RETIREMENT AND AGE EQUALITY: DIGNITY AND SOLIDARITY PERSPECTIVES

Simonetta Manfredi and Lucy Vickers

Oxford Brookes University

Labour Law Research Network

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Simonetta Manfredi and Lucy Vickers

Oxford Brookes University

smanfredi@brookes.ac.uk

lrvickers@brookes.ac.uk

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Simonetta Manfredi and Lucy Vickers, Oxford Brookes University

Abstract: This paper considers how policy makers across Europe can meet the challenges of extending working lives, which is a key element of the 'Active Ageing' agenda, whilst striking a balance between the interests of older workers, those of younger generations to access jobs and career opportunities, and the interests of employers for effective workforce planning. It examines the experience of the UK which removed mandatory retirement in October 2011 and outlines the steps taken to dismantle the legal regime governing retirement. It considers retirement from a Marxist perspective, and as part of a neo-liberal political approach to regulation, and argues that the developments in the UK failed to strike the correct balance between the different interests at stake. It then considers the arguments from an equalities perspective and suggests that retaining some form of regulation of the end of working lives can still meet the demands of equality. The final section discusses some proposals for reform. It considers the introduction of a 'light touch' right to request to work beyond a default retirement age, which may be understood as an example of a reflexive approach to law as a mechanism to balance the competing interests identified.

Introduction: Meeting the challenges of an ageing population

The European population is ageing and it is projected that by '2060 there will be only two people of working age (15-64) in the European Union for every person aged over 65 years.'[1] On-going demographic changes combined with early retirement trends, have created what has been defined as 'the age/employment paradox.'[2] This means that while life expectancy has increased, participation in the labour market has dropped significantly due to early retirement trends. This age/employment paradox poses a number of challenges, including sustainability of pension benefits which in all European countries account for a significant proportion of national income. In order to address these issues policy makers in the European Union have developed a series of policy initiatives to promote greater participation of older workers in the labour market to reverse early retirement trends and encourage 'active ageing' through the extension of working lives. A key measure to support these objectives has been the introduction of protection against age discrimination. The Equal

[1]Silver Workers – Golden Opportunities. Briefing Note Cedefop (2013) Retrieved 31 May 2013 from www.cedefop.europa.eu/EN/publications/21091.aspx
[2]A. Walker, Towards Active Ageing in the European Union. Paper prepared for the Millennium Project Workshop – Towards Active Ageing in the 21st Century (Tokyo: The Japan Institute of Labour, 29-30 November 2001:3)

Treatment Framework Directive 2000/78/EC prohibits discrimination on the grounds of age. However, Article 6(1) of the Directive allows for exceptions to the non-discrimination principle in case of age discrimination based on legitimate employment policy aims and, where appropriate and necessary. Article 6(1) thus creates the potential to justify retirement, something which would otherwise be directly discriminatory on the grounds of age. There has been much debate about the interpretation of Article 6(1) following a series of cases[3] where retirement rules were challenged on the grounds of age discrimination but ultimately found justifiable by the CJEU. The concept of intergenerational fairness emerged from most of these cases as an acceptable legitimate aim. For example in the case of *Felix Palacios de la Villa v CortefielServicios SA*, the Court accepted that the aim of redistributing work among different generations was legitimate and that retirement was an appropriate and necessary way of achieving this aim. This has been confirmed in other cases including the most recent one of *Hornfeldt v Meddelande.* These cases however, have highlighted a tension between, on the one hand, the right of individuals not to be discriminated against because of their age, and social policy aims of extending working lives in response to increased life expectancy and, on the other hand the interests of younger employees to access jobs and career opportunities, as well as the interests of employers to run their businesses efficiently. This was clearly summarised in the case of *Rosenbladt vOellerkingGebauderinigungsges.mbH*[4] where the Court highlighted in its judgment the importance of striking a balance between 'diverging but legitimate interests'. These interests include on the one hand, the need to guarantee workers with a certain stability of employment and the opportunity to retire at one point and, on the other hand, the employers' needs for 'a certain flexibility in the management of their staff…against a complex background of employment relationships closely linked to political choices in the area of retirement and employment'.[5]

Thus it has become clear that 'active ageing' involves a complex agenda where individual rights intersect with social policy aims as well as economic considerations relating to the sustainability of pensions. The challenge for policy makers is to find ways to strike a balance between the 'diverging but legitimate interests' while encouraging the extension of working lives which is a key element of the 'active ageing' agenda. The purpose of this paper is to discuss whether the abolition of mandatory retirement could be an effective response to

[3] Judgment of the CJEU of 16 October 2007, Case C-411/05 *Felix Palacios de la Villa v CortefielServicios SA*. Judgment of the CJEU of 5 March 2009, Case C-388/07 *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] . Judgement of the CJEU of 12 January 2010 Case C-341/08 of *Dr Domnica Petersen v Berufungsausschuss fur Zahn fur den Bezirk Westfalen-Lippe.* Judgement of the CJEU 5 July 2012, Case C-141/11 *Hornfeldt v Meddelande*

[4] Judgement of the CJEU 12 October 2010, Case C-45/09 of *Rosenbladt v OellerkingGebauderinigungsges.mbH*

[5] *Ibid at* paragraph 68

these challenges. This is explored by examining the experience of the United Kingdom where mandatory retirement was removed in October 2011.

The outline of this paper is as follows. In the first section we discuss the experience of the UK in removing mandatory retirement. We outline the steps taken to dismantle the legal regime governing retirement, and then consider a number of arguments suggesting that this development in the UK failed to strike the correct balance between the different interests at stake; first, it does not correctly meet the needs of a varied workforce; second it does not meet the requirements of employers who were still using retirement up until its abolition; third, it serves a neoliberal agenda of rolling back the state's responsibility for older people. The third section considers the arguments from an equalities perspective and suggests that retaining some form of regulation of the end of working lives can still meet the demands of equality. The final section discusses some proposals for reform. It considers the introduction of a 'light touch' right to request to work beyond a default retirement age, which may be understood as an example of reflexive approach to law as a mechanism to balance the competing interests identified.

Removing mandatory retirement: The experience of the UK

Before discussing the implications of the abolition of mandatory retirement for the 'active ageing' agenda we consider briefly how the UK policy response and legislation has evolved in relation to age discrimination and retirement policies.

In 1999 the UK government took its first step towards tackling age discrimination through the introduction of a Code of Practice on Age Diversity in Employment. An evaluation of the impact of the Code on employers, commissioned by the government, revealed however that overall this measure had little effect in practice. For example it found that levels of awareness about the Code among employers were very low and that hardly any changes had taken place in employment practices as a result of its introduction. In spite of the failure of the voluntary Code approach, the government delayed the introduction of legislation which made age discrimination unlawful in employment and training until 2006, because of the 'new, wide ranging and complex issues'[6] that age discrimination raised.

[6] S. Fredman, 'The Age of Equality' in S. Fredman and S. Spencer Age as an equality Issue: Legal and Policy Perspectives (Oxford: Hart, 2003:53)

In 2006 the Employment (Age) Regulations (the 'Age Regulations') were introduced which made direct and indirect discrimination on the grounds of age unlawful and provided for a default retirement age of 65 (DRA). Thus employers could no longer retire employees before the age of 65, except in those instances where it could be objectively justified, for example for health and safety reasons. These regulations also introduced a right for all employees to request to continue to work past the age of 65 or their contractual retirement age if this was later than 65 ('the right to request'). Employers had to formally consider a request to continue to work past retirement but if they decided to refuse it they did not have to provide a reason. The Age Regulations also removed the bar on claiming unfair dismissal and redundancy for those over the age of 65.

The abolition of mandatory retirement

The DRA and the right to request were, however, short lived as mandatory retirement was abolished in October 2011 by the UK coalition government of Liberal Democrats and Conservatives. Changes to the DRA were almost inevitable following the outcome of the legal case brought against the UK government by the charity Age Concern (now Age UK) which argued that the DRA breached the EU Directive.[7] Although, in the short term, the Age Concern challenge did not succeed, and the DRA was upheld, it did however, put pressure on the UK government to bring forward its review of the Age Regulations to 2010, since the court in the final ruling of this case made it clear that there was 'a compelling case' for a change in the law and for reviewing the age of 65 as a DRA.[8]

The UK coalition government's decision to remove mandatory retirement was based on a number of considerations which included: demographic changes resulting in an ageing population; economic benefits such as pension sustainability, increase of labour supply resulting in a higher GDP; greater opportunities for older people to participate in the labour market; and 'issues of equity and fairness' for those employees who either wish or need to continue to work past the age of 65.[9] Under the current legal regime employers can retain provisions for mandatory retirement only if they are able to demonstrate that this is objectively justified by the need to pursue a legitimate aim of employment policy and that the

[7] Case C-388/07 R (on the application of the *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373

[8] H. Osborne and J. Insley, *Retirement age challenge rejected*, The Guardian 25 September 2009; also see Case C-388/07 R (on the application of the *Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] IRLR 373

[9] *Phasing out the Default Retirement Age* Consultation Document (London: Department for Business Innovation and Skills and Department for Work and Pensions, annex E 2010:26)

measure is proportionate to achieve such aim (this is known as an employer's justified retirement age EJRA).

Thus, over the last decade the UK legislation has moved from a norm of retirement at a fixed age, prior to the introduction of the Age Regulations, to the establishment of a DRA of 65 and a right to request to work beyond this age, to the removal of the DRA and contractual retirement. In other words the UK has shifted from a presumption in favour of retirement at a fixed age, with some exceptions, to a presumption in favour of non retirement, with some exceptions.

One of the government's objectives in removing mandatory retirement, as seen earlier, is to address 'issues of equity and fairness' for those employees who wish or need to continue to work. This appears to reflect core values of liberalism like personal choice and autonomy and state neutrality (the latter being the removal of any state interference in the form of a statutory default retirement age with the individual freedom to retire when one wishes to do so). Thus by removing mandatory retirement older employees will be free to exercise their personal choice and autonomy when it comes to decisions about their retirement.

Whilst this objective appears valid, the extent to which removal of mandatory retirement can address 'issues of equity and fairness' for older employees is debatable for a number of reasons: it relies on the assumption that older workers are a homogeneous group; it does not seem to have considered sufficiently the needs of those organisations whose workforce planning paradigm was based on mandatory retirement; it is arguably underpinned by a neoliberal political agenda focussed on rolling back the state and reducing welfare benefits, including pensions. We now examine these issues in turn.

The likely impact of the abolition of mandatory retirement on different groups of employees

UK government policy in this area appears to be underlined by an assumption that older employees are a homogenous group which has a choice over their late working lives and at what point to retire. However, it is open to question whether older employees really have a genuine choice over such matters. In practice this will depend on where they are positioned in the labour market. Using labour market theory,[10] it becomes evident that those who are located in the higher segments of the labour market are likely to have a range of options open to them. These employees are professionals with a high level of human capital, who

[10] M Reich, DM Gordon and RC Edwards Dual Labour Markets: A Theory of Labour Market Segmentation (1982) 17 J Human Resources 359

are likely to have an occupational pension or other savings for their retirement. These employees will often have genuine choice as to whether to continue to work, retire or make use of other options such as flexible-retirement or consultancy work. Conversely, those in the lower segments of the labour market on low paid and low skill jobs do not have such a range of options and may not have enough pension income to retire should they wish to do so. Given the internal logic of the labour market, it is difficult to see how the simple removal of mandatory retirement can guarantee genuine choice to all those older employees who either need or wish to continue to work past pensionable age.

This situation is mirrored at organizational level where different groups of employees possess different skills and expertise which, as highlighted by Lepak and Snell[11] 'vary in importance to a firm's competitiveness'. For example, knowledge-based employees with a high level of human capital are likely to be of greater importance to a firm's competitiveness and contribute to its strategic objectives. Consequently as with the broader labour market, these employees are more likely to be in a position to negotiate with their employer an extension of their working lives on mutually convenient terms since organizations will find it advantageous to retain their expertise. However, the lower the human capital of employees and their ability to contribute to a firm's competitiveness, the less incentive there will be for organizations to retain them as they get older. Moreover, these occupational groups are likely candidates for outsourcing which may be seen by some employers as a solution to avoid having to accommodate older employees that no longer wish to retain.

Thus we can see that if the level of choice and autonomy for older employees, as a result of removing mandatory retirement, is viewed through the prism of the inter-related functioning of the labour market and an organisation's business interest to remain competitive, then choice appears to be significantly limited to highly skilled professional workers who are less likely to be disadvantaged and at risk of poverty in their old age.

Employer's perspectives on the removal of mandatory retirement

Prior to the removal of the DRA the UK government commissioned research to assess the use of mandatory retirement in different sectors of the economy. It also ran consultations with a number of stakeholders (including businesses, employers associations, trade unions, academics and age equality champions) about the proposed changes to the legislation. The

[11] D. Lepak, S Snell, The Human Resource Architecture: Toward a Theory of Human Capital Allocation and Development (1999) Academy of Management Review, Vol. 24, No1 31-48

results from both the research and the consultation exercises[12] showed a mixed picture: although several employers had voluntarily removed mandatory retirement, a significant number of them were still using it. This was especially the case in larger organisations, in the public sector and education but equally in private sectors like manufacturing. Not surprisingly these employers were more likely to be in favour of retaining mandatory retirement and the most common arguments in support of this position were: the need for certainty in workforce planning; the need to maintain jobs and career opportunities for younger employees; and the need to avoid the use of 'less acceptable' methods of managing older employees out of the workforce. Especially in manufacturing, where jobs are more physically demanding, employers were reluctant to retain employees past their normal retirement age since they believed that older employees become less efficient and able. In summary a compulsory retirement age was valued by these employers 'as a focal point' for workforce planning.[13]

On the basis of this evidence it appears that the UK government assessment about the impact of the removal of the DRA failed to address the concerns raised by those employers who were still using mandatory retirement, for example by allowing a longer transition period to help these employers changing their retirement practices.[14] It is worth noting that this is in contrast to the decision of the previous Labour government that waited until 2006 to adopt legislation on age discrimination because of the 'new, wide ranging and complex issues that this raised'.

The government failure to engage with the concerns of these employers is likely to lead to a situation where organisations which saw mandatory retirement as a 'focal point' for workforce planning will now focus more on performance management and capability procedures as a way to terminate employment. The consequences of this could result in an extension of the management prerogative as 'line managers…will have to be more precise about the boundaries between an acceptable and less acceptable contribution to the organisation at all stages in an employee's career, not just as it approaches a possible point of retirement'.[15] This compounded with measures that the UK government is about to

[12] H. *Metcalf and P. Meadows, Second Survey of Employers', Practices and Preferences, Relating to Age* Employment Relations Research Series No.110 (London: Department for Business Innovation and Skills and Department for Work and Pensions, 2010); W. Sykes, N. Coleman and C.Groom, *Review of the Default Retirement Age: Summary of the Stakeholders Evidence.* Research Paper No.675 (London: Department for Business Innovation and Skills and Department for Work and Pensions, 2010); A. Thomas and J. Pascall-Calitz, *Default Retirement Age: Employer Qualitative Research.* Research report No 672 2010 (Department for work and pensions, 2010)

[13] A. Thomas and J. Pascall-Calitz, *Default Retirement Age: Employer Qualitative Research.* Research report No 672 2010 (Department for work and pensions, 2010: 4)

[14] The abolition of DRA and mandatory retirement was announced in late 2010 and employers had just about 12 months to prepare for this change.

[15] B Price Age discrimination and retirement in Higher Education: A practitioner's response. *International Journal of Discrimination and the Law,* (2011) Vol11 No1/2: 83

introduce to make it easier for employers to terminate employment presents serious risks of weakening employment protection for employees of all ages.[16]

Furthermore it is important to remember here that, as mentioned earlier, under the current UK legislation (s13 Equality Act 2010) employers could still adopt a retirement rule if it can be objectively justified. This year the Supreme Court had its first opportunity to address the issue of retirement and age discrimination in the case of *Seldon v Clarkson Wright and Jakes*.[17] In this case Mr Seldon, the claimant, was a partner in a firm of solicitors which had adopted a compulsory retirement age for partners of 65. However, when required to retire, in accordance with the partnership agreement, Mr Seldon claimed age discrimination. In this case the Supreme Court, having considered the CJEU jurisprudence on the interpretation of Article 6 in relation to age discrimination and retirement rules, concluded that although the claimant had been treated less favorably because of his age, this was justified by the following legitimate aims: intergenerational fairness which in this case involved the need to ensure that younger lawyers employed by the firm were given the opportunity to become partners after a reasonable period of time; and 'dignity' broadly defined as the need to avoid having to dismiss older workers because of their incapacity or poor performance, in order to preserve their dignity and avoid unpleasant disputes in the workplace about capability.[18] The question as to whether a retirement rule of 65 on the facts of the case was a proportionate means to achieve these legitimate aims was remitted to the Employment Tribunal which found in favour of the firm. It ought to be noted that this case started in 2006 prior to the removal of mandatory retirement and therefore it may have been viewed differently under the current legal regime. It is however, also worth considering that it may give confidence to more employers to adopt an EJRA.

Abolishing mandatory retirement: is this driven by a neoliberal agenda?

The abolition of the DRA appears to have paved the way for a major government review of state and public sector pensions. This has involved a number of changes which are not welcomed by the trade unions and other groups, including making people working for longer before becoming eligible for a state pension. It also sparked a major dispute between the UK government and the trade unions over pensions which led to a national strike on November

[16] The UK government is planning to introduce settlement agreements to make it easier for employers to end the employment relationship when employees are under-performing and avoid disputes on unfair dismissal (see Department for Business and Innovation and Skills, Ending the Employment Relationship: Government Response to Consultation. January 2013). Trade unions however, have expressed concern about the possible weakening of employment protection that this reform could entail (see T Lezard, TUC condemns Cable plans to make it easier for employers to sack staff, 14th September 2012 Union-News.co.uk/2012/09

[17] Seldon v Clarkson Wright and Jakes [2008] UKEAT 0063_08_1912 at [74]

[18] For a full analysis of this case see L.Vickers and S.Manfredi, Age Equality and Retirement: Squaring the Circle. Industrial Law Journal, (2013) Vol. 42 No1: 61-74

30th in 2011 (ironically shortly after the abolition of the DRA). Thus discussion about the right of older workers not to have retirement imposed upon them as an expression of age equality has now been overshadowed by an increasing number of workers claiming for their right to retire at the age of 65 as set by the former DRA. The concern has not been limited to the trade unions. The charity Age UK commented that although average life expectancy has increased this should not be the only factor on the basis of which an increase in pension age should be determined. They highlighted that there are 'huge disparities in health life expectancy across the country and that this 'means the poorest socio-economic groups will be required to sacrifice proportionately more of their retirement'[19]. In the light of these concerns raised about pension reforms and their likely impact on workers it is worth examining further the stated intention of this legislation, to address 'issues of equity and fairness', and ask whose 'fairness' is being considered in practice. Although one may assume that the idea of fairness relates to older workers this may not be the case. Since the late 1980s a neoliberal agenda has been developing in the US which portrays 'older people as 'greedy geezers', who are well off and subsidised by poorer families.[20] From this perspective older people are seen as taking up a large share of national income and services at the expense of younger generations. These ideas have now taken root in the UK social discourse, as evidenced by the Intergenerational Foundation which has developed an intergenerational fairness index, and claims that 'what this index highlights is the increasing problem of poor young people financing richer older people'.[21] Moreover, similar arguments have been articulated by UK conservative politicians like for example David Willits (Minister for Higher Education at the time of writing this paper) who has argued that the baby boomer generation has taken resources away from younger generations and ought to give them back.[22] As highlighted by Vincent, these types of arguments represent a new form of ageism and it is not clear whether the 'fairness' that the abolition of mandatory retirement intends to achieve is in respect of older workers by giving them choice to prolong their working lives or in respect of younger generations by making older workers pay for their old age through work.

These considerations suggest that the approach taken by the UK of abolishing the DRA is part of a re-negotiation of the length of working lives and a form of 'de-regulation of retirement' driven by a neoliberal agenda committed to rolling back the state and dismantling welfare benefits, including pensions. This is further evidenced by comments made by the

[19] H Osboene, George Osborne Confirms State Pension Age Will Rise to 67, The Gurdian 29 November 2011
[20] J.A. Vicent, *Politics, Power and Old Age* (Buckingham: Open University, 1999: 111)
[21] J. Leach, A. Hanton, Intergenerational Fairness Index. Measuring Changes in Intergenerational Fairness in the United Kingdom (Intergenerational Fairness Foundation 26 June 2012, retrieved from www.if.org.uk 31 May 2013)
[22] D. Willetts, *The Pinch: How the Baby Boomers Took their Children's Future – And How they can Give it Back* (Ataltic Bookes, 2010)

Chancellor of the Exchequer, George Osborne, who speaking at a conference on global investment in London, said that he was able to make 'absolutely enormous savings' by raising the state pension age. This statement attracted much criticism from Pensioners' groups who felt that 'the comments were insensitive to hard-working Britons who were being forced to work well past the point at which they expected to retire'.[23]

This analysis resonates with the Marxist discussion about the length of the working day. Marx's labour market theory points to the fact that 'the measure of time is flexible, [and] it can be stretched out and manipulated for social purposes'.[24] Marx argued that the working day is a socially constructed concept and that it is defined by physical limits and moral ones. The 'physical' limit is the 24 hours day although the whole of this period cannot be used for work, since workers need time to eat and sleep. The 'moral' limit, in contrast is determined by social values which in turn are determined by the socio and economic stage of development at a given time. Thus, the length of the working day 'fluctuates within boundaries both physical and social'.[25] When it comes to determining the lengths of working lives we can apply similar principles and argue that the length of working lives too 'fluctuates between physical and social boundaries'. Working lives in most European countries start at the age of 16 which nowadays is deemed to be a socially acceptable boundary to start work (although in some countries lower age limits apply). It can be argued that the physical limit of working lives can be identified with average life expectancy and that the 'moral' limit is determined by socially acceptable boundaries about how much free time workers should enjoy towards the end of their life. It appears that both the 'physical' and 'moral' limits about the length of working lives are being re-negotiated and extended but the outcomes may not always be in the interest of the workers concerned, especially those in the most vulnerable socio-economic groups. In other words working longer may not necessarily equate to improved quality of life especially for those workers in the lower segments of the labour market in physically demanding manual jobs or in low skill and repetitive occupations.

In summary, the social and political factors discussed above may suggest that the removal of the retirement age was a misguided policy response to the social and economic challenges of an aging population that it was attempting to address. However, despite these political criticisms of the policy, there remains an underlying issue that favours the abolition of retirement. This is that abolition avoids the inherently unequal treatment of older workers

[23] Chancellor Accused of Celebrating Pension Pain, (Daily Mail, May 10 2013)
[24] D.Harvey, '*A Companion to Marx's Capital*'(Verso, London 2010: 140)
[25] K.Marx, *Capital, A New Abdridgement*, (Oxford University Press, Oxford, 2008:149)

that otherwise occurs with retirement. In the next section we consider how these egalitarian concerns might be met if retirement is to be retained.

Equality based arguments against retirement

The egalitarian case against retirement is reasonably straightforward. Essentially, retirement involves less favourable treatment of older workers, as they are denied the opportunity to continue in employment. This less favourable treatment of a group of workers on grounds of age can be viewed as an affront to individual dignity, particularly as the treatment is often based on stereotypical assumptions about capacity reducing with age.[26] Furthermore, retirement can cause economic and social disadvantage to older workers: shorter working lives can lead to poverty in old age;[27]and those out of work are more likely to suffer from low self-esteem, depression and ill health.[28] For many, work plays a significant part in their sense of identity,[29] and is the medium through which they feel a sense inclusion in society.[30] In short, then, imposing retirement on older workers diminishes older people, and infringes human dignity.

These arguments are forceful, and even if the socio-political case in favour of retirement set out above is accepted, there thus remains a powerful case against mandatory retirement. The question that remains, therefore, is whether the egalitarian case can be countered. It is suggested below that the principle of equality should remain as a guiding principle to be taken into account as we consider retirement policy, but that the way in which it is understood in this context should be reinterpreted. In this way, it is suggested, it is possible to retain a commitment to egalitarian principles, whilst still allowing retirement as a policy response to the social and economic challenges identified above.

Meanings of equality

Of course, the first point to note about the egalitarian case against retirement is that the notion of equality itself is one which bears a number of competing meanings. The differing principles which can underpin equality law are contested in the academic literature,[31] but it is

[26] J Grimley Evans, Age discrimination: Implications of the Ageing Process' in S Fredman and S Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, Oxford,2003).
[27] However, this can depend on the form of work involved, with some occupational groups more affected than others. Moreover, the link was lessened for women, whose poverty or wealth remains linked to that of their male partners. See E Bardasi and SP Jenkins *Income in later life: Work history matters* by (Joseph Rowntree Foundation 2002).
[28]*Winning the Generation Game* (Report of the Performance and Innovation Unit, 2000, Cabinet Office, London2000) 28.
[29] K Karst, 'The Coming Crisis Of Work In Constitutional Perspective' [1997] Cornell LR 523, 532
[30]V Schultz 'Life's Work' [2000] 100 Colum LRev 1881. See also Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16
[31] For a discussion of different aims of equality law see H Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16, S Fredman, The Future of Equality In Britain, EOC, Working Paper Series No. 5, (London, Equal Opportunities Commission

clear at the very least that there are two main aims which a concern for equality may address. First, equality can be understood as upholding dignity because treating people less favourably based on a protected characteristic affronts individual dignity. Second, equality can be seen as a concern for removing economic and social disadvantage suffered by those sharing a particular protected characteristic. The egalitarian case for resisting retirement can be framed from both perspectives: retirement seems incompatible with a dignity based approach to age equality, as workers should not be expected to leave employment just because they have reached the age of 65. Alternatively, a concern based on equality understood in terms of disadvantage may be concerned both with retirement forcing older workers out of financially rewarding work, as well as with the economic disadvantage of younger workers unable to get a start in working life. The fact that the two concepts of equality are at times in tension with each other is the first means by which one might re-evaluate the egalitarian case against retirement.

The argument from dignity

The second aspect of the egalitarian case to be examined is the concept of dignity itself, as it applies in the context of retirement. The assumption of the egalitarian case is that people should be treated as individuals and that just as it infringes human dignity if we refuse work to a person based purely on gender, race or disability, so it infringes dignity if work is refused on the basis of age. As already mentioned, this is a very strong argument, but it is worth considering some of the ways in which it can be tempered. First, it is arguable that age discrimination is not like other grounds of discrimination as it is a characteristic that changes over time: everyone starts young and hopes to become old. This means that the benefits and disadvantages of each phase of life are enjoyed or suffered by everyone in their time, assuming they live long enough. Those who reach older age will have spent time being young, and have had a chance to enjoy youth's benefits; and the young will, in turn, face any disadvantages of age in time. Thus the argument is that distinctions based on age do not infringe human dignity, as we all move from advantage to disadvantage at different stages of our lives.[32]

A second thread to this argument can be seen by reference to debates that surround the issue of positive action or positive discrimination. Although usually differential treatment based on sex, race or other protected grounds would be suspect, the argument has been made by some proponents of positive action that some differential treatment is acceptable

2002) 11, N Fraser, 'Rethinking Recognition'(2000) *3* New Left Review 107, and L Vickers, 'Promoting Equality Or Fostering Resentment? The Public Sector Equality Duty And Religion And Belief' (2011) Legal Studies 135.

[32] See further the discussion of these concepts in S Fredman, 'The Age of Equality'in S Fredman and S Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, Oxford,2003).

where it does not carry with it assumptions of stigma or insult. The point is famously made by Dworkin in relation to race discrimination: individuals have the right not to suffer disadvantage because the group they belong to is the object of prejudice or contempt.[33] However, if this is the basis on which individuals can claim the protection of equality laws, the corollary is that where the disadvantage is suffered without prejudice or contempt for the group, then it may be acceptable. In effect then, the anti-discrimination principle may not apply where adverse treatment does not bring with it demeaning assumptions based on stereotype.[34] Applied in the context of retirement, it is arguable that if retirement is imposed on workers in order to serve the social and economic interests of the younger generation, then it may be that it will meet the egalitarian objection based on the notion of dignity: the argument is that there is no infringement of dignity in this case as retirement is not imposed out of contempt for older workers, or based on assumptions about declining performance, but because the needs of others require that jobs be passed on after a particular period of time. The needs of others, understood to include the need to balance the legitimate needs of younger and older workers, can be termed 'intergenerational solidarity' in order to avoid the idea of the needs of younger workers being used to set one generation competing against another for jobs, as discussed above.[35], it would be preferable to refer instead to the notion of 'intergenerational solidarity'.

It is worth noting that in the EU and UK context, positive action is allowed in narrowly defined circumstances.Article 7 of Directive 2000//78 provides: 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 [age].' Case law from the CJEU on gender discrimination tells us that positive action practices will be lawful as they do not operate in an automatic and unconditional manner. Instead, there needs to be space in any positive action scheme for an objective assessment of the individual candidates.[36] This approach is echoed in the UK provisions on this issue. These allow positive action in employment which is a proportionate means of achieving the aims of alleviating disadvantage experienced by people who share a protected characteristic, or reducing their under-representation. Such action is allowed as long as there is nopolicy or practice of treating those with the characteristic more favourably.[37] Effectively this replicates the EU position that positive action in employment is allowed, as long as there is space left for the 'personal equation' to be considered so that where there is

[33] See R. Dworkin, *A Matter of Principle.* (Harvard University Press,Cambridge (Mass.) , 1965)
[34]See E Anderson, 'Integration Affirmative Action and Strict Scrutiny' (2002) NYULRev. 1195 cited in Bamforth, Malik and O'Cinneide (eds) *Discrimination Law, Theory and Context* (London, Sweet and Maxwell, 2008), p363
[35] For further discussion of this issue see L Vickers and S Manfredi, 'Age equality and retirement: squaring the circle' (2013) ILJ 42(1), 61-74
[36]*Marschall* [1997] ECR – 1 ECJ
[37] Equality Act 2010 s 159

particular reason why the general rule should not be applied to an individual, an exception can be made. The reason such actions can be justified, and are not immediately ruled out as being discriminatory against others, is that the preferential treatment does not infer any contempt or insult. The preference is allowed in order to address underrepresentation or other disadvantage otherwise suffered by the preference-enjoying group.

It is arguable that the issue of retirement should be viewed as analogous to positive action in this regard. In this way, the egalitarian concern for dignity is preserved, but interpreted so as not to preclude retirement. Just as the egalitarian concern is met with respect to positive action by the notion that different treatment that is not based on contempt is lawful, where it serves the overall aim of promoting equality, so the egalitarian concern with differential treatment on the basis of age is met by the idea that retirement serves the needs of intergenerational solidarity, in most cases the needs of the young. In some cases, this type of solidarity between generations may mean that disadvantaged older workers (for example, those who have not been able to build up sufficient pension) should not be required to retire: in these case the 'personal equation' that should be allowed in positive action schemes would mean that retirement may not be imposed in a blanket manner.

Thus a model by which retirement can be justified as a general policy, but with some mechanism for review, might be a reasonable response to the policy challenges of the aging population identified above. This model addresses the egalitarian concerns surrounding retirement, and suggests that the current CJEU approach of justifying the flexible retention of retirement ages[38] is compatible with concepts of dignity and respect for the individual.

Work as an economic asset

A second way in which the egalitarian case against retirement may be met involves a reconsideration of the role of work in the life of the worker. The case that is usually advanced against retirement is that work plays significant economic and social roles for many individuals. The economic role is obvious: work provides the main income stream for most people, enabling them to house, clothe and feed themselves and their dependents. Work also serves important non-financial role in the lives of workers. It acts as a source of identity and status.[39] Denying workers access to this benefit on the basis of age again diminishes dignity. Again, however, further examination of this notion may mean that a different conclusion can be justified.

[38] *Petersen v Berufungsausschuss fur Zahn fur den BezirkWestfalen-Lippe* Judgment of the CJEU of 12 January 2010, Case-C-341/08; *Rosenbladt v OellerkingGebaudereinigungsges.mbH* Judgment of the CJEU 12 October 2010, Case C-45/09. See Seldonparas 32-54.

[39] K Karst, 'The Coming Crisis Of Work In Constitutional Perspective' [1997] Cornell LR 523, 532

It is undoubtedly the case that for many, work does bring non-material benefits, such as status and identity. However, although a significant interest, there may be a danger in giving it too much emphasis. Many things outside of work also give individuals a sense of identity and it is not really clear why personal identity given by employment should be given any particular weight if it is to be set against any other interests, such as the rights of other workers to a job, the rights of employers to manage their enterprises as they see fit etc. Thus the worker's interest in the identity and status enhancing aspects of a job may be important to the individual, but this is not sufficiently strong to outweigh other interests. Moreover, the social status benefits provided by work are most likely to be experienced by workers with high status employment. A better work related benefit, therefore, is the psychological benefit of active participation in the work force,[40] including a reduced level of depression, improved sense of well-being, and higher self-esteem, benefits that have been shown to be enjoyed by all types of employee, not only those doing high status work.[41] However, even here the benefits of work should not be given too much weight when considering retirement policy.

This argument is made on the assumption that any retirement policy is imposed in order to ensure the turnover of employment from the older to the younger generation. Where this is the aim, there will be no net reduction in the number of people who enjoy the material and non-material benefits of work, just a re-distribution of these benefits. In effect, a policy response to the challenges set out above which allows for retirement can be said to meet the egalitarian concern with dignity because it views jobs as economic assets rather as sources of identity and dignity-enhancing status. Indeed, 'for the large majority of people their job is their principle asset.'[42]

Viewed as an economic asset, there is an argument that 'equality,' if understood as a mechanism for avoiding economic disadvantage, might oblige workers to pass on that asset when it has served its main economic function. For those who have had the opportunity to work for a full career and have built up sufficient pension, this would suggest that the asset should be passed on to another worker, who then has the chance to use the asset for the same purpose, before handing it on in turn.

Addressing the egalitarian case against retirement

It has been accepted that there are strong egalitarian concerns regarding retirement: it can certainly seem unjust to remove workers from the labour force merely because of

[40] For references see V.Schultz, 'Life's Work' [2000] 100 *Colum LR* 1881,1890
[41] V. Schultz, 'Life's Work' [2000] 100 *Colum LR* 1881,1892
[42] Otto Kahn-Freund, *Labour Law: Old Traditions and New Developments* (Toronto: Clarke, Irwin & Co, 1968) at 38, cited by in W. Njoya *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, 2007).

chronological age; and moreover, the result may in some cases be to cause economic disadvantage. However, closer examination of these claims suggests that the case is not as robust as it first seems. Dignity arguments are less strong when it is remembered that the age based difference in treatment is not a signifier of contempt for older workers, but is based on the understanding of the job as an economic asset, which should be distributed fairly between the generations.

Note, however, that this framework does suggest some need for exceptions to any general rule in favour of retirement. There will be cases where fair distribution requires that some individuals be given longer in the job in order to build up their economic stability. However, a legal framework that envisages that retirement can be imposed on workers who have sufficient financial means should not be rejected merely on the basis that it breaches concerns for equality: as set out above, such an approach is compatible with a respect for the concerns of equality.

How can the challenges of 'active ageing' be met whilst striking a balance between 'diverging but legitimate interests'?

Our analysis shows that although *prima facie* the abolition of retirement appears to provide a solution to the inherently unequal treatment of older workers, when this is considered in conjunction with underpinning political choices in the area of pension benefits, retirement and employment, it can be seen that 'retirement and reconceptulising work – also imply threats'.[43] These include the erosion of pension benefits which can reinforce disadvantage especially for those workers in the poorest socio-economic groups and the weakening of employment protection for all workers. Moreover, we have established that the overriding concern for fairness and equality in labour policy does not necessarily require a removal of retirement.

What, then, would provide for a better legislative framework to encourage the extension of working lives and changes to retirement norms whilst at the same time striking a balance between 'diverging but legitimate interests'? As pointed out earlier this is a very complex policy area therefore any suggestions remain tentative at this stage.

Retaining a flexible retirement age and intergenerational solidarity

[43] A Numhauser-Henning, Labour Law in a Greying Labour Market- Challenges of Active Ageing 5th Annual Legal Seminar European Labour Law Network 11-12 October 2012

The first suggestion is that, after all, it may be desirable to maintain the option of a default retirement age. This could be set by national law having regard to a number of country specific factors such as pension benefits but also increased life expectancy. The adoption of this default retirement age could operate in a flexible way leaving the freedom to the social partners to use collective agreements to apply a retirement rule to some occupational groups while removing it for others if, of course, such differential treatment could be objectively justified. Collective agreements appear to be the best methods to identify any legitimate aim which may warrant the retention of a retirement rule and to ensure that this is a proportionate measure, having regard to the requirements of different types of occupations, pension arrangements and the conditions of the labour market. Using collective agreements to implement flexible retirement rules would mitigate for the 'one size fits all'[44] approach which, as highlighted by Rubenstein, would be in contrast with the very concept of proportionality. An example of this is provided by the Spanish case of *Felix Palacio de La Villa v Cortfel Servicios SA* where a retirement rule was introduced through national collective agreement, as a result of high levels of unemployment. This agreement however, stated that employees would be made to retire at 65 provided that, in accordance with their pension scheme, they were able to retire on a full pension. Whilst this provision was aimed at re-distributing work among different generations of employees, at the same time it safeguarded the interest of older employees against the risk of hardship if they did not have sufficient income for their retirement.

Thus the advantage of a flexible retirement rule would be that it could meet the economic and social interests of those most in need, such as young unemployed people especially at a time of very high youth unemployment and economic recession. This would allow for a re-distribution of work among different generations which, as seen earlier has been referred to as 'intergenerational fairness'. We suggest however, that the concept of 'intergenerational solidarity' should be preferred to that of 'intergenerational fairness' for two reasons. Firstly as discussed earlier the concept of intergenerational fairness has been linked to a neoliberal agenda which depicts older people as 'greedy geezers' taking up a large proportion of resources. The application of these arguments in the context of employment would portray older workers as taking jobs and career opportunities away from younger workers. The concept of solidarity, instead, is well rooted in the European social policy tradition,[45] and it overcomes the potential conflict between the right of older employees not to be made to

[44] M. Rubenstein The Very Concept of Proportionality is Inimical to "One Size Fits All" Solutions. EOR (1 February 2011: 25)
[45] *Renewed Social Agenda: Opportunities, Access and Solidarity* (COM 2008) 421 www.eur-lex.europa.eu/LexUriServ.do?uri=COM: 2008:0412 (accessed 21 September 2012); *Towards a Europe of All Ages – Promoting Prosperity and Intergenerational Solidarity* (COM 1999) 221

retire once they have reached a certain age, and the interest of younger people to have access to jobs and career opportunities.

Right to request flexible retirement

The second suggestion is to complement a flexible retirement rule with a right for older workers to request flexible retirement arrangements which could involve the following options: to continue to work past the default retirement age (if the employer still has one) either on the same contract for a specified period of time or on reduced hours; to move to a different role perhaps with reduced responsibilities; to partly retire and continue to work on a part-time basis. This is similar to the right to request to continue to work past retirement that was introduced by the UK government in 2006. Whilst it is difficult to assess their effectiveness because they were so short lived, those regulations were, in our view, to a certain extent flawed because they did not require employers to give a reason if they refused an employee's request to work for longer. We would advocate that a right to request flexible retirement should instead be shaped along the lines of the right to request flexible working for employees with caring responsibilities which has now been in place for almost a decade. Under this legislation employers have a duty to consider requests to work flexibly from eligible employees by following a statutory procedure. Employees' requests to work flexibly may be refused by employers but only if there is a demonstrable business reason such as for example added costs, difficulty in re-allocating work or other operational reasons (the law provides a list of examples which although not exhaustive nonetheless provides some clear guidance). Employees however, have a right to appeal against their employer's decision. Moreover, if an employer does not comply with its statutory obligations an employee may be entitled to take legal action that could ultimately result in compensation.

This legislative approach has been characterised as 'light touch' and it is clearly underpinned by the social policy aim of increasing the participation of people with caring responsibilities, and especially women, in paid employment. Although the right to request flexible working has been criticized as weak,[46] there is a significant body of research and organisation-based case studies[47] which show that this legislation has contributed in an effective way to a re-conceptualisation of work from a norm of full-time employment to a wide range of flexible working options, which in several cases have been described as win/win solutions able to

[46] L Anderson, 'Sound bite legislation: the Employment Act 2002 and new flexible working "rights" for parents' (2003) Industrial Law Journal 32(1), 37-42; G James, 'The Work and Families Act 2006: legislation to improve choice and flexibility'? (2006) Industrial Law Journal 35(3), 272-278

[47] H. Hooker, F.Neathey, J.Casebourne, M.Munro The Third Work-Life Balance Employee Survey: Main Findings. Employment Relations Research Series No.58 (Department of Trade and Industry March 2007 (Amended June 2011); A. Maitland, Working Better: A Manager's Guide to Flexible Working (Equality and Human Rights Committee: Manchester 2009); Top Employers for Working Families (accessed 31 May 2013 www.topemployersfor workingfamilies.org.uk)

integrate both the needs of employers and employees. These results suggest that this type of right can be viewed more positively as a useful trigger for organizational change, and this may justify its extension to the context of retirement. Indeed, this form of 'light touch' regulation can be understood as an example of 'reflexive legislation' in practice.

Reflexive legislation

The concept of reflexive legislation has been adopted by a number of scholars[48] as a framework to analyse how equality legislation can be used to change behavior in ways which are not always directly linked to enforcement. This approach predicates that society is not organised in a hierarchical order with the law at the top of the pyramid but rather that it is made up of a series of sub-systems, like for example the labour market and the workplace. Each of these sub-systems speaks its own 'language' which is not capable of being understood or translated by other sub-systems.[49] Each sub-system however, 'translates external stimuli into its own language and reacts reflexively according to its own internal logic'.[50] Thus, reflexive legislation tries 'to provoke… a re-configuration of self-regulation'[51]. 'by those being regulated without falling into the trap of …command and control'[52].

If we apply these concepts to the right to request flexible working or to flexible retirement, we can argue that these rules are intended to act as stimuli to be translated by the targeted sub-system (the workplace) to achieve the intended objectives of the law. These regulations try to encourage workplaces to find solutions together with their employees in order to resolve key social policy issues such as the need to re-think and modify working practices to enable greater participation in paid work of both people with caring responsibilities and older workers.

It may be argued that the UK new legal regime which has removed mandatory retirement all together has actually strengthened the 'reflexive law' approach by creating an environment where employers and employees will have to generate solutions to their 'diverging but legitimate interests' through self-regulation. However, we argue that this new legal regime has fallen into 'the trap of de-regulation'[53] and therefore it is unlikely for the reasons

[48] See B. Hepple *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation* (2011) Industrial Law Journal 40(4), 315-335; S Fredman *The Public Sector Equality Duty* (2011) Industrial Law Journal 40(4), 405-427; C McCrudden Equality Legislation and Reflexive Legislation: A Response to the Discrimination Law Review's Consultative Paper (2007) Industrial Law Journal 36(3), 255-266

[49] G.Teubner, Substantive and Reflexive Elements in Modern Law (1983) 17 Law and Society Review 293 cited in S Fredman op.cit p.418

[50] S Fredman, op.cit p. 418

[51] Hugh Collins, 'Book Review' (1998) 61 MLR 916, 917, cited in C Mc McCrudden, op.cit

[52] C Mc McCrudden, op.cit p.258

[53] C Mc McCrudden, op.cit p.258

discussed earlier to provoke a re-configuration of retirement practices and encourage the development of self-regulation by those who are being regulated.

In summary the experience of the UK shows that 'reflexive legislation' can be effective in pursuing social policy aims as demonstrated by the case of the right to request flexible working but it also shows that it needs to be 'calibrated' to ensure its effectiveness. The UK's brief experiment with the right to request to work past retirement clearly illustrates the need for careful calibration since it appeared that it was too 'light touch' to stimulate significant change. Equally, it is important that the reflexive model does not fall into 'the trap of de-regulation' as in the case of the removal of mandatory retirement. In this case there is a risk that an important social policy aim, like the extension of working lives, ends up been left to be determined by market forces and by employers' business interests.

Conclusions

In conclusion, the experience of the UK shows that removal of mandatory retirement may not be the right policy response to meet the challenges of the 'Active Ageing' agenda to prolong working lives whilst maintaining quality of life. We also have established that the overriding concern for fairness and equality in labour policy does not necessarily require the removal of retirement. We have tentatively proposed two approaches which in our view could be more helpful in progressing the active ageing agenda rather than a mere 'de-regulation' of retirement. The first one would address the need to strike a balance between 'diverging but legitimate interests' by empowering the social partners to use collective agreements to retain a flexible retirement age where appropriate and necessary to achieve inter-generational solidarity. The second approach would involve the adoption of a right to request flexible working, to include older workers and enable them to access flexible retirement options, shaped on the model of 'reflexive legislation'. This would help to achieve a gradual reconfiguration of retirement practices which would allow for an incremental and sustainable extension of working lives through self-regulation at the level of the workplace. Of course for any legal regime in this area to achieve the aims of the 'active ageing agenda' it would also need to be supported by fair and flexible pension systems.

Finally the lessons from the UK show that whatever approaches are taken to progress the 'active ageing' agenda and to extend working lives, it is important that legislative solutions support a commitment to social cohesion and a European model of capitalism where 'efficiency and equity go together, in which a degree of equity is seen to help the overall

efficiency of the society'[54] rather than take an individualist, market driven, neoliberal approach.

[54]S.Walby (2000), Globalisation, Women and Work: Global Contexts for Policy Options for Gender Equality. ESRC Seminar Series: Women, Work and Trade Unions. The Oxford Women's Studies Network. July 6-7 Harris Manchester College Oxford