

**Claimant  
Mr P Grattan  
First Witness Statement**

**IN THE HIGH COURT OF JUSTICE**

**ADMINISTRATIVE COURT**

**B E T W E E N :**

**T H E Q U E E N**

**(on application of**

**THE INCORPORATED TRUSTEES OF THE NATIONAL  
COUNCIL ON AGEING (AGE CONCERN, ENGLAND)**

**Claimants**

**-and-**

**THE SECRETARY OF STATE FOR TRADE AND INDUSTRY**

**Defendants**

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**FIRST WITNESS STATEMENT OF  
PATRICK GRATTAN**

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I, Patrick Henry Grattan of TAEN (The Age and Employment Network and Help the Aged) of 207-221 Pentonville Road, London N1 9NZ, will say as follows:

- 1 I am founder and Chief Executive of TAEN (The Age and Employment Network, formerly Third Age Employment Network) which has operated since 1998. I have been a member of the DTI's Age Advisory Group throughout its 5 year life from 2001 and was a member of the Retirement Age Consultative Group in 2004, attending all its meetings. TAEN is a leading centre of expertise on age, employment and training and 250 organisations are members of the Network. It is part sponsored by Help the Aged. At the advisory and consultative groups on legislation and retirement age I represented both organisations.
- 2 Help The Aged is a major UK charity which has been in existence since 1961. It is committed to promoting the rights, equality and dignity of older people and to an end to discrimination based on age. In 2001 Help The Aged launched a campaign on age

discrimination and equality; as part of its work it published a review of evidence of age discrimination in public policy in 2002 and a report of older people's experience, *Everyday Age Discrimination*, in 2004.

3 I have been asked to comment upon the consultation process and the aspects with which TAEN was involved in consultation and I set out below TAEN's involvement. I make this statement on behalf of both Help The Aged and TAEN, and in support of the Claimant's submissions.

4 Our submissions are concerned particularly with the justification put forward by the Government for the introduction of a default retirement age. I applied under the Freedom of Information Act for disclosure of the legal advice on why the Default Retirement Age was compatible with the Equal Treatment Directive. This was declined on 6 April 2005. Mr Fuller's letter is at pages 1 – 2 of the exhibits to this witness statement.

#### Consultation Process

5 We recognise that the Government consulted widely and over a long period about the content of the Age Regulations. Those consultations had a positive influence on several aspects of the Regulations. We also recognise that it is the job of Government to take decisions in the light of the evidence available to them, and that in the case of retirement age they were faced with conflicting views.

#### Our submission

6 Our submission is that:

6.1 The Government was partial and selective in its assessment of the evidence.

6.2 The evidence on which it principally relied was not representative of the views of employers and workers.

6.3 The public policy aims which it set out – safeguarding of employer confidence, workforce planning and avoidance of disincentives to occupational pension schemes – do not constitute adequate legitimate aims and the Government's case both in 2004 and now does not demonstrate adequate objective justification for them, given the proportionate impact of a default retirement age on age discrimination.

Therefore our submission is that the inclusion of a default retirement age in the Age Regulations, self evidently an age-based rule with an impact on those in their 50s and 60s, is not a proportionate response to the policy issues presented by Government and does not

form a legitimate part of the Age Regulations or the transposition of the Equal Treatment Directive to the UK.

Partiality in use of evidence

7 The Government's case, as set out at the time and in the witness statement of Ms McCarthy Ward relies strongly on the survey by Mr Bruce Warman in February 2004 of the views of senior executives and on the submissions of the Confederation of British Industry (CBI) and Engineering Employers Federation (EEF). The Age Advisory Group and the Government also had available to it:

- TAEN's briefing on *The Debate on Normal Retirement Age* of March 2004 setting out the evidence why many of the statements put forward by the CBI and EEF were not founded on the evidence. The briefing note is at pages 3 to 6 of the exhibits to this witness statement.
- TAEN's *Response to the Paper by Mr Warman* of March 2004 setting out why much of that was not well founded on evidence and was rather a demonstration of stereotypical thinking on age. The Response is at pages 7 to 9 of the exhibits to this witness statement.
- TAEN's commentary, *Retirement Age, Productivity and Competitiveness* on the argument that default retirement ages are necessary to protect the UK's international competitiveness. The commentary is at pages 10 to 13 of the exhibits to this witness statement.

There were of course other papers on similar lines including those of the Claimant referred to in the witness statement of Mr Harrop.

8 It is indicative of the Government's partiality in examining the evidence that the witness statement of Ms McCarthy Ward makes no mention of this material. It makes only passing mention of the most detailed explanation of patterns of retirement behaviour at the time, commissioned by Government – DWP Research Report 182 (February 2003) on *Working after State Pension Age* and Report 200 (November 2003) on *Factors Affecting the Labour Market Participation of Older Workers*. A TAEN Briefing note on those reports is attached at pages 14 to 17 of the exhibits to this witness statement and the DWP Report itself is at Bundle B Volume IV divider 42 pages 1435 to 1447 of the exhibits to Andrew Harrop's first witness statement. I can only assume that this was because those rigorous evidence-based finding did not suit the conclusion which Government wished to draw.

9 In contrast the status of the much quoted report of Mr Warman is curious. He himself describes it as "informal" and it is not apparent that the DTI went through the normal contracting processes to select a professional body to do the best possible job. He

collected the personal views of a network of 31 senior executives, mainly in large blue chip companies. Their views are of course important. What they illustrate is the fixed stereotypes of some business leaders about the significance of chronological age in employment and training, exactly the attitudes which the Age Legislation is designed to change. Those stereotypes include “declining productivity” and “increased costs” associated with age. Neither assertion is borne out by evidence. The Warman exercise should have led to the conclusion that abolition of fixed retirement ages was imperative if attitudes are to change, not the opposite.

- 10 An example is the quotation from the Chairman of Shell UK about the siting of an oil refinery. He appears unaware of the facts about comparative labour costs of workers by age cohort in the UK and Spain. An extract from the OECD paper Life Longer, Work Longer setting out a table on age wage profiles by gender is attached at page 18 of the exhibits to this witness statement. An economically rational decision for Shell would be to employ more older workers for longer at a UK site as they are lower cost than younger colleagues while older workers in Spain are higher cost than younger colleagues. Despite this lack of rigour, Mr Warman’s report is relied on by the Government to make the statement that ending fixed retirement ages “would not have been sufficient to maintain employer confidence” (paragraph 95, witness statement of Ms McCarthy Ward).

The evidence of employers’ views is not representative

- 11 The views of the CBI and EEF on the need for a fixed retirement age were clear. Our contention is that the evidence from the CBI, EEF and Mr Warman on which the Government relied was shown at the time and subsequently to be unrepresentative.

- 12 The Court should be aware that:

12.1 The Institute of Directors published a survey in February 2005 of its members in which 75% opposed having a fixed retirement age. The Institute of Directors has upwards of 52,000 members in the United Kingdom and overseas. Membership includes directors from across the business spectrum from media to manufacturing, e-business to the public and voluntary sections. Members include CEOs of large corporations as well as entrepreneurial directors of start up companies. Michael Templeman, Director General said “we all know that demographic changes will radically affect our pension position. Abolishing a compulsory retirement age could certainly help in easing the problem”. A copy of the Institute of Directors views is at pages 19 and 20 of the exhibits to this statement.

12.2 Lord Adair Turner, a former Director General of the CBI and member of the Retirement Age Consultative Group said in that Group and in the Interim Report of the Pension Commission “policies which make it easier for those who wish to work

beyond the State Pension Age are desirable and should be pursued. The Commission has already communicated to Government its clear recommendation that there should be no default retirement age". This is referred to at page 1121 of the Claimant's original bundle of documents. Sir Howard Davis, another former Director General of the CBI has also said that fixed retirement ages are contrary to public policy objectives.

- 12.3 The Chartered Institute of Personnel and Development (CIPD), the national organisation of Human Resource professionals opposes a default retirement age. The CIPD said in September 2005 "Having a default retirement age goes against what the Government is trying to do in terms of abolishing age discrimination and increasing pension age. It is counter productive and unnecessary." The CIPD's position is confirmed in a press release which is at pages 21 and 22 of the exhibits to this statement.
- 12.4 The Work Foundation has opposed a fixed retirement age. Will Hutton said in September 2006 "there's a missed opportunity here. The Americans don't have a retirement age at all, and the Government have still kept 65 as an age where you're either useless if you're one side of it or still useful if you're the other side of it."
- 12.5 Lord John Brown, Chairman of BP and cited at Britain's most successful businessman set out the case against fixed retirement ages in a speech to the Young Foundation in March 2006. A newspaper report of this is at page 23 of the exhibits to this statement.
- 12.6 Employers such as Asda, Marks and Spencer, Department for Work and Pensions, Sainsbury's, HBOS, HM Customs and Excise and BT have removed or are removing their former fixed retirement ages. If they are positive about the benefits of doing this then it is not clear why Government believe that a default retirement age is an essential requirement for business confidence in the UK
- 13 The witness statement by Mr Harrop has already drawn attention to the DTI's own research by NIESR showing that the majority of workplaces do not have fixed retirement ages and appear to operate satisfactorily without them. The representative of the Small Business Council made this clear in the Retirement Age Consultative Group.
- 14 The Government might argue that this is understandable. There is no requirement on employers to have a default retirement age. It is a matter of choice for them. It is there for those who feel they need it and the witness statement by Ms McCarthy-Ward emphasises that there may nevertheless be a third of employers who would welcome this. Our contention is that the balance of all the evidence does not support putting in place a national age-based barrier to employment which is clearly contrary to the spirit and aims of the legislation. The Government policy is not a necessary and proportionate response to the situation.

## Workforce planning

- 15 The Government's argument is that "a set retirement age is a significant element in employers' workforce planning and allows the recruitment, training and development of employees and the planning of wage structures and pension provision against known attrition profile". Mr Warman talks of "advance planning, training, employee development and recruitment against a known attrition profile" (paragraphs 53 and 56, witness statement of Ms McCarthy-Ward).
- 16 Anyone who has managed a business will know that this is a pipe dream. Re-organisations, changes in customer behaviour, changing technology, employees' health and personal circumstances, waves of redundancies all make a nonsense of the idea that workforce planning can be securely based on the knowledge that given numbers of people will retire in 5, 10 or 15 years time. As set out in the DWP Research and the TAEN papers cited, most retirement takes place within an unforecastable 15 year time span, with less than 1 in 5 people retiring in the year that they reach the employers' fixed retirement age. A more rational assumption for workforce planning would be to take average retirement age or percentages historically retiring in 3 or 5 year cohorts.
- 17 The reality is well illustrated in a series of case studies in one of the Joseph Rowntree Foundations Transitions after 50 series, Happy Retirement by Sarah Vickerstaff of Kent University. The executive summary of this report is attached at pages 24 to 28 of the exhibits to this witness statement.
- 18 A further part of the workforce planning argument is described as the prevention of "job blocking". Situations where people are in a job too long, have gone stale and need a change (without being directly incompetent) are the common place of management. They are difficult to handle. The fallacy in the Government's position is that this is something specifically related to people shortly before they reach a fixed retirement age. On the contrary it can happen to people in their 30s, 40s and 50s as well as their 60s. To suggest that it is related to those close to retirement is to subscribe to the stereotype that older workers are more likely to be less productive, care less and are drifting towards retirement. Having a default retirement age only encourages those attitudes and undermines the purpose of the Age Regulations, which is to bring about the necessary change in attitude in the face of demographic change.

- 19 A final argument put forward for workforce planning and a default retirement age is that it allows retirement with dignity. Leaving on one side the fact that more than 4 out of 5 retire now outside the immediate context of a fixed retirement age, it pre-supposes that personal dignity is a factor in managing retirement. To quote from the University of Kent case studies: personal retirements are “often highly contingent, unpredictable and frequently beyond the individuals control... the exit of older workers from organisations was not actively managed as a whole but rather responded to a in a piece meal way according to immediate pressures”. At best the argument about dignity is a self serving one.
- 20 Our conclusion is that workforce planning is not grounds for objective justification of a default retirement age as a proportionate response to the management of retirement.

#### Improving the participation of workers aged 50-64

- 21 “The government considered that the default retirement age was a useful tool in achieving the wider aim of government [employment] policy” (paragraph 82, witness statement of Ms McCarthy-Ward). We recognise that the removal of current fixed retirement ages under 65, especially in the public sector where they are most prevalent, will contribute to a higher employment rate. That would have happened in any event if fixed retirement ages had been abolished.
- 22 We share the view of the Pensions Commission, CIPD and others, already quoted, that a default retirement age undermines rather than supports public employment policy aims. The evidence shows that companies that do not have fixed retirement ages have larger numbers of people staying on after State Pension Age, 18% compared to 7% (DWP Research Report no 200) which is in the Claimant’s first bundle of documents at Bundle B Volume IV divider 26 page 1251.
- 23 A default retirement age does not just impact on the opportunities of those over 65 to work. It affects attitudes and workplace culture towards those in their 40s and 50s. The assumption that it is not worth training, promoting or developing an employee because “it’s not long till they retire” is widespread. Age limits on opportunities to train are in place in many professions and elsewhere as young as the early 30s, on the grounds that it is too late to get a pay back on the investment. If retirement was open-ended this culture would change faster.
- 24 When Patricia Hewitt and Alan Johnson announced the default retirement age in December 2004 to the House of Commons they defined the Governments’ policy as “we want to give

individuals more choices about how long they work and when they retire". They went on to announce exactly the opposite.

- 25 Employment policy does not constitute a legitimate aim for a default retirement age.

Impact of no retirement age on occupational pensions and individual savings.

- 26 The final justification advanced for a default retirement age was the threat to pensions. The government argues that "without a default retirement age younger people may not making financial plans for their retirement, expecting to go on working indefinitely" (paragraph 63 witness statement Ms McCarthy Ward). Mr Warman makes the same point.
- 27 This is a groundless argument. There has been flight from savings and conventional pensions instruments in the last 5 years amongst the under 40s, driven by lack of confidence in financial service products, the introduction of student debt to be repaid and housing costs squeezing out scope to save. Surveys show that the younger a person the earlier (and more unrealistic) are their ideas about the age at which they may be able to retire. It is on average well before the default retirement age. Only later on do they take a more realistic view. Whether or not there is a default retirement age is largely irrelevant to patterns of personal saving.
- 28 The further argument is that the ending of fixed retirement ages will encourage employers to reduce their offers in occupational pensions. This mainly relates to final salary pensions because they have a pension age built into them. In contrast defined contribution schemes are open ended in respect of age, except in relation to how long an employer may continue to make a contribution.
- 29 The scale of reduction in the private sector role in occupational pensions is already so massive that it is hard to regard that this argument for a default retirement age as a significant objective justification. Mr Warman acknowledges that the majority of his sample has already closed their final salary schemes to new entrants. The Government Actuaries Department estimate that active members of final salary schemes have fallen 30% in the 10 years 1995-2005 from 5.cm to 3.7m. It is estimated to fall to no more than 1.5m, about 7% of the private sector workforce, regardless of whether or not there is a default retirement age.
- 30 If the Government thought that by introducing a default retirement age they were responding to employer concerns about pensions, the recent response to the revised occupational

pension elements of the Age Regulations illustrates the opposite. Despite the fact that occupational pensions are almost entirely exempted from the Age Regulations and that a default retirement age is in place employer bodies are unsatisfied with the situation.

- 31 In our view the final possible objective justification for a default retirement age advanced by the government is therefore without foundation.

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2 November 2006**

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