] and the resulting legislation has undoubtedly been an important first step in addressing age discrimination. But the post-modernist society is one in which jobs are in such demand that age acts as a filter which employers will continue to use unless the legislation is

[149] Framework Directive, Recitals 8 and 12.
[150] C Barnard, EC *Employment Law* (OUP 2006) 391.

interpreted and applied more rigorously and compensation reflects the true injury suffered by claimants. Legislation which prohibits age discrimination does send a message to society that such behaviour is unacceptable but this thesis wholly supports O'Cinneide's assertion, referred to in the Introduction, that equality rights can 'be interpreted and applied in a manner that can render them empty vessels, lacking any significant legal impact or substance'.[151]

The difficulties encountered in the prohibition of age discrimination are manifold as age discrimination is not always irrational and age cohorts do not form homogenous discrete suspect groups deemed worthy of legislative help. Using an individualistic, formal equality, modernist approach to this public policy concern is unlikely to succeed in achieving the objective of reducing ageist treatment, as a reliance on individual fault-finding will not bring about the type of social transformation needed to challenge negative stereotypes. Age discrimination issues transcend individual workplaces and unfair treatment across society needs to be challenged. The negative prohibition of age discrimination, in conjunction with an absence of positive equality obligations and lack of agency enforcement, does little to promote true equality of capability. Chapter One discussed the hypothesis that the mere 'induced compliance'[152] to the reduction of discriminatory conduct by means of legislation is unsuccessful and that the encouragement of free choice decisions to adopt non-discriminatory practices leads to reductions in the use of stereotypes.[153] As this thesis has demonstrated that the legislative approach adopted in England and Wales is likely to fail, this further reinforces the need for positive actions to facilitate such free choice decisions and reduce unfair discrimination.

The abandonment of the default retirement age was a major step towards removing age barriers in employment but the decision in *Seldon*[154] that an enforced retirement age can be maintained in the interests of intergenerational fairness has

[151] C O'Cinneide, 'The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?' (2008) 1 UCL Human Rights Review 81.
[152] B Gawronski and F Strack, 'On the Propositional Nature of Cognitive Consistency: Dissonance Changes Explicit, but not Implicit Attitudes' (2004) 40(4) Journal of Experimental Social Psychology 535.
[153] B Gawronski, R Deutsch, S Mbirkou, B Seibt and F Strack, 'When 'Just Say No' is Not Enough: Affirmation Versus Negation Training and the Reduction of Automatic Stereotype Activation' (2008) 44(2) Journal of Experimental Social Psychology 370, 376; RE Petty, RH Fazio and P Briñol (eds), *Attitudes: Insights from the New Implicit Measures* (Psychology Press 2008) 102.
[154] *Seldon* (n 24).

ensured that age discrimination has been legitimised by the judiciary. Furthermore if the removal of the DRA results in an increase in claims of involuntary dismissal on the grounds of age, which is extremely likely, those making such claims need to understand that their capability of carrying out their work will be examined in detail. If equality law is based on the right of individuals to 'dignity and participation,'[155] claimants facing a tribunal hearing often found their dignity removed, not only by the discriminating conduct in the workplace, but by the adversarial claim process. The subjective examination of a worker's ability by a tribunal may seem less preferable than the objective use of age as a factor determining retirement: claimants may experience a humiliating end to their working life, their chances of success are slim and if they do succeed at the tribunal, compensation is likely to be low and will probably not cover the cost of legal representation.

The legislation has placed the burden of addressing age discrimination solely and squarely upon an aggrieved employee, rather than attempting to focus on the duty of government to solve the public policy issue of encouraging and supporting those age cohorts who have particular problems. Yet claimants have little assistance in making an application to a tribunal and employers have quickly responded to the legislation to develop effective defences in order to maintain their freedom to contract. The finding that claimants became increasingly less successful over the period of study as employers improved their tactics may lead to fewer workers making claims as they realise the stress of litigation may be unrewarding.

The proposed introduction in July 2013 of a £1200 fee, paid in advance, to bring a claim to an employment tribunal will further discourage many potential claimants. A tribunal will be given the power to reimburse any fees paid by a successful claimant but this is not an automatic reimbursement. Many age discrimination claimants may have lost their jobs or failed to obtain work thereby experiencing a sudden fall in income; nevertheless they may be in receipt of pay in lieu of notice or redundancy pay and therefore not liable for fee remission at the time of making a claim. The time limit for filing discrimination claims is shorter than for other legal proceedings and claimants may not be able to raise the fee before they make a claim. If low-paid discrimination claimants cannot afford to bring a claim their access to justice will be

[155] B Hepple, 'Age Discrimination in Employment' in S Fredman and S Spencer (eds), *Age as an Equality Issue* (Hart Publishing 2003) 79.

denied. This may breach the UK's obligations under the European Convention on Human Rights[156] as under Article 6 (entitlement to a fair and public hearing) the right of access to a tribunal must be effective. In *Kreuz v Poland*[157] it was held that the requirement to pay court fees can give rise to a denial of access and the particular circumstances of the applicant must be assessed in the light of the fee level. The Framework Directive states that access to judicial procedure must be made 'available to all persons who consider themselves wronged by failure to apply the principle of equal treatment'[158] and the introduction of a fee may prevent some from making a claim. The introduction of fees will further hinder the aims of the Directive because of the deterrent effect on potentially meritorious claims.

Those claimants who cannot afford legal representation are further disadvantaged as this study has shown they have lower chances of success. Those without representation are more likely to not follow the application procedure correctly and they may in future suffer a loss of the fee as well as possibly incurring punitive additional costs orders. As Moorhead and Cumming found that claimants 'were largely motivated by a sense of injustice, rather than more instrumental series of compensation'[159] this may lead to workers feeling that they have been subjected to, not only discrimination in the workplace, but additional injustice dispensed by the judicial system.

It is disappointing that the observations and criticisms of the implementation of sex discrimination and equal pay legislation made by Leonard in 1987[160] are still valid and little progress has been made towards her recommendations of providing consistency, more flexible time-limits and establishing effective remedies. It is also unfortunate that the UK has not taken advantage of the experience of other nations in order to build a substantive approach to age discrimination rather than merely follow the minimum requirements insisted upon by the EU. A symposium held in 1997 in the USA to discuss the failure of the ADEA to address age discrimination concluded that a

[156] European Convention on Human Rights, Articles 6 and 14.
[157] [2001] 11 BHRC 456.
[158] Framework Directive, Article 9.
[159] R Moorhead and R Cumming, *Something for Nothing? Employment Tribunal Claimants' Perspectives on Legal Funding* (Department for Business, Innovation and Skills ERRSeries No 101, 2009).
[160] AM Leonard, *Judging Inequality: Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases* (Civil Liberties Trust 1987).

multi-faceted approach was needed to improve its effectiveness. It recommended that remedies needed to take into account the true loss suffered by claimants,[161] that judicial support for cost-justifications for age-related recruitment and termination decisions should be reconsidered[162] and the evidential problems that claimants faced because of the covert nature of age discrimination should be addressed by a lowering of the standard of proof.[163] The evidence produced in this study supports the application of every one of these recommendations to the UK legislation.

Whilst the legislation has provided a remedy for some claimants, the traditional anti-discrimination model may be unable to address the institutionalised and systemic nature of ageism which appears to be beyond the bounds of such equality law. Legislation of this sort can only tackle symptoms of ageist prejudice, which may be lessened by measures which re-connect older workers to the workforce, reinforced by societal condemnation of ageist practices outside the workplace. Just as the task of tackling ageist conduct should not fall upon individual aggrieved employees, the cost of achieving equality of capability should not be borne by employers alone but needs to be supported by the State and society. The focus needs to move from the modernist solution of trying to offer a remedy after an individual has suffered discrimination to preventing such treatment, but the 'comfort' factor provided by the enactment of legislation has resulted in a paucity of alternative, post-modern methods of addressing ageism. The findings of this research reflect ageist attitudes which are continually reinforced on a daily basis by the media and the subsequent lack of acceptance of age as an equivalent 'suspect' category, as discussed in Chapter 1.5. Sargeant's suggestion, introduced in Chapter 1.4, that the establishment of a body to counter-act negative age stereotypes in the media 'might be more influential than considering any legal alternatives'[164] appears to have real validity.

The Equality Act 2010 replaced the Regulations and, in addition to the prohibitions contained in the Regulations, the Act recognises the need to advance equality of opportunity,[165] imposing a duty on public bodies to have 'due regard' to

[161] MC Harper, 'ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda Symposium – The Aging American Workforce: Thirty Years under the Age Discrimination in Employment Act' (1997) 31 University of Richmond Law Review 580, 791.
[162] ibid 787.
[163] ibid 790.
[164] M Sargeant, 'Age Stereotypes and the Media' (2008) 13(4) Communications Law 125.
[165] Equality Act 2010, s 149(1)(b).

'remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic'.[166] Unfortunately this duty has not resulted in advances in the race, gender or disability discrimination arenas to which it has applied for a number of years. The most recent assessment of the duties 'raises serious concerns regarding performance on the equality duties. In particular, there was a significant lack of evidence of implementation and impact resulting in a lack of evidence of improved outcomes for equality groups'.[167] Fredman has pointed out that the '"due regard" standard does not necessarily require a change in policy'[168] or 'to take steps or achieve results'[169] and defers to public authorities' view of the importance of equality in addressing disadvantage.[170] The equality duty with regard to age may not bring significant change and it is in any event confined to public bodies and functions rather than all employers.

The goal of equality of capability[171] will not be achieved by this current model of legislation and narrow and inconsistent interpretation by the judiciary. This goal depends at least as much upon positive steps such as improving skills, adaptability and training as upon the simplistic prohibition of ageist conduct which, as pointed out in Chapter 1.6, may escalate rather than curb the problem.[172] Schiek's definition of 'non-discrimination law' is that it is 'a set of legal rules' which aims 'to provide legal remedies and positive obligations which correspond to individual disadvantaging acts and establish structures to counteract disadvantage'.[173] The Age Regulations provided a set of legal rules but established no specific structure to counteract disadvantage caused by age. A holistic approach is needed, ensuring positive action is taken to address cohort disadvantage and promoting active strategies to counter-act stereotyping, following the recommendations given in 2002 by the UN and discussed in Chapter 2.2. Long has suggested that a government commitment to continuous life-long training may counter-act a deficit of up-to-date skills in older cohorts thereby

[166] ibid s 149(3)(a).
[167] Equality and Human Rights Commission and Focus Consultancy, *The Performance of the Health Sector in Meeting the Public Sector Equality Duties: Moving Towards Effective Equality Outcomes* (EHRC 2011) 7.
[168] S Fredman 'The Public Equality Sector Duty' (2011) 40(4) Industrial Law Journal 406.
[169] ibid 409.
[170] ibid 418.
[171] Discussed in Chapter 1.7.
[172] Gawronski et al (n 152) 376.
[173] D Schiek and A Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 21.

reducing negative stereotyping and associated discrimination.[174] Pension, tax and national insurance rules could be changed to permit more flexible working whilst phased retirement and disadvantage suffered by particular age cohorts could be addressed by 'reskilling' younger and older workers.

Parallels can be drawn with the traditional view of upholding benefits given to older age cohorts in eastern cultures, referred to in Chapter 1.2. Although not providing equal treatment for all at any point in time, these measures would provide reasonable accommodation for age cohorts to be enjoyed equally by all as they grow older. They would also benefit younger individuals as the whole community would profit. Lady Hale SCJ pointed out in the Supreme Court that there 'are benefits both to individuals and to the wider society if people continue to work for as long as they can. Put simply, the younger generations need the older ones to continue to be self-supporting for as long as possible'.[175]

This thesis has revealed that age discrimination legislation in England and Wales permits, rather than restricts, age discrimination. Employers appear to have been given a mandate to continue to discriminate on the grounds of age by the weak provisions of the Employment Equality (Age) Regulations 2006 and Equality Act 2010 and by a tribunal process which displays substantial shortcomings that render the legal rules without significant impact. The numerous derogations, loose justification defence, ineffective sanctions and low compensation awards demonstrate that age discrimination is viewed as a less important type of discriminatory treatment and will remain so unless the hierarchical approach to suspect grounds is replaced with one where all are regarded as equally undesirable.

[174] Long (n 1) 229.
[175] *Seldon* (n 24) [15] (Lady Hale SCJ).

Appendices and Bibliography

Appendix A: Abbreviated text of the Employment Equality (Age) Regulations 2006, SI 2006/1031[1]

S T A T U T O R Y I N S T R U M E N T S
2006 No. 1031
EMPLOYMENT AND TRAINING
AGE DISCRIMINATION
The Employment Equality (Age) Regulations 2006
Made
3rd April 2006
Coming into force
1st October 2006

A draft of these Regulations was laid before Parliament in accordance with paragraph 2 of Schedule 2 to the European Communities Act 1972(1), and was approved by resolution of each House of Parliament;
The Secretary of State, who is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to discrimination(2), makes the following Regulations in exercise of the powers conferred by section 2(2):—

PART 1
GENERAL

Citation, commencement and extent
1.—(1) These Regulations may be cited as the Employment Equality (Age) Regulations 2006, and shall come into force on 1st October 2006.
(2) Any amendment, repeal or revocation made by these Regulations has the same extent as the provision to which it relates.
(3) Subject to that, these Regulations do not extend to Northern Ireland.
Interpretation
2.—(1) In these Regulations, references to discrimination are to any discrimination falling within regulation 3 (discrimination on grounds of age), regulation 4 (discrimination by way of victimisation) or regulation 5 (instructions to discriminate) and related expressions shall be construed accordingly, and references to harassment shall be construed in accordance with regulation 6 (harassment on grounds of age).
(2) In these Regulations—
"1996 Act" means the Employment Rights Act 1996(3);
"act" includes a deliberate omission;
"benefit", except in regulation 11 and Schedule 2 (pension schemes), includes facilities and services;
"commencement date" means 1st October 2006;
"Crown employment" means —
(a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office; or
(b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body;
"detriment" does not include harassment within the meaning of regulation 6;
"employment" means employment under a contract of service or of apprenticeship or a contract personally to do any work, and related expressions (such as "employee" and

[1] Omitting Schedules 1, 2, 5, 7, 8, 9

"employer") shall be construed accordingly, but this definition does not apply in relation to regulation 30 (exception for retirement) or to Schedules 2, 6, 7 and 8;
"Great Britain" includes such of the territorial waters of the United Kingdom as are adjacent to Great Britain;
"Minister of the Crown" includes the Treasury and the Defence Council;
"proprietor", in relation to a school, has the meaning given by section 579 of the Education Act 1996(4);
"relevant member of the House of Commons staff" means any person who was appointed by the House of Commons Commission or who is a member of the Speaker's personal staff;
"relevant member of the House of Lords staff" means any person who is employed under a contract of employment with the Corporate Officer of the House of Lords;
"school", in England and Wales, has the meaning given by section 4 of the Education Act 1996(5), and, in Scotland, has the meaning given by section 135(1) of the Education (Scotland) Act 1980(6), and references to a school are to an institution in so far as it is engaged in the provision of education under those sections;
"service for purposes of a Minister of the Crown or government department" does not include service in any office mentioned in Schedule 2 (Ministerial offices) to the House of Commons Disqualification Act 1975(7);
"statutory body" means a body set up by or in pursuance of an enactment, and "statutory office" means an office so set up; and
"worker" in relation to regulations 32 and 34 and to Schedule 2, means, as the case may be—
(a) an employee;
(b) a person holding an office or post to which regulation 12 (office-holders etc) applies;
(c) a person holding the office of constable;
(d) a partner within the meaning of regulation 17 (partnerships);
(e) a member of a limited liability partnership within the meaning of that regulation;
(f) a person in Crown employment;
(g) a relevant member of the House of Commons staff;
(h) a relevant member of the House of Lords staff.
(3) In these Regulations references to "employer", in their application to a person at any time seeking to employ another, include a person who has no employees at that time.

Discrimination on grounds of age

3.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if—
(a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—
(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
(ii) which puts B at that disadvantage,
and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.
(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.
(3) In this regulation—
(a) "age group" means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and
(b) the reference in paragraph (1)(a) to B's age includes B's apparent age.

Discrimination by way of victimisation

4.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the

same circumstances, and does so by reason that B has—
(a) brought proceedings against A or any other person under or by virtue of these Regulations;
(b) given evidence or information in connection with proceedings brought by any person against A or any other person under or by virtue of these Regulations;
(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or
(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,
or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.
(2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Instructions to discriminate

5. For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that—
(a) B has not carried out (in whole or in part) an instruction to do an act which is unlawful by virtue of these Regulations, or
(b) B, having been given an instruction to do such an act, complains to A or to any other person about that instruction.

Harassment on grounds of age

6.—(1) For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of—
(a) violating B's dignity; or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.

PART 2
DISCRIMINATION IN EMPLOYMENT AND VOCATIONAL TRAINING

Applicants and employees

7.—(1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person—
(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;
(b) in the terms on which he offers that person employment; or
(c) by refusing to offer, or deliberately not offering, him employment.
(2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Great Britain, to discriminate against that person—
(a) in the terms of employment which he affords him;
(b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;
(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or
(d) by dismissing him, or subjecting him to any other detriment.
(3) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to subject to harassment a person whom he employs or who has applied to him for employment.
(4) Subject to paragraph (5), paragraph (1)(a) and (c) does not apply in relation to a person—
(a) whose age is greater than the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65; or

(b) who would, within a period of six months from the date of his application to the employer, reach the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65.
(5) Paragraph (4) only applies to a person to whom, if he was recruited by the employer, regulation 30 (exception for retirement) could apply.
(6) Paragraph (2) does not apply to benefits of any description if the employer is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public which includes the employee in question, unless—
(a) that provision differs in a material respect from the provision of the benefits by the employer to his employees; or
(b) the provision of the benefits to the employee in question is regulated by his contract of employment; or
(c) the benefits relate to training.
(7) In paragraph (2)(d) reference to the dismissal of a person from employment includes reference—
(a) to the termination of that person's employment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the employment is renewed on the same terms; and
(b) to the termination of that person's employment by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer.
(8) In paragraph (4) "normal retirement age" is an age of 65 or more which meets the requirements of section 98ZH of the 1996 Act(8).

Exception for genuine occupational requirement etc

8.—(1) In relation to discrimination falling within regulation 3 (discrimination on grounds of age)—
(a) regulation 7(1)(a) or (c) does not apply to any employment;
(b) regulation 7(2)(b) or (c) does not apply to promotion or transfer to, or training for, any employment; and
(c) regulation 7(2)(d) does not apply to dismissal from any employment,
where paragraph (2) applies.
(2) This paragraph applies where, having regard to the nature of the employment or the context in which it is carried out—
(a) possessing a characteristic related to age is a genuine and determining occupational requirement;
(b) it is proportionate to apply that requirement in the particular case; and
(c) either—
(i) the person to whom that requirement is applied does not meet it, or
(ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

Contract workers

9.—(1) It is unlawful for a principal, in relation to contract work at an establishment in Great Britain, to discriminate against a contract worker—
(a) in the terms on which he allows him to do that work;
(b) by not allowing him to do it or continue to do it;
(c) in the way he affords him access to any benefits or by refusing or deliberately not affording him access to them; or
(d) by subjecting him to any other detriment.
(2) It is unlawful for a principal, in relation to contract work at an establishment in Great Britain, to subject a contract worker to harassment.
(3) A principal does not contravene paragraph (1)(b) by doing any act in relation to a contract worker where, if the work were to be done by a person taken into the principal's employment, that act would be lawful by virtue of regulation 8 (exception for genuine occupational

requirement etc).
(4) Paragraph (1) does not apply to benefits of any description if the principal is concerned with the provision (for payment or not) of benefits of that description to the public, or to a section of the public to which the contract worker in question belongs, unless that provision differs in a material respect from the provision of the benefits by the principal to his contract workers.
(5) In this regulation—
"principal" means a person ("A") who makes work available for doing by individuals who are employed by another person who supplies them under a contract made with A; "contract work" means work so made available; and
"contract worker" means any individual who is supplied to the principal under such a contract.

Meaning of employment and contract work at establishment in Great Britain

10.—(1) For the purposes of this Part ("the relevant purposes"), employment is to be regarded as being at an establishment in Great Britain if the employee—
(a) does his work wholly or partly in Great Britain; or
(b) does his work wholly outside Great Britain and paragraph (2) applies.
(2) This paragraph applies if—
(a) the employer has a place of business at an establishment in Great Britain;
(b) the work is for the purposes of the business carried on at that establishment; and
(c) the employee is ordinarily resident in Great Britain—
(i) at the time when he applies for or is offered the employment, or
(ii) at any time during the course of the employment.
(3) The reference to "employment" in paragraph (1) includes—
(a) employment on board a ship only if the ship is registered at a port of registry in Great Britain, and
(b) employment on an aircraft or hovercraft only if the aircraft or hovercraft is registered in the United Kingdom and operated by a person who has his principal place of business, or is ordinarily resident, in Great Britain.
(4) Subject to paragraph (5), for the purposes of determining if employment concerned with the exploration of the sea bed or sub-soil or the exploitation of their natural resources is outside Great Britain, this regulation has effect as if references to Great Britain included—
(a) any area designated under section 1(7) of the Continental Shelf Act 1964(9) except an area or part of an area in which the law of Northern Ireland applies; and
(b) in relation to employment concerned with the exploration or exploitation of the Frigg Gas Field, the part of the Norwegian sector of the Continental Shelf described in Schedule 1.
(5) Paragraph (4) shall not apply to employment which is concerned with the exploration or exploitation of the Frigg Gas Field unless the employer is—
(a) a company registered under the Companies Act 1985(10);
(b) an oversea company which has established a place of business within Great Britain from which it directs the exploration or exploitation in question; or
(c) any other person who has a place of business within Great Britain from which he directs the exploration or exploitation in question.
(7) This regulation applies in relation to contract work within the meaning of regulation 9 as it applies in relation to employment; and, in its application to contract work, references to "employee", "employer" and "employment" are references to (respectively) "contract worker", "principal" and "contract work" within the meaning of regulation 9.

Pension schemes

11.—(1) It is unlawful, except in relation to rights accrued or benefits payable in respect of periods of service prior to the coming into force of these Regulations, for the trustees or managers of an occupational pension scheme to discriminate against a member or prospective member of the scheme in carrying out any of their functions in relation to it (including in particular their functions relating to the admission of members to the scheme and the treatment of members of it).

(2) It is unlawful for the trustees or managers of an occupational pension scheme, in relation to the scheme, to subject to harassment a member or prospective member of it.
(3) Schedule 2 (pension schemes) shall have effect for the purposes of—
(a) defining terms used in this regulation and in that Schedule;
(b) exempting certain rules and practices in or relating to pension schemes from Parts 2 and 3 of these Regulations;
(c) treating every occupational pension scheme as including a non-discrimination rule;
(d) giving trustees or managers of an occupational pension scheme power to alter the scheme so as to secure conformity with the non-discrimination rule;
(e) making provision in relation to the procedures, and remedies which may be granted, on certain complaints relating to occupational pension schemes presented to an employment tribunal under regulation 36 (jurisdiction of employment tribunals).

Office-holders etc

12.—(1) It is unlawful for a relevant person, in relation to an appointment to an office or post to which this regulation applies, to discriminate against a person—
(a) in the arrangements which he makes for the purpose of determining to whom the appointment should be offered;
(b) in the terms on which he offers him the appointment; or
(c) by refusing to offer him the appointment.
(2) It is unlawful, in relation to an appointment to an office or post to which this regulation applies and which is an office or post referred to in paragraph (8)(b), for a relevant person on whose recommendation (or subject to whose approval) appointments to the office or post are made, to discriminate against a person—
(a) in the arrangements which he makes for the purpose of determining who should be recommended or approved in relation to the appointment; or
(b) in making or refusing to make a recommendation, or giving or refusing to give an approval, in relation to the appointment.
(3) It is unlawful for a relevant person, in relation to a person who has been appointed to an office or post to which this regulation applies, to discriminate against him—
(a) in the terms of the appointment;
(b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit, or by refusing to afford him any such opportunity;
(c) by terminating the appointment; or
(d) by subjecting him to any other detriment in relation to the appointment.
(4) It is unlawful for a relevant person, in relation to an office or post to which this regulation applies, to subject to harassment a person—
(a) who has been appointed to the office or post;
(b) who is seeking or being considered for appointment to the office or post; or
(c) who is seeking or being considered for a recommendation or approval in relation to an appointment to an office or post referred to in paragraph (8)(b).
(5) Paragraphs (1) and (3) do not apply to any act in relation to an office or post where, if the office or post constituted employment, that act would be lawful by virtue of regulation 8 (exception for genuine occupational requirement etc); and paragraph (2) does not apply to any act in relation to an office or post where, if the office or post constituted employment, it would be lawful by virtue of regulation 8 to refuse to offer the person such employment.
(6) Paragraph (3) does not apply to benefits of any description if the relevant person is concerned with the provision (for payment or not) of benefits of that description to the public, or a section of the public to which the person appointed belongs, unless—
(a) that provision differs in a material respect from the provision of the benefits by the relevant person to persons appointed to offices or posts which are the same as, or not materially different from, that which the person appointed holds; or
(b) the provision of the benefits to the person appointed is regulated by the terms and conditions of his appointment; or

(c) the benefits relate to training.
(7) In paragraph (3)(c) the reference to the termination of the appointment includes a reference—
(a) to the termination of the appointment by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the appointment is renewed on the same terms and conditions; and
(b) to the termination of the appointment by any act of the person appointed (including the giving of notice) in circumstances such that he is entitled to terminate the appointment without notice by reason of the conduct of the relevant person.
(8) This regulation applies to—
(a) any office or post to which persons are appointed to discharge functions personally under the direction of another person, and in respect of which they are entitled to remuneration; and
(b) any office or post to which appointments are made by (or on the recommendation of or subject to the approval of) a Minister of the Crown, a government department, the National Assembly for Wales or any part of the Scottish Administration,
but not to a political office or a case where regulation 7 (applicants and employees), 9 (contract workers), 15 (barristers), 16 (advocates) or 17 (partnerships) applies, or would apply but for the operation of any other provision of these Regulations.
(9) For the purposes of paragraph (8)(a) the holder of an office or post—
(a) is to be regarded as discharging his functions under the direction of another person if that other person is entitled to direct him as to when and where he discharges those functions;
(b) is not to be regarded as entitled to remuneration merely because he is entitled to payments—
(i) in respect of expenses incurred by him in carrying out the function of the office or post; or
(ii) by way of compensation for the loss of income or benefits he would or might have received from any person had he not been carrying out the functions of the office or post.
(10) In this regulation—
(a) appointment to an office or post does not include election to an office or post;
(b) "political office" means—
(i) any office of the House of Commons held by a member of it;
(ii) a life peerage within the meaning of the Life Peerages Act 1958(11), or any office of the House of Lords held by a member of it;
(iii) any office mentioned in Schedule 2 (Ministerial offices) to the House of Commons Disqualification Act 1975(12);
(iv) the offices of Leader of the Opposition, Chief Opposition Whip or Assistant Opposition Whip within the meaning of the Ministerial and other Salaries Act 1975(13);
(v) any office of the Scottish Parliament held by a member of it;
(vi) a member of the Scottish Executive within the meaning of section 44 of the Scotland Act 1998(14), or a junior Scottish Minister within the meaning of section 49 of that Act;
(vii) any office of the National Assembly for Wales held by a member of it;
(viii) in England, any office of a county council, a London borough council, a district council, or a parish council held by a member of it;
(ix) in Wales, any office of a county council, a county borough council, or a community council held by a member of it;
(x) in relation to a council constituted under section 2 of the Local Government etc (Scotland) Act 1994(15) or a community council established under section 51 of the Local Government (Scotland) Act 1973(16), any office of such a council held by a member of it;
(xi) any office of the Greater London Authority held by a member of it;
(xii) any office of the Common Council of the City of London held by a member of it;
(xiii) any office of the Council of the Isles of Scilly held by a member of it;
(xiv) any office of a political party;
(c) "relevant person", in relation to an office or post, means—
(i) any person with power to make or terminate appointments to the office or post, or to

determine the terms of appointment,
(ii) any person with power to determine the working conditions of a person appointed to the office or post in relation to opportunities for promotion, a transfer, training or for receiving any other benefit, and
(iii) any person or body referred to in paragraph (8)(b) on whose recommendation or subject to whose approval appointments are made to the office or post;
(d) references to making a recommendation include references to making a negative recommendation; and
(e) references to refusal include references to deliberate omission.

Police

13.—(1) For the purposes of this Part, the holding of the office of constable shall be treated as employment—
(a) by the chief officer of police as respects any act done by him in relation to a constable or that office;
(b) by the police authority as respects any act done by it in relation to a constable or that office.
(2) For the purposes of regulation 25 (liability of employers and principals)—
(a) the holding of the office of constable shall be treated as employment by the chief officer of police (and as not being employment by any other person); and
(b) anything done by a person holding such an office in the performance, or purported performance, of his functions shall be treated as done in the course of that employment.
(3) There shall be paid out of the police fund—
(a) any compensation, costs or expenses awarded against a chief officer of police in any proceedings brought against him under these Regulations, and any costs or expenses incurred by him in any such proceedings so far as not recovered by him in the proceedings; and
(b) any sum required by a chief officer of police for the settlement of any claim made against him under these Regulations if the settlement is approved by the police authority.
(4) Any proceedings under these Regulations which, by virtue of paragraph (1), would lie against a chief officer of police shall be brought against the chief officer of police for the time being or in the case of a vacancy in that office, against the person for the time being performing the functions of that office; and references in paragraph (3) to the chief officer of police shall be construed accordingly.
(5) A police authority may, in such cases and to such extent as appear to it to be appropriate, pay out of the police fund—
(a) any compensation, costs or expenses awarded in proceedings under these Regulations against a person under the direction and control of the chief officer of police;
(b) any costs or expenses incurred and not recovered by such a person in such proceedings; and
(c) any sum required in connection with the settlement of a claim that has or might have given rise to such proceedings.
(6) Paragraphs (1) and (2) apply to a police cadet and appointment as a police cadet as they apply to a constable and the office of constable.
(7) Subject to paragraph (8), in this regulation—
"chief officer of police"—
(a) in relation to a person appointed, or an appointment falling to be made, under a specified Act, has the same meaning as in the Police Act 1996(17);
(b) in relation to a person appointed, or an appointment falling to be made, under the Police (Scotland) Act 1967(18), means the chief constable of the relevant police force;
(c) in relation to any other person or appointment means the officer or other person who has the direction and control of the body of constables or cadets in question;
"police authority"—
(a) in relation to a person appointed, or an appointment falling to be made, under a specified Act, has the same meaning as in the Police Act 1996;

(b) in relation to a person appointed, or an appointment falling to be made, under the Police (Scotland) Act 1967, has the meaning given in that Act;
(c) in relation to any other person or appointment, means the authority by whom the person in question is or on appointment would be paid;
"police cadet" means any person appointed to undergo training with a view to becoming a constable;
"police fund"—
(a) in relation to a chief officer of police within sub-paragraph (a) of the above definition of that term, has the same meaning as in the Police Act 1996;
(b) in any other case means money provided by the police authority; and
"specified Act" means the Metropolitan Police Act 1829(19), the City of London Police Act 1839(20) or the Police Act 1996.
(8) In relation to a constable of a force who is not under the direction and control of the chief officer of police for that force, references in this regulation to the chief officer of police are references to the chief officer of the force under whose direction and control he is, and references in this regulation to the police authority are references to the relevant police authority for that force.
(9) This regulation is subject to regulation 14.

Serious Organised Crime Agency

14.—(1) For the purposes of this Part, any constable or other person who has been seconded to SOCA to serve as a member of its staff shall be treated as employed by SOCA.
(2) For the purposes of regulation 25 (liability of employers and principals)—
(a) the secondment of any constable or other person to SOCA to serve as a member of its staff shall be treated as employment by SOCA (and not as employment by any other person); and
(b) anything done by a person so seconded in the performance, or purported performance, of his functions shall be treated as done in the course of that employment.
(3) In this regulation "SOCA" means the Serious Organised Crime Agency established under section 1 of, and Schedule 1 to, the Serious Organised Crime and Police Act 2005(21).

Barristers

15.—(1) It is unlawful for a barrister or barrister's clerk, in relation to any offer of a pupillage or tenancy, to discriminate against a person—
(a) in the arrangements which are made for the purpose of determining to whom the pupillage or tenancy should be offered;
(b) in respect of any terms on which it is offered; or
(c) by refusing, or deliberately not offering, it to him.
(2) It is unlawful for a barrister or barrister's clerk, in relation to a pupil or tenant in the set of chambers in question, to discriminate against him—
(a) in respect of any terms applicable to him as a pupil or tenant;
(b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
(c) in the benefits which are afforded or denied to him; or
(d) by terminating his pupillage, or by subjecting him to any pressure to leave the chambers or other detriment.
(3) It is unlawful for a barrister or barrister's clerk, in relation to a pupillage or tenancy in the set of chambers in question, to subject to harassment a person who is, or has applied to be, a pupil or tenant.
(4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to a barrister, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.
(5) In this regulation—
"barrister's clerk" includes any person carrying out any of the functions of a barrister's clerk;
"pupil", "pupillage" and "set of chambers" have the meanings commonly associated with their use in the context of barristers practising in independent practice; and

"tenancy" and "tenant" have the meanings commonly associated with their use in the context of barristers practising in independent practice, but also include reference to any barrister permitted to work in a set of chambers who is not a tenant.
(6) This regulation extends to England and Wales only.

Advocates

16.—(1) It is unlawful for an advocate, in relation to taking any person as his pupil, to discriminate against a person—
(a) in the arrangements which he makes for the purpose of determining whom he will take as his pupil;
(b) in respect of any terms on which he offers to take any person as his pupil; or
(c) by refusing to take, or deliberately not taking, a person as his pupil.
(2) It is unlawful for an advocate, in relation to a person who is his pupil, to discriminate against him—
(a) in respect of any terms applicable to him as a pupil;
(b) in the opportunities for training, or gaining experience, which are afforded or denied to him;
(c) in the benefits which are afforded or denied to him; or
(d) by terminating the relationship, or by subjecting him to any pressure to terminate the relationship or other detriment.
(3) It is unlawful for an advocate, in relation to a person who is his pupil or taking any person as his pupil, to subject such a person to harassment.
(4) It is unlawful for any person, in relation to the giving, withholding or acceptance of instructions to an advocate, to discriminate against any person by subjecting him to a detriment, or to subject him to harassment.
(5) In this regulation—
"advocate" means a member of the Faculty of Advocates practising as such; and
"pupil" has the meaning commonly associated with its use in the context of a person training to be an advocate.
(6) This regulation extends to Scotland only.

Partnerships

17.—(1) It is unlawful for a firm, in relation to a position as partner in the firm, to discriminate against a person—
(a) in the arrangements they make for the purpose of determining to whom they should offer that position;
(b) in the terms on which they offer him that position;
(c) by refusing to offer, or deliberately not offering, him that position; or
(d) in a case where the person already holds that position—
(i) in the way they afford him access to any benefits or by refusing to afford, or deliberately not affording, him access to them; or
(ii) by expelling him from that position, or subjecting him to any other detriment.
(2) It is unlawful for a firm, in relation to a position as partner in the firm, to subject to harassment a person who holds or has applied for that position.
(3) Paragraphs (1)(a) to (c) and (2) apply in relation to persons proposing to form themselves into a partnership as they apply in relation to a firm.
(4) Paragraph (1) does not apply to any act in relation to a position as partner where, if the position were employment, that act would be lawful by virtue of regulation 8 (exception for genuine occupational requirement etc).
(5) In the case of a limited partnership references in this regulation to a partner shall be construed as references to a general partner as defined in section 3 of the Limited Partnerships Act 1907(22).
(6) This regulation applies to a limited liability partnership as it applies to a firm; and, in its application to a limited liability partnership, references to a partner in a firm are references to a member of the limited liability partnership.

(7) In this regulation, "firm" has the meaning given by section 4 of the Partnership Act 1890(23).
(8) In paragraph (1)(d) reference to the expulsion of a person from a position as partner includes reference—
(a) to the termination of that person's partnership by the expiration of any period (including a period expiring by reference to an event or circumstance), not being a termination immediately after which the partnership is renewed on the same terms; and
(b) to the termination of that person's partnership by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the other partners.

Trade organisations

18.—(1) It is unlawful for a trade organisation to discriminate against a person—
(a) in the terms on which it is prepared to admit him to membership of the organisation; or
(b) by refusing to accept, or deliberately not accepting, his application for membership.
(2) It is unlawful for a trade organisation, in relation to a member of the organisation, to discriminate against him—
(a) in the way it affords him access to any benefits or by refusing or deliberately omitting to afford him access to them;
(b) by depriving him of membership, or varying the terms on which he is a member; or
(c) by subjecting him to any other detriment.
(3) It is unlawful for a trade organisation, in relation to a person's membership or application for membership of that organisation, to subject that person to harassment.
(4) In this regulation—
"trade organisation" means an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists;
"profession" includes any vocation or occupation; and
"trade" includes any business.

Qualifications bodies

19.—(1) It is unlawful for a qualifications body to discriminate against a person—
(a) in the terms on which it is prepared to confer a professional or trade qualification on him;
(b) by refusing or deliberately not granting any application by him for such a qualification; or
(c) by withdrawing such a qualification from him or varying the terms on which he holds it.
(2) It is unlawful for a qualifications body, in relation to a professional or trade qualification conferred by it, to subject to harassment a person who holds or applies for such a qualification.
(3) In this regulation—
"qualifications body" means any authority or body which can confer a professional or trade qualification, but it does not include—
(a) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations, or
(b) a proprietor of a school;
"confer" includes renew or extend;
"professional or trade qualification" means any authorisation, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular profession or trade;
"profession" and "trade" have the same meaning as in regulation 18.

The provision of vocational training

20.—(1) It is unlawful, in relation to a person seeking or undergoing training, for any training provider to discriminate against him—
(a) in the arrangements he makes for the purpose of determining to whom he should offer training;
(b) in the terms on which the training provider affords him access to any training;

(c) by refusing or deliberately not affording him such access;
(d) by terminating his training; or
(e) by subjecting him to any other detriment during his training.
(2) It is unlawful for a training provider, in relation to a person seeking or undergoing training, to subject him to harassment.
(3) Paragraph (1) does not apply if the discrimination concerns training that would only fit a person for employment which, by virtue of regulation 8 (exception for genuine occupational requirement etc), the employer could lawfully refuse to offer the person seeking training.
(4) In this regulation—
"professional or trade qualification" has the same meaning as in regulation 19;
"registered pupil" has the meaning given by section 434 of the Education Act 1996(24);
"training" means—
(a) all types and all levels of training which would help fit a person for any employment;
(b) vocational guidance;
(c) facilities for training;
(d) practical work experience provided by an employer to a person whom he does not employ; and
(e) any assessment related to the award of any professional or trade qualification;
"training provider" means any person who provides, or makes arrangements for the provision of, training, but it does not include—
(a) an employer in relation to training for persons employed by him;
(b) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations; or
(c) a proprietor of a school in relation to any registered pupil.

Employment agencies, careers guidance etc

21.—(1) It is unlawful for an employment agency to discriminate against a person—
(a) in the terms on which the agency offers to provide any of its services;
(b) by refusing or deliberately not providing any of its services; or
(c) in the way it provides any of its services.
(2) It is unlawful for an employment agency, in relation to a person to whom it provides its services, or who has requested it to provide its services, to subject that person to harassment.
(3) Paragraph (1) does not apply to discrimination if it only concerns employment which, by virtue of regulation 8 (exception for genuine occupational requirement etc), the employer could lawfully refuse to offer the person in question.
(4) An employment agency shall not be subject to any liability under this regulation if it proves that—
(a) it acted in reliance on a statement made to it by the employer to the effect that, by reason of the operation of paragraph (3), its action would not be unlawful; and
(b) it was reasonable for it to rely on the statement.
(5) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (4)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
(6) For the purposes of this regulation—
(a) "employment agency" means a person who, for profit or not, provides services for the purpose of finding employment for workers or supplying employers with workers, but it does not include—
(i) a governing body of an educational establishment to which regulation 23 (institutions of further and higher education) applies, or would apply but for the operation of any other provision of these Regulations; or
(ii) a proprietor of a school; and
(b) references to the services of an employment agency include guidance on careers and any other services related to employment.

Assisting persons to obtain employment etc

22.—(1) It is unlawful for the Secretary of State to discriminate against any person by subjecting him to a detriment, or to subject a person to harassment, in the provision of facilities or services under section 2 of the Employment and Training Act 1973(**25**) (arrangements for assisting persons to obtain employment).

(2) It is unlawful for Scottish Enterprise or Highlands and Islands Enterprise to discriminate against any person by subjecting him to a detriment, or to subject a person to harassment, in the provision of facilities or services under such arrangements as are mentioned in section 2(3) of the Enterprise and New Towns (Scotland) Act 1990(26) (arrangements analogous to arrangements in pursuance of the said Act of 1973).

(3) This regulation does not apply in a case where—

(a) regulation 20 (the provision of vocational training) applies or would apply but for the operation of any other provision of these Regulations, or

(b) the Secretary of State is acting as an employment agency within the meaning of regulation 21 (employment agencies, careers guidance etc).

Institutions of further and higher education

23.—(1) It is unlawful, in relation to an educational establishment to which this regulation applies, for the governing body of that establishment to discriminate against a person—

(a) in the terms on which it offers to admit him to the establishment as a student;

(b) by refusing or deliberately not accepting an application for his admission to the establishment as a student; or

(c) where he is a student of the establishment—

(i) in the way it affords him access to any benefits,

(ii) by refusing or deliberately not affording him access to them, or

(iii) by excluding him from the establishment or subjecting him to any other detriment.

(2) It is unlawful, in relation to an educational establishment to which this regulation applies, for the governing body of that establishment to subject to harassment a person who is a student at the establishment, or who has applied for admission to the establishment as a student.

(3) Paragraph (1) does not apply if the discrimination concerns training that would only fit a person for employment which, by virtue of regulation 8 (exception for genuine occupational requirement etc), the employer could lawfully refuse to offer the person in question.

(4) This regulation applies to the following educational establishments in England and Wales, namely—

(a) an institution within the further education sector (within the meaning of section 91(3) of the Further and Higher Education Act 1992(27));

(b) a university;

(c) an institution, other than a university, within the higher education sector (within the meaning of section 91(5) of the Further and Higher Education Act 1992).

(5) This regulation applies to the following educational establishments in Scotland, namely—

(a) a college of further education within the meaning of section 36(1) of the Further and Higher Education (Scotland) Act 1992(28) under the management of a board of management within the meaning of Part I of that Act;

(b) a college of further education maintained by an education authority in the exercise of its further education functions in providing courses of further education within the meaning of section 1(5)(b)(ii) of the Education (Scotland) Act 1980(29);

(c) any other educational establishment (not being a school) which provides further education within the meaning of section 1 of the Further and Higher Education (Scotland) Act 1992;

(d) an institution within the higher education sector (within the meaning of Part 2 of the Further and Higher Education (Scotland) Act 1992);

(e) a central institution (within the meaning of section 135 of the Education (Scotland) Act 1980).

(6) In this regulation—

"education authority" has the meaning given by section 135(1) of the Education (Scotland)

Act 1980;
"governing body" includes—
(a) the board of management of a college referred to in paragraph (5)(a), and
(b) the managers of a college or institution referred to in paragraph (5)(b) or (e);
"student" means any person who receives education at an educational establishment to which this regulation applies; and
"university" includes a university college and the college, school or hall of a university.

Relationships which have come to an end

24.—(1) In this regulation a "relevant relationship" is a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship ("B") by the other party to it ("A") is unlawful by virtue of any preceding provision of this Part.
(2) Where a relevant relationship has come to an end, it is unlawful for A—
(a) to discriminate against B by subjecting him to a detriment; or
(b) to subject B to harassment;
where the discrimination or harassment arises out of and is closely connected to that relationship.
(3) In paragraph (1), reference to an act of discrimination or harassment which is unlawful includes, in the case of a relationship which has come to an end before the coming into force of these Regulations, reference to an act of discrimination or harassment which would, after the coming into force of these Regulations, be unlawful.

PART 3
OTHER UNLAWFUL ACTS

Liability of employers and principals

25.—(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of these Regulations as done by that other person as well as by him.
(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

Aiding unlawful acts

26.—(1) A person who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purpose of these Regulations as himself doing an unlawful act of the like description.
(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under regulation 25 (or would be so liable but for regulation 25(3)) shall be deemed to aid the doing of the act by the employer or principal.
(3) A person does not under this regulation knowingly aid another to do an unlawful act if—
(a) he acts in reliance on a statement made to him by that other person that, by reason of any provision of these Regulations, the act which he aids would not be unlawful; and
(b) it is reasonable for him to rely on the statement.
(4) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (3)(a) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

PART 4
GENERAL EXCEPTIONS FROM PARTS 2 AND 3

Exception for statutory authority

27.—(1) Nothing in Part 2 or 3 shall render unlawful any act done in order to comply with a

requirement of any statutory provision.
(2) In this regulation "statutory provision" means any provision (whenever enacted) of—
(a) an Act or an Act of the Scottish Parliament;
(b) an instrument made by a Minister of the Crown under an Act;
(c) an instrument made under an Act or an Act of the Scottish Parliament by the Scottish Ministers or a member of the Scottish Executive.

Exception for national security

28. Nothing in Part 2 or 3 shall render unlawful an act done for the purpose of safeguarding national security, if the doing of the act was justified by that purpose.

Exceptions for positive action

29.—(1) Nothing in Part 2 or 3 shall render unlawful any act done in or in connection with—
(a) affording persons of a particular age or age group access to facilities for training which would help fit them for particular work; or
(b) encouraging persons of a particular age or age group to take advantage of opportunities for doing particular work;
where it reasonably appears to the person doing the act that it prevents or compensates for disadvantages linked to age suffered by persons of that age or age group doing that work or likely to take up that work.
(2) Nothing in Part 2 or 3 shall render unlawful any act done by a trade organisation within the meaning of regulation 18 in or in connection with—
(a) affording only members of the organisation who are of a particular age or age group access to facilities for training which would help fit them for holding a post of any kind in the organisation; or
(b) encouraging only members of the organisation who are of a particular age or age group to take advantage of opportunities for holding such posts in the organisation,
where it reasonably appears to the organisation that the act prevents or compensates for disadvantages linked to age suffered by those of that age or age group holding such posts or likely to hold such posts.
(3) Nothing in Part 2 or 3 shall render unlawful any act done by a trade organisation within the meaning of regulation 18 in or in connection with encouraging only persons of a particular age or age group to become members of the organisation where it reasonably appears to the organisation that the act prevents or compensates for disadvantages linked to age suffered by persons of that age or age group who are, or are eligible to become, members.

Exception for retirement

30.—(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the 1996 Act, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.
(2) Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.
(3) For the purposes of this regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of the 1996 Act(30).

Exception for the national minimum wage

31.—(1) Nothing in Part 2 or 3 shall render it unlawful for a relevant person ("A") to be remunerated in respect of his work at a rate which is lower than the rate at which another such person ("B") is remunerated for his work where—
(a) the hourly rate of the national minimum wage for a person of A's age is lower than that for a person of B's age, and
(b) the rate at which A is remunerated is below the single hourly rate for the national minimum wage prescribed by the Secretary of State under section 1(3) of the National Minimum Wage Act 1998(31).
(2) Nothing in Part 2 or 3 shall render it unlawful for an apprentice who is not a relevant person to be remunerated in respect of his work at a rate which is lower than the rate at which an apprentice who is a relevant person is remunerated for his work.

(3) In this regulation—
"apprentice" means a person who is employed under a contract of apprenticeship or, in accordance with regulation 12(3) of the National Minimum Wage Regulations 1999(32), is to be treated as employed under such a contract;
"relevant person" means a person who qualifies for the national minimum wage(33) (whether at the single hourly rate for the national minimum wage prescribed by the Secretary of State under section 1(3) of the National Minimum Wage Act 1998 or at a different rate).

Exception for provision of certain benefits based on length of service

32.—(1) Subject to paragraph (2), nothing in Part 2 or 3 shall render it unlawful for a person ("A"), in relation to the award of any benefit by him, to put a worker ("B") at a disadvantage when compared with another worker ("C"), if and to the extent that the disadvantage suffered by B is because B's length of service is less than that of C.
(2) Where B's length of service exceeds 5 years, it must reasonably appear to A that the way in which he uses the criterion of length of service, in relation to the award in respect of which B is put at a disadvantage, fulfils a business need of his undertaking (for example, by encouraging the loyalty or motivation, or rewarding the experience, of some or all of his workers).
(3) In calculating a worker's length of service for these purposes, A shall calculate—
(a) the length of time the worker has been working for him doing work which he reasonably considers to be at or above a particular level (assessed by reference to the demands made on the worker, for example, in terms of effort, skills and decision making); or
(b) the length of time the worker has been working for him in total;
and on each occasion on which he decides to use the criterion of length of service in relation to the award of a benefit to workers, it is for him to decide which of these definitions to use to calculate their lengths of service.
(4) For the purposes of paragraph (3), in calculating the length of time a worker has been working for him—
(a) A shall calculate the length of time in terms of the number of weeks during the whole or part of which the worker was working for him;
(b) A may discount any period during which the worker was absent from work (including any period of absence which at the time it occurred was thought by A or the worker to be permanent) unless in all the circumstances (including the way in which other workers' absences occurring in similar circumstances are treated by A in calculating their lengths of service) it would not be reasonable for him to do so;
(c) A may discount any period of time during which the worker was present at work ("the relevant period") where—
(i) the relevant period preceded a period during which the worker was absent from work, and
(ii) in all the circumstances (including the length of the worker's absence, the reason for his absence, the effect his absence has had on his ability to discharge the duties of his work, and the way in which other workers are treated by A in similar circumstances) it is reasonable for A to discount the relevant period.
(5) For the purposes of paragraph (3)(b), a worker shall be treated as having worked for A during any period during which he worked for another if—
(a) that period is treated as a period of employment with A for the purposes of the 1996 Act by virtue of the operation of section 218 of that Act; or
(b) were the worker to be made redundant by A, that period and the period he has worked for A would amount to "relevant service" within the meaning of section 155 of that Act.
(6) In paragraph (5)—
(a) the reference to being made redundant is a reference to being dismissed by reason of redundancy for the purposes of the 1996 Act;
(b) the reference to section 155 of that Act is a reference to that section as modified by the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999(34).

(7) In this regulation—
"benefit" does not include any benefit awarded to a worker by virtue of his ceasing to work for A; and
"year" means a year of 12 calendar months.

Exception for provision of enhanced redundancy payments to employees

33.—(1) Nothing in Part 2 or 3 shall render it unlawful for an employer—
(a) to give a qualifying employee an enhanced redundancy payment which is less in amount than the enhanced redundancy payment which he gives to another such employee if both amounts are calculated in the same way;
(b) to give enhanced redundancy payments only to those who are qualifying employees by virtue of sub-paragraph (a) or (c)(i) of the definition of qualifying employee below.
(2) In this regulation—
"the appropriate amount", "a redundancy payment" and "a week's pay" have the same meaning as they have in section 162 of the 1996 Act(35);
"enhanced redundancy payment" means a payment of an amount calculated in accordance with paragraph (3) or (4);
"qualifying employee" means—
(a) an employee who is entitled to a redundancy payment by virtue of section 135 of the 1996 Act;
(b) an employee who would have been so entitled but for the operation of section 155 of that Act;
(c) an employee who agrees to the termination of his employment in circumstances where, had he been dismissed—
(i) he would have been a qualifying employee by virtue of sub-paragraph (a) of this definition; or
(ii) he would have been a qualifying employee by virtue of sub-paragraph (b).
(3) For an amount to be calculated in accordance with this paragraph it must be calculated in accordance with section 162(1) to (3) of the 1996 Act.
(4) For an amount to be calculated in accordance with this paragraph—
(a) it must be calculated as in paragraph (3);
(b) however, in making that calculation, the employer may do one or both of the following things—
(i) he may treat a week's pay as not being subject to a maximum amount or as being subject to a maximum amount above the amount laid down in section 227 of the 1996 Act(36);
(ii) he may multiply the appropriate amount allowed for each year of employment by a figure of more than one;
(c) having made the calculation as in paragraph (3) (whether or not in making that calculation he has done anything mentioned in sub-paragraph (b)) the employer may increase the amount thus calculated by multiplying it by a figure of more than one.
(5) For the purposes of paragraphs (3) and (4), the reference to "the relevant date" in section 162(1)(a) of the 1996 Act is to be read, in the case of a qualifying employee who agrees to the termination of his employment, as a reference to the date on which that termination takes effect.

Exception for provision of life assurance cover to retired workers

34.—(1) Where a person ("A") arranges for workers to be provided with life assurance cover after their early retirement on grounds of ill health, nothing in Part 2 or 3 shall render it unlawful—
(a) where a normal retirement age applied in relation to any such workers at the time they took early retirement, for A to arrange for such cover to cease when such workers reach that age;
(b) in relation to any other workers, for A to arrange for such cover to cease when the workers reach the age of 65.
(2) In this regulation, "normal retirement age", in relation to a worker who has taken early retirement, means the age at which workers in A's undertaking who held the same kind of

position as the worker held at the time of his retirement were normally required to retire.

PART 5
ENFORCEMENT

Restriction of proceedings for breach of Regulations

35.—(1) Except as provided by these Regulations no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of these Regulations.

(2) Paragraph (1) does not prevent the making of an application for judicial review or the investigation or determination of any matter in accordance with Part 10 (investigations: the Pensions Ombudsman) of the Pension Schemes Act 1993(37) by the Pensions Ombudsman.

Jurisdiction of employment tribunals

36.—(1) A complaint by any person ("the complainant") that another person ("the respondent")—

(a) has committed against the complainant an act to which this regulation applies; or

(b) is by virtue of regulation 25 (liability of employers and principals) or 26 (aiding unlawful acts) to be treated as having committed against the complainant such an act;

may be presented to an employment tribunal.

(2) This regulation applies to any act of discrimination or harassment which is unlawful by virtue of any provision of Part 2 other than—

(a) where the act is one in respect of which an appeal or proceedings in the nature of an appeal may be brought under any enactment, regulation 19 (qualifications bodies);

(b) regulation 23 (institutions of further and higher education); or

(c) where the act arises out of and is closely connected to a relationship between the complainant and the respondent which has come to an end but during the course of which an act of discrimination against, or harassment of, the complainant by the respondent would have been unlawful by virtue of regulation 23, regulation 24 (relationships which have come to an end).

(3) In paragraph (2)(c), reference to an act of discrimination or harassment which would have been unlawful includes, in the case of a relationship which has come to an end before the coming into force of these Regulations, reference to an act of discrimination or harassment which would, after the coming into force of these Regulations, have been unlawful.

(4) In this regulation, "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.

Burden of proof: employment tribunals

37.—(1) This regulation applies to any complaint presented under regulation 36 to an employment tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent—

(a) has committed against the complainant an act to which regulation 36 applies; or

(b) is by virtue of regulation 25 (liability of employers and principals) or 26 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

Remedies on complaints in employment tribunals

38.—(1) Where an employment tribunal finds that a complaint presented to it under regulation 36 is well-founded, the tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court or by a sheriff

court to pay to the complainant if the complaint had fallen to be dealt with under regulation 39 (jurisdiction of county and sheriff courts);
(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination or harassment to which the complaint relates.
(2) As respects an unlawful act of discrimination falling within regulation 3(1)(b) (discrimination on the grounds of age), if the respondent proves that the provision, criterion or practice was not applied with the intention of treating the complainant unfavourably on grounds of age, an order may be made under paragraph (1)(b) only if the employment tribunal—
(a) makes such order under paragraph (1)(a) (if any) and such recommendation under paragraph (1)(c) (if any) as it would have made if it had no power to make an order under paragraph (1)(b); and
(b) (where it makes an order under paragraph (1)(a) or a recommendation under paragraph (1)(c) or both) considers that it is just and equitable to make an order under paragraph (1)(b) as well.
(3) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by an employment tribunal under paragraph (1)(c), then, if it thinks it just and equitable to do so—
(a)
the tribunal may increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under paragraph (1)(b); or
(b)
if an order under paragraph (1)(b) was not made, the tribunal may make such an order.
(4) Where an amount of compensation falls to be awarded under paragraph (1)(b), the tribunal may include in the award interest on that amount subject to, and in accordance with, the provisions of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996(38).
(5) This regulation has effect subject to paragraph 6 of Schedule 2 (pension schemes).

Jurisdiction of county and sheriff courts

39.—(1) A claim by any person ("the claimant") that another person ("the respondent")—
(a) has committed against the claimant an act to which this regulation applies; or
(b) is by virtue of regulation 25 (liability of employers and principals) or 26 (aiding unlawful acts) to be treated as having committed against the claimant such an act,
may be made the subject of civil proceedings in like manner as any other claim in tort or (in Scotland) in reparation for breach of statutory duty.
(2) Proceedings brought under paragraph (1) shall—
(a) in England and Wales, be brought only in a county court; and
(b) in Scotland, be brought only in a sheriff court.
(3) For the avoidance of doubt it is hereby declared that damages in respect of an unlawful act to which this regulation applies may include compensation for injury to feelings whether or not they include compensation under any other head.
(4) This regulation applies to any act of discrimination or harassment which is unlawful by virtue of—
(a) regulation 23 (institutions of further and higher education); or
(b) where the act arises out of and is closely connected to a relationship between the claimant and the respondent which has come to an end but during the course of which an act of discrimination against, or harassment of, the claimant by the respondent would have been unlawful by virtue of regulation 23, regulation 24 (relationships which have come to an end).
(5) In paragraph (4)(b), reference to an act of discrimination or harassment which would have been unlawful includes, in the case of a relationship which has come to an end before the coming into force of these Regulations, reference to an act of discrimination or harassment which would, after the coming into force of these Regulations, have been unlawful.

Burden of proof: county and sheriff courts

40.—(1) This regulation applies to any claim brought under regulation 39 in a county court in England and Wales or a sheriff court in Scotland.

(2) Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent—

(a) has committed against the claimant an act to which regulation 39 applies; or

(b) is by virtue of regulation 25 (liability of employers and principals) or 26 (aiding unlawful acts) to be treated as having committed against the claimant such an act,

the court shall uphold the claim unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

Help for persons in obtaining information etc

41.—(1) In accordance with this regulation, a person ("the person aggrieved") who considers he may have been discriminated against, or subjected to harassment, in contravention of these Regulations may serve on the respondent to a complaint presented under regulation 36 (jurisdiction of employment tribunals) or a claim brought under regulation 39 (jurisdiction of county and sheriff courts) questions in the form set out in Schedule 3 or forms to the like effect with such variation as the circumstances require; and the respondent may if he so wishes reply to such questions by way of the form set out in Schedule 4 or forms to the like effect with such variation as the circumstances require.

(2) Where the person aggrieved questions the respondent (whether in accordance with paragraph (1) or not)—

(a) the questions, and any reply by the respondent (whether in accordance with paragraph (1) or not) shall, subject to the following provisions of this regulation, be admissible as evidence in the proceedings;

(b) if it appears to the court or tribunal that the respondent deliberately, and without reasonable excuse, omitted to reply within eight weeks of service of the questions or that his reply is evasive or equivocal, the court or tribunal may draw any inference from that fact that it considers it just and equitable to draw, including an inference that he committed an unlawful act.

(3) In proceedings before a county court in England or Wales or a sheriff court in Scotland, a question shall only be admissible as evidence in pursuance of paragraph (2)(a)—

(a) where it was served before those proceedings had been instituted, if it was so served within the period of six months beginning when the act complained of was done;

(b) where it was served when those proceedings had been instituted, if it was served with the leave of, and within a period specified by, the court in question.

(4) In proceedings before an employment tribunal, a question shall only be admissible as evidence in pursuance of paragraph (2)(a)—

(a) where it was served before a complaint had been presented to the tribunal, if it was so served within the period of three months beginning when the act complained of was done;

(b) where it was so served when a complaint had been presented to the tribunal, either—

(i) if it was served within the period of twenty-one days beginning with the day on which the complaint was presented, or

(ii) if it was so served later with leave given, and within a period specified, by a direction of the tribunal.

(5) A question and any reply thereto may be served on the respondent or, as the case may be, on the person aggrieved—

(a) by delivering it to him;

(b) by sending it by post to him at his usual or last-known residence or place of business;

(c) where the person to be served is a body corporate or is a trade union or employers' association within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992(39), by delivering it to the secretary or clerk of the body, union or association at its registered or principal office or by sending it by post to the secretary or clerk at that office;

(d) where the person to be served is acting by a solicitor, by delivering it at, or by sending it by post to, the solicitor's address for service; or
(e) where the person to be served is the person aggrieved, by delivering the reply, or sending it by post, to him at his address for reply as stated by him in the document containing the questions.
(6) This regulation is without prejudice to any other enactment or rule of law regulating interlocutory and preliminary matters in proceedings before a county court, sheriff court or employment tribunal, and has effect subject to any enactment or rule of law regulating the admissibility of evidence in such proceedings.
(7) In this regulation "respondent" includes a prospective respondent.

Period within which proceedings to be brought

42.—(1) An employment tribunal shall not consider a complaint under regulation 36 unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.
(2) A county court or a sheriff court shall not consider a claim brought under regulation 39 unless proceedings in respect of the claim are instituted before the end of the period of six months beginning when the act complained of was done.
(3) A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.
(4) For the purposes of this regulation and regulation 41 (help for persons in obtaining information etc)—
(a) when the making of a contract is, by reason of the inclusion of any term, an unlawful act, that act shall be treated as extending throughout the duration of the contract; and
(b) any act extending over a period shall be treated as done at the end of that period; and
(c) a deliberate omission shall be treated as done when the person in question decided upon it, and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this regulation to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.

SCHEDULE 3 Regulation 41(1)

Questionnaire of person aggrieved

To .....*(name of person to be questioned)*
of .....
.....*(address)*

1.—**(1)** I .....*(name of questioner)*
of .....
.....*(address)*
consider that you may have discriminated against me [subjected me to harassment] contrary to the Employment Equality (Age) Regulations 2006.

(2) *(Give date, approximate time and a factual description of the treatment received and of the circumstances leading up to the treatment.)*

(3) I consider that this treatment may have been unlawful because .....
.....
.....
.....*(complete if you wish to give reasons, otherwise delete)*.

2. Do you agree that the statement in paragraph 1(2) above is an accurate description of what happened? If not, in what respect do you disagree or what is your version of what happened?

3. Do you accept that your treatment of me was unlawful discrimination [harassment]? If not—

(a) why not,

(b) for what reason did I receive the treatment accorded to me, and

(c) how far did considerations of age affect your treatment of me?

4. *(Any other questions you wish to ask.)*

5. My address for any reply you may wish to give to the questions raised above is [that set out in paragraph 1(1) above] [the following address .....
.....]

.....*(signature of questioner)*

.....*(date)*

N.B.—By virtue of regulation 41 of the Employment Equality (Age) Regulations 2006 this questionnaire and any reply are (subject to the provisions of that regulation) admissible in proceedings under the Regulations. A court or tribunal may draw any such inference as is just and equitable from a failure without reasonable excuse to reply within eight weeks of service of this questionnaire, or from an evasive or equivocal reply, including an inference that the person questioned has committed an unlawful act.

SCHEDULE 4 Regulation 41(1)

Reply by respondent

To .....*(name of questioner)*
of .....
.....*(address)*

1. I .....*(name of person questioned)*
of .....
.....*(address)*
hereby acknowledge receipt of the questionnaire signed by you and dated .....
which was served on me on .....*(date)*.

2. [I agree that the statement in paragraph 1(2) of the questionnaire is an accurate description of what happened.]

[I disagree with the statement in paragraph 1(2) of the questionnaire in that .....
.....]

3. I accept/dispute that my treatment of you was unlawful discrimination [harassment].

[My reasons for so disputing are .....
.....
The reason why you received the treatment accorded to you and the answers to the other questions in paragraph 3 of the questionnaire are .....
.....]

4. *(Replies to questions in paragraph 4 of the questionnaire.)*

5. [I have deleted (in whole or in part) the paragraph(s) numbered .....above, since I am unable/unwilling to reply to the relevant questions in the correspondingly numbered paragraph(s) of the questionnaire for the following reasons .....
.....]

.....*(signature of questioner)*

.....*(date)*

PART 6
SUPPLEMENTAL

Validity of contracts, collective agreements and rules of undertakings

43. Schedule 5 (validity of contracts, collective agreements and rules of undertakings) shall have effect.

Application to the Crown etc

44.—(1) These Regulations apply—

(a) to an act done by or for purposes of a Minister of the Crown or government department; or

(b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office, as they apply to an act done by a private person.

(2) These Regulations apply to Crown employment as they apply to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service and references to dismissal included references to termination of Crown employment.

(3) Paragraphs (1) and (2) have effect subject to paragraph (4) and regulations 13 (police) and 14 (Serious Organised Crime Agency).

(4) These regulations do not apply to service in any of the naval, military or air forces of the Crown.

(5) Regulation 10(3) (meaning of employment and contract work at establishment in Great Britain) shall have effect in relation to any ship, aircraft or hovercraft belonging to or

possessed by Her Majesty in right of the government of the United Kingdom as it has effect in relation to a ship, aircraft or hovercraft specified in regulation 10(3)(a) or (b).
(6) The provisions of Parts 2 to 4 of the Crown Proceedings Act 1947(40) shall apply to proceedings against the Crown under these Regulations as they apply to proceedings in England and Wales which by virtue of section 23 of that Act are treated for the purposes of Part 2 of that Act as civil proceedings by or against the Crown, except that in their application to proceedings under these Regulations section 20 of that Act (removal and transfer of proceedings) shall not apply.
(7) The provisions of Part 5 of the Crown Proceedings Act 1947 shall apply to proceedings against the Crown under these Regulations as they apply to proceedings in Scotland which by virtue of the said Part are treated as civil proceedings by or against the Crown, except that in their application to proceedings under these Regulations the proviso to section 44 of that Act (proceedings against the Crown in the Sheriff Court) shall not apply.

Application to House of Commons staff

45.—(1) Subject to paragraphs (2) and (3), these Regulations apply in relation to employment as a relevant member of the House of Commons staff as they apply in relation to other employment.
(2) These Regulations apply to employment as such a member as they apply to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of employment of such a member and references to dismissal included references to termination of such employment.
(3) In relation to employment as such a member, subsections (6) to (12) of section 195 of the 1996 Act(41) (person to be treated as employer of House of Commons staff) apply, with any necessary modifications, for the purposes of these Regulations.

Application to House of Lords staff

46.—(1) These Regulations apply in relation to employment as a relevant member of the House of Lords staff as they apply in relation to other employment.
(2) Section 194(7) of the 1996 Act (continuity of employment) applies for the purposes of this regulation.

Duty to consider working beyond retirement

47. Schedule 6, which sets out the procedure to be followed if an employee (within the meaning of that Schedule) is to be retired, shall have effect.

SCHEDULE 6

Duty to consider working beyond retirement

Interpretation

1.—(1) In this Schedule—
"dismissal" means a dismissal within the meaning of section 95 of the 1996 Act(63);
"employee" means a person to whom regulation 30 (exception for retirement) applies and references to "employer" shall be construed accordingly;
"intended date of retirement" has the meaning given by sub-paragraph (2);
"operative date of termination" means (subject to paragraph 10(3))—
(a) where the employer terminates the employee's contract of employment by notice, the date on which the notice expires, or
(b) where the employer terminates the contract of employment without notice, the date on which the termination takes effect;
"request" means a request made under paragraph 5; and
"worker" has the same meaning as in section 230(3) of the 1996 Act.
(2) In this Schedule "intended date of retirement" means—
(a) where the employer notifies a date in accordance with paragraph 2, that date;
(b) where the employer notifies a date in accordance with paragraph 4 and either no request is made or a request is made after the notification, that date;
(c) where,

(i) he employer has not notified a date in accordance with paragraph 2,
(ii) a request is made before the employer has notified a date in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given),
(iii) the request is made by an employee who has reasonable grounds for believing that the employer intends to retire him on a certain date, and,
(iv) the request identifies that date, the date so identified;
(d) in a case to which paragraph 3 has applied, any earlier or later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 3(3);
(e) in a case to which paragraph 10 has applied, the later date that has superseded the date mentioned in paragraph (a), (b) or (c) as the intended date of retirement by virtue of paragraph 10(3)(b).

Duty of employer to inform employee

2.—(1) An employer who intends to retire an employee has a duty to notify the employee in writing of—
(a) the employee's right to make a request; and
(b) the date on which he intends the employee to retire,
not more than one year and not less than six months before that date.
(2) The duty to notify applies regardless of—
(a) whether there is any term in the employee's contract of employment indicating when his retirement is expected to take place,
(b) any other notification of, or information about, the employee's date of retirement given to him by the employer at any time, and
(c) any other information about the employee's right to make a request given to him by the employer at any time.

3.—(1) This paragraph applies if the employer has notified the employee in accordance with paragraph 2 or 4 or the employee has made a request before being notified in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given), and—
(a) the employer and employee agree, in accordance with paragraph 7(3)(b) or 8(5)(b), that the dismissal is to take effect on a date later than the relevant date;
(b) the employer gives notice to the employee, in accordance with paragraph 7(7)(a)(ii) or, where the employee appeals, paragraph 8(9)(a)(ii), that the dismissal is to take effect on a date later than the relevant date; or
(c) the employer and employee agree that the dismissal is to take effect on a date earlier than the relevant date.
(2) This Schedule does not require the employer to give the employee a further notification in respect of dismissal taking effect on a date—
(a) agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) that is later than the relevant date and falls six months or less after the relevant date; or
(b) agreed as mentioned in sub-paragraph (1)(c) that is earlier than the relevant date.
(3) If—
(a) a date later than the relevant date is agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) and falls six months or less after the relevant date, or
(b) a date earlier than the relevant date is agreed as mentioned in sub-paragraph (1)(c),
the earlier or later date shall supersede the relevant date as the intended date of retirement.
(4) In this paragraph, "the relevant date" means the date that is defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2).

Continuing duty to inform employee

4. Where the employer has failed to comply with paragraph 2, he has a continuing duty to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative date of termination.

Statutory right to request not to retire

5.—(1) An employee may make a request to his employer not to retire on the intended date of retirement.
(2) In his request the employee must propose that his employment should continue, following the intended date of retirement—
(a) indefinitely,
(b) for a stated period, or
(c) until a stated date; and, if the request is made at a time when it is no longer possible for the employer to notify in accordance with paragraph 2 and the employer has not yet notified in accordance with paragraph 4, must identify the date on which he believes that the employer intends to retire him.
(3) A request must be in writing and state that it is made under this paragraph.
(4) An employee may only make one request under this paragraph in relation to any one intended date of retirement and may not make a request in relation to a date that supersedes a different date as the intended date of retirement by virtue of paragraph 3(3) or 10(3)(b).
(5) A request is only a request made under this paragraph if it is made—
(a) in a case where the employer has complied with paragraph 2, more than three months but not more than six months before the intended date of retirement, or
(b) in a case where the employer has not complied with paragraph 2, before, but not more than six months before, the intended date of retirement.

An employer's duty to consider a request

6. An employer to whom a request is made is under a duty to consider the request in accordance with paragraphs 7 to 9.

Meeting to consider request

7.—(1) An employer having a duty under paragraph 6 to consider a request shall hold a meeting to discuss the request with the employee within a reasonable period after receiving it.
(2) The employer and employee must take all reasonable steps to attend the meeting.
(3) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—
(a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or
(b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.
(4) The duty to hold a meeting does not apply if—
(a) it is not practicable to hold a meeting within the period that is reasonable, and
(b) the employer complies with sub-paragraph (5).
(5) Where sub-paragraph (4)(a) applies, the employer may consider the request without holding a meeting provided he considers any representations made by the employee.
(6) The employer shall give the employee notice of his decision on the request as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (4) and (5) apply, his consideration of the request.
(7) A notice given under sub-paragraph (6) shall—
(a) where the decision is to accept the request, state that it is accepted and—
(i) where the decision is that the employee's employment will continue indefinitely, state that fact, or
(ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,
(b) where the decision is to refuse the request, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect,
and, in the case of a notice falling within paragraph (b), and of a notice referred to in paragraph (a) that specifies a period shorter than the period proposed by the employee in the request, shall inform the employee of his right to appeal.
(8) All notices given under this paragraph shall be in writing and be dated.

Appeals

8.—(1) An employee is entitled to appeal against—

(a) a decision of his employer to refuse the request, or

(b) a decision of his employer to accept the request where the notice given under paragraph 7(6) states as mentioned in paragraph 7(7)(a)(ii) and specifies a period shorter than the period proposed by the employee in the request,

by giving notice in accordance with sub-paragraph (2) as soon as is reasonably practicable after the date of the notice given under paragraph 7(6).

(2) A notice of appeal under sub-paragraph (1) shall set out the grounds of appeal.

(3) The employer shall hold a meeting with the employee to discuss an appeal within a reasonable period after the date of the notice of appeal.

(4) The employer and employee must take all reasonable steps to attend the meeting.

(5) The duty to hold a meeting does not apply if, before the end of the period that is reasonable—

(a) the employer and employee agree that the employee's employment will continue indefinitely and the employer gives notice to the employee to that effect; or

(b) the employer and employee agree that the employee's employment will continue for an agreed period and the employer gives notice to the employee of the length of that period or of the date on which it will end.

(6) The duty to hold a meeting does not apply if—

(a) it is not practicable to hold a meeting within the period that is reasonable, and

(b) the employer complies with sub-paragraph (7).

(7) Where sub-paragraph (6)(a) applies, the employer may consider the appeal without holding a meeting provided he considers any representations made by the employee.

(8) The employer shall give the employee notice of his decision on the appeal as soon as is reasonably practicable after the date of the meeting or, if sub-paragraphs (6) and (7) apply, his consideration of the appeal.

(9) A notice under sub-paragraph (8) shall—

(a) where the decision is to accept the appeal, state that it is accepted and—

(i) where the decision is that the employee's employment will continue indefinitely, state that fact, or

(ii) where the decision is that the employee's employment will continue for a further period, state that fact and specify the length of the period or the date on which it will end,

(b) where the decision is to refuse the appeal, confirm that the employer wishes to retire the employee and the date on which the dismissal is to take effect.

(10) All notices given under this paragraph shall be in writing and be dated.

Right to be accompanied

9.—(1) This paragraph applies where—

(a) a meeting is held under paragraph 7 or 8, and

(b) the employee reasonably requests to be accompanied at the meeting.

(2) Where this paragraph applies the employer must permit the employee to be accompanied at the meeting by one companion who—

(a) is chosen by the employee;

(b) is a worker employed by the same employer as the employee;

(c) is to be permitted to address the meeting (but not to answer questions on behalf of the employee); and

(d) is to be permitted to confer with the employee during the meeting.

(3) If—

(a) an employee has a right under this paragraph to be accompanied at a meeting,

(b) his chosen companion will not be available at the time proposed for the meeting by the employer, and

(c) the employee proposes an alternative time which satisfies sub-paragraph (4),

the employer must postpone the meeting to the time proposed by the employee.

(4) An alternative time must—
(a) be convenient for employer, employee and companion, and
(b) fall before the end of the period of seven days beginning with the first day after the day proposed by the employer.
(5) An employer shall permit a worker to take time off during working hours for the purpose of accompanying an employee in accordance with a request under sub-paragraph (1)(b).
(6) Sections 168(3) and (4), 169 and 171 to 173 of the Trade Union and Labour Relations (Consolidation) Act 1992(64) (time off for carrying out trade union duties) shall apply in relation to sub-paragraph (5) above as they apply in relation to section 168(1) of that Act.

Dismissal before request considered

10.—(1) This paragraph applies where—
(a) by virtue of paragraph 6 an employer is under a duty to consider a request;
(b) the employer dismisses the employee;
(c) that dismissal is the contemplated dismissal to which the request relates; and
(d) the operative date of termination would, but for sub-paragraph (3), fall on or before the day on which the employer gives notice in accordance with paragraph 7(6).
(2) Subject to sub-paragraph (4), the contract of employment shall continue in force for all purposes, including the purpose of determining for any purpose the period for which the employee has been continuously employed, until the day following that on which the notice under paragraph 7(6) is given.
(3) The day following the day on which that notice is given shall supersede—
(a) the date mentioned in sub-paragraph (1)(d) as the operative date of termination; and
(b) the date defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2) as the intended date of retirement.
(4) Any continuation of the contract of employment under sub-paragraph (2) shall be disregarded when determining the operative date of termination for the purposes of sections 98ZA to 98ZH of the 1996 Act.

Complaint to employment tribunal: failure to comply with paragraph 2

11.—(1) An employee may present a complaint to an employment tribunal that his employer has failed to comply with the duty to notify him in paragraph 2.
(2) A tribunal shall not consider a complaint under this paragraph unless the complaint is presented—
(a) before the end of the period of three months beginning with—
(i) the last day permitted to the employer by paragraph 2 for complying with the duty to notify, or
(ii) if the employee did not then know the date that would be the intended date of retirement, the first day on which he knew or should have known that date; or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(3) Where a tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the employee of such amount, not exceeding 8 weeks' pay, as the tribunal considers just and equitable in all the circumstances.
(4) Chapter 2 of Part 14 of the 1996 Act (calculation of a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the complaint was presented or, if earlier, the operative date of termination.
(5) The limit in section 227(1) of the 1996 Act(65) (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Complaint to employment tribunal: denial of right to be accompanied

12.—(1) An employee may present a complaint to an employment tribunal that his employer has failed, or threatened to fail, to comply with paragraph 9(2) or (3).
(2) A tribunal shall not consider a complaint under this paragraph in relation to a failure or

threat unless the complaint is presented—
(a) before the end of the period of three months beginning with the date of the failure or threat; or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(3) Where a tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks' pay.
(4) Chapter 2 of Part 14 of the 1996 Act (calculation of a week's pay) shall apply for the purposes of sub-paragraph (3); and in applying that Chapter the calculation date shall be taken to be the date on which the relevant meeting took place (or was to have taken place).
(5) The limit in section 227(1) of the 1996 Act (maximum amount of a week's pay) shall apply for the purposes of sub-paragraph (3).

Detriment and dismissal

13.—(1) An employee has the right not to be subjected to any detriment by any act by his employer done on the ground that he exercised or sought to exercise his right to be accompanied in accordance with paragraph 9.
(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he accompanied or sought to accompany an employee pursuant to a request under paragraph 9.
(3) Section 48 of the 1996 Act shall apply in relation to contraventions of sub-paragraph (1) or (2) above as it applies in relation to contraventions of certain sections of that Act.
(4) Sub-paragraph (2) does not apply where the worker is an employee and the detriment in question amounts to dismissal (within the meaning of Part 10 of the 1996 Act).
(5) An employee who is dismissed shall be regarded for the purposes of Part 10 of the 1996 Act as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that he—
(a) exercised or sought to exercise his right to be accompanied in accordance with paragraph 9, or
(b) accompanied or sought to accompany an employee pursuant to a request under that paragraph.
(6) Sections 128 to 132 of the 1996 Act (interim relief) shall apply in relation to dismissal for the reason specified in sub-paragraph (5)(a) or (b) above as they apply in relation to dismissal for a reason specified in section 128(1)(b) of that Act.

Appendix B: Council Directive 2000/78/EC of 27 November 2000 establishing a General Framework for Equal Treatment in Employment and Occupation (OJ 2000 L303/16)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 13 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the Opinion of the European Parliament(2),

Having regard to the Opinion of the Economic and Social Committee(3),

Having regard to the Opinion of the Committee of the Regions(4),

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(2) The principle of equal treatment between women and men is well established by an important body of Community law, in particular in Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions(5).

(3) In implementing the principle of equal treatment, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

(5) It is important to respect such fundamental rights and freedoms. This Directive does not prejudice freedom of association, including the right to establish unions with others and to join unions to defend one's interests.

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take

appropriate action for the social and economic integration of elderly and disabled people.

(7) The EC Treaty includes among its objectives the promotion of coordination between employment policies of the Member States. To this end, a new employment chapter was incorporated in the EC Treaty as a means of developing a coordinated European strategy for employment to promote a skilled, trained and adaptable workforce.

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

(10) On 29 June 2000 the Council adopted Directive 2000/43/EC(6) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. That Directive already provides protection against such discrimination in the field of employment and occupation.

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. This prohibition of discrimination should also apply to nationals of third countries but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation.

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to

perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

(22) This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

(24) The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.

(26) The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a

group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or sexual orientation where their main object is the promotion of the special needs of those persons.

(27) In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community(7), the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities(8), affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons.

(28) This Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State.

(29) Persons who have been subject to discrimination based on religion or belief, disability, age or sexual orientation should have adequate means of legal protection. To provide a more effective level of protection, associations or legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts.

(30) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(31) The rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation.

(32) Member States need not apply the rules on the burden of proof to proceedings in which it is for the court or other competent body to investigate the facts of the case. The procedures thus referred to are those in which the plaintiff is not required to prove the facts, which it is for the court or competent body to investigate.

(33) Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations to address different forms of discrimination at the workplace and to combat them.

(34) The need to promote peace and reconciliation between the major communities in Northern Ireland necessitates the incorporation of particular provisions into this Directive.

(35) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive.

(37) In accordance with the principle of subsidiarity set out in Article 5 of theEC Treaty, the objective of this Directive, namely the creation within the Community of a level playing-field as regards equality in employment and occupation, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and impact of the action, be better achieved at Community level. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in

Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

Article 4

Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these

activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Article 5

Reasonable accommodation for disabled persons

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.

Article 6

Justification of differences of treatment on grounds of age

1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are 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.

Such differences of treatment may include, among others:

(a) 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;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Article 7

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

Article 8

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.

2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

CHAPTER II

REMEDIES AND ENFORCEMENT

Article 9

Defence of rights

1. Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

2. Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.

3. Paragraphs 1 and 2 are without prejudice to national rules relating to time limits for bringing actions as regards the principle of equality of treatment.

Article 10

Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove

that there has been no breach of the principle of equal treatment.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any legal proceedings commenced in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 12

Dissemination of information

Member States shall take care that the provisions adopted pursuant to this Directive, together with the relevant provisions already in force in this field, are brought to the attention of the persons concerned by all appropriate means, for example at the workplace, throughout their territory.

Article 13

Social dialogue

1. Member States shall, in accordance with their national traditions and practice, take adequate measures to promote dialogue between the social partners with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct and through research or exchange of experiences and good practices.

2. Where consistent with their national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to conclude at the appropriate level agreements laying down anti-discrimination rules in the fields referred to in Article 3 which fall within the scope of collective bargaining. These agreements shall respect the minimum requirements laid down by this Directive and by the relevant national implementing measures.

Article 14

Dialogue with non-governmental organisations

Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on any of the grounds referred to in Article 1 with a view to promoting the principle of equal treatment.

CHAPTER III

PARTICULAR PROVISIONS

Article 15

Northern Ireland

1. In order to tackle the under-representation of one of the major religious communities in the police service of Northern Ireland, differences in treatment regarding recruitment into that service, including its support staff, shall not constitute discrimination insofar as those differences in treatment are expressly authorised by national legislation.

2. In order to maintain a balance of opportunity in employment for teachers in Northern Ireland while furthering the reconciliation of historical divisions between the major religious communities there, the provisions on religion or belief in this Directive shall not apply to the recruitment of teachers in schools in Northern Ireland in so far as this is expressly authorised by national legislation.

CHAPTER IV

FINAL PROVISIONS

Article 16

Compliance

Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended.

Article 17

Sanctions

Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 December 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 18

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 2 December 2003 at the latest or may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements. In such cases, Member States shall ensure that, no later than 2 December 2003, the social partners introduce the necessary measures by agreement, the Member States concerned being required to take any necessary measures to enable them at any time to be in a position to guarantee the results imposed by this Directive. They shall forthwith inform the Commission thereof.

In order to take account of particular conditions, Member States may, if necessary, have

an additional period of 3 years from 2 December 2003, that is to say a total of 6 years, to implement the provisions of this Directive on age and disability discrimination. In that event they shall inform the Commission forthwith. Any Member State which chooses to use this additional period shall report annually to the Commission on the steps it is taking to tackle age and disability discrimination and on the progress it is making towards implementation. The Commission shall report annually to the Council.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 19

Report

1. Member States shall communicate to the Commission, by 2 December 2005 at the latest and every five years thereafter, all the information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of this Directive.

2. The Commission's report shall take into account, as appropriate, the viewpoints of the social partners and relevant non-governmental organisations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In the light of the information received, this report shall include, if necessary, proposals to revise and update this Directive.

Article 20

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 21

Addressees: This Directive is addressed to the Member States.

(1) OJ C 177 E, 27.6.2000, p. 42.
(2) Opinion delivered on 12 October 2000 (not yet published in the Official Journal).
(3) OJ C 204, 18.7.2000, p. 82.
(4) OJ C 226, 8.8.2000, p. 1.
(5) OJ L 39, 14.2.1976, p. 40.
(6) OJ L 180, 19.7.2000, p. 22.
(7) OJ L 225, 12.8.1986, p. 43.
(8) OJ C 186, 2.7.1999, p. 3.

Appendix C: Self-certification ethics form

Applicant Details

Name Lynda Diane Irving	E-mail irvingl@coventry.ac.uk
Department Law	Date 22 June 2009
Course PhD/MPhil	Title of Project Challenging Ageism in Employment: An Analysis of the Implementation of Age Discrimination Legislation in England and Wales

Project Details

This project aims to review the Employment Equality (Age) Regulations 2006 by means of a library study and a statistical analysis of Tribunal decisions over the past four years, in order to develop our understanding of the problems of regulating ageist behaviour.

Participants in your research

Will the project involve human participants?		No

If you answered **Yes** to this questions, this may **not** be a low risk project.

If you are a student, please discuss your project with your Supervisor.

If you are a member of staff, please discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval or NHS or Medical Approval Routes.

Risk to Participants

Will the project involve human patients/clients, health professionals, and/or patient (client) data and/or health professional data?		No
Will any invasive physical procedure, including collecting tissue or other samples, be used in the research?		No
Is there a risk of physical discomfort to those taking part?		No
Is there a risk of psychological or emotional distress to those taking part?		No
Is there a risk of challenging the deeply held beliefs of those taking part?		No
Is there a risk that previous, current or proposed criminal or illegal acts will be revealed by those taking part?		No
Will the project involve giving any form of professional, medical or legal advice, either directly or indirectly to those taking part?		No

If you answered **Yes** to **any** of these questions, this may **not** be a low risk project.

If you are a student, please discuss your project with your Supervisor.

If you are a member of staff, please discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval or NHS or Medical Approval Routes.

Risk to Researcher

Will this project put you or others at risk of physical harm, injury or death?		No
Will project put you or others at risk of abduction, physical, mental or sexual abuse?		No
Will this project involve participating in acts that may cause psychological or emotional distress to you or to others?		No
Will this project involve observing acts which may cause psychological or emotional distress to you or to others?		No
Will this project involve reading about, listening to or viewing materials that may cause psychological or emotional distress to you or to others?		No
Will this project involve you disclosing personal data to the participants other than your name and the University as your contact and e-mail address?		No
Will this project involve you in unsupervised private discussion with people who are not already known to you?		No
Will this project potentially place you in the situation where you may receive unwelcome media attention?		No
Could the topic or results of this project be seen as illegal or attract the attention of the security services or other agencies?		No
Could the topic or results of this project be viewed as controversial by anyone?		No

If you answered **Yes** to **any** of these questions, this is **not** a low risk project. Please:

If you are a student, discuss your project with your Supervisor.

If you are a member of staff, discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval route.

Informed Consent of the Participant

Are any of the participants under the age of 18?		No
Are any of the participants unable mentally or physically to give consent?		No
Do you intend to observe the activities of individuals or groups without their knowledge and/or informed consent from each participant (or from his or her parent or guardian)?		No

If you answered **Yes** to **any** of these questions, this may **not** be a low risk project. Please:

If you are a student, discuss your project with your Supervisor.

If you are a member of staff, discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval route.

Participant Confidentiality and Data Protection

Will the project involve collecting data and information from human participants who will be identifiable in the final report?		No
Will information not already in the public domain about specific individuals or institutions be identifiable through data published or otherwise made available?		No
Do you intend to record, photograph or film individuals or groups without their knowledge or informed consent?		No
Do you intend to use the confidential information, knowledge or trade secrets gathered for any purpose other than this research project?		No

If you answered **Yes** to **any** of these questions, this may **not** be a low risk project:

If you are a student, discuss your project with your Supervisor.

If you are a member of staff, discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval or NHS or Medical Approval routes.

Gatekeeper Risk

Will this project involve collecting data outside University buildings?		No
Do you intend to collect data in shopping centres or other public places?		No
Do you intend to gather data within nurseries, schools or colleges?		No
Do you intend to gather data within National Health Service premises?		No

If you answered **Yes** to **any** of these questions, this is **not** a low risk project. Please:

If you are a student, discuss your project with your Supervisor.

If you are a member of staff, discuss your project with your Faculty Research Ethics Leader or use the Medium to High Risk Ethical Approval or NHS or Medical Approval routes.

Other Ethical Issues

Is there any other risk or issue not covered above that may pose a risk to you or any of the participants?		No
Will any activity associated with this project put you or the participants at an ethical, moral or legal risk?		No

If you answered **Yes** to these questions, this may **not** be a low risk project. Please:

If you are a student, discuss your project with your Supervisor.

If you are a member of staff, discuss your project with your Faculty Research Ethics Leader.

Principal Investigator Certification

If you answered **No** to **all** of the above questions, then you have described a low risk project. Please complete the following declaration to certify your project and keep a copy for your record as you may be asked for this at any time.

Agreed restrictions to project to allow Principal Investigator Certification

Please identify any restrictions to the project, agreed with your Supervisor or Faculty Research Ethics Leader to allow you to sign the Principal Investigator Certification declaration.

Principal Investigator's Declaration

Please ensure that you:

Tick all the boxes below and sign this checklist.

Students must get their Supervisor to countersign this declaration.

I believe that this project **does not require research ethics approval**. I have completed the checklist and kept a copy for my own records. I realise I may be asked to provide a copy of this checklist at any time.	√
I confirm that I have answered all relevant questions in this checklist honestly.	√
I confirm that I will carry out the project in the ways described in this checklist. I will immediately suspend research and request a new ethical approval if the project subsequently changes the information I have given in this checklist.	√

Signatures

If you submit this checklist and any attachments by e-mail, you should type your name in the signature space. An email attachment sent from your University inbox will be assumed to have been signed electronically.

Principal Investigator

Signed Lynda Diane Irving.....(Principal Investigator or Student)

Date 22 June 2009 .....

Students storing this checklist electronically must append to it an email from your Supervisor confirming that they are prepared to make the declaration above and to countersign this checklist. This-email will be taken as an electronic countersignature.

Student's Supervisor

Countersigned Jane Johnson.....(Supervisor)

Date 22 June 2009 .....

I have read this checklist and confirm that it covers all the ethical issues raised by this project fully and frankly. I also confirm that these issues have been discussed with the student and will continue to be reviewed in the course of supervision.

Appendix D: Judgment search sheet

Folio No.	Case No.	Location	Date	Age	Sex	Claimt repr	Occu/ pation	Empl size	Empl statu	Emp solve	Empl activi	Type o compla	Issue	Conc claim	Outcom	Multi/ Single claim	Additi sum	Compen/ sation/ Injury/f

Appendix E: Typical employer activity search interface record sheet

Sample result sheet for FAME company search giving information for employer variables: Case 134, ET 1300069/2006, Startin Group Ltd.

Appendix F: Codes used for input in SPPS PASW Version 17

Case characteristics

Date of entry of judgment on Register: Numeric
Employment Tribunal Office Codes:

1	Aberdeen
2	Ashford
3	Bedford
4	Birmingham
5	Bristol
6	Bury St Edmunds
7	Cardiff
8	Dundee
9	Edinburgh
10	Exeter
11	Glasgow
12	Leeds
13	Leicester
14	Liverpool
15	London Central
16	London East, Stratford
17	London South
18	Manchester
19	Newcastle
20	Nottingham
21	Reading
22	Sheffield
23	Shrewsbury
24	Southampton
25	Watford
91	Not applicable
999	Not known

Issue:

1	Discrimination on grounds of ‘old’ age
2	Discrimination on grounds of ‘young’ age
3	Discrimination on grounds of being in a particular age band
91	Not applicable
999	Not known

Type of complaint:

1	Recruitment
2	Job status
3	Dismissal
4	Retirement
5	Redundancy Selection
6	Harassment/victimisation
91	Not applicable
999	Not known

Outcome:
1 Time expired
2 Incorrect Procedure
3 Struck out
4 Successful for claimant
5 Settled
6 Withdrawn Claim
7 Case dismissed
8 Default judgment for claimant
9 Default judgment for respondent
91 Not applicable
999 Not known
Compensation awarded: Numeric
Injury to feelings award: Numeric

Claimant characteristics

Sex:
1 Male
2 Female
91 Not applicable
999 Not known
Age: Numeric
Occupation: Detailed description of ISCO88 available online at http://www.ilo.org/public/english/bureau/stat/isco/docs/struct08.xls (accessed 05/10/12)
1 Legislators, Managers and senior officials,
2 Professionals
3 Technicians and associate professionals
4 Clerical and Related Workers
5 Service workers and shop and market sales workers
6 Skilled agricultural and fishery workers
7 Craft and related trades workers
8 Plant and machine operators and assemblers
9 Elementary occupations – cleaners, labourers, street vendors etc.
0 Armed Forces
91 Not applicable
999 Not known
Claimant representation:
1 Self-representation
2 Other legal representation by union, solicitor etc.
91 Not applicable
999 Not known
Concurrent Claims:
1 Discrimination on the grounds of sex
SXD Sex discrimination SDA 1975 Sec 6 & 10
MAT Suffer a detriment and/or dismissal on grounds of pregnancy, child birth or maternity

EQP Failure to provide equal pay for equal value work EPA 1970 Sec 2 (1)

2 Discrimination on the grounds of race
RRD Race discrimination RRA 1976 Sec 54 & 64

3 Discrimination on the grounds of disability
DDA Suffered a detriment, discrimination and/or dismissal on grounds of disability or failure of an employer to make reasonable adjustments
DDA1 Unfairly dismissed because of disability DDA 1995 Sec 4(2)
DDA2 Suffered other detriment(s) because of disability DDA 1995 Sec 4
DDA3 Suffer discrimination in obtaining employment because of disability DDA 1995 Sec 4(1)
DDA4 Employer fails to make reasonable adjustment to accommodate a disability DDA 1995 S6

4 Discrimination on the grounds of sexual orientation
DSO Discrimination on the grounds of sexual orientation

5 Discrimination on the grounds of religion or belief
DRB Discrimination on the grounds of religion or belief

6 Breach of Contract
BOC Breach of contract

7 Part-time worker
PTE Suffer less favourable treatment and/or dismissal as a result of being a part-time employee

8 Redundancy
RPT Failure to pay a redundancy payment ERA 1996 Sec 163 & 164

9 Other

91 Not applicable

Employer characteristics

Employer size:

1 Micro – less than 10 employees and a turnover or balance sheet total of not more than £2 million.

2 Small - up to 50 employees with a turnover of not more than £6.5 million and a balance sheet total of not more than £3.26 million

3 Medium – 50 to 250 employees, a turnover of not more than £25.9 million and a balance sheet total of not more than £12.9 million

4 Large – over 250 employees a turnover of more than £25.9 million and a balance sheet total of more than £12.9 million

91 Not applicable

999 Not known

Employer status:

'Business Link' guide developed with Companies House and HM Revenue and Customs available online at http://www.businesslink.gov.uk (accessed 05/10/12)

1 Sole Trader

2 Partnership including Limited liability partnership (LLP)

3 Private Limited Company

4 Public Limited Company

5 Government Agency or Public Body

6 Community Interest Company (CIC), Friendly Society, Provident Society, Members Club, Social Enterprise, Guarantee Company or Charity
7 Other, including Overseas Company
91 Not applicable
999 Not known

Employer solvency:

1 Employer solvent
2 Employer in administration/liquidation/insolvent
91 Not applicable
999 Not known

Employer activity: SIC-07 code (amended December 2009) to four figures produces a numeric code, available online at http://www.statistics.gov.uk/methods_quality/sic/downloads/SIC2007explanatorynotes.pdf (accessed 04/10/12)

A Agriculture, Forestry and Fishing
B Mining and quarrying
C Manufacturing
D Electricity, gas, steam and air conditioning supply
E Water supply, sewerage, waste management and remediation activities
F Construction
G Wholesale and retail trade; repair of motor vehicles and motorcycles
H Transportation and storage
I Accommodation and food service activities
J Information and communication
K Financial and insurance activities
L Real estate activities
M Professional, scientific and technical activities
N Administrative and support service activities
O Public administration and defence; compulsory social security
P Education
Q Human health and social work activities
R Arts, entertainment and recreation
S Other service activities
T Activities of households as employers;
U Activities of extraterritorial organizations and bodies

Appendix G: Data used to calculate number of workers per employer activity (Chapter 5.6, Figure 5.25)

Activity[2]	**SIC 2007 code**	**No of employees in industry**	**No of claims settled + successful at tribunal**
Administration of the State	8410	5,672,000[3]	60
Construction of buildings	4110	2,068,800[4]	27
Hospital activities	8610	1,599,000[5]	24
Sale of motor vehicles	4510	188,789[6]	23
Legal activities	6910	160,563[7]	18
Restaurants and mobile food activities	5610	614,400[8]	15
Real estate agencies	6830	80,000[9]	14
Secondary education	8530	740,800[10]	13
Higher education	8540	325,940[11]	11
Other human health activities	8690	377,000[12]	10
Postal activities	5310	232,500[13]	9
Justice and judicial activities	8423	82,640[14]	5

[2] All websites on this page accessed on 06/10/12

[3] Office for National Statistics, *Public Sector Employment* (ONS 2011) 18 <http://www.statistics.gov.uk/pdfdir/pse0311.pdf>

[4] Office for National Statistics, *Workforce Jobs by Industry* (ONS 2011) Table 2.06 <http://www.statistics.gov.uk/elmr/06_10/2.asp>

[5] Office for National Statistics, *Public Sector Employment* (ONS 2011) 19 <http://www.statistics.gov.uk/pdfdir/pse0311.pdf>

[6] Dept. of Business, Innovation and Skills, *Finding Out About Vehicle Sales* (The Stationery Office 2010) 2 <http://readingroom.skillsfundingagency.bis.gov.uk/sfa/nextstep/lmib/Next%20Step%20LMI%20Bitesize%20-%20IMI%20automotive%20-%20vehicle%20sales%20-%20Jun%202010.pdf>

[7] The Law Society, *Annual Statistical Report 2009* (2009) 9 <http://www.lawsociety.org.uk/secure/file/183555/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2009report.pdf>: The General Council of the Bar of England and Wales, *Pilot Statistical Report* (2011) 13 <http://www.barcouncil.org.uk/assets/documents/Bar%20Barometer,%20March%202011.pdf>

[8] Dept. of Business, Innovation and Skills, *Finding Out About Restaurants* (The Stationery Office 2010) 1 <http://readingroom.skillsfundingagency.bis.gov.uk/sfa/nextstep/lmib/Next%20Step%20LMI%20Bitesize%20-%20People%201st%20-%20restaurants%20%20-%20Jun%202010.pdf>

[9] Dept. of Business, Innovation and Skills, *Finding Out About Property and Planning* (The Stationery Office 2010) 2 <http://readingroom.skillsfundingagency.bis.gov.uk/sfa/cas/cas-assetskillspropertyv2may2010.pdf>

[10] Dept. of Business, Innovation and Skills, *School Workforce in England* (The Stationery Office 2010) - Maintained Sector Only <http://www.education.gov.uk/rsgateway/DB/SFR/s000743/index.shtml>

[11] Dept. of Business, Innovation and Skills, *Finding Out About Higher Education* (The Stationery Office 2010) 1 <http://readingroom.skillsfundingagency.bis.gov.uk/sfa/nextstep/lmib/Next%20Step%20LMI%20Bitesize%20-%20LLUK%20-%20higher%20education%20June%202010.pdf>

[12] Office for National Statistics, *Public Sector Employment* (ONS 2011) 21 <http://www.statistics.gov.uk/pdfdir/pse0311.pdf>

[13] Dept. of Business, Innovation and Skills, *Finding Out About Postal Services* (The Stationery Office 2010) 1 <http://readingroom.skillsfundingagency.bis.gov.uk/sfa/nextstep/lmib/Next%20Step%20LMI%20Bitesize%20-%20Skills%20for%20Logistics%20-%20postal%20services%20-%20Jun%202010.pdf>

[14] Office for National Statistics, *Public Sector Employment* (ONS 2011) 25 <http://www.statistics.gov.uk/pdfdir/pse0311.pdf>

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www.bc.edu/research/agingandwork	Sloan Center on Aging and Work Database
www.bvdinfo.com	FAME business directory
http://www.dango.bham.ac.uk/record_details.asp?id=1007&recordType=coll	Campaign Against Age Discrimination in Employment
www.companieshouse.gov.uk	Companies House
www.cota.org.au	Australian Council on the Ageing
www.cps.unt.edu/natla/rsrc/index.html	The National Academy for Teaching and Learning about Aging (NATLA), Texas
www.ecu.ac.uk	Higher Education Equality Challenge Unit
www.efa.org.uk	Employers Forum on Age
www.icaa.cc	International Council on Active Aging
http://www.bis.gov.uk/insolvency	UK Insolvency Service
www.kompass.com	Business Directory
www.macraesbluebook.co.uk	Business Directory
www.niace.org.uk/crow/index.htm	Centre for Research into the Older Workforce
www.shrm.org	Society for Human Resource Management
www.statistics.gov.uk	Office for National Statistics
www.taen.org.uk	The Age and Employment Network
www.tmt.missouri.edu/publications.html	Terror Management Theory at the University of Missouri-Columbia