
Mandatory Retirement in the United Kingdom, Canada and the United States of America

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About the authors and this paper

Casey Wunsch and Jaya Vimala Raman studied for their MSc degrees in International Employment Relations and Human Resource Management at the London School of Economics and Political Science (LSE) in 2008 – 2009. This paper, edited and published by TAEN, draws on their MSc dissertations: *Justified Age Discrimination? Examining the case of mandatory retirement in the United Kingdom, compared to the experiences of Canada and the United States of America* (Casey Wunsch) and *Ageing, Employment and Age Discrimination: An Overview* (Jaya Vimala Raman). TAEN was approached by Dr Eddy Donnelly Seear, Fellow in the Employment Relations and Organisational Behaviour Group in the Department of Management at the London School of Economics, to help these students identify useful and topical subjects for their dissertations. In our view, their work has provided a timely opportunity to consider mandatory retirement from a comparative perspective.

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Abstract

Under the Employment Equality (Age) Discrimination Regulations 2006 (SI No. 1031), the UK government legalised mandatory retirement with the inclusion of Regulation 30, which introduced a default retirement age (DRA) of 65. However, the Government undertook to review the need for the default retirement age in 2011.

Heyday, a subsidiary of Age Concern England, mounted a legal challenge in late 2006 to the Government's inclusion of the default retirement age within the Regulations, arguing that the legislation did not properly implement the European Union Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) in respect of retirement age. The High Court in the UK referred the case to the European Court of Justice.

In March 2009, the European Court of Justice clarified that a mandatory retirement age can only be in place for socially justifiable objectives, which will influence current and future cases contesting Regulation 30 and mandatory retirement policies. The European Court of Justice referred the case back to the High Court. In early July 2009, the Government announced that it would bring forward its planned review of Regulation 30 to 2010 from 2011. In late September 2009, the High Court ruled that the default retirement age was lawful.

To the older workers forced to retire under mandatory retirement, the debate over its justification will always be significant. Given that the review is now effectively under way, it is timely to consider whether Regulation 30 and its legalisation of mandatory retirement should be removed. It is important to reflect on the controversial experience of mandatory retirement in the UK, and for comparative insights on the experience of mandatory retirement in the USA and Canada.

This paper reviews the much longer mandatory retirement legislative history in Canada and the USA where more participation impact studies have been conducted. It also examines the main arguments by employers used to support mandatory retirement, common in the UK, Canada and the USA, showing apparent weaknesses in each argument. After reviewing the country comparisons, studies, and weaknesses in the employer arguments, the authors suggest that Regulation 30 lacks justification and there should be no default retirement age.

Introduction

Mandatory retirement is the practice of requiring employees to retire at a certain age, most commonly at age 65 (Hepple 2003: 89). This is either effected by law or by a clause in the employment contract. There is considerable debate over whether mandatory retirement should be phased out as an employment practice. Since most mandatory retirement schemes specify a certain age at which employees must retire, it can be considered explicitly discriminatory and arbitrary since it is not based on an evaluation of the competency of the individual.

Many people saw the Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) as the spur for the United Kingdom to enact legislation which would prohibit all discrimination. This was especially true for age discrimination. For many years, the Government had largely taken a voluntarist route toward combating age discrimination (Macnicol 2007). The new legislation could send a powerful message that age discrimination would not be tolerated. However, when the Employment Equality (Age) Regulations 2006 came into force, a controversial, and to some, surprising exception was included (SI No. 1031). Regulation 30 introduced a “default retirement age” of 65 which enabled (but did not compel) employers to set a mandatory retirement age of 65 or over. Employees have the right to request to work on after retirement age, but employers are not required to grant such requests. The Government thus legalised employers’ ability to discriminate against older workers in relation to retirement.

On 5 March 2009, the European Court of Justice (ECJ) ruled that mandatory retirement would be allowed if it was “objectively and reasonably” justified for social policy objectives only (C-388/07). The case, which had been brought in 2006 by Heyday, a subsidiary of Age Concern, and challenged the legitimacy of the default retirement age, was referred back to the UK High Court for a ruling.

In early July 2009, the Government announced that it would bring forward its planned review of Regulation 30 to 2010 from 2011. In September 2009, the High Court ruled that the default retirement age was lawful. However, although the judge Mr Justice Blake decided that the default retirement age did comply with the EU Directive, he explained in his judgment there was a case for a change in the law, and that he would have ordered a review of the need for a default retirement age of 65 if the Government had not already announced it was bringing forward its own review (paragraph 128).

The Government department with lead responsibility for the legislation was the Department of Trade and Industry, now renamed the Department for Business, Innovation and Skills (BIS). The review will be lead by civil servants in BIS, but with the Department for Work and Pensions contributing to the process and the final decisions regarding the future being made by a cabinet committee.

The aim of this paper is to review the history of mandatory retirement, to analyse employer arguments for its retention and to consider whether there are grounds for keeping or repealing Regulation 30. As the legislation is relatively new for the UK, the paper will look at the history of mandatory retirement in the USA and Canada and at the impact studies conducted in the two countries to form a more broadly based view. Both countries have had longer debates on the issue than the UK. The employer arguments are analysed to see if they provide justification for having mandatory retirement in the first place.

Section one defines mandatory retirement and its place within discrimination legislation in general. Section two focuses on the development and current standing of age discrimination legislation and relates to mandatory retirement in the UK, Canada, and the USA. This section also provides an overview on retirement policies in the three countries, as they have a great influence on retirement ages in general. A summary table compares the UK, Canada, and the USA, detailing the similarities and differences. Section three examines the few mandatory retirement participation impact studies available, and discusses their apparent weaknesses. Section four shows how each of the main arguments employers use to support mandatory retirement are either based on inaccurate stereotypes or, if accurate, only relate to a small number of employees. The conclusion then brings together the country policy comparison, impact studies, and employer stereotype arguments to demonstrate that Regulation 30 should be removed on the basis of the information available at the present time.

1. Mandatory retirement in the context of age discrimination

Mandatory retirement has been widely seen as age discrimination (MacGregor 2005 and Munroe 2005, cited in Ibbott et al 2006: 171): “It is a blunt rule that requires people to retire at a specified age – it is not tied to any qualification or occupational requirement” (Gunderson 2003: 35). Yet, it is still viewed by many to be completely acceptable for a variety of reasons (Levine 1988). Some have even argued that it is not discriminatory since it is usually limited to employment (Levine 1988; Riley et al 1972).

The basic legislative structure on direct or indirect discrimination, harassment, and victimisation for age discrimination in the UK is very similar to that for gender or race discrimination. But, the retirement age provision is very different (Swift 2006). What is striking is that what might constitute indifference in relation to age discrimination, would cause outrage in the context of gender or race discrimination (Gunderson 2003; Ibbott et al 2006). The views on age discrimination have not changed as much as those on gender and race, which is partly due to the nature of the discrimination (Ibbott et al 2006; Loretto et al 2007; Walker 2006).

Many researchers have concluded that much age discrimination in general, especially as it relates to mandatory retirement ages, is based on inaccurate stereotypes (Gunderson 2003; Levine 1988; Loretto et al 2007; Neumark 2001; Posner 1995; Spencer & Fredman 2003). Negative stereotypes can cause employers to treat older workers differently due to misconceptions they have about them. These will be further discussed in section four.

Age discrimination does not define a discrete group in the same way gender or race does. We start off young and then eventually become older (Posner 1995). The ‘us versus them’ mentality is not always relevant, since older workers themselves have often been responsible for hiring and firing (Neumark 2001).

2. Historical review of mandatory retirement and pension policies

2.1 The United Kingdom

On 1 October 2006, the Employment Equality (Age) Regulations came into force to tackle direct and indirect age discrimination, harassment, and victimisation in employment (SI No. 1031). The new legislation covers all age groups from young to old. It exempts certain age based practices, such as pensions. One of the most controversial elements in the legislation, and, to many, surprising, was Regulation 30 that allowed employers to set a mandatory retirement age of 65 (Bytheway 2007; Keldusild 2009).

The legislation states that while the employer can justify dismissal on the grounds of age at 65 or over, they have to give employees 6–12 months' notice of their intention to retire them (LRD 2008). The employee has the right to request to continue working beyond 65 (or the retirement age the employer sets if later than 65), and with the employer's approval, can continue working. However, the employer has no obligation to agree to the employee's request or to provide a reason to the employee for turning it down. If the employer sets a retirement age that is lower than 65, the employer needs to be prepared to justify the reason (LRD 2008). The upper age limits for unfair dismissals and redundancy claims have been removed (ACAS 2006).

The legislation was implemented to comply with the Council Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC). The Directive called for all EU member states to create and / or redesign legislation to prohibit direct and indirect discrimination on the basis of gender, race, sexual orientation, religion, belief, disability and age (2000/78/EC; OECD 2004). Given the wide variety of practices within member states concerning mandatory retirement, it was not surprising that the Directive did not mention age limits (Hornstein 2001). Rather, the preamble of the Directive states, "this Directive shall be without prejudice to national provisions laying down retirement age" (2000/78/EC: recital 14).

The UK had taken a voluntary approach towards issues of age discrimination before it was compelled by the EU to introduce age discrimination legislation (Macnicol 2007). During John Major's Conservative government (1990-1997), most efforts to stop age discrimination took the form of limited information campaigns (Ebbinghaus 2006). The new Labour government which came into power in 1997 was more proactive, but still very cautious (Macnicol 2007). The Government established a non-statutory Code of Practice for Age Diversity (Ebbinghaus 2006).

Although the UK had no statutory retirement age, 65 was commonly believed to be the "normal retirement age", which was in line with the age men were eligible for the state pension at the time (Kilpatrick 2007). The Employment Rights Act of 1996 (c. 18) officially set 65 as the normal retirement age for unfair dismissal cases if the employer did not have one (DTI 2003). Employers though could still impose an organisation-wide normal retirement age; and employees could not claim unfair dismissal when forced to retire in line with the organisation's set age (Kilpatrick 2007; Spencer & Fredman 2003). A majority of employers set a specific age ranging between 60-65 (Spencer & Fredman 2003).

Many commentators saw the opportunity in the development of the new legislation to send a clear message to UK citizens that age discrimination would not be tolerated, especially in relation to retirement age. However, there is a view in the UK that legislation relating to age discrimination has paid mere lip service to the idea of age equality as laid out in the Directive framework, since it addresses age discrimination in employment only (Swift 2006: 229). The Department for Work and Pensions paper *Simplicity, Security, and Choice: Working and Saving for Retirement* stated: "(...) under the Directive, compulsory retirement ages are likely to be unlawful unless employers can show that they are objectively justified" (DWP 2002: 105). The Government was leaning towards making mandatory retirement ages unlawful, but was seeking views about the possible age being set at 70 (DTI 2003; Smeaton & McKay 2003).

The Department of Trade and Industry's 2003 consultation paper *Age Matters* found that 57 per cent of respondents were against employers forcing people to retire at a certain age. And, out of the 43 per cent of respondents that were in favour, only 68 per cent thought that a legal limit on mandatory retirement should be put in place. The paper concluded that "on the whole, the majority of organisations, whether businesses, their representative organisations, unions, not-for-profit organisations or charities were clear that people want flexibility to choose when they retire, or to retire gradually" (DTI 2003: 25).

In a study by the Chartered Institute of Personnel and Development, 60 per cent of employee respondents said that there should not be a mandatory retirement age (CIPD 2003). An ICM poll conducted for the Institute of Public Policy Research (IPPR) found that only three per cent of the public favoured mandatory retirement at 70, "49 per cent thought employees should 'be able to work for as long as they want to' and 30 per cent 'as long as employers think they are competent to do so'. Sixteen per cent thought there should be retirement at 65" (Spencer & Fredman 2003: 70).

All the signs seemed to be pointing towards the abolition of a mandatory retirement age – with the support of public opinion. However, the Department of Trade and Industry pushed for a default retirement age to be included in the legislation in opposition to the Department for Work and Pensions, which wanted it prohibited (Turner 2004). In the end, it was set at men's state pension age of 65 (HC Deb 2004; O'Connell 2005).

In adopting a national default retirement age, the Government appeared to be responding to some employers' concerns and the CBI's arguments in favour of mandatory retirement ages. The 2005 Government consultation document states:

"In setting the default age, we have taken careful note of a number of representations we received in the course of consultations, which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. Whilst an increasing number of employers are able to organise their business around the best practice of having no retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. *This is our primary reason for setting the default retirement age* (italics added for emphasis)" (DTI 2005: paragraph 6.1.14).

It is noteworthy that the same 2005 consultation elicited opposing views from the employers and unions that responded: while most employers supported the

introduction of a default retirement age, all the unions opposed it (Sargeant 2006). Thus, in opting to set a default retirement age, it appears that the Government was taking the part of those employers that promoted “poor practice” as, according to its own statement above it regards “best practice” in business organisation as having no retirement age.

The Government further emphasised the acceptability of a variety of legitimate aims in support of introducing a default retirement age, stating: “A wide variety of aims may be considered as legitimate (...) Economic factors such as business needs and considerations of efficiency may also be legitimate aims” (DTI 2005: paragraph 4.1.16). It is thus tempting to deduce that the Government was more concerned about employers’ individual reasons for adopting retirement ages than any social policy objectives.

2.1.1 Current action

Before the Employment Equality (Age) Regulations came into effect, Heyday, a membership organisation and subsidiary of Age Concern England lodged a case against the Secretary of State for Trade and Industry, which was heard in the European Court of Justice (ECJ) (C-388/07). The central challenge of the case was the interpretation of Articles 2 and 6 (Justification of differences of treatment on grounds of age) of the Directive in respect of Regulation 30 on the set retirement age of 65 (Connolly 2009).

The ECJ found in favour of the UK government. However, it clarified Articles 2 and 6 of the Directive, which may well prove useful in future cases (OJ C 102/08, 1.5.2009). The ECJ explained that although Article 2 on direct discrimination could be used as a defence by employers for their policies, its use must be in accordance with Article 6. This states that exceptions need to be “objectively and reasonably” justified. The ECJ’s judgment further defined this as being restricted to social policy objectives, so:

“By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers” (paragraph 46).

The ECJ was not asked to decide on the matter of whether or not the UK’s retirement age was socially justifiable, and so did not offer any opinion on the matter (Connolly 2009). The ECJ referred that decision back to the UK High Court. The High Court ruled that the default retirement age was lawful. However, although Mr Justice Blake decided that the default retirement age did comply with the EU Directive, he explained in his judgement:

“It will, however, be apparent from my observations at [128] above that the position might have been different if the government had not announced its timely review. I cannot presently see how 65 could remain as a DRA after the review” (paragraph 130).

Public opinion has been strengthening, according to an April 2009 ICM poll for Age Concern and Help the Aged: “Almost nine in 10 people think it is unfair that employees aged 65 can be forced to retire purely on the basis of their age” (Age Concern & Help the Aged 2009: 7). Even the OECD stated: “While in the past it

may have been part of an efficient arrangement to encourage greater work effort by workers, mandatory retirement is incompatible with a general policy thrust towards removing age barriers to employment and to offering greater choice to workers over the work-retirement decision” (2006: 12). In addition, the Department for Work and Pensions is urging the Government to remove Regulation 30 that “contradicts the Government’s wider social policy and labour market objectives to raise the average retirement age and allow people to continue to work and save for their retirement” (Age Concern 2009: 1).

The Equality Bill, published on 27 April 2009, extends the prohibition of age discrimination to the provision of goods, services and facilities and combines all discrimination legislation into one Bill (HC Bill (2008-9) [131]). The Government has so far decided not to make any amendments to the new Bill relating to the removal of the default retirement age. However, on 13 July 2009, the Government announced it would bring forward by a year to 2010 the review of Regulation 30, when the Department of Business, Innovation, and Skills (BIS) would conduct another evidence-based review (Timmins 2009). In the meantime, lessons can be learned from Canada and the USA.

2.2 Canada

Canada has a federal structure in which power is divided between the federal central government in Ottawa and 10 provincial governments. There are three other territories governed by the federal government to which special powers have been delegated. Thus decision making powers vary between federal and provincial levels, depending on the issue (Gunderson 2001) and anti-discrimination legislation is therefore complicated (HRSDC 2008).

Legislation outlawing age discrimination was first introduced in 1964 by the province of British Columbia. By the 1970s, such legislation was included in the human rights legislation of all provinces (Hornstein 2001). In 1982, Canada implemented an overarching federal Charter of Rights and Freedoms included in the Constitution Act (Gunderson 2004). The Charter encompasses several different laws covering items such as workers’ compensation, health and safety and collective bargaining. It also prohibits discrimination against individuals on the grounds of race, national or ethnic origin, colour, religion, sex, mental or physical disability or age.

Overall, this means that age discrimination is unlawful both at provincial level, under human rights legislation and at federal level, under the Charter of Rights and Freedoms. However, individual provinces dealt with mandatory retirement differently for many years (Ibbott et al 2006). Quebec, in 1982, and Manitoba, in 1983, became the first provinces to make mandatory retirement unlawful in response to the Charter (Gunderson 2004; Shannon & Grierson 2004). Quebec uniquely also included this in its labour standards legislation (Gunderson 2004). Yet, in the decision of the case *Parent v The Gazette (1991)*, the Quebec Court allowed a collective agreement that guaranteed employment until 65 and enforced a fair redundancy policy to retire older employees (*Parent v The Gazette*, 81 D.L.R (4th) (A.Q.) (1991)).

The federal Government, Quebec, Manitoba, Alberta, New Brunswick, Nova Scotia and Prince Edward Island abolished mandatory retirement at 65 unless there were bona fide occupational qualifications for retaining it (BFOQ) (HRSDC 2008). This

exception was based on the premise that direct age discrimination at the age of 65 should be allowed if it was needed to ensure adequate performance and safety (Gunderson 2001). The employer, however, would need to have a strong case justifying the policy.

In *Mckinney v University of Guelph*, 3 S.C.R. 229 (1990), the Supreme Court upheld allowing contractual mandatory retirement. It acknowledged that mandatory retirement was discriminatory, but similar to the ECJ ruling in the UK *Heyday* case, stated it was “demonstrably justified in a free and democratic society” under Section 15(1) of the Charter (Gunderson 2003: 322). The justices believed the social costs did not outweigh the social objectives on pensions and younger workers (Gunderson 2001). This was partly because they held the view that “on average there is a decline in intellectual ability from the age of 60 onward” (*Mckinney v University of Geulph* 1990: minimal impairment, paragraph 10).

The irony is that Supreme Court justices can hold office until the age of 75, and the average age of the justices hearing the case was 65. Three of them were over 65 (Kesselmann 2004). Additionally, they were deciding on the mandatory retirement of university professors, who have very similar skills requirements as Supreme Court justices (Kesselmann 2004).

Nonetheless, the outcome of the case continued to influence subsequent Supreme Court cases. It left the power to decide on mandatory retirement policy in the hands of the provinces (OHRC 2000). And, until recently, mandatory retirement at age 65 or over continued to be lawful in Ontario, British Columbia, Saskatchewan and Newfoundland and Labrador (OECD 2005a).

In the past few years, most of the political parties have called for the issue of mandatory retirement to be reconsidered (Ibbott et al 2006). Paul Martin, on becoming Prime Minister at the age of 65, supported the renewal of a national debate on the subject (Chase 2003, cited in Ibbott et al 2006: 161). Even the unions and employers began to reconsider mandatory retirement (Ibbott et al 2006). In response to further research disproving previous arguments for mandatory retirement and to the growing concern about the ageing population. This is an issue that also affects the UK and the USA (Danson 2007; Ibbott et al 2006; OECD 2005a; OECD 2006).

Ontario was the first to prohibit mandatory retirement out of the five provinces that still allowed it; the prohibition came into force on 12 December 2006 (HRSDC 2008). Newfoundland and Labrador quickly followed suit on 26 May 2007; British Columbia did so on 1 January 2008, and Saskatchewan on 17 November 2007 (HRSDC 2008). Finally, on 1 July 2009, Nova Scotia’s amendments came into force (Von Wacher 2002). So 27 years after the Charter was introduced, mandatory retirement was prohibited (except where bona fide occupational qualifications applied) in all jurisdictions of Canada.

As the ban on mandatory retirement has been so recent in Canada, it is hard to gauge what the long-term impact on the labour market will be. We have to turn to the USA for that.

2.3 The United States of America

When it comes to understanding the possible design or potential of age legislation, especially in reference to mandatory retirement, many analysts look towards the USA (Hornstein 2001). Although the USA is mostly known, in this context, for its Age Discrimination in Employment Act 1967 (ADEA), mandatory retirement practices and legislation were established before 1967.

Mandatory retirement was not common until the first pension systems became widespread in the 1940s (Posner 1995). The first pension system in the USA was proposed by the American Express Company in 1875 and fully introduced by the Baltimore and Ohio Railroad in 1884 (Levine 1988). Not until after the Second World War did the pension systems extend to the ordinary worker (Posner 1995). “The pension and mandatory retirement system were interrelated because the first helped legitimate the second” (Levine 1988: 21). Slowly even Government departments began to adopt mandatory retirement practices (Levine 1988).

It was not long before concern developed over this practice. Future labour supply issues were becoming more apparent, even in the 1950s (Macnicol 2007). In 1953, one *Time* article stressed the importance of removing mandatory retirement practices in response to concerns over retirement trends and the increasing older population (*Time* 1953, cited in Macnicol 2007: 30). This issue combined with those arising from the civil rights movement in the 1960s to push for an end to mandatory retirement practices (Crawshaw-Lewis 1996; Macnicol 2007).

It had been intended to include age discrimination in Title VII of the Civil Rights Bill 1964, but its inclusion in legislation was postponed until official studies established that age was a legitimate area requiring discrimination legislation coverage (US Department of Labour 1965). “The justification for the ADEA was therefore uncannily similar to the mixture of ‘social justice’ and ‘labour supply’ justifications that figure prominently in today’s British debate” (Macnicol 2007: 32).

The ADEA was originally passed in 1967. It protected all workers between the ages of 40 and 65 from age discrimination in workplaces with more than 20 employees. This meant that people of 65 or over could be forced to retire. Prior to the ADEA, eight states already had some form of age discrimination legislation as part of the states’ Fair Employment Practices Acts, but none prohibited mandatory retirement at that time (Neumark & Stock 1999). Enforcement of the ADEA was by the existing state agencies or those in the process of being set up (US code Section 633, cited in Neumark 2001: 46).

Responding to similar pressures that led to the introduction of the ADEA in 1967, the Carter administration amended the ADEA for the first time in 1978 (Ebbinghaus 2006). This increased the mandatory retirement age to 70 and eliminated mandatory retirement for federal employees (Neumark 2001). It allowed employers with tenured employees, such as universities, to wait until 1982 to implement the new age cap (Clark & Hammond 2001). Mandatory retirement was finally abolished under the Reagan administration in 1986 with very limited exceptions (Ebbinghaus 2006). Again, implementation of the new age cap was delayed for employers with tenured employees, until 1994 (Clark & Hammond 2001). By the time of the 1986 amendment, 24 states had already created their own legislation banning mandatory retirement, some as early as the beginning of the 1970s (Levine 1988; Neumark & Stock 1999).

The awareness and enforcement of age discrimination legislation rose dramatically in 1979 when the Equal Employment Opportunity Commission (EEOC) took over enforcement duties from the Department of Labor (Schuster & Miller 1984; Von Wacher 2002). Between 1975 and 1979 the Department of Labor enforced the legislation in about 5,000 cases a year; by 1981 the EEOC was enforcing some 9,500 cases a year (McConnell 1983, cited in Von Wacher 2002: 5).

From 1997 to 2008 age discrimination cases made up an average 21.73 per cent of all receipts to the EEOC, and secured 23.16 per cent of financial compensation (EEOC 2009a; EEOC 2009b). Although the percentage of receipts was similar during the 1980s, the secured financial compensation was much higher. In the 1980s age discrimination cases made up 25 per cent of the EEOC's case load, but brought in over 50 per cent of the secured financial compensation (Von Wacher 2002). Most employers settle prior to cases going to court if they believe they cannot win. Posner (1995) studied all the American court cases from 1 January 1993 and 30 June 1994 in relation to the ADEA. He found it had become more difficult to prove unfair dismissal based on grounds of age as employers had become more sophisticated in the tactics they use to work around the charges. When the Act was first enacted, cases contained open age discrimination practice charges, but since the 'you can't teach an old dog new tricks' evidence is not as common now, a plaintiff has the more difficult job of showing that an equally competent younger employer was treated better than him / her (Posner 1995: 335).

2.4 Pension systems

The UK government has found that since 1979 the fall in worker participation of people over the age of 50 has cost the public purse £3-5 billion in lost taxes and the payment of additional benefits and about £16 billion a year in lost GDP (Cabinet Office 2000). The most recent data from the OECD showed that in 2006 four workers supported each pensioner. By 2050 the dependency ratio is projected to fall to two workers supporting each pensioner (OECD 2006). Given that the population is ageing, the sustainability of state pension systems and retirement plans has been called into question (OECD 2006). For this reason, in a speech in 2007, the Rt Hon John Hutton MP, Secretary of State for Work and Pensions 2005-2007, spoke about how employers will over time drop mandatory retirement policies to encourage wider labour force participation and to ease the potential strain on the pension system (Hutton 2007). He said that his department had already abolished mandatory retirement.

The importance of occupational pension schemes in the UK has been increasing as the value of the state pension system has been decreasing. "Employer contributions to funded occupational pension schemes rose from £16.5 billion in 2001 to £38.7 billion in 2006 and then fell to £37.0 billion in 2007, as funded private sector defined benefit schemes moved from deficit to surplus" (ONS 2009a). Between 2007 and 2008, the total membership of UK occupational pension schemes rose by 1.0 million (ONS 2009b). Membership in defined benefit schemes remained relatively unchanged, whereas membership in defined contribution schemes increased from 0.9 million to 1.0 million between 2007 and 2008 (ONS 2009b). In Canada, as of 2002, 46 per cent of employees were covered by an employer retirement scheme, 83 per cent of which were defined benefit schemes (OECD 2005a).

Under defined benefit schemes, pension benefits accrue according to a formula that normally incorporates salary and length of service, but which can also include rules regarding other factors such as age at retirement. Both the employer and the employee are responsible for funding such schemes (OECD 2005a). In the current economic climate, many employers are finding that defined benefit schemes are proving burdensome (BBC News 2009) and companies in the UK and the USA are increasingly turning to introducing defined contribution schemes. These shift the risk to the employee as well as decisions about the levels of contributions instead of a more rigid system that pays a fixed pension to the employee based on a fixed employment tenure. Defined contribution schemes have worked well in the USA when employees choose to delay their retirement (Ebbinghaus 2006).

The evidence from the USA is that in 1975 two-thirds of the workforce were fully covered and one-third partly covered by defined benefit schemes. By 1992, however, only 19 per cent of workers in the USA were covered by defined benefit schemes while 44 per cent were covered by defined contribution schemes and 37 per cent by a mixed plan (apRoberts & Turner 1997, cited in Ebbinghaus 2006: 168). Since then, the number of defined contribution schemes has continued to rise (OECD 2005b). Though employer pension schemes are important in influencing retirement ages, it has been found that the state pension age has exerted greater influence (OECD 2005b). Discounting the recent trend for taking early retirement, the normal retirement age has had a strong correlation with the state pension age, which is when the bulk of people have taken retirement (Baker et al 2003).

For many years, the USA had a social security retirement age of 65, which in 1935 was three years beyond the average lifespan of the typical American (*The Economist* 2009). The spending on public pensions represented only 0.2 per cent of US GDP in 1935, compared with more than seven per cent of the GDP today, as lifespans have continued to grow. However, state pension age has only slowly increased (*The Economist* 2009). Since 1983, successive US administrations have gradually increased the retirement age from 65 for people born before 1939 to 67 for people born after 1959 (SSA 2009b). People can take a reduced pension at 62 or increased payments if they delay their retirement until 70 (SSA 2009b).

In Canada, people can take a state pension, under certain circumstances, from the ages of 60 to 64. The official state pension age is 65 (Service Canada 2008). Canada also has the Old Age Security Act, which is not self-funding like the Canadian Pension Plan, but involves direct expenditure by the federal government (Kesselmann 2004). There has been a call for an increase in pension age to 69 or 70 (Brown 1995; Robson 1996).

The situation is similar in the UK. Women's state pension age will equalise with that of men (age 65) by 2020. It will then gradually increase for both men and women to 68, from 2024 to 2044 (DWP 2006). This further complicates the inclusion of a default retirement age of 65 in the UK Employment Equality (Age) Regulations.

2.5 International comparison summary

	United Kingdom	Canada	United States
Age discrimination legislation (ADL)	ADL introduced in 2006	ADL at both federal and province level	ADL at both federal and state level of age 40+
Age limits	All ages, but restrictions on employment for younger people under 16, 16-18 in other legislation	All ages, minimum employment age of 16-18 average in provinces	Over 40
Mandatory retirement	Allowed after 65	Prohibited in most cases as of 1 July 2009	Prohibited in most cases since 1986
State Pension / Retirement Age	Women 60, Men 65; 2020 both at 65; 2024-2044 increasing gradually to 68	65 for both genders	65 for those born before 1939, increasing gradually to 67 when born after 1959

As can be seen in the summary table, there are quite a few similarities, but also differences that need to be taken into account when making a comparison between countries. In addition to the points above, certain restricted financial incentives can be used in the USA. This is much harder to justify under the UK legislation since it would appear to discriminate against younger workers (DTI 2003).

Similarities between the USA and Canada allow the UK to learn from their examples. Both Canada and the USA eventually prohibited mandatory retirement, and businesses have learned to adapt and benefit without it.

3. Review of participation impact research

3.1 Participation impact studies

An important question to consider is whether eliminating mandatory retirement has any direct impact on increasing older worker participation rates. This is especially pertinent for understanding the potential impact of removing the default retirement age in the UK Employment Equality (Age) Regulations. As Canada and the USA have a longer history of age discrimination legislation than the UK, participation impact studies in these countries provide good examples of the potential impact on older worker employment rates. While the studies examined demonstrate variable rates of impact in relation to the percentage increase in employment rates for older workers, these participation rates are generally shown to rise.

3.1.1 Canada

Reid's empirical paper focusing on Quebec and Manitoba was one of the first studies to consider the impact of abolishing mandatory retirement in Canada

(1988). He found that in Quebec the impact was statistically insignificant and small and in Manitoba the impact was actually a decrease in participation rates. Ten years later, Gunderson and Pesando (1998) found that about 50 per cent of Canadian workers at the time could have been mandatorily retired. When Gomez et al (2002) investigated further, they found that of the 50 per cent, only 12 per cent had actually been forced to retire. And, of the 12 per cent who had been compelled to retire, only 18 per cent of men and three per cent of women would have continued working past 65 if they had been allowed to do so. Thus, this conclusion correlated with Reid's finding that the impact had been relatively small. Gomez et al (2002) noted that the labour participation rates of 65+ workers in Canada and the USA had demonstrated similar declines from 1976 to 1986. After the USA banned mandatory retirement in 1986 for most positions, the rate rose, but in Canada it continued to fall (Gomez et al 2002).

Reid's study was followed by Shannon and Grierson's empirical study of Quebec and Manitoba (2004). They also concluded there was little effect on the employment rate of Canadian workers aged 65-69. However, they acknowledged that there had been an impact on a small number. They concluded that although mandatory retirement is unlikely to diminish the impact of ageing population issues, neither does it help address business or youth employment needs.

3.1.2 The United States of America

It was estimated that in the 1970s 59 per cent of all US white male employees were covered by mandatory retirement (US Manpower Administration 1970, cited in Von Wacher 2002: 7), similar to the situation in Canada. However, a few other studies found that the proportion covered could have been nearer 40 per cent (Von Wacher 2002). The first significant studies to appear, which were based on surveys, predicted that there would be a 10-15 per cent rise in worker participation due to delayed retirement after the abolition of mandatory retirement for workers currently covered by mandatory retirement policies (Halpern 1978 and Schulz (1974, cited in Von Wacher 2002: 6-7; Reno 1971). Halpern (1978) was aware of the potential this could have when considering Social Security funding, already a concern at the time.

Burkhauser and Quinn (1983) was one of the few studies to attempt to remove the impact on mandatory retirement resulting from pension plans. They argued that simply comparing before and after numbers provided inaccurate results, considering instead how the labour force would have changed over a two-year period if mandatory retirement had been removed in 1973. They concluded that six per cent of the men who would have been forced to retire, would have preferred to continue working. They calculated that the labour participation rate for the age 65+ labour force bracket would have increased from 38 per cent to 40 per cent at the time (Burkhauser & Quinn 1983). Additionally, the overall labour force impact would have been smaller. However, it should be noted that Morrison (1988) used a similar technique, but with a larger sample size. He found that there would have been a 15 per cent increase in the 65-70 labour force bracket (cited in Von Wacher 2002: 8).

More recent research has not concluded the debate over whether the impact is large or small. Neumark and Stock (1999) examined differences in state legislation between 1940-1980 to test the impact of US age discrimination legislation. They found that although age discrimination legislation had increased the employment rate of older workers, there was no statistically significant impact from the mandatory retirement age removal. Adams (2004) found, when considering state legislation influences during 1964-1967, that there had been an overall

employment boost, but actually an increase in more workers retiring. Both studies concluded that public and private pension schemes were likely to have discouraged delayed retirement (Gunderson 2003; Neumark 2001).

Ashenfelter and Card's findings from their study of university staff (2000) contradicted the research results published by Neumark and Stock (1999) and Adams (2004) (above). They found that before 1994, nine out of 10 professors working at age 70 would retire within two years. After 1994, when mandatory retirement was finally removed, this number fell to half the professors retiring after two years. Clark et al (2001) found similar results when studying three North Carolina universities. However, these findings could be due to Ashenfelter and Card and Clark *et al* having more informative data on a unique profession compared with previous studies (Neumark 2001).

Von Wachter (2002), examining the relative labour force attachment of older workers from the 1970s to the 1980s, found that those covered by mandatory retirement had a much higher spike in retirement at 65 compared with those without a mandatory retirement policy in place. By the 1990s, after the ADEA 1986 amendment, worker profiles that were previously subject to mandatory retirement, had similar retirement rates to those that were not. He believed that pension systems did not exert much influence, contradicting Burkhauser and Quinn's conclusions (1983), finding that the abolition of mandatory retirement increased the labour market participation of the 65-70 worker bracket by 10 - 20 per cent during the 1980s (Von Wachter 2002).

Overall, the studies show an impact, whether they conclude it is large or small. Labour market participation increases, and it could be argued that it is important to acknowledge that fact when determining whether the social benefits, such as the continuing financial contribution to the public purse of older people who remain in employment, outweigh the loss of valuable older workers. What needs to be considered are the apparent weaknesses in the studies from both countries.

3.2 Weaknesses in the studies

Unlike areas such as gender and race discrimination, there are not many comprehensive studies analysing the effectiveness of legislation prohibiting age discrimination (Gunderson 2003; Hornstein 2001). The issue of age discrimination has not attracted the same public interest or attention in the past, a factor traditionally influencing the call for more research in the area (Gunderson 2003). Many of the studies address only one question or use a small unique sample, which makes it difficult to draw strong conclusions on the impact of mandatory retirement (Neumark 2001). This is also due to the inherent methodological issues that arise in isolating specific impacts from the legislation.

One of the major concerns when studying mandatory retirement is a direct link with retirement pension plans (Levine 1988). Retirement is a complex decision made up of a variety of factors; such as health, financial stability and the state pension system to name a few (Ibbott et al 2006). As previously mentioned in section two, the Baker et al (2003) research demonstrated that improvements in pension systems exerted a large impact on retirement age. Although a few studies have attempted it, it is thus very difficult to directly link a specific increase in worker participation rates to mandatory retirement (Rowe & Nguyen 2003).

Even if the reason for retirement could be better linked directly to mandatory retirement policies, the actual definition and reporting of retirement is difficult to

distinguish from person to person (Ibbott et al 2006). There is much confusion about when someone retires. After leaving their main job, people may take bridge jobs, move to another full-time or part-time position, or have periods of unemployment before completely removing themselves from the labour pool (McNair et al 2004; Phillipson 2007; Posner 1995). In addition, Rowe and Nguyen (2003) found that when looking at Canadian Labour Force Surveys conducted from 1976 to 2001 of those that turned 50, only 51 per cent of men and 30 per cent of women had actually reported retirement when leaving their main position. Thus, data relying on self-reporting censuses may not be accurate.

Another general issue is that the data on mandatory retirement available to provide comparisons is time-limited at all levels – provincial, state or federal. This is especially true in Canada which, for many years, only had data from Quebec and Manitoba. For example, the Reid (1988) study was based on only 12 years of data, including only two to four years for which the ban was in place. The other provinces only prohibited mandatory retirement practices over the past few years. In the USA, some studies, such as Adams (2004), also analyse only a few years' data. Examining short-term effects may not provide an accurate assessment of long-term impact. The years studied included much transition, when employer policies and employee knowledge were adjusting to the implications of the removal of mandatory retirement (Gunderson 2003).

However, even in the handful of studies looking at long range data, “it is hazardous to extrapolate trends far into future, such as to the end or even to the middle of the 21st century” (Beehr & Bennett 2007: 297). This is especially true when considering the current changes in the economic and political climate internationally and domestically in recent decades.

A review of the studies and the inherent methodological issues point to a positive increase in labour participation of those aged 65+ when a mandatory retirement age is removed. However, any arguments used to promote mandatory retirement should be reviewed to take account of whether it is “socially justifiable” in the spirit of the law (Council Directive 2000/78/EC).

4. Review of employer arguments for mandatory retirement

There are various arguments put forward in support of mandatory retirement. The four principal ones will be discussed in detail and their inherent weaknesses explained.

4.1 Younger workers are more productive than older workers

One justification for mandatory retirement is that since productivity declines with age, making people retire by using a blanket rule is a more dignified way for older people to exit the labour market. Otherwise they would be subjected to humiliating competency tests and forced to leave because of low productivity (Gunderson 2001: 36). This supposes advanced age and productivity are inversely linked. A number of studies have examined the complex relationship between ageing and productivity. Warr (1994), who surveyed over one hundred studies linking ageing and productivity, found no difference in performance between age groups. In fact, productivity differences are larger within particular age groups than between age

groups (Banks and Smith 2006: 51). Fleisher and Kaplan (1980) found that “despite age-related changes, research studies over the last 30 years have documented that chronological age is not inevitably correlated with productivity” (cited in Levine 1988: 143). More evidence relating to US production functions for the manufacturing industry revealed that productivity seemed to level off after age 55; it did not decline compared with the productivity of people aged 35-54. Workers aged 35 to 54 were found to be equally as productive as those aged under 35 (Hellerstein et al 1999).

It is true that older people suffer some decline in faculties, such as hearing and eyesight, as a result of biological ageing. How can it be then that, despite this, performance across cohorts is roughly the same? Perhaps older people who continue to work into their late 60s are not representative of their cohort. Those plagued by ill health and other problems would have already retired. Additionally, the traditional view that older people are somehow less capable could be a reflection of having been educated under a different style of learning rather than a difference in ability (Evans 2003: 12). The differences that come with age in the ability to learn new technology is a common worry of managers but it does not mean that older workers lack the capacity to learn (OECD 2005a). When taught appropriately for their age, older workers can learn most new technology just as easily as younger workers (Evans 2003, cited in Spencer & Fredman 2003: 24).

Older people also have more experience, which perhaps compensates for any decline in their faculties. However, the most important reason for advanced age not significantly affecting productivity is that most jobs do not require workers to operate at the upper limits of their capacity. Therefore, even though some capacity is lost due to age, it does not reach a point where it is a significant impediment to job performance (Meadows 2003: 19).

Parnes et al (1979) found that half the employees in the USA retired due to poor health (cited in Rix & Fisher 1982: 80). Humphrey et al (2003) found similar results for the UK: 49 per cent (53 per cent men and 44 per cent women) of respondents aged 50-69 stated health reasons for taking early retirement. In addition, other studies have also found a significant link between poor health and early retirement (Barnes et al 2002; Haardt 2006; McNair et al 2004). People with poor health derive less personal satisfaction from work than they once did, which leads them to retire (Kesselmann 2004). This means that higher performers usually retire later, so their productivity is higher than that of the average older person (Kesselmann 2004).

Even if there were a slight decline in productivity in older workers, there still is no evidence that this happens exactly at 65 years old (Kesselmann 2004). “It fails to take account of the vastly different situations that older persons may find themselves in at that date” (O’Cinneide 2005: 42).

4.2 Wage premiums and monitoring costs would increase

Perhaps the strongest theoretical defence of mandatory retirement is the back-loaded compensation model proposed by the economist Ed Lazear (1979). Under this compensation model, employees are underpaid during the initial stages of their career. Mid-career, they are paid close to the marginal product of their labour, and towards the end of their career they are paid a premium. For this reason, it is argued that it is essential that people be made to retire so that employers can avoid paying this wage premium indefinitely (Banks and Smith 2006: 51). Though theoretically compelling, there are several limitations to the Lazear back-loaded compensation model. The first is that there is no evidence to suggest that older

people are overpaid in relation to their productivity, or even that they are paid more than younger people. Age-earning profiles in Canada, the USA and the UK are all shown to level off and then decrease after age 55 (OECD 2006). In the UK, employees over age 55 earn around 20 per cent less than employees aged 45-54 (Meadows 2003: 23). After 60, their wages are close to those aged 25-29 (OECD 2006). Additionally, this view of mandatory retirement does not reflect labour market realities. This model wrongly assumes that a person remains with the same employer for most of their career. The Lazear model of back-loaded compensation is no longer valid.

Another argument for retaining mandatory retirement is that performance monitoring costs would rise without it. In most large organisations, however, employees of all ages are evaluated individually (Levine 1988). During a US Supreme Court case in 1976 relating to a police officer who was forced to retire under the state's mandatory retirement law, it was noted that nine out of 10 firms with mandatory retirement at that time had individual appraisal systems in place (*Massachusetts Board of Retirement v Murgia*, 427 U.S. 307 (1976)). In response to this fact, the trial judge stated that it "is not rational to let go a worker of demonstrated individual capacity because of generalisations about workers' usual low competence" (Levine 1988: 162). There is no need to generalise then. Moreover, personalising decisions, relating them to individual workers' competence and capacity, would come at no extra cost in those businesses (the majority) which have monitoring systems in place.

4.3 Older workers need to make room for the young

Even if older workers are more productive, and monitoring/wage costs do not make a substantial difference, many employers view mandatory retirement of older workers as necessary to allow for more jobs or promotion for younger workers (Meadows 2003; Stephen & Fredman 2003).

If this argument were valid, any decrease in older worker employment should see a corresponding rise in youth employment. This line of reasoning hints at the 'lump of labour' fallacy which states that there are a fixed number of jobs in any economy and that a job occupied by an older worker is necessarily one that precludes a younger worker from working in it (Meadows 2003:4). While there might be only a set number of positions within an employing organisation, it is not true for the economy as a whole.

The OECD (2006) found that there is in fact a positive rather than a negative correlation of younger and older employment rates. Bruno Tobback, Belgian Minister for Pensions, explained during an OECD forum:

"In the past, early retirement was seen as a way to 'make room for younger workers'. However, the reverse has occurred, since unemployment rates for young workers remain particularly high in countries where early retirement has been widely cited" (2005: paragraph 4).

It is argued that older workers have a moral obligation to retire so that younger workers can have a better chance to gain experience, or through promotion earn more money to provide for their growing families (Levine 1988).

In the USA, when changes to the legislation increased the age of mandatory retirement to 70, only a few employers said that employees continuing to work had caused blockages or slowdowns in promotions (Levine 1988).

Furthermore, most jobs do not have fixed job duties which enable a young person to fill the position of a more skilled and experienced worker who was being retired (Gunderson 2003). There is a potential for an increase in morale of younger workers who achieve quicker promotions, but there is also a decrease in morale of workers who will soon be retired (Levine 1988). It is also important to acknowledge the potential disadvantage of increased stress on the younger workers who are left to fill the positions of the recently retired (Moore, Grunberg & Greenberg 2004, cited in Beehr & Bennett 2007: 287). It might be better to reward younger workers through “salary increases, better titles, or increased responsibilities,” while letting older workers continue to work (Levine 1988: 163).

4.4 Facilitates workforce planning

Helping workforce and succession planning is a key argument used by employers to defend mandatory retirement: Older people in senior positions exit to make room for younger employees to take their place. However, the number of jobs fluctuates with the economy, leading to much uncertainty (Levine 1988). The current economic recession shows that planning cannot prepare for every eventuality. Yet, even when there is more security over planning, “employers could hypothetically achieve the same degree of certainty and planning by setting individual contractual terms, encouraging early retirement where necessary, and using good management techniques rather than the blunt tool of mandatory retirement age” (O’Cinneide 2005: 42).

Conclusion

The USA and Canada have much longer legislative history relating to age discrimination and mandatory retirement than the UK. They provide examples of how other countries have dealt with the effects of retirement plans, ageing population issues and public push on voluntary and mandatory retirement. Like the UK, both the USA and Canada originally allowed mandatory retirement ages in most states, provinces, and federally. Yet, for the last few decades in the USA, and very recently in Canada, mandatory retirement has essentially been prohibited in most cases. This indicates that businesses have adapted well to not having mandatory retirement.

The overall conclusion of the studies on the impact of mandatory retirement on labour participation in the two countries is that there appears to be a small increase in labour participation rates on average. This indicates that although the removal of mandatory retirement would help those who wish to continue working, it would not have a strong impact on total labour market or business activity. Unfortunately, there are several apparent weaknesses in the studies. In addition, there is a general lack of research on the subject compared with other discrimination areas, such as gender and race. More studies are needed before there is an adequate body of research and evidence to properly inform policy decisions.

In looking at the history and development of the UK Employment Equality (Age) Regulations, there was significant support by certain government departments, unions and the general public for a ban on mandatory retirement. Despite this

support, the arguments of some employer bodies prevailed and a default retirement age of 65 was included in the legislation. However, many employer views, such as those described in section four, are based on incorrect stereotypes and unfair generalisations rather than on current evidence or social policy needs.

Although the recent ECJ ruling on the lawfulness of the default retirement age found in favour of the UK Government, it did clarify that any exception made to the Directive must be a legitimate and justifiable aim for social policy objectives (C-388/07). This is significant for the UK Government review in 2010. After analysing the country comparison, studies and weakness in some employers' arguments, the suggested social policy benefits do not seem to justify direct age discrimination in the form of a default retirement age in the UK.

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