The Aging Workforce: Addressing its Challenges Through Development of a *Dignified Lives Approach* to Equality

by

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Faculty of Law
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Abstract

Against the background of the global demographic shift towards an aging workforce and its impacts on the labour market and the economy in industrialized societies, this dissertation pinpoints six salient challenges for future litigation and policy-making in the area of labour and employment discrimination law. These include the global tendency towards abolishing mandatory retirement and increasing the eligibility age for pension benefits; legislative age-based distinctions; cost as a justification for age discrimination; performance appraisals of senior workers; and the duty to accommodate senior workers.

At the core of each challenge lies a normative question regarding our conception of senior workers’ right to age equality, its importance and relative weight compared with other rights and interests. The aim of this dissertation is therefore to critically review the current understanding of this right and its moral and economic underpinning. Most notably, the dissertation contends that the prevailing conception of equality assessment (the *Complete Lives Approach* to equality), according to which equality should be assessed based on a comparison of the total share of resources obtained by individuals over a lifetime, has substantial implications for age discrimination discourse. As it uncovers the numerous difficulties with the complete lives approach, the dissertation develops an alternative: the *Dignified Lives Approach* to equality, according to which an individual should be treated with equal concern and respect, at any particular time and regardless of any comparison.
The dissertation then articulates five essential principles founded in Dworkin’s notion of equal concern and respect: the principle of *individual assessment*, the principle of *equal influence*, the principle of *sufficiency*, the principle of *social inclusion*, and the principle of *autonomy*. When one of these principles is not respected at any particular time, a wrong is done, and the right to equality is violated. Next, the dissertation elucidates when and why unequal treatment of senior workers based on age does not respect each of these five principles and therefore constitutes unjust age discrimination. It demonstrates that senior workers’ right to age equality is a fundamental human right. Finally, it examines the above-mentioned challenges through the lens of the new *Dignified Lives* approach.
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Introduction

The year was 2005. The Ontario government had just abolished mandatory retirement. Age discrimination was increasingly widespread especially in the workplace. The proportion of senior workers in the labour market was rapidly increasing. The Department of Justice Canada, the Ontario Ministry of the Attorney-General and the University of Toronto, Faculty of Law co-hosted a pivotal conference celebrating the 20th anniversary of s. 15 of the Canadian Charter of Rights and Freedoms. The conference speakers addressed numerous aspects of equality discourse and discrimination on various grounds such as sex, race, disability, sexual orientation and religion as well as Aboriginal rights. Age discrimination was not mentioned, even briefly.

This dissertation argues that age discrimination – although a severe and widespread phenomenon, especially in the workplace – plays only a marginal role within the legal and public discourse of equality. Against the background of the aging workforce, which creates new challenges for future litigation and policy-making in this field, this dissertation advocates a revision of the current economic and moral justifications for anti-age discrimination law, focusing on people at advanced age in the employment sphere.

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1 For information on this legislation see Chapter I, note 125 and accompanying text.
2 For detailed evidence on age discrimination in the employment sphere see Chapter III, section B.
3 Although I prefer the expression “workers at advanced age”, for the sake of convenience, I will use the term “senior workers”, while avoiding terms such as “old” and “elderly” as much as possible due to their negative connotations. Note that the term “senior” is not used here to suggest workplace hierarchy.
4 For demographic information on Canada and other developed countries see Chapter I, section B.
6 See e.g. Doris Anderson’s presentation (gender), David Lepofsky’s presentation (disability), Beverley Baines’ presentation (gender and religion) and Mayo Moran’s presentation (race). Sexual orientation was discussed thoroughly in several presentations due to the new legislation on same sex marriage. The presentations can be viewed over the Faculty of Law website: <http://www.law.utoronto.ca/conferences/equality.html>.
7 It was mentioned in the informative materials distributed in the conference yet none of the participants discussed it in their presentations.
8 I use the term “moral” here in contrast with economic justifications. That is, I do not mean to beg any questions about whether the relevant legal principles depend on “morality” in the sense of a separate domain of principles about right and wrong that govern human behaviour.
9 Many countries around the globe have realized that reliance on voluntary action is ineffective. Therefore, they have recently introduced anti-age discrimination legislation. See e.g. Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, “Age Discrimination and Working Life: Perspectives and Contestations – A Review of the Contemporary Literature” (2008) 10:4 International Journal of Management Reviews 425 at 436-37 (on the ineffectiveness of voluntary mechanisms in the U.K., such as the Code of Practice on Age Diversity in Employment of 1999). The legislation is, however, often motivated by utilitarian considerations and does not always cater for the needs and interests of senior workers. As will be argued in Chapter III, there is a lack of robust economic and moral justification for anti-age discrimination law.
10 While the literature divides people of advanced age to several categories including “old-old” (above retirement age), “old” (retirement age), and “old-young” (below retirement age), I do not intend to follow this path. I would rather talk in general about age discrimination against workers at advanced age. This may include people at the age of 80, and in some industries and cultures people at the age of 35. As will be further argued in this dissertation, they all suffer from the wrongs of unequal treatment based on age yet sometimes to various
Most notably, this dissertation contends that the prevailing conception of equality assessment (known as the *Complete Lives Approach* to equality) has substantial implications for age discrimination discourse. As it uncovers the numerous difficulties of this approach, this dissertation develops an alternative: the *Dignified Lives Approach* to equality. This new approach strengthens the justification for anti-age discrimination law. It recognizes that senior workers possess a fundamental right to age equality at work. Finally, it serves as a useful theoretical framework for tackling the new challenges of the aging workforce.

***

As a consequence of a long term decline in fertility rates, increased life expectancy, technological innovations in the health industry, and improvements in the quality of life, the world’s population is aging. The proportion of senior people in the population is becoming significantly high, exceeding that of younger people. According to the United Nations, 10.3 percent of the world population was aged 60 or above in 2005 (673 million). By 2050, it is expected to more than double, reaching 21.8 percent (2 billion).\(^\text{12}\) This global demographic trend corresponds to a growing proportion of senior workers in the labour market especially in developed countries. The global share of those aged 50-64 years within the population aged 15-64 is projected to grow rapidly from 17 percent in 2005 to 27.1 percent in 2050. In the developed countries, those aged 50-64 are expected to represent almost one third (31.2 percent) of the working age population by 2050.\(^\text{13}\)

Although the labour market is increasingly dependent on senior workers, labour force participation rates among seniors remain relatively low. As a large cohort of baby boomers (born between 1946 and 1964) is fast approaching retirement, and the succeeding cohorts...
reaching working age are significantly lower in numbers, there is expected to be a slow increase and even decline in labour supply. Soon the number of retirees is expected to exceed the number of people entering the labour market. Consequently, the dependency ratio of the old-age population will increase, the pressure on pension funds and health and long-term care systems will grow, and economic growth will be negatively affected. In addition, the imminent retirement of many baby boomers, the ongoing decrease in the proportion of younger workers and the slowdown in labour force growth are expected to create labour shortages in certain professions. This is already evident in several countries.\textsuperscript{14}

These significant implications for the labour market and the economy have induced many governments and employers around the globe to seek new ways to attract and retain senior workers in the labour market. Various legislative changes and reforms have been implemented. Many countries have introduced new anti-age discrimination laws and some have also abolished mandatory retirement. Almost all industrialized countries have decided to increase the age of eligibility for full public pension or social security benefits. Many countries have introduced restrictions on, and penalties for, early retirement and incentives for delayed retirement through the pension and tax systems. Some countries have decided to promote gradual retirement arrangements and to extend training opportunities to senior workers.\textsuperscript{15}

While some of these efforts have borne fruit, not enough has been done. Furthermore, these initiatives have been often complex and contested as they represent conflicting forces and interests. Some initiatives might be, for example, harmful to senior workers while arguably alleviating unemployment rates among younger workers. Against the background of substantial economic pressures, the efficiency and effectiveness of some initiatives have been often questioned. The complexity and the multiplicity of approaches taken have created a wide array of critical challenges for future litigation and policy-making dealing with the aging workforce and its impacts. This dissertation will pinpoint six salient challenges in the area of labour law and employment discrimination law.

First, there is an ongoing debate over the global tendency towards the abolition of mandatory retirement even in countries that have already abolished this practice.\textsuperscript{16} In some countries a large range of exceptions still exist, while others have abolished it completely.

\textsuperscript{14} For more information and references on the impacts of the aging workforce see Chapter II.
\textsuperscript{15} On the various measures adopted by different countries to increase the level of labour force participation among senior workers see Chapter I, section D.
\textsuperscript{16} Mandatory retirement is a blunt rule that terminates employment relationships at a fixed age. It is often not officially legislated, but widely exercised, usually through workplace practices or collective agreements, and conditions on pension plans. It may be facilitated by governments through omission to prohibit mandatory retirement or protect people above a certain age (usually 65) from age discrimination.
There is also vigorous dispute over the interpretation of some exceptions. Furthermore, while more and more countries introduce new legislation against age discrimination, they debate whether to continue allowing mandatory retirement arrangements. Lastly, mandatory retirement still provokes wide-ranging controversy in the literature. While many scholars argue that it is efficient and beneficial for various social and economic reasons and should therefore be allowed, at least in several circumstances, others rebut these claims and argue that it is demeaning and should therefore be abolished.

Second, while age caps and age-based distinctions in the provision of benefits, for example, are still very popular even in countries that have abolished mandatory retirement, the literature and case law is mixed as to whether these laws are sustainable. While some argue for a distinction between working life and pension life and stress the heavy burden imposed on employers who continue to sponsor senior workers above the normal age of retirement, others maintain that these age limits and distinctions constitute an affront to one’s dignity.

Third, many senior workers are not hired, denied training, or even dismissed due to cost considerations. While in other forms of discrimination mere cost savings may not serve as a justification for discrimination, it is very common in age discrimination cases. Once again, the literature and case law is inconclusive on this issue. While some scholars argue that this behaviour amounts to age discrimination (albeit of an adverse effect type), others maintain that it is not or that it is still justified. This issue is part of a larger debate on the extent to which cost or profitability should be a potential justification for age discrimination. As age discrimination is often considered less of a wrong than other forms of discrimination, economic considerations are often used to justify age discrimination.

Fourth, there is an enormous controversy around the various initiatives pursued by different countries to attract and retain senior workers in the labour market, especially increasing the age of eligibility for full public pension benefits. These initiatives are often a compromise between rival interests and forces. Some might have an adverse effect on senior workers, while their effectiveness in tackling the challenges of the aging workforce is often uncertain. It is therefore still a matter of dispute whether the age of eligibility should be increased in countries that have not yet done so, or be increased even further in countries that have already adopted this measure.

17 In Ontario, for example, the prohibition on age discrimination in the provision of benefits such as disability or health applies to workers aged 18 to 64. It allows employers to provide workers aged 65 and over with fewer or no benefits at all. In both Ontario and Newfoundland, the prohibition on age discrimination also exempts employers from the obligation to re-employ injured workers aged 65 and above and from the duty to accommodate them up to the point of undue hardship, and limits their loss of earning benefits.
Fifth, as more and more countries abolish mandatory retirement, the use of appraisal systems to evaluate the job performance of senior workers is becoming increasingly common. This in turn raises several controversial issues. Among other things, there is uncertainty with regard to the extent to which governments or courts should interfere ex ante with the design of these appraisals, and if so, what is the recommended method of performance appraisal, how performance appraisal should be supervised, and who should bear its costs.

Finally, while accommodation of senior workers becomes an increasingly topical issue, the nature and scope of this duty are subject to ongoing debate. There is very little literature and case law on this issue. While some argue that the duty to accommodate disabled workers should apply to senior workers who have a disability or who are perceived as disabled, others reject this proposal or suggest limiting the duty to accommodate senior disabled workers due to the potential undue hardship to be borne by employers. Furthermore, it is not clear whether there should be a duty to accommodate senior workers because of their age (regardless of any disability), and if so what it should include and who should bear its costs.

While the above challenges revolve around broad economic and social considerations, at the core of each challenge lies a normative question regarding our conception and assessment of the right of senior workers to age equality, its importance and relative weight compared with other rights and interests. The aim of this dissertation is therefore to critically review the current understanding of the right to age equality and its moral and economic underpinning. In doing so, it exposes the limited and fragile theoretical foundations of the contemporary understanding of age discrimination. Focusing on people at advanced age in the employment sphere, it develops a new account that strongly emphasizes the wrongs associated with unequal treatment based on age.\textsuperscript{18} It advocates that all doctrinal and policy controversies pertaining to the aging workforce should be examined through the lens of this robust account of age discrimination in employment.

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The dissertation is organized as follows. Chapter I explores the global demographic trend towards an aging workforce and its impacts. It starts with a brief description of the

\textsuperscript{18} I could have argued that age discrimination against people of any age and in several spheres is wrong. However, since the marginalization of workers at advanced age is the most evident and documented form of age discrimination, I chose to present the strongest, most detailed case I could. This does not mean that the account developed in this dissertation is not applicable to younger workers and to other spheres as well. For a detailed explanation of this choice see Chapter III, section D.2.
nature and magnitude of this trend. It proceeds with a detailed discussion of its impacts on
the labour market and the economy, stressing the need to increase the level of labour force
participation among senior workers. It then examines in depth the wide array of approaches
taken by different countries to tackle the consequences of the aging workforce. Most
importantly, the tendency towards abolishing mandatory retirement and increasing the age of
eligibility for full public pension benefits is depicted. The last part of the Chapter assesses
the effectiveness of legislative changes and reforms pursued to attract and retain senior
workers in the labour market. Most notably, it stresses the complexity of retirement decision
making and the so-far partial success in increasing labour force participation among senior
workers and delaying retirement.

Chapter II outlines six of the most prominent doctrinal and policy controversies
pertaining to the aging workforce and its impacts in the field of labour law and employment
discrimination law. It begins with a thorough analysis of the debate over the legality of
mandatory retirement arrangements. The different arrangements adopted in different
countries are described and the main arguments for and against allowing such arrangements
are set out. It then analyses the controversy over legislative age-caps and age-based
distinctions especially with regard to workers aged 65 and over. These distinctions are still
very common even in countries that have already abolished mandatory retirement. Next, it
presents the various positions on the extent to which cost should be a potential justification
for age discrimination against senior workers. It also explores the controversies over the
measures chosen by employers and policy-makers in different countries in their attempt to
improve the sustainability and affordability of public pension plans and to encourage senior
workers to remain active in the labour market. As well, it raises several crucial questions
relating to performance appraisals. Finally, it identifies several queries pertaining to the
scope of the duty to accommodate senior workers. Each part of this Chapter entails a critical
examination of the relevant literature and case law and strongly illustrates the enormous
controversy that these questions have engendered.

The main argument put forward in Chapter II is that the answer to the myriad
challenges of the aging workforce depends on one’s conception of the right to age equality
and more specifically on one’s normative view on which interests of senior workers ought to
be protected and how the interests of senior workers should be balanced against the interests
of other workers, employers and society as a whole. If age equality constitutes a strong,
fundamental human right (at least in the employment setting) that aims at protecting
important values and interests, then it will have a significant role in the way that policy-
makers and jurists resolve the controversies delineated above and will usually trump other
considerations involved unless they are highly compelling. If age equality is not as important as gender and race equality, the rights and interests of senior workers will often be overridden by other countervailing considerations. This Chapter therefore stresses the need for a richer and more profound theory that will delve into the meaning of age discrimination, elucidate the circumstances in which unequal treatment of senior workers is wrong, and properly balance competing rights and interests.

Starting with a brief introduction to ageism and age discrimination in the employment sphere, Chapter III argues that despite its increasing prevalence, there is a lack of a robust theory of age discrimination. Age discrimination is considered less harmful than other grounds of discrimination. Age discrimination is often regarded as legitimate and economically efficient. Consequently, it is often permitted under various legislative exceptions, and justified by economic considerations. The main argument advanced in this Chapter is that while age is a unique ground of discrimination, the relative weight that is currently assigned to the right to age equality – at least in the context of senior workers – is inappropriate. That is, age discrimination against senior workers is as wrong as, for example, race and gender discrimination. To this end, the analysis focuses on senior people in the employment sphere, and the economic and moral justifications for anti-age discrimination law are critically examined.

First, Chapter III maintains that while the common economic justifications are weak, they are often based on false assumptions. Alternative arguments to strengthen the economic justification are therefore offered. Next, the Chapter argues that the prevalent moral justification for anti-age discrimination in employment is weak. It demonstrates its foundation on false assumptions and questionable philosophical theories. Most notably, it critiques a philosophical view according to which equality should be assessed based on a lifetime experience because since we all age, we get the same benefits and bear the same burdens at different stages of our lives. This view is often called the *complete lives approach to equality*. This approach has justified many age-based distinctions in employment (including mandatory retirement) and in other spheres as long as they apply to all people when they age. Furthermore, it has often influenced the balance struck between the right of senior workers to age equality and other social and economic considerations and interests. However, as this Chapter reveals, there are various difficulties with this approach and its modified versions. Among other things, this approach does not oppose even the most severe disparity between the young and the senior, provided that the sum of their benefits and burdens over a lifetime is even.
The last part of this Chapter delves into the meaning of equality using Ronald Dworkin’s distinction between equal treatment and treatment as equals. While equal treatment (the comparative dimension of equality) means equal distribution of shares which can be reducible to sameness of treatment, treatment as an equal means treating a person with the same respect and concern as anyone else. The idea of equal concern and respect is derived from the philosophical, Kantian notion that all individuals have the same unconditional intrinsic worth; and therefore are entitled to an equal degree of concern and respect and should not be used instrumentally as a means to some other end. The idea of treatment as an equal is more substantive and fundamental than the idea of equal treatment. It has distributive implications, yet it is not essentially comparative. In my view, it focuses on people’s needs at any particular time often without comparison to other people’s situation.

It is therefore maintained that assessing equality requires more than a mere comparison between two individuals. Equality is most notably about treating individuals as having equal moral worth at any particular time and regardless of any comparison. This in turn exposes the fatal flaw of the complete lives approach to equality. In short, since the complete lives approach focuses on assessing and comparing the total share of resources obtained by individuals over a lifetime, it ignores wrongs such as stereotyping, oppression and marginalization of individuals within certain temporal stages of life. These wrongs are not embedded in the comparative treatment of other individuals. They are also not compensated for by benefits that were provided (or will be provided) in the past (or in the future). These wrongs occur when some essential principles, which stem from Dworkin’s idea of equal concern and respect and constitute the concept of equality, are compromised.

Chapter IV develops a new alternative approach which will be named the Dignified Lives Approach to equality. According to this approach, human beings should be treated with equal concern and respect at any particular time and regardless of any comparison. This approach has significant implications for age discrimination analysis. In a manner that is informed by the philosophical and legal literature on the meaning of equality and discrimination, this Chapter articulates five essential principles of equality founded in the

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19 This includes Elizabeth Anderson, Harry Frankfurt, Sandra Fredman, Donna Greschner, Sophia Moreau, John Rawls, Denise Réaume, T.M. Scanlon and Iris Young. Fredman identified three substantive values in the specific context of age equality (at any age and in several spheres): dignity, social inclusion and autonomy. While I do not consider dignity as one of the substantive principles of equality (or age equality), dignity assumes a significant role in my analysis. Further, alongside autonomy and social inclusion, which were identified by Fredman and will be further elaborated in this dissertation, I will discuss the principles of individual assessment, equal influence and sufficiency. In my opinion, a variety of ideas underpinning the meaning of equality better reflects the complexity and manifoldness of our lives. The five principles may
notion of equal concern and respect: the principle of individual assessment, the principle of equal influence, the principle of sufficiency, the principle of social inclusion, and the principle of autonomy. When one of these principles is not respected at any particular time a wrong is done, and the right to equality is violated.

The five principles are examined in the context of senior workers. That is, the Chapter provides a detailed explanation of when and why unequal treatment of senior workers based on age does not respect each of these five principles and therefore is wrong. In short, not every age distinction is unlawful age discrimination. An age distinction is unlawful age discrimination when the unequal treatment is based on ageist stereotypes or ageism towards senior workers; when it perpetuates oppression of senior workers; when it denies senior workers access to basic goods thus pushing them into poverty and unreasonable living conditions; when it excludes them from full and meaningful participation in social life; or reduces their autonomy and free will.

This analysis clearly demonstrates that – at least when senior workers are concerned – age equality is a fundamental human right and that age discrimination may be as unjust as any other form of discrimination. Public actors as well as private actors who distribute important goods that are essential to a dignified life are under an obligation to respect the principles of equality. Often they should not only refrain from age discrimination against senior workers but also actively promote the right to age equality in the workplace. That is, failing to respect one (or more) of the principles underpinning equality undermines the idea of equal concern and respect which informs these principles, and amounts to a personal wrong, akin to tort, against an individual. The liability of the wrongdoers stems from the harm done to an individual whether it was intentional or not. This personal wrong is so significant that it cannot be compensated for by earlier or later benefits. It is not embedded in the comparative treatment of the young and the senior but rather in the denial of equal concern and respect. An individual who suffers this wrong has a personal claim (or a right) against public and private actors even in the absence of a legislative prohibition on this kind of behaviour. Lastly, the analysis urges the introduction of complementary legislative measures that will diminish socially constructed and systemic age discrimination where a personal wrong or a wrongdoer cannot be identified.

Finally, moving back from theory to practice, Chapter V examines the doctrinal and policy questions raised in Chapter II through the lens of this Dignified Lives Approach to overlap in certain situations, yet, as will be further argued, breach of any of the principles constitutes a distinct wrong associated with discrimination.

Nonetheless, the analysis may be relevant to younger workers and to other spheres (such as housing or service provision) as well.
equality. In short, it is argued that general policies or laws permitting or forcing mandatory retirement should be banned as they are incompatible with the five principles underpinning the right of senior workers to equality. Several measures that mitigate this effect while allowing some specific mandatory retirement arrangements to prevail are offered. It is also asserted that legislative age-caps and age-based distinctions should, in general, be repealed as they undermine the principles of equality to a great extent. Once again, alternative methods to mitigate this effect are introduced. Then, it is maintained that decision or actions based on cost considerations which do not respect the principles of age equality should be upheld only when no other less discriminatory means are available. As for the trend towards increasing the age of eligibility for full pension benefits, this Chapter emphasizes the need to take into account the right of senior workers to age equality in the design and execution of any labour market policy that aims at tackling the implications of the aging workforce by encouraging senior workers to work longer. Then, some general guidelines with regard to performance appraisals are drawn. Finally, the Chapter advocates a broad scope of the duty to accommodate senior workers, in line with the Dignified Lives Approach to equality.
Chapter I:
The Aging Workforce: Causes, Impacts and the Legislative Challenge

A. Introduction

*It’s the end of the world as we know it.*¹ Our world is rapidly changing. Many of these changes have enormous effects on the world of work. As the world experiences major demographic shifts, the composition of the labour force is substantially affected. That is, the workplace is increasingly heterogeneous due to a growing proportion of female, ethnic, migrant and skilled workers.² While the world witnesses a rapid growth in global trade and an increase in internationalization of economic activity, there is an increase in mobility of capital and labour and in global competition.³ Technological developments are a catalyst for the emergence of new forms and organization of production, management, and work. There is a significant shift from mass-production manufacturing and rigorous managerial control over workers to a flexible post-industrial mode of production which is more and more outsourced and computerized. The nature of work is increasingly part-time, telecommunicated and service dominated and thus less physically demanding.⁴

Technological innovation also generates more employee involvement in the workplace. There is a substantial increase in the importance of “human capital”.⁵ At the same time, processes of globalization intensify the demand for flexibility and competitiveness in business. Employers use various techniques to strengthen their competitiveness including corporate restructuring, outsourcing and downsizing to core workforces. Consequently, atypical patterns of employment such as temporary work, contingency-based, contract work and independent contracting (which are often “bad” jobs)

³ The essential idea of globalization is that “economic activity takes on a global character, so that national systems lose their distinctiveness and are increasingly influenced by international forces” (Paul Edwards, “The Employment Relationship and the Field of Industrial Relations” in Paul Edwards, ed., *Industrial Relations: Theory and Practice*, 2nd ed. (Malden, MA: Blackwell, 2003) 1 at 23).
⁵ The workers themselves, their knowledge, skills, professional education and experience are valuable assets of the business. Accordingly, new forms of employee participation and work organization, such as self-managed teams, quality of work life, quality circles, employee representatives on boards and works councils, labour-management cooperation committees, and profit-sharing programs, are increasingly developed and adopted by managers. On the emergence of these new forms of management and work organization see e.g. Samuel Estreicher, ed., *Employee Representation in the Emerging Workplace: Alternatives* (Boston: Kluwer Law International, 1997); Bruce E. Kaufman & Daphne Gottlieb Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (Armonk, NY: M.E. Sharpe, 2000).
are increasingly common.\textsuperscript{6} Job security, stability and long-term employment relationships are less prevalent.\textsuperscript{7}

In this chapter, I will focus on one global trend affecting the world of work which is nonetheless closely linked to the considerable changes delineated above: the aging of the world’s population. Due to a long term decline in fertility rates, increased life expectancy, technological innovations in the health industry, and improvements in the quality of life, there is a global demographic shift towards an aging population. The economic and social consequences and implications of this trend are multiple, affecting, among other things, family structures, living arrangements, savings, pensions, taxation, and health-care services. This trend is shadowed by a growing proportion of senior workers in the labour market. As it is expected to intensify in years to come, this trend creates new challenges for policy-makers and jurists in numerous aspects of our lives. Among other things, it raises a range of critical questions for future litigation and policy-making in the area of labour law and employment discrimination law.

The centre of this introductory chapter is the demographic shift in the composition of the workforce and its impact on the labour market and the economy. Section B will first identify and assess the nature and magnitude of this trend. Next, Section C will examine its impacts on the labour market and the economy including a slowdown in labour force and economic growth, an increase in dependency ratios, a growing financial burden on pension and health care systems, and a looming labour shortage. It will stress the need to increase the level of labour force participation among senior workers to address these impacts. Indeed, various reforms have been undertaken towards this aim around the globe. Section D will examine in depth the accelerating trend towards the abolition of mandatory retirement and

\begin{footnotes}
\item[7] There are still debates over the issue of job stability. According to Statistics Canada, both descriptive and statistical studies provide little evidence of a significant increase in permanent layoff rates between the 1980s and the 1990s for men or women (with the exception of men aged 55 to 64 and women aged 35 to 44). Yet, the chances of finding a new job in the event of a layoff decreased significantly over this period. See René Morissette, “Permanent Layoff Rates” (March 2004) 5:3 Perspectives on Labour and Income 15, online: \url{http://www.statcan.ca/english/freepub/75-001-XIE/10304/art-2.htm}. In the U.S., decline in job stability has been observed and argued by many scholars. See e.g. Stone, \textit{supra} note 6 at 68, 88-92; Gary Minda, “Aging Workers in the Postindustrial Era” (1996) 26 Stetson L. Rev. 561 at 564-65, 596; Paul Osterman \textit{et al.}, \textit{Working in America: A Blueprint for the New Labor Market} (Cambridge: MIT Press, 2001) at 6-9. See also Henry S. Farber, “Job Loss and the Decline in Job Security in the United States” Working Paper No. 520, Princeton University, Industrial Relations Section (July 2007), online: \url{http://www.irs.princeton.edu/pubs/pdfs/520revised.pdf}. Farber notes that while job tenure and the incidence of long-term employment have declined sharply in the U.S. between 1973 and 2006, overall rates of job loss have not increased between 1984 and 2006. His study concludes that the Displaced Workers Survey which measures rates of job loss fails to identify all relevant displacement. Finally, see \textit{Ageing and Employment Policies: United States} (Paris: OECD, 2005) at 61, online: \url{http://213.253.134.43/oecd/pdfs/browseit/8105101E.PDF} (male American workers aged 50-64 have experienced a significant decline in job stability over the past 20 years, while for female American workers job stability has been broadly stable).
\end{footnotes}
various other legislative changes introduced by different governments to attract and retain senior workers in the labour market. These changes include for example an increase in the age of eligibility for full public pension benefits and the introduction of incentives for delayed retirement and penalties for early exits. Section E will try to assess the effectiveness of these reforms. It will stress the complexity of retirement decision making and show that there has been only partial success in increasing participation among senior workers and delaying retirement so far. Finally, Section H will set out some conclusions.

B. The Aging of the Workforce
The aging of the population is a worldwide phenomenon. Global life expectancy at birth has increased from 58 years in 1970-1975 to 67.2 years in 2005-2010 and is projected to reach 75.4 years in 2045-2050, while total fertility fell from 4.47 children per woman in 1970-1975 to 2.55 in 2000-2005 and is expected to reach 2.02 in 2045-2050. There is, however, a great variation between countries. Projected life expectancy in developed countries is much higher and fertility rates are lower than the global average.

Consequently, the proportion of senior people in the population is becoming significantly high, exceeding that of younger people. According to the United Nations, 10.3 percent of the world population was aged 60 or above in 2005 (673 million). By 2050, it is

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9 According to a medium variant projection.

10 In the U.S., life expectancy at birth is 78.2 years in 2005-2010 and is projected to reach 83.1 years in 2045-2050, while total fertility slightly increased from 2.02 children per woman in 1970-1975 to 2.04 in 2000-2005 and is expected to decline and reach 1.85 in 2045-2050. In the U.K., life expectancy at birth is 79.4 years in 2005-2010 and is projected to reach 84.1 years in 2045-2050, while total fertility declined from 2.04 children per woman in 1970-1975 to 1.70 in 2000-2005 and is expected to slightly increase and reach 1.85 in 2045-2050. In Germany, life expectancy at birth is 79.4 years in 2005-2010 and is projected to reach 84.1 years in 2045-2050, while total fertility declined from 1.64 children per woman in 1970-1975 to 1.35 in 2000-2005 and is expected to slightly increase and reach 1.74 in 2045-2050. In France, life expectancy at birth is 80.7 years in 2005-2010 and is projected to reach 85.3 years in 2045-2050, while total fertility declined from 1.98 children per woman in 1970-1975 to 1.52 in 2000-2005 and is expected to slightly increase and reach 1.85 in 2045-2050.

11 See World Population Prospects: The 2006 Revision, Highlights (New York: United Nations, Department of Economic and Social Affairs, Population Division, 2007) at 9, 15 and tables II.1, III.1, A.15 and A.17, online: <http://www.un.org/esa/population/publications/wpp2006/WPP2006_Highlights_rev.pdf>. In the more developed countries, the projected increase is from 77 today to 82 by 2050. In the least developed countries, it is expected to increase from 55 in 2005-2010 to 67 in 2045-2050. In developed countries, fertility is currently 1.6 children per woman and is projected to slightly increase to 1.79 in 2045-2050. In the least developed countries, fertility is 4.63 children per woman and is expected to decline to 2.50 by 2045-2050. In the rest of the developing world, fertility is 2.45 children per woman and is expected to decline to 1.91 by 2050 (ibid. at viii-ix).
expected to more than double, reaching 21.8 percent (2 billion).\textsuperscript{12} By contrast, the number of children aged 0-14 years is expected to decline from 1.84 billion to 1.82 billion during the same period, a drop from 28.3 percent to 19.8 percent of the total population.\textsuperscript{13}

The global median age (the age at which half the population is older and half is younger) is projected to increase from 28.0 to 38.1 years between 2005 and 2050. Nine of the ten countries with the oldest populations in the world are European. The only exception is Japan which is ranked first with a median age of 42.9 years in 2005 (and 54.9 years in 2050), followed closely by Germany and Italy with a median age of 42.1 and 42.0 years respectively in 2005 (and 49.4 and 50.4 years respectively in 2050). The European median age is expected to increase from nearly 39 years in 2005 to 47 years in 2050.\textsuperscript{14}

The labour force is also aging. Due to low fertility rates, the global share of those aged 50-64 years within the population aged 15-64 is projected to grow rapidly from 17 percent in 2005 to 27.1 percent in 2050. In the developed countries, those aged 50-64 are expected to represent almost one third (31.2 percent) of the working-age population by 2050.\textsuperscript{15} In the U.S., for example, the number of people aged 55-64 is anticipated to grow by about 11 million between 2005 and 2025, while the number of those aged 25-54 years old is expected to increase only by 5 million.\textsuperscript{16} By 2014, it is estimated that workers aged 45 and over will comprise 43.1 percent of the American labour force,\textsuperscript{17} while more than 1 in 5 workers will be over 55.\textsuperscript{18} The median age of the American labour force is expected to reach

\textsuperscript{12} The older population itself is aging. Those who are 80 years old or older represent the fastest growing segment of the older population. This segment is expected to increase from 88 million in 2005 (1.3% of the world’s population) to 402 million (4.4% of the total population) by 2050 (\textit{ibid.} at 4).

\textsuperscript{13} In the U.S., the share of people aged 60 years or above will increase from 16.6% of the total population in 2005 to 26.8% in 2050, whereas the share of children aged 0-14 years will drop from 20.8% to 17.3% of the total population. In the U.K., the share of people aged 60 years and above will increase from 21.2% to 30.1% of the total population, whereas the share of children aged 0-14 years will drop from 18.0% to 16.2% of the total population. In Germany, the share of people aged 60 years and above will increase from 25.1% to 37.0% of total population, whereas the share of children aged 0-14 years will drop from 14.4% to 13.7% of the total population. In France, the share of people aged 60 years and above will increase from 20.8% to 31.8% of the total population, whereas the share of children aged 0-14 years will drop from 17.8% to 13.9% of the total population. Finally, in Canada, the share of people aged 60 years and above will increase from 18.4% to 16.0% of the total population.\textsuperscript{\textsuperscript{14} Ibid. at 2-3 and tables 1.3 and A.10.}

\textsuperscript{14} \textit{Ibid.} at 3 and tables A.11 and A.12. The median age in the U.S. is projected to increase from 36.0 years in 2005 to 41.1 years in 2050. The median age in the U.K. is projected to increase from 38.9 years in 2005 to 43.4 years in 2050, from 38.9 to 44.7 years in France, and from 38.8 to 49.5 years in Spain. The median age in Canada is projected to increase from 38.6 years in 2005 to 45.3 years in 2050.\textsuperscript{\textsuperscript{15} See World Economic and Social Survey 2007, supra note 8 at 24.}

\textsuperscript{15} See World Economic and Social Survey 2007, supra note 8 at 43.

\textsuperscript{16} Ibid. at 3 and tables A.11 and A.12. The median age in the U.S. is projected to increase from 36.0 years in 2005 to 41.1 years in 2050. The median age in the U.K. is projected to increase from 38.9 years in 2005 to 43.4 years in 2050, from 38.9 to 44.7 years in France, and from 38.8 to 49.5 years in Spain. The median age in Canada is projected to increase from 38.6 years in 2005 to 45.3 years in 2050.\textsuperscript{\textsuperscript{17} See World Economic and Social Survey 2007, supra note 8 at 24.}

\textsuperscript{17} See World Economic and Social Survey 2007, supra note 8 at 43.

\textsuperscript{18} Ibid. at 25-26.
41.6 in 2014 (compared to 40.3 in 2004 and 37.7 in 1994). In 25 EU Member States, the proportion of the total labour force aged 55-64 is projected to almost double, rising from 10 percent in 2003 to about 18 percent in 2050. The projected increase is particularly high in Germany, Austria, Spain, Italy and Ireland. In Canada, the proportion of the working-age population aged 55-64 is expected to grow from 16.9 percent in 2006 to more than 20 percent in 2016. In other words, more than one in five potential workers will be in the 55-64 age group. The median age of the Canadian labour force rose from 39.5 years in 2001 to 41.2 years in 2006.

C. The Impacts of the Aging Workforce

1. Slowdown and Decline in Labour Force Growth and Economic Growth

Due to decreasing fertility rates, population growth is expected to slowdown substantially. This in turn affects labour force growth especially in developed countries. While the labour market increasingly relies on senior workers, labour force participation rates among seniors remain relatively low. In the developed world, labour participation rates of those aged 55-64 years in 2005 were 63.9 percent for men and 44.9 percent for women, considerably lower than among those aged 25-54 (91.9 percent for men and 75.3 percent for women in the same year). Indeed, the average age at which workers retire is significantly below the age at which the country offers a full public pension. Furthermore, the rates decline significantly.

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23 In 2005, 63.9% of those aged 55-64 participated in the labour market in Japan, 60.8% participated in the U.S., 56.8% participated in the U.K., 54.8% participated in Canada, 53.7% participated in Australia, 52.0% in total OECD countries, 45.5% in Germany, 43.1% in Spain, 40.7% in France, and only 31.4% in Italy. The decline in participation rates among male seniors since the 1970s has been slightly reversed in OECD countries, recently, whereas for female seniors there has been a constant increase. See OECD in Figures 2006-2007 Edition (Paris: OECD Observer 2006/Supplement 1, 2007) at 80, online: <http://browse.oecdbookshop.org/oecd/pdfs/browseit/0106061E.PDF>.

24 See Ageing and Employment Policies: Live Longer, Work Longer (Paris: OECD, 2006) at 31-32, online: <http://browse.oecdbookshop.org/oecd/pdfs/browseit/8106021E.PDF>. In general, women retire around one to two years earlier than men. While in most OECD countries the age at which workers retire has declined substantially since 1970, recently this trend has slowed or even slightly reversed. Yet, for most countries retirement age remains well below the levels of the 1960s and 1970s. In Japan and Korea male workers retire significantly later (almost 70) than the official age of retirement (60). In the U.S., men retire at around 64 and women at around 63, while the official retirement age is slightly above 65. In Canada, men retire at around 63 and women at 62, while the official age of retirement is 65. In Germany, men retire at around 61 and women at
for those aged 65 and over in developed countries (13.4 percent for men and 6.3 percent for women in 2005).\footnote{25}

As participation rates among senior workers are relatively low, a large cohort of baby boomers (born between 1946 and 1964)\footnote{26} is fast approaching retirement,\footnote{27} and the succeeding cohorts reaching working age are significantly lower in numbers, there is expected to be a slow increase and even decline in labour supply. While increased participation rates of women have had a positive influence on the rate of labour force growth, it is not sufficient to compensate for the effects of population aging on labour supply.\footnote{28} Similarly, since the median age of migrants has increased over the years, international migration might slightly slow – but not reverse – the aging trend in the developed countries and its effects on labour supply.\footnote{29} In more developed countries, the proportion of the population of working age (aged 15-59 years) is expected to decline from 63 percent in 2005 to 52 percent by 2050. In the less developed regions, the proportion of the population of working age is expected to decline slightly from 61 percent in 2005 to 59 percent by 2050.\footnote{30} Soon the number of retirees is expected to exceed the number of young people entering the labour market.\footnote{31} Consequently, as will be shown below, the dependency

60, while the official age is 65. The effective age of retirement refers to the average age at which persons aged 40 and over left the labour force during the period of 1999-2004. The official age of retirement refers to the earliest age in 2004 at which workers are entitled to a full public pension.\footnote{25} See World Economic and Social Survey 2007, supra note 8 at table IV.2.

26 In the U.S., in 2006, this cohort comprised more than 78 million Americans, born between 1946 and 1964 (see the U.S. Census Bureau, online <http://www.census.gov/popest/national/>). Nearly one in three Canadians was a baby-boomer (born between 1946 and 1965) in 2006 (see Martel & Malenfant, supra note 21).


28 The global labour force in 2020 will comprise approximately 833 million workers more than in 2000. Yet most of this increase will occur in developing countries. The labour force in the developed world will grow by less than 14 million workers over the same period mainly due to increased participation by women. The labour force in Europe will be smaller in 2020 than now. See World Economic and Social Survey 2007, supra note 8 at 54.

29 In Canada, for example, it increased from 25 years in 1956-1976 to 30 years in 1994-1999, while the median age of the entire Canadian population has increased even more (from 26.3 years in 1961 to 37.6 years in 2001). Consequently, a slight growth in population growth was observed in 2004 (0.9% from year 2003). See Don Kerr & Roderic Beajot, “Demographic Change and Mandatory Retirement in Canada” in C.T. (Terry) Gillin, David MacGregor & Thomas R. Klassen, eds., Time’s up!: Mandatory Retirement in Canada (Toronto: James Lorimer, 2005) 102 at 106-07; “Summary of Population Projections for Canada, Provinces and Territories, 2005 to 2031”, The Daily (December 15, 2005), online: <http://www.statcan.ca/Daily/English/051215/d051215b.htm>; Martel & Malenfant, supra note 21; Laurent Martel et al., “Labour Force Projections for Canada, 2006-2031”, Internet Edition of Canadian Economic Observer (June 2007), online: <http://www.statcan.ca/english/freepub/11-010-XIB/00607/feature.htm>.

30 See World Population Prospects, supra note 12 at 3. If participation rates by age and gender do not change, labour force growth is expected to slow from 1.63% per year over the past 50 years to 0.55% per year over the next 50 year in the U.S. By contrast, in Japan labour force growth is expected to decline from 1.2% to -1.00% during the same periods. In Germany, it is expected to decline from 0.56% to -0.69%. In France, it is expected to decline from 0.60% to -0.29%. In the U.K., it is expected to decline from 0.60% to -0.15%. See Ageing and Employment Policies: United States, supra note 7 at 44, figure 1.4.

31 If participation levels in OECD countries do not change, the number of labour market exits among seniors (aged 50 and over) would rise from around 8.5 million per year during 2000-2005 to around 12 million per year.
ratio of old-age population will increase, the pressure on pension funds will intensify, and economic growth will be negatively affected.\textsuperscript{32}

2. Increase in Dependency Ratio

Between 2005 and 2050, the global old-age dependency ratio (\textit{i.e.}, the number of people aged 65 or above relative to the working-age population aged 15-64) is expected to climb from 11 to 25 dependents per 100 persons of working age. The old-age dependency ratio is projected to almost double (from 23 to 44) in more developed regions and to almost triple in less developed regions (from 9 to 23). In Europe, the old-age dependency ratio is anticipated to increase from 23.3 to 48.0 dependents per 100 persons of working age between 2005 and 2050. Finally, in North America, it is projected to increase from 18.5 to 34.2 dependants per 100 persons of working age during the same period.\textsuperscript{33} An OECD study includes in the old-age dependency ratio the number of inactive people aged 50 and above thus presenting an even gloomier picture according to which the ratio is expected to almost double between 2000 and 2050 from around 38 to over 70 dependants per 100 workers on average in OECD countries. In Europe, it is expected to reach almost one dependant for every worker by 2050.\textsuperscript{34}

The total dependency ratio (\textit{i.e.}, the number of children aged 0-14 and the number of seniors aged 65 and over relative to the working-age population aged 15-64) is slightly different because it takes into consideration the reduction in fertility rates. However, it is also expected to increase. The world total dependency ratio was 55 dependants per 100 persons of working age in 2005. It is projected to slightly decline to 53 in 2025 and to reach 57 during 2025-2030, while the number of labour market entrances among those below 30 would decline from around 12.9 million per year to 11.9 million. In European OECD countries the number of retirees is expected to exceed the number of younger entrants by the year 2015. See \textit{Ageing and Employment Policies: Live Longer, Work Longer}, supra note 24 at 23-24.

\textsuperscript{32} For a thorough analysis of the impacts of aging on several economic factors that in turn affect potential growth see Joaquim Oliveira Martins \textit{et al.}, “The Impact of Ageing on Demand, Factor Markets and Growth Economics” Working Papers No. 420 (Paris: OECD, 2005), online: <http://www.olis.oecd.org/olis/2005doc.nsf/LinkTo/NT00000DDE/SFILE/JT00181207.PDF>. This study shows that low fertility rates and increased longevity tend to depress growth especially in countries where pension and labour market policies discourage private saving and employment of senior workers. As the proportion of inactive population grows and labour supply declines, GDP \textit{per capita} growth will tend to slow in most OECD economies in this century. It therefore recommends policies that provide incentives for early retirement, strengthening incentives to save, encouraging labour force participation among seniors and increasing their employability.

\textsuperscript{33} Japan presents an extreme case where the old-age dependency ratio is expected to reach more than 70 persons aged 65 years or over per 100 persons aged 15-64 by 2050, whereas the total dependency ratio is projected to reach almost one dependant per member of the working-age population. See \textit{World Economic and Social Survey 2007}, supra note 8 at 21-24 and figure II.4; and \textit{World Population Prospects: The 2004 Revision} (New York: United Nations, 2006) at table II.1, online: <http://www.un.org/esa/population/publications/WPP2004/WPP2004_Vol3_Final/WPP2004_Analytical_Report.pdf>.

\textsuperscript{34} See \textit{Ageing and Employment Policies: Live Longer, Work Longer}, supra note 24 at 19, figure 1.2.
dependants per 100 persons of working age by 2050.\textsuperscript{35} In the developed countries, the total dependency ratio was 49 dependants per 100 persons of working age in 2005. It is projected to reach 72 dependants per 100 persons of working age by 2050.\textsuperscript{36} In Europe, the total dependency ratio is expected to increase from 46.5 to 74.2 dependents per 100 persons of working age between 2005 and 2050. Finally, in North America it is projected to climb from 48.9 to 61.9 dependants per 100 persons of working age during the same period.\textsuperscript{37}

3. Heavy Financial Burden on Public Pension and Health Care Systems

The projected global increase in old-age dependency ratio places a heavy financial burden on public pension schemes and health and long-term care systems. Since public pensions are often based on a “pay-as-you-go” financing system according to which the working age generation pays for the pension benefits received by retirees through their payroll taxes, the current demographic trend creates a substantial problem of pension sustainability. It is aggravated by the significant increase in the number of years that workers spend in retirement due to increases in longevity.\textsuperscript{38} Indeed, many pension funds suffer from actuarial deficit.\textsuperscript{39} If levels of participation among senior workers do not alter significantly, the projected increase in public expenditures on pension will have to be financed by either higher taxes (including higher pension contributions) from the working-age population, or by a significant reduction in pension benefits.\textsuperscript{40} Accordingly, different countries have adopted pension reforms to overcome these concerns.\textsuperscript{41} Furthermore, as the population is aging, there is likely to be an increase in public health expenditures. Long-term care systems will become increasingly prominent due to increased longevity, an increasing number of

\textsuperscript{35} According to a medium variant projection.
\textsuperscript{36} According to a medium variant projection.
\textsuperscript{37} See World Economic and Social Survey 2007, supra note 8 at 21-24 and figure II.4; and World Population Prospect, supra note 33 at table II.1.
\textsuperscript{38} In 1970 men in OECD countries spent on average less than 11 years in retirement, but they spent almost 18 years in 2004. For women the number of years rose from 14 to 22.5. As longevity increases, the number of years spent in retirement is likely to rise further and this creates a heavier burden on pension systems. In the U.S., the number of years spent in retirement increased from 11.0 to 17.1 for men and from 14.7 to 21.0 for women between 1970 and 2004. In France, it increased from 10.8 to 21.4 for men and from 13.4 to 26.2 for women in the same period. In Italy, it increased from 13.1 to 20.6 for men and from 18.4 to 23.9 for women. In Germany, it increased from 10.5 to 18.9 for men and from 13.9 to 23.8 for women. In Canada, it increased from 13.1 to 17.8 for men and from 16.2 to 21.3 for women. Finally, in the U.K. it increased from 10.5 to 17.6 for men and from 15.3 to 21.9 for women. See Ageing and Employment Policies: Live Longer, Work Longer, supra note 24 at 32-33.
\textsuperscript{39} Actuarial deficit means that the expected future capital of the pension fund is lower than its liabilities for future pensioners.
\textsuperscript{40} See Ageing and Employment Policies: Live Longer, Work Longer, supra note 24 at 20.
\textsuperscript{41} This includes increasing the age of eligibility for full pension benefits, promotion of gradual retirement, penalties for early retirement, an increase in the contributions by members and a reduction in the benefit level, and a shift from defined benefit schemes to defined contribution schemes. See e.g. Geneviève Reday-Mulvey, Working Beyond 60: Key Policies and Practices in Europe (New York: Palgrave Macmillan, 2005) at 49-54. Some of these changes will be discussed in Section D below.
people with disabilities, and the epidemiological transition from the predominance of infectious diseases to the predominance of chronic diseases.\textsuperscript{42}

According to projections by the European Commission and the OECD, public spending on public pensions and health and long-term care for the seniors in an average developed country will increase from 11 to 18 percent of gross domestic product (GDP) over the next fifty years.\textsuperscript{43} It is however argued that aging itself is not the only or main factor for this spending increase. Higher costs of health and long-term care mainly reflect technological progress and relative price changes in the provision of health care services.\textsuperscript{44}

4. Labour Shortage

In addition, the imminent retirement of many baby boomers, the ongoing decrease in the proportion of younger workers and the slowdown in labour force growth are expected to create labour shortages in certain professions.\textsuperscript{45} This is already evident in several countries. In western Canada, for example, it was one of the factors in the slowdown in labour productivity and decline in labour quality in 2006.\textsuperscript{46}

5. The Legislative Challenge

The need to tackle the projected slowdown in labour force and economic growth, to prevent a crisis in public pension funds and to deal with increasing dependency ratios and impending labour shortages has motivated many governments and employers around the globe to seek new ways to attract and retain senior workers in the labour market.\textsuperscript{47} As a consequence,
various legislative changes and reforms have been advanced. Many countries have introduced new anti-age discrimination laws and some have also abolished mandatory retirement. Almost all industrialized countries have decided or proposed to increase the age of eligibility for full public pension or social security benefits.\textsuperscript{48} Many countries have introduced restrictions on, and penalties for, early retirement and incentives for delayed retirement through their pension and tax systems.\textsuperscript{49} Some countries have decided to promote gradual retirement arrangements and to extend training opportunities to senior workers. These legislative changes – and most notably the abolition of mandatory retirement – will be examined in the following Section.

**D. Legislative Changes to Encourage Labour Force Participation among Senior Workers**

1. Introduction

Mandatory retirement is a blunt rule that terminates employment relationships at a fixed age without reference to any qualification or occupational requirement.\textsuperscript{50} It is often not officially legislated,\textsuperscript{51} but widely exercised, usually through workplace practices or collective agreements, and conditions on pension plans. It may be facilitated by governments through omission to prohibit mandatory retirement or to protect people above a certain age (usually 65) from age discrimination. When it is part of an employment contract or a collective agreement, the parties (employers and workers or their trade unions) have agreed upon the fixed age of retirement. When it is part of a workplace policy unilaterally created by an

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\textsuperscript{48} Based on simulations of demographic, economic and political scenarios for the year 2050, it is expected that the age of eligibility for social security benefits will be increased while the social security contribution rate will rise in many OECD countries (see Vincenzo Galasso, “Postponing Retirement: The Political Push of Aging”, CEPR Discussion Paper No. 5777 (August 2006), online: <http://ssrn.com/abstract=933099>).

\textsuperscript{49} During the 1970s and 1980s many firms in OECD countries were in need of restructuring due to technological improvements and decreasing demands for manpower. This led to mass unemployment especially among the young. Government, employers and unions therefore promoted early retirement schemes which were considered, especially in European countries, as a social right providing senior workers with a reward for their long term hard work while avoiding redundancies and youth unemployment. See Reday-Mulvey, supra note 41 at 2, 46-47.


\textsuperscript{51} But see the exceptional case of Israel discussed in Section D.2.d. below.
employer, it constitutes, according to the common law, an implied term in the employment contract.\textsuperscript{52}

For historical reasons, the fixed age of retirement is usually 65. The German Chancellor, Prince Otto von Bismarck, invented the first social security pension system in 1889 for people at the age of 70 and over, when life expectancy was very low (around 45 years). By 1929, the age of eligibility was lowered to 65.\textsuperscript{53} Similarly, Great Britain introduced its first old-age pension legislation in 1908 initially applying from age 70 and since 1925 from age 65. Other countries also followed this model. In the U.S., the Social Security Act was enacted in 1935 to provide some security for senior people but at the same time to remove them from the labour market and make room for younger employees with families during the Great Depression years. The age of 65 was adopted as “it appears to have been widely accepted at the time”.\textsuperscript{54} The Act did not impose retirement at a fixed age. Yet since people who worked were not eligible for security payments, it became the “normal” age of retirement and was adopted in many workplace policies and collective agreements. The age of 65 is therefore usually termed “the normal age of retirement”, “the statutory age of retirement” or “the pensionable age of retirement”. The same process occurred in other countries, including Canada, where mandatory retirement has become “part of the very fabric of the organization of the labour market in this country”.\textsuperscript{55}

Mandatory retirement was widely practiced in the U.S. during the 1960s and 1970s and in Canada until very recently and is still very common among many European countries. In recent years, as a response to the impacts of the aging workforce, there is a global tendency towards the abolition of mandatory retirement.\textsuperscript{56} The U.S., Australia,\textsuperscript{57} New

\textsuperscript{52} For this reason, one might argue that the term “mandatory” is inappropriate in this context. Yet, as will be illustrated in Chapter V, section B., policies and agreements laying down retirement at a fixed age might include some coercive elements and amount to a wrong even where they are freely negotiated.

\textsuperscript{53} See Retirement without Tears (Report of the Canadian Special Senate Committee on Retirement Age Policies, Ottawa, 1979) at 20-21; McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 292-93 (La Forest J.).

\textsuperscript{54} McKinney, ibid. at 293 (La Forest J.). See also Retirement without Tears, ibid. at 2, 21.

\textsuperscript{55} McKinney, ibid. at 295 (La Forest J.).

\textsuperscript{56} This includes prohibition of mandatory retirement by state governments through different legislative banning of this practice. It also entails a voluntary abolition of mandatory retirement practices by employers. The University of Toronto is an example of a voluntary movement towards ending mandatory retirement about a year before the government of Ontario presented its bill on this matter.

\textsuperscript{57} Mandatory retirement was first abolished in New South Wales in 1990 and then in other states during the 1990s. Provisions allowing mandatory retirement were removed from the Commonwealth Public Service Act in 1999. In 2001, the Abolition of Compulsory Age Retirement (Statutory Officeholders) Act was introduced to abolish mandatory retirement in the federal public sector. A federal prohibition on age discrimination was introduced only in 2004 in the Commonwealth Age Discrimination Act. This new Act prohibits direct and indirect forms of age discrimination in various spheres including employment, education, access to premises, goods, and services and facilities. S. 18(2) makes it unlawful to discriminate against a person on the basis of age by “dismissing” the person, failing to offer them “opportunities for promotion, transfer or training … or any other benefits associated with employment”, or subjecting them to some form of “detriment”. It therefore extends the prohibition on mandatory retirement from the public service to the entire workforce. However, it is not unlawful for an employer to discriminate against a senior worker on the ground of age if that worker is
Zealand, and many Canadian provinces have already outlawed mandatory retirement. Israel is a unique example of a country that has set and increased the age of mandatory retirement in primary legislation instead of abolishing it. Other countries, mostly in Europe, have been gradually introducing anti-age discrimination legislation while considering whether to abolish mandatory retirement. Some countries, such as the U.S. and others in Europe, have also raised the age of eligibility for full public pension or social security benefits and have made some other legislative changes in the pension and tax systems to encourage labour force participation among senior workers. In this Section, I will sketch these major legislative changes and reforms in several countries chosen to illustrate the wide array of approaches taken in tackling the impacts of the aging workforce. In particular, I will discuss the prevalence of mandatory retirement in these countries, how it is regulated and the various legislative endeavors to eliminate this practice.

2. Significant Legislative Changes to encourage Participation among Seniors

(a) The International Arena

When the early international human rights documents were drafted, age was not considered as one of the critical grounds of discrimination. During the 1970s, an interest in age discrimination emerged. The ILO adopted the Older Workers Recommendation, 1980 (No. 162), extending its earlier decisions on discrimination in employment to include age and stressing the need for regulations promoting equality of both opportunity and treatment. It defines “older workers” as all those who are liable to encounter difficulties in employment and occupation because of advancement in age. Article 3 proclaims an obligation of every state member to take the necessary measures to prevent discrimination in employment against senior workers.
Among other things, it states that retirement should be voluntary and not imposed. In 1982, the U.N. General Assembly adopted the first international document advancing policies and programmes on aging – the Vienna International Plan of Action on Ageing. This Plan was designed to deal with the challenges of the aging population via regional and international collaboration. In 1991, the General Assembly adopted the *United Nations Principles for Older Persons* consisting of five clusters – independence, participation, care, self-fulfillment, and dignity – that relate to the status of senior persons. The 1995 World Summit for Social Development in Copenhagen adopted a Programme for Action, which states that its aim is “to create ‘a society for all’, in which every individual, each with rights and responsibilities, has an active role to play”.

In 2002, the Second World Assembly on Ageing was held in Madrid to produce a new International Plan of Action on Ageing and promote the development of a society for all ages. The Assembly called for changes in policies and practices with regard to age to ensure that senior persons will be able “to age with security and dignity and to continue to participate in their societies as citizens with full rights”. It called for urgent action to ensure the continuing integration and empowerment of senior people in the labour market, education and training, social security and more. Only a year before, in 2001, the U.N. Human Rights Committee held that age is an analogous prohibited ground of discrimination under Article 26 of the International Covenant on Civil and Political Rights. However, the Committee refused to declare that mandatory retirement constitutes age discrimination as it was of the opinion that mandatory retirement often protects workers by limiting their life-long working time and providing them with comprehensive social security schemes.

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61 See Article 21(a). Article 22 proclaims that every retirement arrangement that imposes termination of employment relationship at a specified age should be examined in light of articles 3 and 21(a).
63 United Nations, Principles for Older Persons, G.A. Resolution 46/91, online: <http://www.un.org/ageing/un_principles.html>. Among other things, it states: “Older persons should have the opportunity to work or to have access to other income-generating opportunities. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place. Older persons should have access to appropriate educational and training programmes. … Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities. Older persons should be able to form movements or associations of older persons. …”
64 The Copenhagen Declaration and Programme of Action, World Summit for Social Development at 95.
66 See *John K. Love et al. v. Australia*, Communication No. 983/2001, U.N. Doc. CCPR/C/77/D/983/2001 (1 August 1997): “While age as such is not mentioned as one of the enumerated grounds of prohibited discrimination in the second sentence of article 26, the Committee takes the view that a distinction related to age which is not based on reasonable and objective criteria may amount to discrimination on the ground of ‘other status’ under the clause in question, or to a denial of the equal protection of the law within the meaning
Despite this decision, the ILO has not yet added the prohibition on age discrimination to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

(b) The U.S.
The Age Discrimination in Employment Act, 1967 prohibited discrimination on the basis of age against workers between ages 40 and 65 in hiring, dismissal, and in any other way pertaining to compensation, employment conditions, and rights at work.\(^{67}\) The 1978 amendment of the ADEA aimed to abolish mandatory retirement in the United States. However, it was only in 1986 that the age ceiling was completely removed.\(^{68}\) While many have protested against mandatory retirement, the legislative change was mostly motivated by

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\(^{67}\) Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967) [ADEA]. This legislation was enacted separately from and later than the prohibition on discrimination based on race, colour, religion, sex and national origin (Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. (1964)). The plaintiff has to show that the employer intentionally treated him or her less favorably because of his or her age. Age should be a decisive (not necessarily sole) factor. In the absence of direct evidence, the plaintiff has to meet four cumulative conditions to establish a prima facie case of age discrimination. In the case of non-hiring, for example, it has to be proved that: (1) the plaintiff is a member of a protected group; (2) the plaintiff was qualified for the job; (3) the plaintiff was denied the position; (4) the employer was interested in filling this position (McDonnell Douglas v. Green, 411 U.S. 792 (1973)). In O'Connor v. Consolidated COIN Caterers Corp., 517 U.S. 308 (1996), the Court held that in termination cases the plaintiff does not have to show that he or she was replaced by someone outside the protected group yet it should be someone who is “substantially younger” (ibid. at 313). Next, the burden of persuasion shifts to the employer who has to present a non-discriminatory reason for non-hiring. The worker then has to prove, on a balance of probabilities, that the employer’s explanation was a cover up for discrimination and that a prohibited reason was behind this decision. Note that in a recent case by the Supreme Court (Gross v. FBL Financial Services, Inc., 557 U.S. ___ (2009)) it was held that it is not enough for the plaintiff to show that age was one motivating factor in the decision. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age. Citing Hazan Paper (infra note 85), the Court held that the plaintiff has to prove that age was the “reason” for the employer decision or action. The Court stressed the differences between the ADEA and Title VII, noting that the former does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Steve Kardell argues that the Court has “made it very difficult for a plaintiff to prevail in an age-discrimination claim, mainly by raising the burden-of-proof bar much higher”. While in the past circumstantial evidence was sufficient, now plaintiffs have to show clear direct evidence, which is usually rare, such as an e-mail from a head manager describing an applicant as an old person. (Steve Kardell, “Over 40? Time for a Reality Check” Dallas Business Journal (July 17, 2009), online: <http://boston.bizjournals.com/boston/othercities/dallas/stories/2009/07/20/editorial1.html?b=1248062400%5E1862503&sa=industry>.

\(^{68}\) See § 631(a). In the 1978 amendment, the Act broadened its protection to employees between the ages of 40 and 70 thus allowing mandatory retirement only at the age of 70 and above. It also eliminated mandatory retirement for most federal employees. See Martin Lyon Levine, Age Discrimination and the Mandatory Retirement Controversy (Baltimore: The Johns Hopkins University Press, 1988) at 15; David Neumark, “Age Discrimination Legislation in the US” in Hornstein supra note 50, 43 at 44.
the growing pressure on pension funds. As of 1986, the ADEA applies to employees aged forty and over who work for private sector employers with more than twenty employees under federal jurisdiction, and for federal, state, and local governments. It also applies to employment agencies and to labour organizations of more than 25 members. Senior managers are not covered by the ADEA. Enforcement became effective in 1979 when the Equal Employment Opportunity Commission (EEOC) received responsibility over the ADEA.

At a national level, many states have adopted anti-age discrimination legislation and imposed limitations on mandatory retirement both in the private and public sectors over the years. In addition, the Age Discrimination Act, 1975 prohibits discrimination on the basis of age, and applies to institutions, including state or local government units, in receipt of federal funds. Finally, Executive Order 11141 prohibits age discrimination by federal contractors and sub-contractors.

There are several exceptions and exemptions to the prohibition on age discrimination and mandatory retirement. The most important one is the bona fide occupational qualification exception [BFOQ] which also appears in Title VII of the Civil Rights Act, 1964. Based on this exception, the employer has to prove that the essence of the business operation would be undermined if it did not make employment decisions based on the characteristic in question. Then, the employer has to justify relying on age rather than the characteristic itself in making the employment decision. To this end, the employer has to prove either that all or substantially all workers above the age qualification are unable to perform safely and effectively the duties of the job, or that it is impossible or highly impractical to deal with the senior workers on an individualized basis and that a generalized policy is a more acceptable alternative. The employer has to provide expert testimony on the nature and risks of the job as well as valid medical evidence. Employers may therefore use

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70 See § 630(b).
71 However, the application to states and state agencies is limited. State employees cannot sue under the ADEA. See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
72 See §§ 630(a), (d), and (e).
73 See § 631(c).
75 See Levine, supra note 68 at 15.
76 42 U.S.C. §§ 6101-6107.
77 See Neumark, supra note 68 at 43.
78 According to § 623(f)(1), age discrimination is prohibited except where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business.
the BFOQ exception to defend a workplace policy or practice of mandatory retirement. In addition, s. 623(j) of the ADEA exempts firefighters and law enforcement officers from the prohibition on mandatory retirement so long as the age of retirement is at least 55.80

Furthermore, the ADEA offers two additional defences that have no Title VII equivalent: the “good cause” defence and the “reasonable factors other than age” defence. S. 623(f)(3) states that “[i]t shall not be unlawful for an employer, ... to discharge or otherwise discipline an individual for good cause”. S. 623(f)(1) states that “[i]t shall not be unlawful for an employer, ... to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age ...”.

The ADEA also allows the use of a bone fide system of seniority so long as it does not evade the purposes of the Act or require or permit involuntary retirement based on age.81 In addition, the Older Workers Benefit Protection Act, 1990 amended the ADEA to prohibit discrimination in the provision of benefits as between young and senior workers. Since the cost of providing certain benefits to senior workers might be greater than the cost of providing those same benefits to younger workers thus creating a disincentive to hire senior workers, the Act allows employers to reduce benefits based on age, as long as the cost of providing the reduced benefits to senior workers is the same as the cost of providing benefits to younger workers.82 Furthermore, this Act places some restrictions on financial incentives to retire offered by employers to their senior workers.83 Early retirement plans are permissible so long as they are voluntary, determined in good faith and the age threshold is not arbitrarily designed.84

Recently, the Supreme Court held that the doctrine of disparate impact is recognizable under the ADEA.85 However, it held that it has a narrower scope than under

80 Until recently, the Federal Aviation Administration Rule has forced commercial pilots to retire at the age of 60. In December 2007, the US Congress unanimously passed legislation allowing commercial pilots to fly until the age of 65. See the Fair Treatment for Experienced Pilots Act of 2007, Pub. L. No. 110-135, 121 Stat. 1450.
83 It was intended to overrule a U.S. Supreme Court judgment that held that the ADEA does not apply to pension matters (see Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989)).
84 See § 623(l).
85 The doctrine of disparate impact was first established in the context of a Title VII case in Griggs v. Duke Power Co., 401 U.S. 424 (1971). It was adopted in 1991 by the Legislature in Title VII of the Civil Rights Act (which prohibits discrimination based on race, colour, sex, religion and national origin). This doctrine prohibits employers from using criteria or policies that may appear neutral on their face but have an adverse impact on members of a protected group. The exception is when the criteria respond to a business necessity and are job related (see 42 U.S.C. 2000e-2(K)(1)(A)). The worker may then show that there are other alternatives to achieve these objectives which have a less severe impact. This is an easier defence than the BFQR. Since the ADEA was not amended, the question was whether it also applies to cases of age discrimination. In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), Biggins was fired at the age of 62 just before his pension plan would have vested. The Supreme Court held that the ADEA is concerned with employment decisions that are motivated by age stereotyping. It therefore does allow decisions to be based on other factors such as seniority despite the fact that they are strongly correlated to age. It concluded that pension status is analytically distinct.
Title VII for two main reasons. First, the legislation significantly narrows the coverage of this doctrine by permitting any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age”. Second, the amendment to Title VII that introduced this doctrine in the *Civil Rights Act* did not amend the *ADEA*.  

Several other major changes in social security and pension systems have been made to enhance the sustainability and affordability of these plans and to encourage senior workers to prolong their participation in the labour market. According to the *Social Security Act*, 1935, a retired worker is entitled to full benefits at his or her “Normal Retirement Age” (NRA). Under a 1983 amendment to the *Act*, the NRA is gradually stepped up from 65 in 2000 to reach 67 by 2022. A worker may choose to receive actuarially reduced benefits at age 62 as the earliest eligibility age or get increased benefits if they wait until the age of 70. Another legislative initiative to encourage senior workers to remain active in the labour market is the *Senior Citizens’ Freedom to Work Act*, 2000. It eliminates the earning test for workers aged 65 and over and allows them to continue working while receiving higher Social Security benefits until they reach the age of 70. Furthermore, the *Pension Protection Act*, 2006 contains numerous provisions to enhance retirement security of American seniors, including automatic enrollment in 401(k)-type pension plans. Under this *Act*, workers may start receiving some benefits from their defined-benefit pension plans while still holding from age and left the question of disparate impact open. While the Second, Eighth, and Ninth Circuits held that disparate impact is available under the *ADEA*, the First, Third, Sixth, Seventh, Tenth, and Eleventh Circuits rejected its availability. The remaining circuits have not addressed the issue.

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86 See *Smith v. City of Jackson*, 544 U.S. 228 (2005). The respondent revised its employee pay plan granting raises to all police officers in an attempt to bring their starting salaries up to the regional average. Officers with less than five years’ service received proportionately greater raises than those with more seniority, and most officers over 40 had more than five years of service. A group of senior officers filed suit under the *ADEA*, claiming, *inter alia*, that they were adversely affected by the plan because of their age. The Court held that the petitioners failed to prove the claim of disparate impact as the City’s purpose was to bring officer rates in line with other communities in order to better compete, not to cause harm to senior workers. For a thorough discussion of this case see Chapter II, section D.

87 The *Social Security Act of 1935*, 42 U.S.C.A. § 301 et seq. Social security covers around 154 million workers (more than 95% of the workforce). At the end of 2004, around 47.7 million people received benefits. Benefits are financed by the social security payroll tax of 12.4%, half paid by employers and half by employees, up to an annual earnings limit of USD 90,000 in 2005. There is also a 2.9% payroll tax (equally divided between employers and employees) to pay for the Medicare program. See *Ageing and Employment Policies: United States*, supra note 7 at 70-71.

88 Despite the existence of a Trust Fund, the social security system is effectively financed on a pay-as-you-go basis and suffers from a long-term deficit (see *Ageing and Employment Policies: United States*, *ibid*. at 73). See also Kathryn L. Moore, “Raising the Social Security Retirement Ages: Weighing the Costs and Benefits” (2001) 33 Ariz. St. L.J 543 at 545-46.

89 The *Senior Citizens’ Freedom to Work Act of 2000*, Pub. L. No. 106-182, 114 Stat. 198. For beneficiaries between ages of 62 (early retirement age) and 65, the early retirement earning test still applies (benefits were reduced by USD 1 for every USD 2 of earnings above USD 12,000 in 2005).

their jobs at the earlier of age 62 or the pension plan’s normal retirement age which is usually 65.91

Finally, over the past 30 years there has been a gradual shift in employer-provided pensions from defined benefit plans to defined contribution plans which now constitute the majority of plans in the U.S. In defined-benefit plans monthly benefits are often assured in advance based on the individual’s wage upon retirement and the years of membership. In defined-contribution plans, like saving plans, benefits are determined by the monthly contributions paid (by members and sometimes their sponsors) into the individual account, the investment return on those contributions, expenses, gains and losses.92 While it may encourage delayed retirement and decrease sponsor costs, this shift also places the investment risk on the members, i.e. the workers (rather than on the scheme sponsor) and increases uncertainty.

(c) Canada

Age discrimination in employment (in hiring, training, promotion, dismissal and more) is prohibited by provincial and federal human rights codes.93 Most codes were enacted during the 1970s and 1980s to prohibit discrimination based on several grounds (such as race, gender and religion) in different spheres (such as employment, housing and education).94

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92 In 2004, around half of all private-sector workers participated in an employer-based pension plan. While in 1989-90 around 35% of all private-sector workers participated in defined benefits plans, only 21% did so in 2004. Over the same period, participation in defined contribution schemes has risen from 34% to 42%. The most rapidly growing type of defined contribution scheme is the section 401(k) (of the I.R.C.) plan. It is a voluntary plan where workers can choose how much to contribute and how to invest the assets while deferring income taxes on the saved money and earnings until withdrawal. See Ageing and Employment Policies: United States, supra note 7 at 76-79.

93 For example, s. 3(1) of the Canadian Human Rights Act, R.S.C. 1985, c. H-6, prohibits discrimination on the basis of age. Under s. 7, it is a discriminatory practice, directly or indirectly, (a) to refuse to employ or continue to employ any individual, or (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. S. 10 states that it “is a discriminatory practice for an employer, employee organization or employer organization (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.” S. 15(1)(a) states: “It is not a discriminatory practice if ... any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement.” S. 15(2) further provides that in order for a discriminatory practice to be considered a bona fide occupational requirement under s. 15(1)(a), “it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost”.

94 Discrimination is only defined in few provinces (Nova Scotia, Quebec and Manitoba). In the remaining provinces, the Supreme Court of Canada’s decision in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, provides a definition. In short, discrimination is differential treatment whether intentional or not that is based on characteristics of a group as opposed to individual merits or capacities. It includes both explicit use of a prohibited ground (“direct discrimination”) and a neutral action or policy that has an adverse effect on
The worker has to establish a *prima facie* case of age discrimination by showing (in a hiring or promotion situation) that he or she was a member of the protected group, was qualified for the position, and was denied the opportunity while it was given to another applicant or worker who is no better qualified, or the employer left it open and continued searching for candidates.95

A major defence for employers is the *bona fide* occupational requirement provision (BFOR) which states that the use of a prohibited ground as a job requirement will not be considered discriminatory if it is a reasonable and *bona fide* occupational requirement.96 The employer must show that the age requirement was adopted for a purpose rationally connected to the performance of the job,97 in good faith and in the honest belief that it was necessary for the fulfillment of that legitimate work-related purpose,98 and that age requirement is reasonably necessary to the accomplishment of that legitimate work-related purpose. To this end, it must be demonstrated that the employer has attempted to accommodate individual employees sharing the characteristics of the claimant up to a point of undue hardship upon the employer.99 Individualized testing is normally required to establish a BFOR, except where the employer can prove that it is not feasible and that all, or

members of a protected group (“adverse effect discrimination”). [“… discrimination may be described as a distinction, whether intentional or not but based on grounds relating to the personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages on such individuals or groups not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classified”; ibid. at 280].

95 It is sufficient that the prohibited ground was one of the reasons for the employment decision. See Geoff England et al., *Employment Law in Canada*, 4th ed. (Markham: Butterworths, 2005) at § 5.45.

96 See Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202 (in principle, mandatory retirement age of 60 for firefighters could be a BFOR on grounds of public safety, but there was a lack of sufficient evidence of a real safety risk). The doctrine was modified in British Columbia (Public Service Employment Relations Commission) v. British Columbia Government and Service Employees’ Union, [1999] 3 S.C.R. 3 [Meiorin].

97 The focus here is on the validity of the general goals of the standard in question. The ability to work safely and efficiently is the purpose most often mentioned in court cases, but there may be other reasons as well.

98 This addresses the subjective element of the test.

99 This third requirement was added in 1999. The *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, expressly states that the defence of BFOR will not be available unless the employer has discharged his or her duty to “reasonably accommodate” the special needs of the employee up to the point of “undue hardship”. In 1999 the Supreme Court of Canada in *Meiorin (supra* note 96 at paras. 54-68), ruled that the duty of reasonable accommodation is implicitly incorporated into the BFOR defence in both direct and indirect forms of discrimination. Accordingly, today the law in all provinces is that an employer cannot successfully claim a BFOR unless and until it has attempted to reasonably accommodate the employee up to the point of undue hardship regardless of which form the discrimination takes. But see Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 S.C.R. 561 at paras. 12, 16 [“What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances. … The test is not whether it was impossible for the employer to accommodate the employee’s characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s workplace or duties to enable the employee to do his or her work”].

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a substantial majority, of the group members are unable to perform the job safely and effectively.\textsuperscript{100}

Mandatory retirement in Canada emerged with the introduction of private and public pension plans and has been widely exercised, through workplace policies, practices or collective agreements usually linked to pension plans. The typical age of mandatory retirement in Canada is 65. In 1927, the \textit{Old Age Pensions Act} was enacted to establish public security plans from the age of 70.\textsuperscript{101} It was replaced by the \textit{Old Age Security Act} in 1952 and during the 1960s the age of eligibility was reduced to 65.\textsuperscript{102} Other programs, such as the Guaranteed Income Supplement (GIS),\textsuperscript{103} the Canada Pension Plan and Quebec Pension Plan\textsuperscript{104} also set 65 as the age of eligibility for retirement benefits.\textsuperscript{105} In 2004, roughly 50 percent of the Canadian workforce was employed in jobs that involve mandatory retirement.\textsuperscript{106}

Quebec and Manitoba were the first provinces to abolish mandatory retirement in 1982 and 1983 respectively. In recent years, many provinces have joined in this legislative


\textsuperscript{101} S.C. 1926-27, c. 35. This means-tested plan was jointly financed by federal and provincial governments but was administrated by the provinces.

\textsuperscript{102} The first tier of security to senior Canadians includes different plans such as the Old Age Security (OAS), the Guaranteed Income Supplement (GIS) and Spouse’s Allowance for low-income senior Canadians. These programs are funded out of general tax revenues. In addition, some provinces provide income supplements. The OAS is paid monthly to people aged 65 and over regardless of means subject to a residency requirement ($516.96 as of 1.1.2009). The Spouse’s Allowance is paid to eligible spouses and surviving spouses of OAS pensioners aged 60-64 subject to income test and residency requirements (up to $947.86 for spouses and $1,050.68 for surviving spouses as of 1.1.2009). See \textit{Benefits Legislation in Canada 2009} (Mercer Human Resource Consulting Ltd, [2008] at 3, online: \texttt{<http://www.mercer.ca/summary.htm?siteLanguage=1007&idContent=1328645>}).

\textsuperscript{103} It is paid monthly to people aged 65 and over in receipt of OAS pension subject to income test and residency requirements (up to $652.51 for single and $430.90 for each married person on 1.1.2009). See \textit{ibid.} at 3.

\textsuperscript{104} The second tier is the Canada Pension Plan (CPP), a compulsory, earnings-related public pension plan that covers all employees and self-employed in Canada, except for Quebec where there is a separate similar plan. The plan is financed through mandatory contributions from employers and employees. Maximum pensionable earnings are indexed every year according to the wage index, and were $46,300 in 2009. The employee and employer contribution rates are each 4.95% of employment earnings. The self-employed rate is 9.9%. CPP and QPP maximum monthly payment from age 65 was $908.75 in 2009. It is reduced by 6% per year (0.5% per month) if taken between 60 and 65. It is increased by 6% per year (maximum of 30%) if taken after age 65 (up to the age of 70). CPP and QPP payments are taxable. See \textit{ibid.} at 4.

\textsuperscript{105} The third tier includes private employer-sponsored pension plans and individual retirement saving mechanisms such as Registered Retirement Savings Plans (RRSP). Employer-based pension plans are often regulated under federal or provincial pension standards legislation, are registered pension plans under the \textit{Income Tax Act}, R.S.C. 1985 (5th Supp.) c. 1 and are tax-deferred. They are provided on the basis of either defined benefits or defined contribution.

\textsuperscript{106} See Morley Gunderson & Douglas Hyatt, “Mandatory Retirement: Not as Simple as It Seems” in Gillin et al., supra note 29, 139 at 142. See also \textit{Mandatory Retirement: Current Practice and Future Directions Survey Report} (Toronto: Hewitt Associates, 2003). This study found that 52% of Canadian establishments of more than 100 employees had a mandatory retirement policy. Given the fact that this study was conducted only among larger firms it seems that mandatory retirement may have been even more common.

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initiative. However, some have left more room for exceptions than others. Generally speaking, many provinces prohibit discrimination in employment and other spheres on the basis of “age”, while not limiting the statutory definition of “age”. Mandatory retirement therefore constitutes unlawful age discrimination unless age is a “bona fide occupational requirement”.

In Manitoba, Quebec and Yukon mandatory retirement is unlawful except in limited circumstances or when age is a bona fide occupational requirement. Despite its pioneering abolition of mandatory retirement, Quebec experiences a high proportion of early retirees and low levels of labour force participation among senior workers compared with the rest of Canada. It was therefore recently proposed to increase the age of eligibility for full benefits under Quebec Pension Plan from 65 to 67 over the next 12 years.

In New Brunswick, Prince Edwards Islands, the Northwest Territories and Nunavut, mandatory retirement is generally not allowed, yet there are many exceptions to

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107 See e.g. Alberta Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14, ss. 7(1) (prohibits discrimination is employment on the basis of age), 7(3) (bona fide occupational requirement exception) and 44(1) (age means “18 years of age or older”); Manitoba Human Rights Code, R.S.M. 1987-88, c. 45, ss. 9(1), 9(2)(e) and 14(1); and Nova Scotia Human Rights Act, R.S.N.S. 1989, c. 214, ss. 5(1)(h), 6(f).

108 Mandatory retirement was abolished in 1983. S. 14(1) of the Manitoba Human Rights Code states that, “no person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirement or qualifications for the employment or occupation”.

109 Mandatory retirement was abolished in 1982. In addition, since the enactment of the Act Respecting the Abolition of Compulsory Retirement in 1982, mandatory retirement is a prohibited practice under the Act Respecting Labour Standards, except when the employer proves good and sufficient cause for dismissal, suspension or transfer of an employee (ss. 84.1, 122.1). Police officers and firefighters are exempted from these sections.

110 Ss. 9(b) and 7(e) of the Yukon Human Rights Act, R.S.Y. 2002, c. 116, prohibit discrimination in employment on the basis of age. S. 10 provides that it is not discrimination if treatment is based on reasonable requirements for the employment or other factors establishing reasonable cause for the discrimination. No exceptions are made for bona fide pension or retirement plans.


112 S. 3(1) of the New Brunswick Human Rights Act, R.S.N.B. 1973 c. H-11, prohibits discrimination in employment on the basis of age. However, s. 3(5) provides a bona fide occupational requirement exemption and s. 3(6) provides that the prohibition under s.3 does not apply to: “(a) the termination of employment or a refusal to employ because of the terms or conditions of any bona fide retirement or pension plan; (b) the operation of the terms or conditions of any bona fide retirement or pension plan that have the effect of a minimum service requirement; or (c) the operation of terms or conditions of any bona fide group or employee insurance plan”. In June 2005 a bill was introduced to remove this exception but was not passed.

113 Prince Edward Island Human Rights Act, R.S.P.E.I. 1988, c. H-12, ss. 6(1) and 2(b) (prohibit discrimination in employment based on age), s. 6(4) provides that: “This section does not apply to (a) a refusal, limitation, specification or preference based on a genuine occupational qualification; (b) employment where physical or mental handicap is a reasonable disqualification” and s. 11 (“The provision of this Act relating to discrimination in relation to age or physical or mental handicap do not affect the operation of any genuine retirement or pension plan or any genuine group or employee insurance plan”).
the age discrimination provision. A clear example is provided by the bona fide retirement or pension plan exception which permits pension plans to provide benefits only after an employee has reached a certain age thus allowing de facto mandatory retirement arrangements. This exemption applies as long as the plan is not a sham. That is, the employer has to show only that the plan itself is bona fide without having to prove that a mandatory retirement age provision is necessary to the operation and sustainability of the plan.\textsuperscript{116} Similarly, in Alberta, mandatory retirement was abolished yet is allowed under many exceptions.\textsuperscript{117} In the federal jurisdiction, mandatory retirement is allowed in various circumstances including when a person has reached the normal retirement age for employees performing the same type of work.\textsuperscript{118}

\textsuperscript{114} Ss. 7(1) and 5(1) of the Human Rights Act, S.N.W.T. 2000, c. 18, prohibit discrimination in employment on the basis of age. However, s. 7(3) provides that s. 7(1) “does not apply with respect to a practice based on a bona fide occupational requirement”. S.7(4) adds that: “In order for a practice described in subsection (1) to be considered to be based on a bona fide occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs”. Also, s. 7(2) provides that: “In respect of the age ... of an individual or a class of individuals, subsection (1) does not affect the operation of any bona fide retirement or pension plan or the terms and conditions of any bona fide group or employee insurance plan”.

\textsuperscript{115} Ss. 9(1) and 7(1) of the Human Rights Act, S.Nu. 2003, c. 12, prohibit discrimination in employment on the basis of age. However, s. 9(4) provides that s. 9(1) “does not apply with respect to a practice based on a justified occupational requirement”. S. 9(5) adds that: “In order for a practice described in subsection (1) to be considered to be based on a justified occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs”. Also, s. 9(2) provides that: “In respect of the age ... of an individual or a class of individuals, subsection (1) does not affect the operation of any genuine retirement or pension plan or the terms and conditions of any genuine group or employee insurance plan”. Also, s. 9(3) provides that for the purposes of s. 9(2), “a genuine retirement or pension plan is one that is established in accordance with an Act of Canada or Nunavut”.

\textsuperscript{116} See New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc., 2008 SCC 45. For a discussion of this case see Chapter II, section B.1.

\textsuperscript{117} S. 7(1) of the Alberta Human Rights, Citizenship and Multiculturalism Act prohibits discrimination on the basis of age. S. 44(1) provides that “age” means 18 years of age or older. However, s. 7(2) provides that the prohibition against age discrimination “does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan”. In addition, similarly to s. 1 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter], s. 11 provides a defence where “the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances”. It is broader than the BFOR defence. It was examined in the Supreme Court case of Dickason (infra note 124) (where the court held that in university setting mandatory retirement does not violate the Alberta Human Rights Code). Therefore, mandatory retirement is widely allowed and justified based on this judgment.

\textsuperscript{118} Mandatory retirement is not practiced by the Government of Canada. Yet, it is permitted in federally-regulated industries. Ss. 3(1), 7 and 10 of the Canadian Human Rights Act prohibit discrimination in employment on the basis of age. However, s. 15(1) creates a number of exceptions. It is not discriminatory practice if “employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that apply to that employment by law or under regulations…” (s. 15(1)(b)). It also does not constitute unlawful age discrimination for an employee to be terminated because he or she has reached “the normal retirement age for employees working in positions similar to the position of that individual” (s. 15(1)(c)). Finally, it is not discriminatory if “the terms and conditions of any pension fund or plan established by the employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age” in accordance with Pension Benefits Standards Act, R.S.C. 1985, c. 32 (s. 15(1)(d)).
In four provinces (Newfoundland, British Columbia, Saskatchewan, and Ontario) the relevant human rights codes did not apply until very recently to those of age 65 and over, thus allowing mandatory retirement at the age of 65 and over. The limited definition of age also allowed employers to discriminate against senior workers above the age of 65 by providing different terms and conditions of employment. Furthermore, the Supreme Court of Canada, in a number of decisions, most notably McKinney, has found that provincial statutes allowing for mandatory retirement (by setting an age cap of 65) are not unconstitutional. They were found to be discriminatory but “demonstrably justified in a free and democratic society” under s. 1 of the Canadian Charter of Rights and Freedoms as the potential social benefits of allowing this arrangement outweighed the social costs including the possible violation of equality rights of senior workers. These social benefits include the promotion of deferred compensation model, the encouragement of hiring of younger workers with fresh ideas, the facilitation of retirement with dignity at a fixed unified age and of personnel planning.

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119 S. 1 of the British Columbia Human Rights Code, R.S.B.C. 1996, c. 210, for example, used to define age as “an age of 19 years or more and less than 65 years”.

120 Mandatory retirement is often also allowed below the age of 65 when age is proved as a bona fide occupational requirement or when a bona fide retirement or pension plan is introduced. For example, in Newfoundland and Labrador, the termination of employment before the age of 65 “because of the terms or conditions of a good faith retirement or pension plan” is not discriminatory (s. 9(5)(a) of the Newfoundland Human Rights Code, R.S.N. 1990, c. H-14). In the absence of such a plan, the employee may file a complaint. However, the protection was only offered to employees aged 19-65 until recently (s. 9(1)(b) prohibits discrimination in employment on the basis of age “if that person has reached the age of 19 years and has not reached the age of 65 years”).

121 Supra note 53.

122 S. 15 of the Charter prohibits discrimination on the basis of age among many other grounds.

123 This model will be explained in Chapter II, section B.2.

124 There were three other similar cases: Harrison v. University of British Columbia, [1990] 3 S.C.R. 451; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483; and Dickason v. University of Alberta, [1992] 2 S.C.R. 1103. In McKinney, several professors and a librarian from different universities in Ontario applied for declarations that the universities’ policies of mandatory retirement at age 65 violated s. 15 of the Charter and that the provision that limited protection against age discrimination under the Human Rights Code to people under 65 also violated s. 15. The Supreme Court of Canada dismissed the appeal. The majority decision delivered by Justice La Forest held that the Charter does not apply to the mandatory provisions of these universities as the Charter was not intended to cover activities by non-governmental entities. If the universities formed part of the government apparatus, their policies on mandatory retirement would violate s. 15 of the Charter since the distinction is based on the enumerated personal characteristic of age. However, the Court found that this distinction constitutes a reasonable limit under s. 1 of the Charter. It cited with agreement the decision of the Court of Appeal in McKinney: “One of the primary objectives of s. 9(a) was to arrive at a legislative compromise between protecting individuals from age-based employment discrimination and giving employers and employees the freedom to agree on a date for the termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees. It permits employers to plan their financial obligations, particularly in the area of pension plans and other benefits. It also permits a deferred compensation system whereby employees are paid less in earlier years than their productivity and more in later years, rather than have a wage system founded on current productivity. In addition it facilitates the recruitment and training of new staff. It avoids the stress of continuous reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a finite date. Employees can plan for their retirement well in advance and retire with dignity. Another important objective of s. 9(a) was the opening up of the labour market for younger
Lately, legislative changes have been introduced in all four provinces. First, Ontario abolished mandatory retirement entirely in 2005 by removing the age cap of 65 on protection against age discrimination in the *Ontario Human Rights Code*. It is now unlawful to discriminate against workers aged 65 and over based on their age. Collective agreements imposing retirement are no longer allowed. Differentiation based on age is only permitted when age is a *bona fide* occupational requirement. Employees, unions and employers may still negotiate or agree upon voluntary early retirement plans.\(^\text{125}\) However, discrimination in the provision of benefits to workers above the age of 65 is still allowed. This includes health, insurance and dental benefits.\(^\text{126}\) Senior workers are still eligible for government benefits such as the Ontario Drug Benefit Plan. Also, there has been no change in the eligibility for pension benefits.\(^\text{127}\) In addition, workers who were injured when they were less than 63 years old will receive loss of earning benefits until they reach 65 years old, while workers who were injured when they were 63 years or over will receive benefits for a maximum of two years only. Furthermore, the employer’s duty to reemploy and accommodate injured workers ceases at the age of 65.\(^\text{128}\)

In 2006, Newfoundland amended its *Human Rights Code* to extend protection against age discrimination beyond age 65.\(^\text{129}\) Mandatory retirement provisions in collective

\(^{125}\) The Code was amended by the Ending Mandatory Retirement Statute Law Amendment Act, passed in December 2005, which came into effect on December 13, 2006. *Ontario Human Rights Code*, s. 5(1) (prohibits discrimination in employment based on age), s. 10(1) (“age” means “an age that is 18 years or more”), s. 11(1) states that the right to equal treatment is infringed even “where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member,” except if “the requirement, qualification or factor is reasonable and *bona fide* in the circumstances.” S. 11(2) provides that “a requirement, qualification or factor” will not be found “reasonable and *bona fide* in the circumstances” unless “it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.” S. 24(1)(b) further provides: “The right under section 5 to equal treatment with respect to employment is not infringed where ... the discrimination in employment is for reasons of age... if the age ... of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment”.

\(^{126}\) The provision of benefits is at employers’ discretion. They can provide fewer or no benefits at all to employees once they reach age 65. This is because the *Ontario Employment Standards Act*, S.O. 2000, c. 41, prohibiting employers from discriminating on the basis of age in providing benefits to employees aged 18 to 64 has not been changed. S. 25 of the *Ontario Human Rights Code* prohibits discrimination in employee benefits, pension and superannuation plans. However, it exempts any employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Ontario Employment Standards Act*.

\(^{127}\) This is because entitlements under the *Ontario Workplace Safety and Insurance Act*, 1997, S.O. 1997, c. 16, Sched. A, were not changed, and its age-based provisions are still exempt from the prohibition against age discrimination (s. 43). The duty lasts for two years from the date of injury, or one year from the date the employee is able to do the essential duties of the job – or until the employee reaches age 65.

\(^{128}\) Bill 25, *An Act to Amend the Human Rights Code*, passed on May 27, 2006, came into effect on May 26, 2007, and removed the words “if that person has reached the age of 19 years and has not reached the age of 65 years” from s. 9(1)(b) of the Code. It also added age discrimination against anyone over the age of 19 to the
agreements are no longer enforceable. Employers are allowed to offer early retirement packages as an incentive. However, the exception for *bona fide* retirement or pension plans in s. 9(5)(a) of the *Code* was not affected, thus allowing *de facto* mandatory retirement arrangements. Finally, similarly to Ontario, coverage under the *Workplace Health, Safety and Compensation Act* was not changed. Injured workers aged 63 or more at the time of injury will continue to be able to receive loss of earning benefits for up to two years.

In 2007, Saskatchewan also changed its *Human Rights Code*’s definition of age to include persons over 65 years, thus banning mandatory retirement, with the exception of some occupations such as firefighters and police officers, where age is considered a relevant criterion for the job performance. As in Newfoundland, the exemption for *bona fide* retirement, superannuation or pension plans was not affected.\(^{130}\) Also in 2007, British Columbia amended its *Human Rights Code* to extend its protection to those over the age of 65.\(^{131}\) As of January 2008, mandatory retirement policies requiring retirement at age 65 are no longer allowed except in cases where a *bona fide* occupational requirement can be demonstrated.\(^{132}\)

Finally, Nova Scotia, which had already abolished mandatory retirement in the public sector in 2003,\(^ {133}\) ended mandatory retirement in the private sector on July 1, 2009. The *Human Rights Act* was amended to remove the exemption of *bona fide* retirement plans,\(^ {134}\) while still allowing *bona fide* age-based distinctions in pension plans and group or employee insurance plans.\(^ {135}\)

Several changes in pension and tax systems have been recently made across Canada to further encourage delayed and phased retirement. Among other things, workers in defined benefit registered pension plans who have reached age 60 (or who have reached age 55 and are entitled to an unreduced pension) may, subject to certain restrictions, continue working and receive up to 60 percent of their accrued pension benefits while they continue to accrue additional benefits.\(^ {136}\) Also, the age at which individuals must begin to receive their benefits

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\(^{131}\) The Bill was passed on May 31, 2007.

\(^{132}\) See *Bill 31: Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007*.

\(^{133}\) In an amendment to the *Nova Scotia Public Service Superannuation Act*, R.S.N.S. 1989, c. 377.

\(^{134}\) See s. 5(1)(h) of the *Nova Scotia Human Rights Act* prohibits discrimination in employment on the basis of age. However, s. 6 provides that the prohibition in s. 5 does not apply to “prevent, on account of age, the operation of a *bona fide* retirement or pension plan or the terms or conditions of a *bona fide* group or employee insurance plan; [or] to preclude a *bona fide* plan, scheme or practice of mandatory retirement”.

\(^{135}\) *Bill 163, An Act Respecting the Elimination of Mandatory Retirement* was introduced on March 29, 2007 and received Royal Assent on April 13, 2007.

\(^{136}\) On December 14, 2007, the federal government gave Royal Assent to the *Budget and Economic Statement Implementation Act* (Bill C-28) which among other things provides phased-retirement options for pension plans
from defined benefit registered pension plans and RRSP plans was increased from 69 to 71 years.\textsuperscript{137} Finally, there has been a significant shift in registered pension plans from defined benefit plans towards defined contribution schemes.\textsuperscript{138}

\textbf{(d) Israel\textsuperscript{139}}

The \textit{Equal Opportunities in Employment Law}, 1988 prohibits discrimination in employment in hiring, conditions of employment, promotion, vocational training, dismissal or severance pay, benefits and payments to an employee in connection with retirement.\textsuperscript{140} Age was added as a prohibited ground in 1995.\textsuperscript{141} The \textit{Act} allows the use of a prohibited ground when the

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\textsuperscript{137} See “Registered Pension Plans (RPPs) and Members, by Jurisdiction of Plan Registration, Sector and Type of Plan” (Ottawa: Statistics Canada, June 18, 2009), online: <http://www40.statcan.ca/l01/cst01/famil117a.htm>; Philippe Gougeon, “Shifting Pensions” (May 2009) Perspectives on Labour and Income 16, online: <http://www.statcan.gc.ca/pub/75-001-x/2009105/pdf/10866-eng.pdf> (Between 1991 and 2006 defined contribution plan membership steadily increased in prevalence by 93\% especially in the private sector, while defined benefit plans lost 4\% of their members. A significant portion of defined benefit plans have converted to defined contribution plans, thus transferring risk from employers to workers).

\textsuperscript{138} See s. 2(a). The \textit{Act} also covers temporary workers employed through an employment agency (s. 10). The Labour Court may award compensation, even if no monetary damages have been proven, and may order reinstatement (s. 10). The employer is also subject to criminal penalties (s. 15). The burden of persuasion shifts to the employer once the worker establishes a \textit{prima facie} case of age discrimination (s. 9). According to the case law, the employer’s motive is not relevant. There is no requirement to prove discriminatory intention. Yet, the worker has to show that the decision was based on a prohibited ground. It means that an employer cannot defend its action by claiming that he or she hired, promoted, and so forth another senior worker. An employment decision is discriminatory even if there were several considerations involved some discriminatory and some legitimate. That is, the process of decision making should be free from humiliating elements including consideration of the age of the appellant or employee. However, the fact that several considerations were involved may have an impact on the remedy. See Sharon Rabin-Margalioth, “The Elusive Case of Discrimination in Employment: How to prove its Existence?” (2000) 44 Ha’praklit 529 at 536-37, 543-45 (Hebrew). In the context of age discrimination, see a decision delivered by the Regional Labour Court in Tel Aviv, A.B. 7170/03 Kisar – Bar Ilan University (not yet published; 6.12.2006) (Hebrew).

\textsuperscript{139} See s. 2(a1)). The \textit{Act} also covers temporary workers employed through an employment agency (s. 2(a1)). The Labour Court may award compensation, even if no monetary damages have been proven, and may order reinstatement (s. 10). The employer is also subject to criminal penalties (s. 15). The burden of persuasion shifts to the employer once the worker establishes a \textit{prima facie} case of age discrimination (s. 9). According to the case law, the employer’s motive is not relevant. There is no requirement to prove discriminatory intention. Yet, the worker has to show that the decision was based on a prohibited ground. It means that an employer cannot defend its action by claiming that he or she hired, promoted, and so forth another senior worker. An employment decision is discriminatory even if there were several considerations involved some discriminatory and some legitimate. That is, the process of decision making should be free from humiliating elements including consideration of the age of the appellant or employee. However, the fact that several considerations were involved may have an impact on the remedy. See Sharon Rabin-Margalioth, “The Elusive Case of Discrimination in Employment: How to prove its Existence?” (2000) 44 Ha’praklit 529 at 536-37, 543-45 (Hebrew). In the context of age discrimination, see a decision delivered by the Regional Labour Court in Tel Aviv, A.B. 7170/03 Kisar – Bar Ilan University (not yet published; 6.12.2006) (Hebrew).

\textsuperscript{140} Equal Opportunities in Employment Law (Amendment no. 3), 1995. The legal recognition that differential treatment based on a worker’s age is unlawful age discrimination in employment has been developed gradually in the Israeli legal system. In 1959, the \textit{Employment Service Law} was enacted. S. 42(a) of this statute prohibited discrimination in the distribution of jobs based on different grounds including age. However, it was not tightly

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\textsuperscript{141} See s. 2(a). The \textit{Act} also covers temporary workers employed through an employment agency (s. 2(a1)). The Labour Court may award compensation, even if no monetary damages have been proven, and may order reinstatement (s. 10). The employer is also subject to criminal penalties (s. 15). The burden of persuasion shifts to the employer once the worker establishes a \textit{prima facie} case of age discrimination (s. 9). According to the case law, the employer’s motive is not relevant. There is no requirement to prove discriminatory intention. Yet, the worker has to show that the decision was based on a prohibited ground. It means that an employer cannot defend its action by claiming that he or she hired, promoted, and so forth another senior worker. An employment decision is discriminatory even if there were several considerations involved some discriminatory and some legitimate. That is, the process of decision making should be free from humiliating elements including consideration of the age of the appellant or employee. However, the fact that several considerations were involved may have an impact on the remedy. See Sharon Rabin-Margalioth, “The Elusive Case of Discrimination in Employment: How to prove its Existence?” (2000) 44 Ha’praklit 529 at 536-37, 543-45 (Hebrew). In the context of age discrimination, see a decision delivered by the Regional Labour Court in Tel Aviv, A.B. 7170/03 Kisar – Bar Ilan University (not yet published; 6.12.2006) (Hebrew).
differential treatment is necessary due to the character or nature of the job or position in question. The courts have interpreted this clause to include reasonableness and proportionality tests. These are objective tests that do not rely on the subjective opinions of employers. An employer has to prove that there are no workers or almost no workers above the age laid out in its policy who meet the job requirements and that these requirements are reasonably necessary for the job. If safety considerations are involved, or if an individualized test is not feasible, age may serve as a proxy, even if it not a perfect one but accurate on average. The doctrine of age discrimination includes adverse effect discrimination. The plaintiff has to prove that a neutral criterion has an adverse effect on members of a protected ground. Then, the employer has to show that the criterion is indeed relevant. There is no need to prove business necessity.

As for mandatory retirement, the statute does not define age or set an age cap for protection against discrimination. The Legislature was, however, silent with regard to the consequent unlawfulness of mandatory retirement. Until 2004, mandatory retirement at the age of 65 was widely practiced mainly through collective agreements, employment contracts and policies that link compulsory retirement to pension plans. For several sectors and occupations, such as the civil service, it was laid down in primary legislation.

The High Court of Justice held that the 1995 amendment was only declarative and not constitutive as age discrimination was recognized years before as a violation of public policy. See H.C.J. 4191/97 Rakent v. El Al Airlines, P.D. 54(5) 330 (Hebrew).

See s. 2(c).

“The relevancy test requires that the job requirements … are reasonably necessary for the nature of the job. The test is therefore a reasonableness test … the question is always a matter of balance. The question is whether the weight given to these considerations among other considerations is reasonable … thus, it is also necessary to consider the question of proportionality. Whether the job requirements that the employer chose – and according to which a different age of retirement was determined for different employees – are proportional” (Rakent, supra note 141 at 349) [translated by author].

For example, when the police force searched for candidates aged 35 and below, the High Court of Justice held that it discriminated against senior workers, because age was not reasonably necessary requirement for the job and individualized evaluation was feasible (H.C.J. 6788/97 The Association for Civil Right in Israel v. The Ministry of Public Security, 58(2) PD 358 at 366, 370 (Hebrew)). In another case, the National Labour Court held that although the physical work in Dead Sea factories objectively required setting an age of retirement earlier than 65, the collective agreement provision violated the rights of the individuals as individualized testing was feasible (A.A. 1414/01 Dead Sea Factories Ltd. v. Nisim, PDA 40, 193 (Hebrew)).

See s. 2(b) of the Act (“the making of irrelevant conditions shall be regarded discrimination”).

See Rabin-Margalioth, supra note 140 at 565.

While the statute does not explicitly stipulate retirement among the instances when discrimination is forbidden, it was interpreted to include retirement as part of employment conditions (see Rabin-Margalioth, ibid. at 173; Rakent, supra note 141).

See Ruth Ben-Israel, Equal Opportunities and the Prohibition on Discrimination in Employment, vol. 3 (Tel Aviv: Open University of Israel Press, 1998) at 1080 (Hebrew).

Many collective agreements laid down different ages of retirement for men (65) and women (60). However, since 1987, the Equal Age of Retirement for Male and Female Workers Law has allowed female workers to choose when to retire and have full benefits between the ages of 60 and 65. It was repealed by the new Retirement Age Law, 2004 (see infra note 161).

It is most often linked to accrued pensions. For example, ss. 2(10)(5) and 7 of the General Collective Agreement between the Manufacturers’ Association, the Histadrut and the Pension Fund “Mivtachim” from 4.6.1979 (came into force 1.4.1980 for an unlimited time) laid down a comprehensive pension plan in the
Both the Supreme Court of Israel and the National Labour Court have expressed the opinion in several cases that mandatory retirement at the age of 65 is not unlawful age discrimination as it represents the conventional age of retirement in Israeli labour relations. The Courts have pointed to existing laws and collective agreements that impose retirement at the age of 65 and left the matter for the Government and the Legislature to decide. Courts

manufacturing industry and mandatory retirement at the age of 60 for women and 65 for men. In many collective agreements, the age of mandatory retirement is determined according to its pension fund plan. For university professors, for example, it is 68. In the construction industry it is 60 because of the physical component of this work.

Compulsory retirement for civil service workers was common and conventional because it was always closely tied to pension plans. Until 2001, most civil service workers enjoyed membership in an unfunded pension plan, which was paid by the State and the employer and was calculated in accordance with the number of years worked. While civil service workers enjoy unfunded pension (except for workers hired after 2001), most pension funds regulated by collective agreements are accrued pension plans (accumulated by both the employer and the worker).

According to the Civil Service Law (Pensions) (Combined Text), 1970, s. 18 and the Civil Service Regulations (Pensions) (The Continued Employment of a 65 Year-Old Worker), 1968, civil service employees (both male and female) who worked for more than ten years are to retire at the age of 65 unless the civic service commissioner approves otherwise. In these special circumstances, and pending medical examination of the employee, the commissioner may decide to prolong the employment contract by one year at a time and not more than 5 years (until the age of 70). After the age of 67, it is also requisite to prove the necessity of prolonging the employment contract. This law also applies through collective agreements to employees in municipalities, local councils, and civil corporations. Early retirement is permissible from the age of 60. This law was recently amended by the Retirement Age Law, 2004 that lays down a new general age of retirement (67) (see infra note 161). In addition, according to s. 13 of the Courts Law, 1984, the mandatory age of retirement for judges is 70. S. 16 of the Judges Law, 1955 sets a mandatory age of retirement for judges in the rabbinical court at 70 and for the presiding judge at 75. S. 13 of the Regular Service in the IDF Law (Pension), 1985 laid down a fixed age of mandatory retirement at 40. It was amended by the new Retirement Age Law, 2004 (see infra note 161). According to s. 21a of the Regulations for Flying (Licenses for Flying Employees), 1981, there are some restrictions on individuals over 60 serving as captains, and compulsory retirement at the age of 65 for all pilots on commercial flights.

See e.g. Rakent, supra note 141. The facts of this case and its ruling are discussed in Chapter III, section C. The High Court of Justice has left open the question of whether mandatory retirement at the age of 65 constitutes unlawful age discrimination. In obiter dictum, the Court was willing to state that it was not unlawful (ibid. at 360). In this case, compulsory retirement at an earlier age for some workers of the same employer was found unlawful age discrimination as it was not reasonably necessary for their jobs. The National Labour Court was much more willing to deal with this complicated question. In Avni, where a worker argued that mandatory retirement at the age of 65 imposed by a collective agreement is prohibited age discrimination, the Court rejected his argument stating that it was determined for the benefit of all employees, to promote younger employees, to facilitate hiring of new employees, and to generate a balanced labour force with respect to costs and ability to contribute to the enterprise. It also held that a retirement age of 65 is widely accepted in the labour market through many collective agreements and legislation. See A.A. 300205/98 Avni – the New General Histadrut, P.D.A. 34, 361 (Hebrew). Recently, the National Labour Court denied a complainant’s claim that a tender for a chief medical officer for the Civil Aviation Authority limiting the full participation of workers above the age of retirement (65) was discriminatory. The complainant, who was a colonel in the air force reserves and a senior flight surgeon, was 72 years old when the tender was published. The Court held that setting a mandatory age of retirement was not unlawful discrimination because unlike other legal systems, the Israeli legislature chose chronological age as the time for retirement. Accordingly, the legislature and the courts allow the use of mandatory retirement. According to the common social norms in Israel, mandatory retirement at a fixed age is not prohibited discrimination but rather a relevant distinction based on age. According to the majority opinion delivered by Chief Justice Adler, the law divides people into groups for different matters. The duty of equal treatment applies only within the group that was determined in advance for a particular matter. It is not discrimination if the same right is denied to an out-of-group individual. The Retirement Age Law proclaims age 67 as the age of retirement. Therefore this is the relevant group. If an employer does not hire a 73-year-old worker, this is not discrimination. In addition, the myriad collective agreements on this matter suggest that it is a consensus between the social partners. At the same time, the Court did recognize that mandatory retirement based on chronological age impairs constitutional rights of employees such as the freedom of occupation and human dignity. Yet, it found this infringement to be justified as it is for a legitimate
have also upheld mandatory retirement policies that were imposed by employers and were not conditional upon the provisions of pension plans. One leading example was the case of Ora Ma’or, who worked for more than twenty years at the Open University and was fired at the age of 65 solely on the basis of her age. Her retirement was not governed by any collective agreement. She was not entitled to any pension benefits. Nevertheless, the Regional Labour Court denied her claim that she was discriminated against on the basis of her age, stating that her employment contract could be terminated at any time by provision of notice, and that most of her colleagues retire at the age of 65.

In 2004, the Retirement Age Law was enacted and gradually raised the age of eligibility for full pension benefits to 67 for men and to 62 for women. The age of eligibility for early retirement (with reduced pension benefits) is 60 for both men and women. Most importantly, this legislation lays down a mandatory retirement age applying to all workers which will rise gradually from 65 to 67. It means that workers below the age of 67 cannot be compelled to retire because of their age (unless required by the character or nature of their job or position) even if existing collective agreements and employment contracts say otherwise. Employers can fire employees below the age of 67 according to purpose (providing a fair opportunity for new participants in the labour market). It also represents an appropriate balance between constitutional rights of senior workers and younger workers from a general social perspective. In his dissenting decision, the workers’ representative on the bench, Shlomo Goverman stated that Kelner was discriminated against because one should distinguish between mandatory retirement provisions in the civil service and participation in a tender. Excluding a person from participation in a tender solely on the basis of his or her age is unlawful age discrimination, and infringement of his or her freedom of occupation and human dignity. He concluded that there is no clause in the law that denies a person the right to make a living in the civil service after age 70. See A.A. 107/05 Kelner – The Civil Service Commissioner (not yet published; 27.2.2006) (Hebrew). In an appeal to the High Court of Justice, Kelner’s claim was denied yet without determining whether mandatory retirement – and s. 4 of the Retirement Age Law – is constitutional (H.C.J 4487/06 Kelner v. The National Labour Court, (not yet published; 25.11.2007) (Hebrew).

Furthermore, the Court ruled that the Legislature’s silence regarding the legal status of mandatory retirement suggests that mandatory retirement is not discriminatory, and that mandatory retirement without pension should not be recognized as unlawful age discrimination solely on the basis of the economic harm to the employee. The court held that the rationale in upholding mandatory retirement arrangements is not primarily economic (as employees compelled to retire tend to feel useless and deprived of an opportunity to participate in society and even those who enjoy pension plans earn considerably less amount of money when they retire). The court concluded by stating that the age of mandatory retirement can and should be reexamined. Yet, it is the role of the legislative and executive authorities to tackle this issue. Finally, Ma’or’s claim that her constitutional right to freedom of occupation (see Basic Law: Freedom of Occupation, article 3) was violated was also denied. The Court expressed the opinion that freedom of occupation does not entail an employer duty to provide an individual with a job.

It came into force in April 1, 2004.

Pending the recommendation of a public committee that will examine the unique situation of women it seems that the age of eligibility for full pension benefits for women will be 64 (s. 9).

See s. 3. The increase is four months every year.

See s. 5.

See s. 4.
dismissal law.\textsuperscript{161} When the worker turns 67, however, he or she can be dismissed solely on the basis of his or her age. The \textit{Act} allows employers to continue employing workers over retirement age through special agreements, yet these are very rare.\textsuperscript{162} Furthermore, a worker who reaches the age of 67 and continues working is no longer protected against age discrimination under the \textit{Equal Opportunities in Employment Law}.\textsuperscript{163} The main impetus behind this legislation was tackling the actuarial deficit of pension funds.\textsuperscript{164} The legislation also relied on the recommendations of the Public Committee for Review of Retirement Age. This committee recommended \textit{inter alia} a gradual increase in the age of mandatory retirement from 65 to 67, and equalizing the age of eligibility for pension benefits for women and men.\textsuperscript{165}

While mandatory retirement policies and practices are very common in Israel, the prevalence of pension plans is low.\textsuperscript{166} Israel is one of the few developed countries that did

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\textsuperscript{161} The \textit{Civil Service Law (Pensions) (Combined Text)} was amended accordingly to include the new mandatory retirement age (s. 21). The age of mandatory retirement in the IDF was also gradually raised (s. 24). The \textit{Equal Age of Retirement for Female and Male Workers Law} was repealed (s. 25).

\textsuperscript{162} Many employers pressure their workers to retire before the required age, even as early as age 48, as for example in the case of Bezeq. See Ruth Sinai, “Longer, Healthier Lives, but More Laws Force People to Leave the Workforce” \textit{Ha'aretz} Website (December 13, 2006) online: <http://www.haaretz.com/hasen/spages/800247.html> (Hebrew).

\textsuperscript{163} See A.A. 107/05 Kelner, supra note 153.

\textsuperscript{164} 60 billion NIS according to the Histadrut, and 137.5 billion NIS according to the Ministry of Finance. On the gap between the two estimates see Rami Yosef & Avia Spivak, \textit{The New Pension World: After the Big Bang of 2003} (Policy Studies, The Van Leer Jerusalem Institution, 2008) at n. 13, online: <http://www.vanleeer.org.il/econsoc/pdf/1_research_mdiniut5.pdf> (Hebrew).

\textsuperscript{165} See Report by the Public Committee for Review of Retirement Age (Chairman: Justice Netanyahu (ret.), July 2000) (Hebrew). The committee advocated laying down a fixed age of retirement in legislation for the entire workforce to override collective agreements and ensure that all workers retire at the same age (\textit{ibid.} at 4-5). The committee decided against abolishing mandatory retirement completely. It gave several reasons for its recommendation to raise the age of retirement, including the fact that decline in job performance occurs at later stages today than in the past due to improvements in education and health; the fact that myriad studies examining the link between job performance and age have not come to conclusive answers; the fact that functional capacity varies considerably between individuals and depends heavily on the employee job. Increasing the age of retirement would also allow those who wish to continue working and accumulating pension benefits such as immigrants and women (\textit{ibid.} at 6). As well, it would improve the well-being of seniors. There is no conclusive evidence that it would increase youth unemployment (\textit{ibid.} at 7). Finally, the committee expressed the opinion that the legislation would not be unconstitutional as the new age would be determined for a proper end and is proportional (\textit{ibid.} at 8). The committee also recommended that the age of eligibility for full pension benefits increase accordingly due to the increase in life expectancy and in dependency ratio and the actuarial deficit of pension funds (\textit{ibid.} at 9), while expressing concern that the higher age of eligibility might harm those employees who are incapable of working until the age of 67 (\textit{ibid.} at 10).

\textsuperscript{166} There is a three-layer solution for senior people in Israel: the first layer includes old-age insurance for all people aged 70 and above from the National Insurance Institution. According to the \textit{National Insurance Law}, 1995, all Israeli residents are insured from the age of eighteen. Compulsory contributions are made by both employees and employers. The allowance is calculated as a percentage of the national average wage. The basic allowance of an individual is one of the lowest among developed countries: 16\% of the average monthly wage (1,159 NIS as of July 1, 2006). Those who do not have other income may be entitled to income support which brings them to 25\% of the average monthly wage. There are, however, some additional allowances available to some (such as dependent insurance, seniority increment, and deferred allowance) to a maximum of 52.5\% of the average monthly wage. An Israeli resident at the age of retirement (since 2004 it has increased gradually from 65 to 67 for men and from 60 to 64 for women) is entitled to an old age allowance if his or her income does not exceed a certain sum determined by the law. Every resident is entitled to an old age allowance regardless of his or her income at the age of 70 (for women it has gradually increased from 65 to 70 since
not have a mandatory insurance pension law until very recently. In 2003, only half of the adult population had pension plans. Around one million workers in Israel did not have a pension plan. Public pension is only available for civil servants. At the same time, the new Age of Retirement Law, 2004 imposes compulsory retirement on all workers – whether they have pension or other arrangements (such as directors insurance) or no other arrangements at all. Today, an extension order entitles all Israeli workers to a pension plan, but these plans are managed by private actors and provide only modest benefits.

(e) Europe

(i) European Union

The European Union has taken various measures to address the implications of the aging workforce in Europe. In 1982, the European Union Council adopted recommendations on the principles of a Community policy on age retirement. It was decided to implement the principle of flexible retirement in State Members providing each worker free choice as to when to retire according to national legislation. In May 1999, the European Commission 2004). The only requirement is that they were insured for five out of the last ten years. The second layer is the pension insurance (unfunded pension, pension funds, directors’ insurance, and provident funds). The last layer includes independent savings and assets.

This is because until the 1980s trade unionism was very powerful and dominant in Israel. The largest union, the Histadrut, was almost the only pension provider in the State. Since the vast majority of workers were members of the Histadrut, there was no necessity to regulate mandatory pension through primary legislation. However, since the 1990s, there has been a drastic decline in union membership and the Histadrut’s power was eroded tremendously. Finally, since pension plans governed by the Histadrut suffered from large actuarial deficits, they were no longer available to new members after the 1995 reform. New pension plans based on a defined contribution scheme were offered to new members. The privatization process was completed in 2003 and the new plans are now managed by insurance companies. The government still struggles with the actuarial deficits of the old plans. See Yinon Cohen et al., “Unpacking Union Density: Membership and Coverage in the Transformation of the Israeli IR System” (2003) 42 Industrial Relations 692; Yosef & Spivak, supra note 164.

This includes unfunded pension, pension funds (accrued pension), life insurance (such as directors insurance) and provident funds. According to the Central Bureau of Statistics social survey conducted in 2003, 53% (2.1 million people) of adult population (20 years old and above) had a pension plan. Around 63% of salaried employees had a pension plan. Approximately 73% of all employed (including those who employ other workers) had a pension plan (see the Central Bureau of Statistics, “Pension and Retirement” (August 26, 2003), online: <http://www.cbs.gov.il/hodaot2003/19_03_200.htm> (Hebrew); the Central Bureau of Statistics, “International Day of the Elderly – Selected Data” (October 1, 2003), online: <http://www.cbs.gov.il/hodaot2003/12_03_239.pdf> (Hebrew)).

These public plans have gone through some major reforms in recent years. Since 1995, the public sector has shifted from unfunded pension plans (pay-as-you-go plans) where there was no fixed allocation of money to the pension fund, and the employers assumed the obligation to provide pension benefits upon retirement from the current budget, to accrued pension plans. Since the 1990s the accrued pension plans have gradually shifted from defined benefits to defined contributions. For more on the reforms in the Israeli pension system see Yosef & Spivak, supra note 164.

On 30.12.2007 an extension order regarding a comprehensive pension security system for all workers was signed. It extended the provisions of a general collective agreement from 19.7.2007 and applied to all workers in Israel from 1.1.2008. According to this order, workers who do not have a pension plan are entitled to have one and to choose one by notifying their employer in writing. The employer is obliged to choose one for workers who have not responded.

identified among its main priorities a mission to increase the level of participation by senior
people in the labour market by reinforcing their employability, reviewing employment rules
and practices to adapt the workplace to aging, and promoting equal opportunities. The
Employment Guidelines for 2000 called Member States and social partners to develop
strategies to attract and retain senior workers to the labour market. In 2001, the Stockholm
European Council set a target for increasing the average employment rate of persons aged 55
to 64 to 50 percent by 2010. In 2002, the Barcelona European Council stated that efforts
should be exerted to extend opportunities to senior people to remain in the labour market. It
recommended that early retirement incentives be reduced. An objective was set to increase
the average age of retirement by five years by 2010.

While the European Convention on Human Rights does not explicitly prohibit age
discrimination, it provides a non-exhaustive list of prohibited grounds of discrimination. Age
is explicitly mentioned as a prohibited ground of discrimination in Article 21(1) of the
Charter of Fundamental Rights of the European Union. In October 2000, the EU adopted
the Directive establishing a general framework for equal treatment in employment and
occupation for all people irrespective of a range of factors, including age. The main
purpose of the Directive is to ensure respect for human dignity by protecting of the right to
equal treatment and enhancing the ability of all age groups to participate in employment and

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176 See Article 14: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.
178 Article 3 of the Directive broadly defines “employment and occupation” as including access to employment, recruitment, promotion, vocational training, working conditions, pay, dismissal, and involvement in employers’ bodies, trade unions and other professional organizations. State social security and social protection schemes are exempted. See Colm O’Cinneide, Age Discrimination and European Law (Brussels: European Commission, April 2005) at 15, online: <http://www.equalrightstrust.org/ertdocumentbank/age%20discrimination%20and%20european%20law.pdf>.
employment-related activities. Direct and indirect forms of discrimination are prohibited. The Directive allows for a wide range of exceptions. Among other things, Article 4 permits differential treatment based on any of the mentioned grounds including age when the characteristic constitutes a genuine occupational requirement [GOR] for a particular job. Article 2(2)(b) provides that indirect discrimination can be justified if it serves a legitimate aim and the means of achieving this aim are objectively necessary and proportionate. There are also specific exceptions to the prohibition on age discrimination. Article 6 exempts the use of age-based distinctions from its general prohibition on direct discrimination, if the use can be demonstrated to be objectively necessary to achieve a legitimate aim and proportionate to the aim sought. A legitimate aim may include legitimate employment policy, and labour market and vocational training objectives. Member States were required, among other things, to introduce legislation on age discrimination in employment implementing the Directive by December 2006. The Directive does not require Member States to outlaw mandatory retirement, yet it might represent a first step in this direction.

(ii) Member States

Many Member States have recently introduced legislation prohibiting age discrimination in employment in response to the EU Directive. The practice of mandatory retirement is by

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180 Recitals 4-6 in the preamble to the Directive refer to the importance of the fundamental rights of dignity and equality, and recognize that unjustified discrimination based upon stereotypes and prejudice violates these basic individual rights.

181 See Article 2. It is interesting to note that direct and indirect discrimination are defined in comparative terms. Direct discrimination occurs when “one person is treated less favourably than another is” and indirect discrimination occurs when a neutral provision, criterion or practice would put some persons at a particular disadvantage compared with other persons.

182 For more exceptions see, for example, Article 2(5), which proclaims that the Directive shall be without prejudice to measures laid down by national law necessary for public security, public order and the prevention of crime, protection of health and rights and freedoms of others. Also, the Directive does not apply to any payments made by state schemes including social security (Article 3(3)). As well, positive discrimination to help disadvantaged groups is allowed (Article 7). See also O’Cinneide, supra note 178 at 11-12, 19, 30.

183 Examples provided by the Directive are: seniority and maximum age of recruitment based on training requirements and the need for a reasonable period of employment before retirement.

184 Recital 14 states: “This Directive shall be without prejudice to national provisions laying down retirement ages”. While state-imposed retirement ages related to pension provision are exempted, the status of mandatory retirement based on a contract, collective agreement or policy is uncertain. Under the Directive, a requirement that an employee retire at a specified age may amount to age discrimination. The question still remains whether it is justified under Article 6 (i.e. whether mandatory retirement is objectively necessary and a proportionate means of achieving a legitimate aim) and this will be determined on a case-by-case basis (see O’Cinneide, supra note 178 at 41-43).

185 Legislation against age discrimination is still a new reality for many Member States. Back in 2000, most did not have any specific legislation to ban age discrimination although in many countries state constitutions or labour codes banned discrimination (see James Arrowsmith & Mark Hall, “Industrial Relations and the Ageing Workforce: A Review of Measures to Combat Age Discrimination in Employment” (Eironline: European Industrial Relations Observatory On-Line, October 28, 2000), online: <http://www.eiro.eurofound.ie/2000/10/study/TN0010201S.html>). By 2006, most countries had introduced
contrast widely exercised. Many countries have chosen (at least for the time being) not to abolish this practice. To improve the sustainability and affordability of public pension systems and to encourage labour force participation among senior workers, many countries have increased the age of eligibility for full public pension benefits and introduced incentives for delayed retirement and penalties for early exits.  

The U.K., for example, has only recently introduced new regulations to end age discrimination in the workplace. The Employment Equality (Age) Regulations, 2006 came into force on October 1, 2006. The provisions apply to employment and vocational training. They prohibit age discrimination in recruitment, promotion and training and remove the current age limits for unfair dismissal and redundancy rights. The prohibition on age discrimination includes direct and indirect forms of age discrimination, harassment cases and victimization on grounds of age, of people of any age, young or senior. It is however

specific laws to implement the directive. While state initiatives to promote the employment of senior workers (including targeted training, employment subsidies and awareness-raising campaigns) were common in State Members in 2000, they were not effective. The conclusion of several studies conducted on this matter was that without the force of law such policies would only have a limited impact in diminishing age discrimination in employment. See James Arrowsmith, “Overview of the Implementation of the Framework Equal Treatment Directive” (Eironline: European Industrial Relations Observatory On-Line, April 30, 2004), online at: <http://www.eurofound.europa.eu/eiro/2004/02/study/tn0402102s.html>.

In Germany, for example, the Federal Equal Treatment Act, 2006 prohibits all forms of discrimination including age. However, mandatory retirement at the age of 65 is permitted. Also, the pensionable age of retirement for women will rise from 60 to 65 by 2010. It will rise gradually for both men and women starting in 2012, reaching 67 in 2029. The age for early retirement will gradually increase from 60 to 62 by 2010 (only for those with at least 35 years of contribution), with a penalty of 3.6% per year. An incentive for later retirement was implemented (6% per year). There is also a penalty for disability pensions before the age of 62. In Belgium, the Anti-Discrimination Act, 2007 prohibits, among other things, age discrimination in employment. There is no statutory retirement age at which employers are allowed to terminate workers (except for white-collar employees at 65 by provision of notice, and civil servants at 65). The standard retirement age for women increased gradually from age 63 in 2003 to 65 in 2009. Early retirement is now available for those who have contributed for a period of 35 years (instead of 32 in 2003). In Spain, Article 14 of the Spanish Constitution prohibits all forms of discrimination (age is not mentioned explicitly) and Article 17 of the Workers’ Statute, 1980 prohibits age discrimination in employment. The ordinary retirement age is 65 but there are exceptions for different professions (for example mandatory retirement for public servants is at 70 years old). The 2002 reform of the pension system abolished mandatory retirement in the private sector and encouraged later retirement. Workers at the age of 65 and above (with a minimum contribution period of 35 years) will increase their pension benefit by 2% per year, and both employers and employees are exempted from paying social security contributions (a reduction of 50% in employers’ contribution will apply from the age of 60 and grow by 10% every year to support demand for senior workers). Financial incentives for working part-time while receiving partial pension have also been introduced. Early retirement is possible from 61 years old, with at least 30 years of paid contributions and after being registered as unemployed for at least 6 months, but with a high penalty. However, as of July 2005, collective agreements may set compulsory retirement for employees, providing that the measure is, among other things, linked to legitimate employment policy, labour market and vocational training objectives and that the workers have sufficient retirement pension (see Carone, supra note 20 at 18-20).


It also removes age limits for Statutory Sick Pay, Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay, so that the legislation for all four statutory payments applies in exactly the same way.

See ss. 3-6. Adopting the EU Directive language, direct discrimination is defined as “less favourable” treatment and indirect discrimination is defined as an application of a provision, criterion or practice which puts or would put an individual “at a particular disadvantage when compared with other persons”.

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lawful for an employer to treat people differently if possessing a characteristic related to age is a genuine occupational requirement [GOR]. Furthermore, both direct and indirect discrimination may be justified if it is a proportionate means of achieving a legitimate aim.

As for retirement, employers are required to give at least six months notice to employees about their intended retirement date. A national default retirement age of 65 was introduced (and will be reviewed in 2011). That is, employers may dismiss workers who have reached 65 solely based on their age. Employees have the right to request to work beyond retirement age, and employers have a duty to consider, although not to accept, that request. If an employer agrees to keep on a worker beyond the age of 65, the general prohibition against age discrimination will apply except for retirement. The Regulations will not affect the age at which people can claim their state pension. Finally, an employer may refuse to recruit individuals who are above, or within six months of, the retirement age set down by the employer (or the national default of 65). Recently, the European Court of Justice rejected a claim that the default retirement age of 65 is incompatible with the EU Directive. The Court ruled that a retirement age of 65 is in principle capable of being justified as being a proportionate means of achieving a legitimate aim, and that therefore it is for the national courts to determine whether that test is met. The High Court of Justice of England has yet to decide this matter.

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190 See s. 8.
191 See s. 3(1).
192 See schedule 6, s.2.
193 See ss. 7(4)(a) and 30.
194 So long as they follow the schedule 6 procedure, which obliges employers to inform their workers of the intended date of retirement 6 to 12 months before it occurs and of their right to request not to retire.
195 See schedule 6, ss.5-9. Failure to do so will make the dismissal automatically unfair. Employees will have a right of appeal if they are dissatisfied with the employer’s response. This policy will be reviewed in 2011.
196 Workers will have the option to continue working while taking advantage of deferring State Pension with subsequent increases or taking State Pension while continuing to work. The Regulations provide exemptions for many age-based rules in occupational pension schemes.
197 See s. 7(4)(d). Other exceptions to the prohibition on age discrimination are, for example, pay related to the National Minimum Wage; pay and other employment benefits based on length of service; life assurance coverage (employers are allowed to stop providing life assurance to a worker, who retired early due to ill health, when the worker reaches the age at which he or she would have retired had they not fallen ill, or at the national default age of 65); and occupational pension systems.
198 See ECJ Case C-388/07 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform (delivered on March 5, 2009), online: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-388/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>. The National Council on Ageing argued before the High Court of Justice of England that by providing for an exception to the principle of non-discrimination where the reason for the dismissal of an employee aged 65 or over is retirement, the UK Regulations infringe Article 6(1) of EU Directive and the principle of proportionality. The High Court of Justice of England decided to refer the question to the European Court of Justice for a preliminary ruling. The European Court of Justice held that UK Regulations “do not establish a mandatory scheme of automatic retirement. They lay down the conditions under which an employer may derogate from the principle prohibiting
The U.K. government has also introduced some changes in the pension system. Between 2010 and 2020, women’s state pensionable age will gradually rise from 60 to 65, as for men. State pensionable age for both men and women will gradually increase from 65 to 68 by 2044-46. Also, incentives were introduced for deferring the basic state pension benefits for two years. In addition, a quasi-compulsory workers’ occupational pension scheme will be introduced by 2012.\(^{199}\) This scheme will automatically enroll all employees who are not covered by better occupational schemes and require employers to make contributions to this plan.\(^{200}\) Finally, there is a significant shift in the private sector pensions from defined benefit schemes to defined contribution schemes. While back in 1995 more than five million workers were covered by defined benefit plans (80 percent of private sector pensions), today fewer than two million workers are covered by these plans.\(^{201}\)

The Netherlands is another example of a Member State that has recently introduced legislation prohibiting age discrimination as an implementation of the EU Directive.\(^{202}\) The *Equal Treatment in Employment (Age Discrimination) Act* prohibits direct and indirect discrimination on the basis of age in recruitment, selection and appointment of personnel, employment conditions, promotion, and dismissal. Employers have to show objective justification for making a distinction based on age. Employers may however terminate employment contracts of workers aged 65 and above. Indeed, many collective agreements automatically terminate employees who reach the age of 65. At the same time, disincentives for early retirement and incentives for delayed retirement have been introduced, while the official pension age remains 65.\(^{203}\)
In France, a new law to ban discrimination in the workplace was introduced in 2008. It adds a new prohibited grounds of discrimination (including age), and broadens the definition of discriminatory practices to cover an employee’s entire career including recruitment, pay, training, qualifications, job classification, promotion, transfer and dismissal. Age distinction is not unlawful when it is objectively and reasonably justified by a legitimate purpose and the means to achieve this legitimate purpose are necessary and appropriate. An employer may terminate the employment contract of an employee when he or she is entitled to full state pension benefits (at age 65). The mandatory retirement age was raised from 60 to 65 in the private sector and limited incentives for working beyond the age of 60 and retiring gradually retirement were introduced as part of the 2003 pension reform. However, until recently mandatory retirement between 60 and 65 was still allowed under collective agreements, provided that the worker was entitled to a full pension. Furthermore, while the mandatory retirement age in the public service is 65, the minimum retirement age in many cases is much lower (55 or 60).

E. The Impact of the Legislative Changes and Reforms

Some scholars and policy-makers argue that ending mandatory retirement is likely to make no significant difference in the level of workforce participation among senior workers. Indeed, Manitoba and Quebec have long abolished mandatory retirement, and no significant effect has been noticed. However, some empirical evidence from the U.S. suggests otherwise. According to one study, by Till von Wachter, the employment participation of American workers aged 65 to 70 rose by 10 to 20 percent with the end of mandatory retirement in the United States in 1978. Another study, by Orley Ashenfelter and David Card, analyzing retirement among university professors in the U.S. reveals a large increase in employment participation rates of senior faculty members following the abolition of mandatory retirement.

204 Article L. 122-45 of the Labour Code, 1973 states that, “No person can be eliminated from a recruitment process … due to their age, sex, lifestyle, sexual orientation, age, family situation, non-membership, whether genuine or assumed, of an ethnic group, nation or race, political beliefs, trade union activities, religious beliefs, physical appearance, surname, state of health or disability”.

205 This clause was valid until December 31, 2008.


208 von Wachter, supra note 74.
mandatory retirement in colleges and universities in 1994.\footnote{209} Using data from the University of North Carolina system, Robert Clark and Linda Ghent reach similar conclusions.\footnote{210}

Yet, as Gunderson argues, it might be that while the legislation against age discrimination has positively affected the employment of senior workers, the specific impact of outlawing mandatory retirement is very small because of the trend towards early retirement and the existence of some financial incentives in public and private pension schemes which might discourage delayed retirement.\footnote{211} Indeed, several Canadian studies have indicated that few workers will continue working when mandatory retirement is banned. Morley Gunderson and Douglas Hyatt, for example, maintain that although half of the Canadian workforce was employed in jobs that involve mandatory retirement in 2004, approximately 12 to 20 percent retired because of mandatory retirement,\footnote{212} and only 6 to 20 percent of those retired involuntarily.\footnote{213} Similarly, a report prepared for Human Resources Development in Canada reveals that only 12.3 percent of retirees retire due to mandatory retirement and most retire voluntarily.\footnote{214}

\footnote{209} Orley C. Ashenfelter & David E. Card, “Did the Elimination of Mandatory Retirement Affect Faculty Retirement?” (2003) 92 American Economic Review 957. Ashenfelter and Card used information on retirement flows over the period 1986-1996 for more than 16,000 senior faculty members at 104 four-year colleges and universities across the United States. Comparing retirement rates before and after 1994 (when postsecondary institutions were no longer allowed to impose mandatory retirement at the age of 70), they concluded that for faculty members under the age of 70 the elimination of mandatory retirement had no effect on retirement flows. For faculty members who are still teaching at age 70, however, the elimination of mandatory retirement had a substantial impact. When mandatory retirement policies prevailed fewer than 10% of 70-year-old faculty members were still teaching two years later. After the elimination of mandatory retirement it reached 50%.

\footnote{210} Robert L. Clark & Linda S. Ghent, “Mandatory Retirement and Faculty Retirement Decisions” (2008) 47:1 Industrial Relations: A Journal of Economy and Society 153 (there has been a significant decrease in the likelihood of faculty members retiring at age 70 since 1994).


\footnote{212} Statistics Canada reports that 12% of those who retired in Canada between 1992 and 2002 said they would have kept working if mandatory retirement policies had not existed. More than 25% would have continued working if they had been able to reduce their work schedule without diminishing their pension benefits. In addition, many would have been influenced by more vacation leave either by working fewer days (28%) or shorter days (26%). Immigrants, university-educated individuals, those who received an early retirement incentive and those who endure financial difficulties since retirement were the most likely to consider working past age 65 if alternative work arrangements were available. See René Morissette, Grant Scellenberg & Cynthai Silver, “Retaining Older Workers” (October 2004) 5:10 Perspectives on Labour and Income, online: <http://www.statcan.ca/english/freepub/75-001-XIE/11004/art-2.htm>. The study used data from the 2002 General Social Survey to examine how willing Canadians who retired during the previous ten years would have been to continue working given certain incentives. It included 1.8 million interviewees.

\footnote{213} Gunderson & Hyatt, supra note 106 at 142. See also Don Kerr, Peter Ibbott & Roderic Beaujot, “Probing the Future of Mandatory Retirement in Canada”, Discussion Paper No. 04-05 (Population Studies Centre, University of Western Ontario, May 2004) at 3, online: <http://www.ssc.uwo.ca/sociology/popstudies/dp/dp04-05.pdf>. They were more likely to retire because of mandatory retirement if they were male, had some post-secondary education, were not in poor health, were covered by an employer pension plan, and were in Ontario or Quebec. There was no significant correlation between retiring due to mandatory retirement and the person’s wealth or their occupational status. See Morley Gunderson, Retirement and Return to Work Decisions of Retirees (Report to Human Resources Development Canada, March 1999). This report was based on retired persons age 50 and over, some of whom have returned to work after retirement. It analyzes their retirement
However, recently the trend towards early retirement has been reversed and more incentives for phased and delayed retirement have been introduced. Furthermore, today more workers wish to postpone their retirement or do not consider retiring at all, mostly due to financial problems.\footnote{According to the 2007 General Social Survey (GSS), 14\% of Canadians aged 45-59 do not know when they will retire, and an additional 11\% say that they do not intend to ever retire. Yet around 22\% plan on retiring before the age of 60, about 25\% plan on doing so between the ages of 60 and 64 and another 25\% plan to leave the workforce at the age of 65. Around 4\% plan on retiring at age 66 and above. Uncertainty was common among Canadians with health concerns or modest financial resources. About one-third of Canadians aged 45-59 expressed concerns about the adequacy of their retirement income. See Grant Schellenberg & Yuri Ostrovsy, “The Retirement Plans and Expectations of Older Workers: 2007 General Social Survey Report” (September 9, 2008) Canadian Social Trends (Canada Statistics) 11, online: <http://www.statcan.gc.ca/pub/11-008-x/2008002/article/10666-eng.pdf>}. A growing number of senior workers choose to collect pension benefits while still working.\footnote{Between 1999 and 2004, the proportion of persons age 50 to 69 in paid employment after retiring from a career job was 9\% on average. See Benoît-Paul Hébert & May Luong, “Bridge Employment” (November 2008) Perspectives on Labour and Income 5, online: <http://www.statcan.gc.ca/pub/75-001-x/2008111/pdf/10719-eng.pdf>}. The shift from defined benefit to defined contribution schemes in the private pension sector also encourages workers to work longer.\footnote{In the U.S. see for example Jonathan Barry Forman & Bing Yung-Ping Chen, “Optimal Retirement Age” New York University Review of Employee Benefits and Executive Compensation [forthcoming] at 29, online: <http://ssrn.com/abstract=1148271> (the shift from traditional defined benefit plans to defined contribution plans is one of the major reasons behind the increase in labour force participation of seniors since 1985).} As well, the global economic crisis which negatively affected pension funds and individual savings increased the proportion of people wishing to continue working past the age of 65. As life expectancy increases, health and living conditions improve, technology advances and physical demands are reduced, preferences regarding the timing of retirement may be altered and the impact of ending mandatory retirement may grow.\footnote{See Morley Gunderson, “Banning Mandatory Retirement: Throwing Out the Baby with the Bathwater” C.D. Howe Institute Backgrounder No. 79 (Toronto, March 2004) at 3, online: <http://www.cdhowe.org/pdf/backgrounder_79.pdf>}. As life expectancy increases, health and living conditions improve, technology advances and physical demands are reduced, preferences regarding the timing of retirement may be altered and the impact of ending mandatory retirement may grow.\footnote{See Morley Gunderson, “Banning Mandatory Retirement: Throwing Out the Baby with the Bathwater” C.D. Howe Institute Backgrounder No. 79 (Toronto, March 2004) at 3, online: <http://www.cdhowe.org/pdf/backgrounder_79.pdf>}. The American experience suggests that when the abolition of mandatory retirement is accompanied by other changes (such as a shift towards defined contribution plans and an increase in the age of eligibility for full social security benefits), it is much more effective. In the U.S., for example, while labour force participation rates at advanced age have increased dec...
over the last decade, the most significant increase was among those aged 65-69.\(^{220}\) According to a recent study by Pierre-Carl Michaud and Susann Rohwedder which attempts to forecast retirement patterns and future labour force participation of American workers born between 1948 and 1953, the trend towards increased labour participation for women and men at advanced age will continue.\(^{221}\)

Although the median age of retirement has dropped significantly in the past two decades,\(^{222}\) in some countries it has recently reversed its direction and risen for both men and women indicating the beginning of a new trend. In Canada, for example, the median age of retirement rose significantly for men (from 61.4 in 1997 to 63.3 years in 2003) and slightly for women (from 60.1 in 1997 to 60.4 years in 2003).\(^{223}\) In the European Union, the average age at which senior workers exit from the labour force rose from 59.9 years in 2001 to 61.0 years in 2003.\(^{224}\)

Still, there is more to be done to strengthen this trend. Employers and policy-makers who wish to influence the timing of retirement often find it very challenging. Indeed, retirement decision making is highly complex and influenced by numerous factors including financial incentives in both public and private pensions and other formal and informal early retirement schemes (such as unemployment rates, sickness and disability benefits).\(^{225}\)

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\(^{220}\) While the labour participation rate of men aged 55-61 years old remained steady (72% in 1990 compared with 73% in 2007), it rose for women (from 50% in 1990 to 62% in 2007). Participation rates for both women and men aged 62-64 rose through this period (for men – from 42% to 49%, and for women from 28% to 42%). The increase was even greater for those aged 65-69. For men it rose from 26% in 1990 to 33% in 2007, and for women from 17% to 26%. There was also a slight increase in participation rates among men and women aged 70 and above (for men from 10% to 15% and for women from 5% to 8%). See the U.S. Census Bureau’s *Current Population Survey*, and Pierre-Carl Michaud & Susann Rohwedder, “Forecasting Labor Force Participation and Economic Resources of the Early Baby Boomers” Michigan Retirement Research Center Research Paper No. WP 2008-175 (May 1, 2008), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157358>. For more on the impact of the social security system on retirement decisions in the U.S. see *Ageing and Employment Policies: United States*, supra note 7 at 87.

\(^{221}\) Michaud & Rohwedder, *supra* note 220. This study uses forward-looking dynamic models of labour force participation, wealth accumulation and data on pension and Social Security benefit claims. It is innovative as it is using alternative measures of pension entitlements and the associated incentives (from respondents’ self-reports) and accounting for individuals’ subjective expectations about future work (as life spans extended and risks borne by individuals increase by defined contribution plans and rising cost of medical care).

\(^{222}\) In Canada, the median retirement age was around 65 in the mid 1980s. It started falling dramatically in the late 1980s until it reached 61 years in 1997. This decline was mainly as a result of the 1987 amendment which allows workers to draw (reduced) benefits from the Canada Pension Plan starting from age 60 (instead of 65). It was also due corporate downsizing during the 1990s, coupled with the emergence of early retirement incentives. See *The Canadian Labour Market at a Glance* (Ottawa: Statistics Canada, Labour Statistics Division, Minister of Industry, 2004) at 80 online: <http://www.statcan.ca/english/freepub/71-222-XIE/71-222-XIE2004000.htm>.

\(^{223}\) See *The Canadian Labour Market at a Glance*, ibid. at 80.

\(^{224}\) Nevertheless, wide variations remain across Member States, with exit ages ranging from as low as 56.2 years in Slovenia to a high of 64.4 years in Ireland in 2003 (*Employment in Europe 2005: Recent Trends and Prospects* (Brussels: European Communities, Employment and Social Affairs, 2005) at 58-60, online: <http://digitalcommons.ilr.cornell.edu/intl/34/>).

\(^{225}\) Policy-makers have therefore urged countries who wish to increase levels of participation among senior workers to aim for the right balance between too generous social protection which might tempt workers to exit.
working conditions, unemployment, family responsibilities, and physical and mental health.\textsuperscript{226}

F. Conclusion
The world’s population is aging. The labour force is aging as well. The proportion of senior workers in the labour market is growing while the proportion of younger workers is dropping. The number of workers leaving the labour market will soon exceed the number of people entering it. This process has significant impacts on the labour market and the economy including a slowdown in labour force and economic growth, an increase in dependency ratios, a growing financial burden on pension and health care systems, and an impending labour shortage. It has therefore induced employers and policy-makers around the globe to develop initiatives that will improve the sustainability and affordability of public pension systems and will encourage senior workers to remain active in the labour market. Various approaches have been taken in terms of the legality of mandatory retirement by different countries. Other legislative changes, including an increase in the age of eligibility for full public pension benefits, incentives for delayed retirement and penalties for early retirement, have also been introduced in many countries.

While some of these efforts have borne fruit, not enough has been done. Developing strategies to increase labour force participation among senior workers is therefore still very

\textsuperscript{226} See Kerr, Ibbott & Beaujot, \textit{supra} note 213 at 12-14; \textit{Ageing and Employment Policies: Live Longer, Work Longer, supra} note 24 at 40, 53. According to Gunderson, who studied the Canadian labour market, the most common reasons for retirement, other than mandatory retirement were ill health (27.4%), personal choice (24.7%), old enough (11.2%), unemployment (9.9%), family responsibilities (9.3%) and early retirement (8%). The voluntary retirement reasons were roughly equal to the involuntary reasons (Gunderson, \textit{supra} note 214 at 12-26). The main reasons for returning to work after retirement were financial need (25%), boredom (21%) and simple desire (20%). It means that about 25% return for involuntary reasons and 41% for voluntary reasons (Gunderson, \textit{supra} note 214 at 26-29). Another Canadian study analyzing the answers of younger retirees who want to go back to work reveals a variety of reasons for this decision. Around 22% of people who retired between 1992 and 2002 at the age of 50 and above went back to some form of paid work, and another 4% said they looked for a job, but had not been able to find one. For 38% of respondents the reason for returning to work was financial concerns; 22% returned because they did not like retirement; 19% returned for the intrinsic rewards, such as challenge and social contacts, and 14% felt they were needed or wanted to help out. Many people had multiple reasons. 55% cited at least one of the three non-financial reasons. See Grant Schellenberg, Martin Turcotte & Bali Ram, “Post-retirement Employment” (September 2005) 6:9 Perspectives on Labour and Income, online: \textcolor{blue}{<http://www.statcan.gc.ca/pub/75-001-x/10905/8622-eng.htm>}. Finally, an American empirical study reveals that wealth adequacy increase the likelihood of retiring, while good earnings prospects encourage working longer. It also finds that workers covered by defined benefit plans (which pay a guaranteed benefit for life) are more likely to retire, while those covered by defined contribution plans tend to delay retirement. As well, workers, who are covered by health insurance that is conditional upon employment, tend to delay retirement, while those covered by alternative plans tend to retire earlier. Finally, the gradual increase in the age of eligibility for full social security benefits encourages younger workers to work longer. See Gaobo Pang, Mark Warshawsky & Ben Weitzer, “The Retirement Decision: Current Influences on the Timing of Retirement among Older Workers” Watson Wyatt Technical Paper No. 07/12 (2008), online: \textcolor{blue}{<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1077637>}. The study uses data by the Health and Retirement Study (1992-2004) of senior workers aged 50 and above across the U.S.
topical. Furthermore, as will be argued in Chapter II, these initiatives have been often complex and contested as they represent conflicting forces and interests. Some initiatives might be, for example, harmful to senior workers while arguably alleviating unemployment rates among younger workers. Moreover, against the background of substantial economic pressures, the efficiency and effectiveness of some initiatives have been often questioned. The complexity and the multiplicity of approaches taken have created a wide array of critical questions for future litigation and policy-making dealing with the aging workforce and its impacts. The next chapter will pinpoint six salient questions in the area of labour law and employment discrimination law.
Chapter II:  
The Aging Workforce Implications for Future Litigation and Policy-Making

A. Introduction  
Chapter I identified and assessed the global demographic shift towards an aging workforce and discussed its impacts on the labour market and the economy. This trend and its impacts pose multiple new challenges for jurists and policy-makers, which are essentially global in character, affecting all industrialized societies. This Chapter will lay out six of the most topical and critical challenges, focusing on doctrinal and policy questions in the area of labour law and employment discrimination law, and will emphasize the diversity of opinions on these controversial issues.

Section B will depict in detail the debate over the legality of mandatory retirement arrangements. The various arrangements prevailing in different countries will be portrayed and the main arguments for and against allowing such arrangements will be sketched. Section C will discuss the controversy over legislative age-caps and age-based distinctions, especially with regard to workers aged 65 and over, which remain very common even in countries that have abolished mandatory retirement. Section D will present the diverse opinions on the extent to which cost should be a potential justification for age discrimination against senior workers. Section E will describe controversies over the measures chosen by employers and policy-makers in different countries in their attempt to improve the sustainability and affordability of public pension systems and to encourage senior workers to remain active in the labour market. One of the main measures is increasing the age of eligibility for full public pension benefits. Section F will introduce several questions relating to performance appraisals. Finally, Section G will pinpoint critical queries pertaining to the scope of the duty of accommodation of senior workers.

The main argument advanced in this Chapter is that, while there are various ways to approach each of the above challenges, the most compelling approach is a normative one. That is, the answer to these myriad challenges depends critically on one’s conception of the right to age equality and more specifically on one’s normative view on which interests of senior workers ought to be protected and how the interests of senior workers should be balanced against the interests of other workers, employers or society as a whole. While some argue for a strong, fundamental right to age equality in the workplace that usually trumps other considerations, others assert that the interests of seniors are only one of many
considerations to be taken into account, or that the right of senior workers to age equality is not as important as other rights to equality and may often be overridden by other considerations. As there is no consensus on the appropriate weight that should be assigned to seniors’ right to age equality in the workplace, this Chapter stresses the need for a richer moral and economic account of age equality that will adequately resolve these controversies and questions.

B. Should Mandatory Retirement be Banned in All Circumstances?

1. Introduction

One of the effects of the aging workforce is an increasing tendency towards the abolition of mandatory retirement. However, this question – should mandatory retirement be banned in all circumstances – is still a matter of dispute even in countries that have already abolished it. Furthermore, there is a vigorous debate over the interpretation of the genuine or bona fide occupational requirement (BFOR, BFOQ or GOR) and other exceptions to the prohibition on mandatory retirement.

In Canada, for example, some provinces, such as Ontario or Manitoba, have banned mandatory retirement entirely except for cases where it operates as a bona fide occupational requirement and do not accommodate freely-negotiated employment contracts and collective agreements. In the federal jurisdiction, by contrast, mandatory retirement is allowed. Other provinces, such as Alberta, Prince Edward Island, and Newfoundland have created several exemptions to the prohibition on age discrimination including a genuine or bona fide retirement or pension plan clause which de facto allows for a wide array of mandatory retirement arrangements. There is however considerable controversy over the interpretation of such clauses. In the Supreme Court of Canada a majority ruled that if the bona fide pension plan is not a sham, mandatory retirement may be allowed even if it is not necessary to the operation and sustainability of the plan, while a strong dissenting opinion called for a

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1 See Chapter I, section D.1.
2 See Chapter I, section D.2.c.
3 Ibid.
4 Ibid.
5 In New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc., 2008 SCC 45, Melrose Scott, a miner employed by Potash Corporation of Saskatchewan Inc., was forced to retire at the age of 65 due to a mandatory retirement policy included in the employer’s pension plan. The main issue was the interpretation of the bona fide retirement or pension plan exception under s. 3(6) of the New Brunswick Human Rights Act, R.S.N.B. 1973 c. H-11. The Supreme Court of Canada, in a 4:3 decision held that the analysis of s. 3(6) is different from that of s. 3(5) addressing bona fide occupational qualifications. Justice Abella reasoned that, “[i]f both ss. 3(6)(a) and 3(5) meant the same thing, both requiring a Meiorin analysis, s. 3(6)(a) would be redundant”. Justice Abella found that “[w]hat the legislature was seeking to do in enacting s. 3(6)(a) was to confirm the financial protection available to employees under a genuine pension plan, while at the same time ensuring that they were not arbitrarily deprived of their employment rights pursuant to a sham”. She concluded that “Section 3(6)(a), notably, states that the age discrimination provisions do not apply to the terms or
broader interpretation of the human rights protection and a narrow interpretation of its exceptions.\(^6\) Furthermore, such clauses are still vulnerable to a future constitutional challenge.\(^7\) Finally, while the Supreme Court held more than 15 years ago that mandatory retirement is discriminatory but “demonstrably justified in a free and democratic society” under s.1 of the *Canadian Charter of Rights and Freedoms*,\(^8\) recently there have been some strong calls to revisit this ruling, which criticize its relaxed analysis of the minimal impairment requirement of s. 1, and stress the importance of senior workers’ rights, and changing demographics.\(^9\)

Another example can be found in Europe, where many countries have recently introduced age discrimination legislation implementing the 2000 EU Directive establishing a

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\(^6\) In a “partially concurring” opinion joined by two other Justices, Chief Justice Beverley McLachlin declared that “protections conferred by human rights legislation should be interpreted broadly and that the exceptions to the prohibition against discrimination are to be construed narrowly”. She held that for a pension plan to qualify as “bona fide”, any provision within it that was on its face discriminatory, such as a mandatory retirement age, had to meet the test set out by the Supreme Court of Canada in *British Columbia (Public Service Employment Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] 3 S.C.R. 3 [*McKinney*]. This interpretation “best reflects the legislature’s intent, based on the wording of s. 3(6)(a) and the applicable principles of statutory construction”. Considering that “[t]o reduce ‘bona fide’ to the mere idea of not being a sham is to take an impoverished view of the term”. This meant, Chief Justice McLachlin held, that “the limit on a right imposed by a mandatory retirement provision in a pension plan: (1) must be adopted for a purpose rationally connected to the operation and sustainability of the plan; (2) must not be a sham imposed to circumvent human rights; and (3) must not impinge on the right to be free from discrimination more than is reasonably necessary to maintain the functionality and sustainability of the pension plan” (*ibid*. at paras. 57, 66, 75, 82).

\(^7\) The constitutional question whether the clause amounts to age discrimination, and violates s. 15 of the *Charter* was not raised by the complainant and was therefore not answered by the Court.


\(^9\) See *Greater Vancouver Regional District Employees’ Union v. Greater Vancouver Regional District*, [2001] B.C.C.A. 435 (QL). The British Columbia Court of Appeal held in 2002 that the City of Vancouver’s mandatory retirement policy violated the *Canadian Charter*. It ruled that *McKinney* (supra note 8) did not determine that all mandatory retirement policies are justified under s. 1. *McKinney* was decided in the context of universities in the private sector, while not encompassing the public sector. However, the Court was critical of the analysis in *McKinney* even in the private sector. While in *McKinney* the court relaxed the minimal impairment requirement of s. 1 by according the legislature deference, the Court of Appeal stated that it should not be assumed that collective agreement protect the rights of minorities. Mandatory retirement policies do not protect the rights of many senior workers. Therefore the court should not give credence to views that discriminate against senior workers (*ibid*. at para. 83, Prowse J.). The Court of Appeal therefore called on the Supreme Court of Canada to revisit its judgment in *McKinney* (*ibid*. at para. 127), declaring: “Eleven years have now passed since *McKinney* was decided. The demographics of the workplace have changed considerably, not only with respect to the university community, but also in the workplace at large. At least two other countries, Australia and New Zealand, have abolished mandatory retirement. Recent studies have been done on the effect of abolishing mandatory retirement in Canada and elsewhere. ... The extent to which mandatory retirement policies impact on other equality rights, and on the mobility of the workforce, have become prominent social issues. The social and legislative facts now available may well cast doubt on the extent to which the courts should defer to legislative decisions made over a decade ago. The issue is certainly one of national importance”.

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general framework for equal treatment in employment and occupation for all people irrespective of a range of factors, including age. Overall, it seems that the issue of age discrimination was the most difficult aspect of the EU Directive to implement into national law. Provisions against age discrimination in employment are often controversial given the widespread practice of mandatory retirement and seniority provisions. In the UK, for example, the new legislation allows employers to retire workers who reach the age of 65 solely on the basis of their age (as a default rule). The clause is not conditioned upon pension qualifications or any kind of agreement between the parties. Also, it is inconsistent with recent reforms in state and private pensions towards delayed and flexible retirement, especially the increase of the age of eligibility for state pension benefits and the shift from defined benefit plans to defined contribution plans which work as saving plans. While the European Court of Justice has recently rejected the claim that the default retirement age of 65 is incompatible with the EU Directive, the High Court of Justice of England has yet to determine whether it is justified as a proportionate means of achieving a legitimate aim (i.e. a social policy objective related to employment policy, the labour market or vocational training and not individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness) within the meaning of Article 6(1) of the Directive.

In a recent judgment in another case, the European Court of Justice rejected a similar claim that a Spanish law permitting mandatory retirement ages to be laid down in collective
agreements was incompatible with the EU Directive. The Court rejected a claim that Recital 14 of the Directive precludes its application to retirement age measures. However, it held that the law was objectively justified under Article 6(1) as it was designed for a legitimate aim: to create vacancies at a time of high unemployment, and to promote intergenerational employment with the cooperation of trade unions and employers’ organizations. It also held that the law was not unreasonable, and was appropriate and necessary to achieve the aim in the context of national employment policy. Finally, the law did not unduly prejudice workers of retirement age because mandatory retirement was subject to a worker being entitled to a retirement pension. This judgment has come under heavy criticism. Among other things, it was argued that the aims of the challenged measure were not supported by evidence, and were highly contestable, and therefore did not justify a blunt discriminatory measure. The British case presents even greater difficulties as the measure is over-inclusive and is not attached to any pension entitlement. The measure is set to be reviewed in 2011, yet there is a strong pressure on the Government to review it earlier. Similarly, the Israeli Age of Retirement Law, which sets a mandatory retirement age of 67 for all workers regardless of their pension entitlement, is the subject of a heated debate, and might be vulnerable to a constitutional challenge.

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14 See Palacios de la Villa v Cortefiel Servicios SA Case C-411/05 (16th October 2007). A blanket exemption for compulsory retirement in collective agreements from 1980 was repealed in 2001. Then, in 2005, Law 14/2005 reinstated the exception provided that the worker has made sufficient contributions to qualify for a retirement pension and that the agreement aims at promoting the quality of employment. Compulsory retirement clauses were allowed in collective agreements negotiated between 2001 and 2005. This transitional measure was subject to one condition, namely that the worker has made sufficient contributions to qualify for a retirement pension. Palacios de la Villa was retired under a collective agreement negotiated in the transitional period, and so the issue in this case was whether the transitional measure complied with the EU Directive (supra note 10).

15 The Court held that the Recital “merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached” (ibid. at s. 44).

16 Ibid. at ss. 53, 58, 60, 62.

17 Ibid. at s. 72.

18 Ibid. at s. 73.

19 As we shall see in Section B.2. below.


21 Several members of Parliament plan on using the soon-to-be published Equality Bill to abolish mandatory retirement. See “U.K.: Mandatory Retirement Age should be put out to Grass” Guardian (March 8, 2009), online: <http://www.seniorsworldchronicle.com/2009/03/uk-mandatory-retirement-age-should-be.html>.

22 Recently several members of Parliament have introduced a Bill that will amend this Law and will lay down lower mandatory retirement ages for men (65) and women (60) in order to allow senior workers to retire with dignity and to create opportunities for younger workers. In its explanatory materials, it was stated that raising the age of mandatory retirement without creating appropriate and fair employment opportunities for women has resulted in a large number of women who are inactive in the labour market for long periods (see Retirement Age Bill (Amendment) of 14.1.2008).

23 The National Labour Court recognized that mandatory retirement based on chronological age impairs constitutional rights of employees such as the freedom of occupation and human dignity. Yet, it found this infringement to be justified as it is for a legitimate purpose (providing a fair opportunity for new participants in
The great variety of mandatory retirement arrangements and of court decisions in different countries echoes the wide controversy that mandatory retirement provokes in the literature. While many scholars maintain that mandatory retirement is efficient and beneficial for various social and economic reasons and should therefore be allowed, at least in several circumstances, others rebut these claims and argue that it is demeaning and should therefore be abolished. In the following Section, I will briefly introduce the primary arguments for and against this practice.

2. The Debate over Mandatory Retirement

Several arguments are pursued by proponents and opponents of mandatory retirement arrangements. Some of these arguments are based on rival “factual” claims about senior people. For example, proponents of mandatory retirement argue that there is a statistical decline in productive capability and job performance associated with aging.24 Employers wishing to maximize their profits will prefer younger workers because they are more productive on average than senior workers and the cost of gaining information on individual applicants is high. Mandatory retirement is therefore argued to be lawful statistical discrimination judging individuals according to the average characteristics of their group25 that if banned, would require costly systems to monitor performance of senior workers and cause a decline in firm productivity.26

By contrast, opponents of mandatory retirement contend that there is no compelling empirical evidence to support the claim that job performance or productivity declines with the labour market). It also represents an appropriate balance between constitutional rights of senior workers and younger workers from a general social perspective. See A.A. 107/05 Kelner – The Civil Service Commissioner (not yet published; 27.2.2006) (Hebrew). However, the High Court of Justice has avoided answering this question until now. In an appeal to the High Court of Justice, Kelner’s claim was denied yet without determining whether mandatory retirement – and s. 4 of the Retirement Age Law – is constitutional (H.C.J 4487/06 Kelner v. The National Labour Court (not yet published; 25.11.2007) (Hebrew)). In H.C.J. 4191/97 Rakent v. El Al Airlines, P.D. 54(5) 330 (Hebrew), the High Court of Justice left the question of whether mandatory retirement at the age of 65 constitutes unlawful age discrimination open. In obiter dictum, the Court was willing to state that it was not unlawful (ibid. at 360). For a full discussion of these cases see Chapter I, section D.2.d. and Chapter III, section C.

24 In McKinney, for example, the Supreme Court justices justified accepting age 65 as a legitimate basis for allowing mandatory retirement, inter alia, on the assumption that “on average there is a decline in intellectual ability from the age of 60 onwards” (supra note 8 at 654). Kesselman finds it ironic that the average age of the justices deciding the case was 65, three were over 65, and Supreme Court justices can continue holding office until 75 (Jonathan R. Kesselman, “Mandatory Retirement and Older Workers: Encouraging Longer Working Lives”, C.D. Howe Institute Commentary No. 200 (June 2004) 1 at 8, online: <http://www.cdhowe.org/pdf/commentary_200.pdf>).
26 It is also argued that since external monitoring and judicial review are complicated, they might lead to inconsistent decisions, and are therefore less reliable than general rules. See Richard A. Epstein, Forbidden Grounds: The Case against Employment Discrimination Laws (Cambridge, MA: Harvard University Press, 1992) at 457.
age.27 Many senior workers are as or more productive, experienced, creative and flexible than younger workers. They do not fear change and can learn and adjust to new things as well as younger workers.28 While many differences between senior and young people are mistakenly connected with aging,29 there are differences between senior and young people that are a result of aging processes.30 That is, there is some decline in abilities that may be connected to aging. This may be especially relevant in occupations that require physical strength, speed of behaviour,31 or sensory acuity.32 Yet, this does not occur suddenly at a fixed age. There is a greater variation in abilities among workers within one age group than between different age groups. Studies have shown that the average level of job performance by senior workers is at least equal to the average level of younger workers, and that the older the worker is, the more difficult it is to predict his or her performance based on their age. Furthermore, decline in abilities is more connected to the health condition of a person than to his or her age.33 As long as the worker is healthy, he or she can perform very well. As well, a decline in some abilities may be offset by other traits such as caution, knowledge and


30 On “normal aging”, see Posner, supra note 25 at c. 1.

31 Decline in speed of behaviour may be due to central nervous system changes, lessened activity or increased cautiousness. Studies have shown that all aspects of behaviour slow with age due to neurological changes (see Levine, supra note 27 at 115). As for memory, general cognitive ability slows in advanced age but insignificantly and does not influence the daily functioning of senior citizens. For a review of studies and stereotypes on the relation between memory and age see Katherine J. Follett, “Memory and Cognitive Function” in Erdman B. Palmore, Laurence Branch & Diana K. Harris, eds., Encyclopedia of Ageism (New York: The Haworth Pastoral Press, 2005) at 220-26; and Becca R. Levy, “Memory Stereotypes” in Palmore et al., ibid. at 227-29.

32 On the correlation between age and sensory senescence see Neil J. Nusbaum, “Aging and Sensory Senescence” (1999) 92:3 Southern Medical Journal 267. But note that even though a decline in, for example, vision or hearing is common among senior people, it only affects only a minority. In the U.S., for example, only 3.1% of those aged 65-74, and 8.3% of those 75 years and above had a hearing or vision related limitation of activities in 1998-2000. See Wan He et al., 65+ in the United States: 2005 (Washington, D.C.: U.S. Census Bureau, Current Population Reports, P23-209, 2005) at 55 (figure 3-16), 57-58, online: <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

33 It might be argued that there is a rational connection between aging and decline in health condition. However, generally speaking, people are living longer and staying healthier than ever before. Studies have indicated substantial declines in the rates of disability and functional limitation among seniors (on the complex relationship between disability and aging see discussion in Section G. below). Furthermore, as Eglit argued, it is not clear that age-related health factors affect job performance (supra note 27 at 679).
experience. Senior workers are less likely to be absent from work, are more stable and loyal at work, and report higher job satisfaction than younger workers. Employing senior workers may thus reduce turnover costs. Moreover, this decline in abilities is often not related to the job in question and thus does not affect job performance. And even if such a decline is job-related, in a postindustrial era where more jobs are knowledge-based and less physically demanding, senior workers may still be capable of performing satisfactorily, if they are provided with accommodation and training. It is therefore argued that age is a poor proxy for job performance.

Since factual claims about the correlation between age and job performance have been widely refuted, Ruth Ben-Israel argues that mandatory retirement excluding fully capable seniors from the workforce because they reach a certain age constitutes unlawful age discrimination, and that workers should be allowed to work according to their functional capability. It is also asserted that individualized assessment is not very costly and usually feasible.

Other arguments, by contrast, explicitly invoke a particular view about which interests of senior workers ought to be protected. These are “normative” claims pertaining to the interests of the senior workers themselves. For example, it is argued that mandatory retirement protects the dignity of senior workers as it provides them with a dignified exit from the labour market. If mandatory retirement is banned, workers will be subject to increased stress associated with constant monitoring and performance evaluation and to

34 See Gunderson, supra note 27 at 325.
35 But see Eglit who presents studies that show that younger workers’ absenteeism is more frequent, yet when senior workers are absent it is for longer periods. Similarly, the frequency of accidents is higher for younger workers, yet the injuries suffered by senior workers are more serious than those of younger workers (supra note 27 at 681-82).
36 For example, according to a study from 1996, among Canadians at age 65, only 15% report a disability that affects their ability to continue working (see Jean Francois Michaud, M.V. George & Shirley Loh, Projections of Persons with Disabilities (Limited at Work/Perception), Canada, Provinces and Territories, 1993-2016 (Ottawa: Statistics Canada, 1996)).
37 See Ruth Ben-Israel & Gideon Ben-Israel, Who is afraid of the Third Age? (Tel Aviv: Am Oved, 2004) at 43-46 (Heberw). Since studies examining the correlation between age and job performance are inconclusive (some point to a positive correlation, some to a negative correlation, while others negate any correlation between the two), there have been several attempts to settle between them all through a meta-analysis. According to McEvoy and Cascio, who examined 96 independent studies published over the course of 22 years, age and job performance are generally unrelated. The type of performance measure as well as the type of job had no significant impact on the results. A consistent yet modest positive correlation was found when examining very young workers (Glenn M. McEvoy & Wayne F. Cascio, “Cumulative Evidence of the Relationship between Employee Age and Job Performance” (1989) 74 Journal of Applied Psychology 11).
38 Ruth Ben-Israel, “Retirement Age Analyzed from an Equality Perspective: Biological or Functional Retirement?” (1997) 43 Ha’praklit 251 at 283-84 (Hebrew). Kesselman argues that workers who experience a decline in ability are more likely to retire voluntarily (self-selection behaviour). Hence, only a limited number of senior workers who are not capable of working will insist on doing so (supra note 27 at 173-74).
39 Performance evaluation is relevant to employees of all ages as part of hiring, promotion and dismissal processes. Senior workers do not require any different methods of evaluation. Indeed, no additional costs of evaluating senior workers were observed in jurisdictions (such as Manitoba, Québec and the U.S.) that abolished mandatory retirement (see Kesselman, supra note 27 at 174, 187).
more dismissals prior to the normal age of retirement due to poor performance, thus undermining their human dignity.40 Others argue, by contrast, that evaluation, which is common and necessary for workers of all ages and is based on actual performance, best promotes the dignity of workers, whereas mandatory retirement, which is based on ageist assumptions, humiliates them.41 Both arguments aim to promote the dignity of senior workers but disagree on how best to do so.

Other arguments take in different interests including the interests of younger workers and employers. This last type of argument is normative also, but it involves a tacit act of balancing the interests of senior workers against the interests of other parties involved. Take for example the argument presented above regarding the feasibility and costs of conducting individualized assessment.42 Another argument of mandatory retirement proponents that involves an act of balancing competing interests (as well as factual claims) stresses the need for work sharing and the importance of making room for new and younger applicants in the labour market. By obliging workers to vacate their place when they reach 65, mandatory retirement provides job and promotion opportunities for new and younger workers.43 Furthermore, as Richard Epstein argues, those who are required to retire are the ones who benefited from the availability of jobs created by the same mandatory retirement policy they now oppose.44

Opponents of mandatory retirement question the factual basis of this argument as well as its act of balancing. They maintain that this argument rest on two false presumptions: that senior and younger workers are substitutes; and that the labour market offers a fixed amount of jobs in the economy that is not affected by the exit of senior workers. However, there is no empirical support for the assumption that young and senior employees are

40 See McKinney, supra note 8 at 283-84, La Forest J. Israeli Supreme Court Justice Dorit Beinish expressed a similar opinion in H.C.J. 6051/95 Rakent v. the National Labour Court, P.D. 50(3) 289 at 380-81 (Hebrew). A similar argument was also advanced by employer representatives before the Ontario Human Rights Commission. See Time for Action: Advancing Human Rights for Older Ontarians (Toronto: Ontario Human Rights Commission, June 2001) at 39, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/TimeForActionsENGL>.
41 See Time for Action, ibid. at 39; and Levine, supra note 27 at 122, 142-43. In her reply to Justice La Forest (see supra note 40), Justice L’Heurex Dubé posed the following question: “Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting ‘turned out’ automatically at a prescribed age, and witnessing your younger ex-colleagues persevere in condoned relative incompetence on the strength of a ‘dignifying’ tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence … Forced removal from the workforce strictly on account of age can be extraordinarily debilitating for those entering their senior years” (McKinney, supra note 8 at 430-31). See also H.C.J. 4191/97 Rakent v. El Al Airlines, P.D. 54(5) 330 at para. 26 (Hebrew) (individualized tests do not violate human dignity as they are periodical and include workers at all ages).
42 See text accompanying supra notes 26 and 39.
44 See Epstein, supra note 26 at 458.
substitutes. Furthermore, the labour market is flexible and dynamic and may create as many jobs as there are workers. That is, a job occupied by a senior person does not mean that another person cannot obtain a job. This misconception is often called the lump-of-labour fallacy. It may be countered that, while this is true at the macro level, particular workplaces (such as universities) do offer a relatively fixed number of jobs and may wish to facilitate renewal and job and promotion opportunities through mandatory retirement arrangements. However, opponents of mandatory retirement object to a balancing of interests that uses senior workers to help another group of workers. They point out that a similar argument was made with regard to women’s employment and was proven false and inappropriate. Finally, they question the assumptions that there are enough new workers to replace those who will retire and that senior workers will remain indefinitely in the labour market. They maintain that due to low fertility rates and labour shortages, it is unlikely that younger workers will be a substitute for skilled, experienced workers.

Another act of balancing can be found in the argument that mandatory retirement facilitates planning which is important for both workers and employers. For employers, it helps in succession and fiscal planning. Employers may predict the number of workers who are leaving and when. They may also predict the costs of pensions, health and disability. If mandatory retirement is banned, there will be uncertainty regarding retirement age. This

Using panel data of twenty-two OECD countries over the time period 1960-2004, a recent study examines the extent to which employment of people aged 55-64 affects the employment of people aged 16-24 and 25-54. It finds no empirical support for the assumption that employment of the young and the senior are substitutes thus refuting the concern that delayed retirement has adverse effects on youth employment. There is even some evidence that they complement each other. That is, increased employment of senior workers (aged 55-64) may have small positive effects on employment of people aged 16-24 and 25-54 (see Adriaan S. Kalwij, Arie Kapteyn & Klaas De Vos, “Early Retirement and Employment of the Young” RAND Working Paper Series No. WR-679 (March 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371889>).


Justice Wilson responded to the argument from scarce resources and disadvantaged younger employees in the dissenting opinion in McKinney: “… in a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. Accordingly, to treat such price (in this case the alleged consequent lack of job opportunities for young academics) as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms” (supra note 8 at 403).


The younger generations also spend more time in schools and universities and therefore enter the labour market at a more advanced age than their parents.
might increase turnover and decrease seniority as a work rule.\textsuperscript{52} Mandatory retirement also provides employees with certainty. It fosters planning and saving for retirement.\textsuperscript{53} Once again, opponents of mandatory retirement question the factual basis of this argument as well as its act of balancing. They argue that planning is not harmed by ending mandatory retirement. Today, fewer employees work for the same employer for their entire lives. The labour market has become dynamic and employees are highly mobile and change their workplaces a number of times during their working lives. Thus, ending mandatory retirement will only slightly harm human resource planning. Lastly, they object to justifying a violation of senior workers’ rights and interests in the name of planning.\textsuperscript{54}

Finally, the strongest claim in favour of allowing mandatory retirement arrangements also involves an act of balancing competing interests. Mandatory retirement proponents argue that it facilitates a deferred compensation model of long-term employment relationships. According to this model, the worker enters into an implied contract with the employer of a long-term wage stream which increases throughout her career regardless of her marginal productivity. The worker will be paid less than her marginal productivity at the beginning of the employment relationship, and then the wage will increase until it exceeds her marginal productivity in later stages of the relationship. Mandatory retirement provides a termination date to the employment relationship so that the worker will no longer be entitled to a wage higher than her productivity.\textsuperscript{55} This model is argued to be beneficial for both employers and workers. It reduces the need for constant performance evaluation and monitoring. Rather, it enables periodic and less costly monitoring. It also allows the parties to invest in firm-specific training and guarantees the parties’ commitment and loyalty to each other for a long-term relationship thus enhancing productivity. As well, it provides workers with a financial interest in the solvency of the firm. It also reduces unwanted turnover and enables the firm to recoup its quasi-fixed hiring and training costs.\textsuperscript{56} Furthermore, it is


\textsuperscript{53} See Gunderson & Hyatt, supra note 43 at 154.


\textsuperscript{55} See Gunderson & Hyatt, supra note 43 at 155.

\textsuperscript{56} Ibid. at 156. Edward Lazear and James Pesando were the first ones to introduce this model back in 1979 providing both theoretical analysis and empirical evidence. See Edward P. Lazear, “Why is there Mandatory Retirement?” (1979) 87:6 Journal of Political Economy 1261; James E. Pesando, The Elimination of Mandatory Retirement: An Economic Perspective (Toronto: Ontario Economic Council, 1979). See also Andrew Luchak & Morley Gunderson, “Do Pension-Covered Employees Perceive Greater Employment Security?” (1998) 8 Advances in Industrial and Labour Relations 207 (this empirical study argues that private pension plans should be part of a deferred compensation system as they encourage commitment and voluntary retirement and prevent unwanted turnover and evasion).
argued that this model has evolved as a result of market forces, suggesting that this model is rational and economically efficient.\(^{57}\)

Since mandatory retirement facilitates a deferred compensation model, proponents of mandatory retirement stress its predominance among “good jobs” in the primary labour market with higher wages, long-term stable employment, pension and retirement plans.\(^{58}\) They also assert that workers subject to these arrangements may be sometimes hired back. Furthermore, these workers are not required to retire from the labour market and may seek alternative jobs.\(^{59}\) As well, it is argued that mandatory retirement is good for lower-income workers, increasing their chances to obtain job security and pension benefits. The only workers, who will benefit from the abolition of mandatory retirement, it is argued, are those who are now employed and enjoy strong job security. They will earn wages much higher than their marginal productivity.\(^{60}\)

If mandatory retirement is banned, it is argued that the model of deferred compensation will no longer flourish as employers will not be able to know in advance the date of termination and will be exposed to ongoing, increasing costs of senior workers. It is likely that wages and pension benefits will decrease due to increased turnover and monitoring and performance costs, and increased medical and disability benefits for senior workers who continue to work.\(^{61}\) Many senior workers will fail their performance evaluation even prior to the normal age of retirement and dismissal rates will probably increase.\(^{62}\) Employers might also induce senior workers to leave by assigning them to less prestigious tasks.\(^{63}\)

It is important to note that according to this line of thought mandatory retirement does not jeopardize the interests of senior workers. It is regarded as part of a long-term mutually-agreed contractual arrangement and not as an oppressive policy imposed by employers on disadvantaged workers. Where workers have reasonable degree of information

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\(^{58}\) See e.g. Gunderson, supra note 54 at 35.

\(^{59}\) As Epstein argues, retirement age is an essential component of any negotiation within the private setting and mandatory retirement is not a legal prohibition against reentering the labour market and looking for other jobs. By contrast, reentry will be easier if anti-age discrimination legislation is repealed (supra note 26 at 456-67).

\(^{60}\) See Gunderson & Hyatt, supra note 43 at 143.

\(^{61}\) See Gunderson, supra note 52 at 10-11. But see Till von Wachter, “The End of Mandatory Retirement in the U.S.: Effects on Retirement and Implicit Contracts”, Working Paper No. 49 (Berkeley: The Center for Labor Economics, University of California, Berkeley, March 2002) (Studying the effects of the end of mandatory retirement in the U.S., this paper suggests that while participation of workers age 65 to 70 rose by 10 to 20% between 1970s and 1990s, neither job tenure nor wage profiles were affected by this change).

\(^{62}\) See Gunderson, supra note 52 at 12.

and bargaining power, the emphasis is on allowing private parties to enter into contractual arrangements such as mandatory retirement. When it does involve jeopardizing the interests of some senior workers, it is justified because of the numerous abovementioned benefits it confers on both employers and workers. Thus, while mandatory retirement proponents agree that protection against age discrimination should be given to people of all ages, they argue that mandatory retirement does not involve an infringement of senior workers’ rights and interests and if it is to be prohibited, there should be an exemption such as a *bona fide* pension or retirement plan.  

Opponents of mandatory retirement attack the argument based on a deferred compensation model from three different angles. First, they claim that the importance and centrality of mandatory retirement for facilitating a deferred compensation arrangement is questionable. It is unclear whether an age limit is necessary for the arrangement since many workers will retire at the age of 65 and even before, and those who continue will do so only for a few additional years and will typically be highly productive. Furthermore, in the U.S. mandatory retirement was abolished more than 30 years ago, yet deferred compensation arrangements still exist under pension incentive schemes that induce workers to retire at a specific age. Hence, the impact on the deferred compensation system would be minimal. Moreover, the system of deferred compensation could adjust to the abolition of mandatory retirement in many ways, or even be replaced. Indeed, there has been a decline in the

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64 See Gunderson, *supra* note 54 at 37; Gunderson, *supra* note 27 at 323; Gunderson & Hyatt, *supra* note 43 at 144-45; Gunderson & Pesando, *supra* note 57 at 359.

65 Lazear himself in a later study concluded that pensions could include incentives structured to induce retirement at specific ages (Edwards P. Lazear, *Personnel Economics* (Cambridge, MA: MIT Press, 1995) at c. 4). However, in some settings (for example, those with a defined contribution benefit plan), the abolition of mandatory retirement resulted in later retirement (see David Neumark, “Age Discrimination Legislation in the US” in Hornstein, *supra* note 54, 43 at 60).

66 See Kesselman, *supra* note 27 at 175.

67 The wage curve could be flattened or decline beyond a specified period for workers with below-average productivity based on performance evaluation (*Ibid. Ibid.*).

68 Levine offers an alternative plan according to which the time of retirement is set at the predicted average voluntary retirement date. As early and late retirement would be even, employers would be indifferent between employee choices, and employee autonomy would be promoted (*supra* note 27 at 58-59).
prevalence of long-term employment contracts in many occupations,\textsuperscript{69} which has weakened the role of the deferred compensation system.\textsuperscript{70}

Second, opponents of mandatory retirement doubt whether it is economically efficient. Senior workers who are compelled to retire often encounter major difficulties in re-entering the job market and are likely to be hired for lower wages. They are therefore more likely to draw public pension benefits sooner than if they had been allowed to continue working.\textsuperscript{71} This also has an impact on tax revenues, public pension and health costs, and the economy.\textsuperscript{72} Banning mandatory retirement, it is argued, may lead to savings in public funding of different social programs as people will continue working. It may also diminish labour shortages.\textsuperscript{73} As well, the fact that the model of deferred compensation was created by market forces does not necessarily prove that it is efficient. Sex and race discrimination used to be a very common outcome of competitive forces. No one suggests that these forms of discrimination are efficient. Legislation was introduced to reduce these forms of discrimination.\textsuperscript{74}

Finally, opponents of mandatory retirement question the contractual and voluntary basis of mandatory retirement arrangements and argue that even if it is voluntary it should not be allowed as it is extremely harmful to the interests and rights of a minority group. According to opponents of mandatory retirement, it is often unilaterally imposed by employers on trade unions.\textsuperscript{75} Even where unions freely agree to such an arrangement, they constrain many workers who wish to work longer and are forced to leave their jobs once they

\textsuperscript{69} On the controversy over the decline in job stability see Chapter I, note 7. See also Henry Farber, “Is the Company Man an Anachronism? Trends in Long Term Employment in the U.S., 1973-2006” Working Paper No 1039 (Princeton University, Department of Economics, Industrial Relations Section, 2007), online: <http://www.irs.princeton.edu/pubs/pdfs/518.pdf>. Using data from 1973-2006, this study examines age-specific changes in the length of employment relationships for different birth cohorts from 1914-1981. It reveals that tenure and long-term employment relationships in the U.S. have become significantly less common among men and slightly more common among women. Furthermore, there has been an increase in the proportion of male workers aged thirty and above who are employed in jobs with less than one year of tenure. The study concludes that “the nature of the employment relationship in the United States has changed substantially in ways that make jobs less secure and workers more mobile”. These changes may reflect an increasing need for firm flexibility in response to competitive pressure.

\textsuperscript{70} See Kesselman, supra note 27 at 176.

\textsuperscript{71} Ibid. at 177.

\textsuperscript{72} Ibid. at 188.

\textsuperscript{73} Ibid. at 179. However, according to Gunderson and Hyatt, since few people will want to continue working, banning mandatory retirement will have only a modest effect (supra note 43 at 148).

\textsuperscript{74} See Kesselman, supra note 24 at 18. Frank Reid therefore argues that mandatory retirement is “an inefficient arrangement reflecting age discrimination, in the same way that labour markets have reflected discrimination on the basis of race and gender” (Frank Reid, “Economic Aspects of Mandatory Retirement: The Canadian Experience” (1988) 43 R.I. 101 at 109).

\textsuperscript{75} According to MacGregor, many Canadian universities did not bargain over retirement arrangements with unions but rather unilaterally imposed them (David MacGregor, “The Ass and the Grasshopper: Canadian Universities and Mandatory Retirement” in Gillin et al., supra note 27, 21 at 22). See also Munro, supra note 49 at 206-07.
reach a fixed age. Although it is true that they are free to look for other jobs elsewhere, senior workers often encounter major difficulties in finding jobs at an advanced age. Moreover, even if all mandatory retirement were based on consensual agreements between workers and their employers, the ability of workers to predict their situation and needs in the future is questionable. Most importantly, opponents of mandatory retirement argue that there are some types of agreements that should not be allowed despite their voluntariness. Just as employees are prohibited from negotiating with employers on terms that violate minority rights such as gender or race equality, they should also be banned from contracting mandatory retirement arrangements which violate senior workers’ right to age equality. That is, despite its contractual basis, critics regard mandatory retirement as unlawful age discrimination that deprives many capable, talented workers of active social lives. They also stress its disproportionate effect on women (who entered the labour force relatively late after raising children), immigrants and other minority groups who may not accumulate sufficient pension and retirement funds by the fixed retirement age.

3. Framing the Question

At one end of the spectrum, there are those who argue that mandatory retirement does not amount to age discrimination or that it is justified because the benefits it generates

76 See Kesselman, supra note 27 at 166. But see Gunderson & Hyatt (supra note 43 at 147-48) who argue that mandatory retirement, like any other provision in a collective agreement, can never represent the wishes of all individuals in the bargaining unit. Some may want it, while others may firmly object it. Yet, unions are free to negotiate different provisions subject to their duty of fair representation.

77 See Chapter III, section B.

78 According to Gunderson and Hyatt, mandatory retirement “involves individuals entering into an inter-temporal agreement in which they themselves agree to a rule that may constrain them at a larger age” (supra note 43 at 146). However, as Kranshinsky argues, “Young people are notoriously unwilling to accept the fact that they will ever age, become infirm, become, unable to work, die” (Michael Krashinsky, “The Case for Eliminating Mandatory Retirement: Why Economics and Human Rights Need No Conflict” (1988) 14 Can. Pub. Pol’y 40 at 44). Krashinsky maintains that arguments in favour of mandatory retirement resulting from an agreement between an employer and an employee are based on a questionable assumption that young workers can rationally assess the expected costs of mandatory retirement many years in advance. As many people do not make a prenuptial agreement or take out life insurance because they do not want to think about bad things that could happen or they believe that bad things will not happen to them, many do not save enough money for retirement (ibid. at 41, 43-44). See, for example, Ruth Helman, Craig Copeland & Jack Vanderhei, “Will More of Us Be Working Forever? The 2006 Retirement Confidence Survey” EBRI Issue Brief, No. 292 (April 2006), online: <http://ssrn.com/abstract=897751> (According to the 16th Annual Retirement Confidence Survey (RCS), many American workers are not financially planning for their retirement and are therefore likely to work longer than they expect). On the behavioural economics explanation for low saving see Richard H. Thaler & Shlomo Benartzi, “Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving” (2004) 112 Journal of Political Economy S164; and Kesselman, supra note 27 at 168. However, as Gunderson and Hyatt argue, although mistakes are always made, it is not a compelling reason for protecting people from themselves by prohibiting such contractual arrangements (supra note 43 at 146-47). Gomaz and Gunderson therefore suggest requiring workers to “sign off” that they are aware of the features of a collective agreement allowing a mandatory retirement arrangement (Rafael Gomez & Morley Gunderson, The Impact of Age Distinctions in Law and Policy on Transitions to Retirement (Ottawa: Law Commission of Canada, December 2004)).

79 See Kesselman, supra note 27 at 185; Munro, supra note 49 at 209.

80 See MacGregor, supra note 75 at 24; Kesselman, supra note 27 at 167.
overweigh the damage it causes. At the other end of the spectrum, there are scholars, who advocate the complete abolition of mandatory retirement, which they argue is discriminatory, humiliating and unnecessary.\textsuperscript{81} An absolute denial of any form of mandatory retirement arouses enormous antagonism as it also denies arrangements that both parties have pushed for (which makes them far from being “mandatory”) and which are mutually beneficial. Indeed, there is a strong case for allowing the parties to decide on the terms and conditions of employment. Collective agreements are the outcome of complicated negotiations, where unions and employers give and take. Mandatory retirement is often considered as an important achievement by trade unions. Legislative intervention will have substantial effects. Also, it does not take into account the unique characteristics of age as a prohibited ground of discrimination. At the same time, it is now evident that there is a need to protect the right of senior workers to age equality.

It may therefore be a mistake to suppose that we either have to accept mandatory retirement or reject it. As some scholars, including Morley Gunderson, Douglas Hyatt and Bob Hepple, have argued, it seems right to allow mandatory retirement arrangements in certain circumstances (for example, when they provide generous pensions and job stability based on a deferred compensation model).\textsuperscript{82} However, determining the circumstances in which mandatory retirement should be allowed requires a richer theoretical account of the rights and interests involved and a careful balancing act.\textsuperscript{83} That is, while some arguments for and against mandatory retirement revolve around facts and especially the interpretation of facts (such as whether job productivity declines with age), the crux of the matter is normative. It critically depends on our conception of the right to age equality and more

\textsuperscript{81} See for example Ben-Israel, \textit{supra} note 38 at 264-74, 283-85. Ben-Israel argues that it is problematic to force workers to retire at a fixed biological age. She advocates that we shift to a functional retirement that will be determined based on an individual physical examination. This actually means a shift from mandatory retirement at a fixed age to a flexible retirement that will allow workers to retire at the age of eligibility for social security or pension benefits or later according to its functional ability. See also Kesselman, \textit{supra} note 27; and Lawrence M. Friedman, “Age Discrimination Law: Some Remarks on the American Experience” in Fredman & Spencer, \textit{supra} note 29, 175.

\textsuperscript{82} Gunderson & Hyatt, \textit{supra} note 43 (who suggest that protection against age discrimination be given to all citizens regardless of their age, yet mandatory retirement based on contractual agreement be recognized as a \textit{bona fide} retirement or pension plan. Note that this exception is a different, less restrictive, form of the “regular” \textit{bona fide} occupational requirement exception); and Hepple, \textit{supra} note 47 at 90-92 (who argues that where mandatory retirement is based on a contractual agreement and the age of mandatory retirement is correlated with the age of entitlement to an occupational pension, it should be allowed because it promotes a legitimate aim of encouraging planning of retirement as a form of deferred compensation and the means (a contractual arrangement) are appropriate). See also Sharon Rabin-Margalioth, “Distinction, Discrimination and Age: A Power Game in the Labor Market” (2002) 32 Mishpatim 131 at 149-61, 173-74 (Hebrew).

\textsuperscript{83} A robust theory is needed especially since the world of work is very dynamic, mandatory retirement arrangements and employer policies are constantly changing. While nowadays many employers provide generous pension plans and job security as a \textit{quid pro quo} for mandatory retirement, they might offer other benefits in the future. In addition, mandatory retirement itself may be substituted by other measures such as penalties for later retirement and incentives for early exit. Then the question would be whether these substitutes constitute unlawful age discrimination.
specifically on our normative view of which interests of senior workers ought to be protected and how the interests of senior workers should be balanced against the interests of other workers, employers or the society as a whole (i.e. what their relative weight should be).

As will be further elucidated in Chapter III, while some advocate a strong, fundamental right to age equality in the workplace that usually trumps other considerations, others assert that the interests of seniors are only one of the many considerations to be taken into account, or that the right of senior workers to age equality is not as important as other rights to equality and may often be overridden by other considerations. If senior workers possess important interests that ought to be protected, then senior workers’ right to age equality should be regarded as a fundamental human right that in principle should not be overridden by countervailing economic and administrative rationales, including those promoted by mandatory retirement arrangements, unless they are highly compelling. If senior workers’ interests are not that important and age discrimination is not as outrageous as other forms of discrimination, then mandatory retirement is not discriminatory or is discriminatory but justified and should be allowed in various circumstances.

To conclude, a richer and more profound theory of age equality, which discusses the meaning of age discrimination, identifies when and why it is wrong, and takes into consideration the unique characteristics of age while preserving the interests of those who are discriminated against, will support the conclusion that mandatory retirement may be justified in certain circumstances but unjustified in others. In other words, it will provide us with a principled explanation of why mandatory retirement is sometimes justifiable, and sometimes unjustifiable. It may reach similar conclusions as those presented by Gunderson or Hepple. Yet, these conclusions will be based on a robust theoretical explanation of when and why mandatory retirement constitutes wrongful age discrimination. It will properly balance relevant rights and competing interests. Consequently, it will be more prescriptive as to the circumstances in which mandatory retirement should be allowed.

84 See Fredman and Spencer’s breakthrough book (supra note 29) which urges us to examine age “as an equality issue” and asserts that the right to age equality of senior workers is a fundamental human right that should sometimes limit freedom of contract and bind public and private parties to some obligations.
85 See Chapter III, especially sections C. and E.
86 Hepple does provide some detailed conditions that will promote the dignity of senior workers and their participation in the workplace such as a requirement that all workers provide informed consent to the mandatory retirement arrangement (compare Gomez & Gunderson, supra note 78), and the establishment of an independent commission that will be authorized to formally inspect unjust arrangements (supra note 47 at 92).
C. Age Caps and Age-Based Distinctions

There are several jurisdictions that have abolished mandatory retirement yet still allow unequal treatment of senior workers above a fixed age. In Ontario, for example, the prohibition on age discrimination in the provision of benefits such as disability or health applies to workers aged 18 to 64. It allows employers to provide workers aged 65 and over with fewer or no benefits at all. In both Ontario and Newfoundland, the prohibition on age discrimination also exempts employers from the obligation to re-employ injured workers aged 65 and above and from the duty to accommodate them up to the point of undue hardship, and limits their loss of earning benefits. Are these laws sustainable? Are they likely to withstand a constitutional challenge?

On the one hand, it is argued that the first exemption discriminates against senior workers over the age of 65 although they may possess the same skills and abilities of 64-year-old workers. Furthermore, senior workers are more likely to depend on disability or health benefits. It therefore leaves them in a substantial disadvantage compared to their younger co-workers and may affect their decision whether to retire or not. Moreover, since many of those who continue to work past age 65, including women and recent immigrants, do so because of financial reasons, the denial of benefits will substantially affect them. As for the second exemption, it is argued that it is incompatible with the duty of accommodation under human rights codes. It undermines the dignity of senior workers and violates their right to participate in the workplace, and pushes senior injured workers into poverty. It again ignores the fact that many senior workers past age 65, including women and immigrants, wish to remain active in the workplace and are sometimes obliged to do so for financial reasons.

On the other hand, it is argued that these exemptions do not constitute age discrimination at all. Rather, they serve as a distinction between working life and retirement. When workers reach the “normal” pensionable age of retirement (65), other benefits are

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87 See Chapter I, note 126 and accompanying text.
88 Workers who were injured when they were less than 63 years old will receive loss of earning benefits until they reach 65 years old, while workers who were injured when they were 63 years and above will receive benefits for a maximum of two years only. See Chapter I, note 128 and accompanying text.
89 See Chapter I, section E.
91 If injury or illness were considered “disability” under the Ontario Human Rights Code, R.S.O. 1990, c. H.19, termination of employment would constitute unlawful discrimination unless the employer can show that its decision was based on a bona fide occupational requirement and that it has attempted to reasonably accommodate the employee up to the point of undue hardship.
92 Ontario Human Rights Commission, supra note 90.
available to them. Furthermore, if these exemptions do discriminate against senior workers, they are justified. They constitute an inevitable compromise that responds to the interests and concerns of employers who bear the burden and costs associated with employing senior workers.

Canadian case law does not definitively resolve this conflict. In the 1991 decision, Têtreault-Gadoury, the Supreme Court of Canada upheld a constitutional challenge to a former age limitation in the Unemployment Insurance Act, 1971 (denial of unemployment benefits to those over age 65 while providing them with a single lump sum retirement benefit). The Court found that a complete denial of benefits violates s. 15(1) of the Charter unjustifiably under s. 1 as it permanently deprives an individual of the status of a socially insured person by making her a pensioner of the state, even if she is still looking for a new job. It stigmatizes senior workers as inactive and perpetuates an insidious stereotype that senior workers over 65 cannot be retrained for the labour market. The Court held that while the objectives of the rule (preventing those over 65 from receiving both pension and unemployment benefits) were legitimate, it was not sufficiently important to justify the infringement of a Charter right while other less strict means were available to achieve government’s objectives.

Subsequently, in Law and Gosselin, the Court upheld age-based distinctions in the provision of social benefits. Following these decisions, several lower courts have upheld provisions that terminate certain benefits at the age of 65 on the basis that there was no violation of s. 15 or that a violation was justified under s. 1.

The Saskatchewan Court of Queen’s Bench ruled that s. 68(2) of the Saskatchewan Workers’ Compensation Act, which denies loss of earnings benefits to workers over the age of 65 (who might or would have worked and thereby continued to earn employment income and not pension income) and substitutes substantially lower annuity benefits, violates s. 15(1) of the Charter. The Court held that the Act denied loss of earnings benefits to a group or class of workers identified solely by virtue of age, similarly to statute struck down in

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93 See the Canadian cases discussed below.
94 See e.g. Rob Ferguson, “Mandatory Retirement at 65 Banned in Ontario” Toronto Star (December 9, 2005) A2.
96 Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497; and Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429. In Law, the Supreme Court of Canada suggest four contextual factors to determine whether differential treatment is discriminatory: (1) pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group; (2) the impugned legislation or state action ignores the actual needs, capacity, or circumstances of the claimant; (3) disadvantaged groups are excluded from the scope of ameliorative purpose or effects of impugned legislation or other state action; (4) the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question.
However, the denial of benefits constituted a reasonable limit prescribed by law and was therefore saved by s. 1 of the Charter. The Court stated that the objectives of the Act (including creating a distinction between lost earning benefits and retirement benefits) were reasonable and rational and the means employed by the Act were proportional to these objectives. It declared that “it is not an objective of the Act to guarantee the payment of pre-injury income compensation to an injured worker for the rest of his or her life. Rather, the legislature has determined that the scheme of the Act should provide injured workers compensation based upon their loss reflecting normally expected and reasonably anticipated employment and benefit patterns. The scheme of the Act provides lost employment income benefits to age 65 and lost pension income benefits thereafter”. It was stressed that ss. 74-75 of the impugned Act provided workers above the age of 65 with an annuity and supplement to the annuity. Also, injured workers above the age of 65 were eligible for other benefits such as independence allowances, rehabilitation and medical benefits. This served to distinguish Tétreault-Gadoury, where the impugned provision of the Unemployment Insurance Act cut people off from all benefits (except a minor retirement benefit) upon reaching the age of 65, and so was found not to meet the minimal impairment test. The Supreme Court of Canada refused to leave to appeal.

In a recent case with very similar facts, there was a constitutional challenge to the New Brunswick Workers’ Compensation Act (terminating the payment of long-term compensation benefits once a disabled worker reaches age 65). The New Brunswick Court of Appeal applied the test set down in Law and followed in the Gosselin, and held that the distinction drawn between injured workers under and over 65 did not violate s. 15(1) of the

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98 Ibid. at paras. 70-71.
99 Ibid. at paras. 26-28.
100 Ibid. at paras. 75-78.
101 See Zaretski v. Saskatchewan (Workers’ Compensation Board), [1998] S.C.C.A. No. 305. Application for leave to appeal dismissed (without reasons) January 28, 1999. The Saskatchewan Court of Appeal assumed, without deciding, that the decision was correct with respect to s. 15 and ruled with no reasons that its analysis and application of s. 1 was “consistent with the governing authorities in the Supreme Court of Canada” (Zaretski v. Saskatchewan (Workers’ Compensation Board), [1998] S.J. No. 319; 163 D.L.R. (4th) 191 (CA)).
102 S. 38.2(5) of the Workers' Compensation Act, R.S.N.B. 1973, c. W-13. Before Laronde reached 65, he received about $1,500 per month (from provincial workers compensation, Canada Pension and Canada Pension Disability) and a one-time payment of $6,800. When he reached 65, the workers compensation benefit ceased and he got a one-time annuity of $6,437 and a monthly payment of $1,262 (from Canada Pension and Old Age Security) (See Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission), 2007 NBCA 10 at para. 4).
Charter. It did not violate the human dignity of citizens over age 65 nor did it marginalize senior workers on the basis of age. It had no such purpose or effect.\(^{103}\)

Applying the four contextual factors of the Law test,\(^{104}\) the Court found that senior workers are more prone to stereotypical attitudes or assumptions that are factually unjustified including the presumption that they are less productive than younger workers (pre-existing disadvantage). However, this was not material in the present case as the assumption that the person could not work was based on disability. The Court also found that a correspondence exists between the legislative scheme and the actual circumstances of the affected group, \textit{i.e.} those aged 65 and over. The immediate effect of the \textit{Act} was that injured workers aged 65 and above had less money to live on. However, according to \textit{Gosselin}, perfect correspondence between a program and actual needs and circumstances is not required. The legislation was premised on the statistically-proven understanding that most workers will have retired by age 65. It was not based on misguided or unfounded stereotypical attitudes or assumptions. It reflected a policy decision to provide injured workers with replacement income for lost wages, rather than to provide a life-time pension plan. The fact that some might prefer a different age did not indicate insufficient correlation. The age chosen (65) was the age at which pension benefits would normally become available. Also, not all benefits terminated at age 65 under the \textit{Act}.\(^{105}\) As well, the \textit{Act} recognized the fact that some individuals continue to work past age 65 by allowing workers aged 63 and above a maximum of two years' compensation benefits. The Legislature had other – more flexible – options to consider when fixing the termination date for long-term compensation benefits.\(^{106}\) However, the Court held that it was not necessary to determine whether the mechanism adopted by the Legislature minimally impaired rights or whether there were more flexible mechanisms available as there was no violation of s. 15(1). The ameliorative purpose factor was found neutral since the scheme was not designed to improve the condition of another group. Finally, the evidentiary record did not support the view that the overall economic impact on affected individuals impaired their human dignity and their right to be recognized as fully-participating members of society.\(^{107}\)

\(^{103}\) \textit{Laronde}, \textit{ibid.} at para. 34. Note that this decision was handed down before \textit{R. v. Kapp}, 2008 SCC 41, where the Supreme Court of Canada has backed away from employing “human dignity” as a legal test as part of the analysis of s. 15. This case will be discussed further in Chapter IV, sections B and C.

\(^{104}\) \textit{Supra} note 96.

\(^{105}\) Following termination of long-term disability benefits, an injured worker becomes eligible for further compensation in the form of an annuity topping up other pension benefits such as CPP and Old Age Security.

\(^{106}\) In Alberta, for example, wage loss benefits cease at the age of 65 unless “there is sufficient and satisfactory evidence to show that the worker would have continued to work past that age if the injury had not occurred” (Alberta Workers’ Compensation Board, Policy 04-04 Part II; June 24, 2003).

\(^{107}\) \textit{Laronde, supra} note 102 at paras. 1, 21-34.
The Court of Appeal ruled that given more recent Supreme Court of Canada decisions, the decision in *Tétreault-Gadoury* was no longer relevant. It nonetheless distinguished *Tétreault-Gadoury* on a factual basis stressing that the *Act* provided up to two years’ benefits for those injured after age 63, while in *Tétreault-Gadoury* unemployment benefits ceased at the age of 65. The Court also commented that *Zaretski* had been decided under an analytical framework that had been significantly changed by *Law* and *Gosselin*.108

In light of these cases, it is not clear whether new legislation, such as Ontario’s, which makes age limits and distinctions, is likely to withstand a constitutional challenge. The primary question is whether these age limits and distinctions constitute a violation of the right to age equality. To determine whether misguided or unfounded stereotypical attitudes or assumptions regarding senior workers are the only form of unlawful age discrimination, we must have a better understanding of the right to age equality itself. If we find that there is a violation of the right to age equality, a balance should be struck between this right and other economic and social considerations. The question is then whether the relative weight assigned to the right of senior workers to age equality is appropriate and consequently whether the balance struck by legislatures who created these exemptions and mechanisms is suitable. This question again depends on our conception of the right to age equality in the workplace. If the right to age equality constitutes a fundamental human right that aims at protecting important values and interests, it would usually override counter-considerations and require the adoption of a mechanism which minimally impairs the right.

D. Cost as a Legitimate Rationale for Age Discrimination against Senior Workers

Employers are often reluctant to hire senior workers as it is argued that they usually earn more than younger workers and are entitled to higher benefits (including health insurance and pension).109 Even if senior workers are more productive than younger workers,
employers fear that their productivity is offset by their higher costs. For similar reasons, in cases of downsizing senior workers are more likely to be laid off and dismissed than younger workers. Consequently, they often exit the labour market earlier than they had intended.\(^{110}\) Should employers be allowed to refuse to hire senior workers, dismiss senior workers or replace them with younger workers due to their higher labour costs? Does this amount to age discrimination? And if so, is it justified? This issue derives from a larger debate on the extent to which cost or profitability should be a potential justification for age discrimination. A relevant issue is the question of an age limit in recruitment based on proximity to retirement. It is argued that senior workers will generally remain employed for only a short period of time, and firms will thus be unable to recoup their investment in hiring and training the workers. Employers therefore avoid hiring senior workers or offer them lower wages to discourage them from applying for these jobs.\(^{111}\) Does this amount to age discrimination? And if so, when it may be justified?\(^{112}\)

On the one hand, senior workers often earn more than their younger co-workers due to the traditional arrangements of deferred compensation, their length of service and experience.\(^{113}\) These wage differences have important consequences for the ability of employers to maintain competitiveness.\(^{114}\) It is therefore argued that despite its effects on senior workers, the use of labour cost in hiring and dismissal decision-making process is economically rational and should be allowed unless the ulterior motive is to exclude senior workers.\(^ {115}\) Furthermore, it is asserted that it would be inappropriate to undermine employer prerogative and discretion especially in times of economic crisis.\(^ {116}\)

On the other hand, when an employer in need of downsizing releases workers based on seniority or labour costs or offers early retirement packages to specific groups of workers, it might be argued that these actions constitute adverse effect discrimination. These actions, while motivated by a legitimate business reason and facially neutral criteria (such as pension

\(^{110}\) See e.g. Aida M. Alaka, “Corporate Reorganizations, Job Layoffs, and Age Discrimination: Has Smith v. City of Jackson Substantially Expanded the Rights of Older Workers under the ADEA?” (2006) 70 Alb. L. Rev. 143 at 144.

\(^{111}\) See Eglit, *supra* note 27 at 684-87.

\(^{112}\) One of the examples provided by Article 6 of the EU Directive (*supra* note 10) for a justified different treatment on grounds of age is “the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement”.

\(^{113}\) It is however argued that eventually the higher wages of senior workers will have to adjust to the new reality of the aging workforce and ending mandatory retirement. Employers will not hire or retain senior workers if their pay keeps increasing. Indeed, deferred compensation contracts are less common today and the link between pay and performance has been tightened (see Barth *et al.*, *supra* note 109 at 329-30).


\(^{116}\) See Lee Franck, “The Cost to Older Workers: How the ADEA Has Been Interpreted to Allow Employers to Fire Older Employees Based on Cost Concerns” (2003) 76 S. Cal. L. Rev. 1409 at 1432.
eligibility, high wages or length of service) may still have a disproportionate effect on senior workers. Moreover, seniority and costs are strongly connected to age. It might be argued that if we allow distinctions based on these facially neutral criteria, it is as if we allow distinctions based on age. The same has happened with regard to women where employers argued that they did not discriminate against them because they were women but because they were on unpaid leave or on maternity leave. However, it is clear that they were on these forms of leave because they are women. It is as if the employer in O'Malley would have argued that it did not discriminate against the worker because she was religious but rather because she did not want to work on Saturdays. Just as refusing to work on Saturday is closely connected to religion, so higher costs are connected to age. This is an adverse effect situation, where a neutral policy affects members of a protected group, and the attempt to hide behind the ostensible reasons is deceptive and dangerous. If we do not accept this argument and do not treat cost rationales with suspicion, every adverse effect discrimination case will fail at the stage of establishing a prima facie case of discrimination. This will undermine some of the major purposes of anti-age discrimination laws: to fight against job displacement, help senior workers retain employment, and uncover opportunistic behavior by employers.

The case law does not provide clear answers to these questions as well. In the U.S., the tendency until recently was to view the Age Discrimination in Employment Act, 1967 as concerned with employment decisions based merely on ageist stereotyping as the “original legislation was primarily an attempt to eliminate the offensive categorical restrictions on

117 See Canada (Canadian Human Rights Commission) v. Canada (Human Rights Tribunal), [1997] F.C.J. No. 1734 (F.C.T.D.) (Q.L.). In this case, female employees were prevented by provisions of their collective agreement from accumulating annual and sick leave credits and credits towards a bilingual bonus while they were on maternity leave. To receive the benefits they needed ten paid workdays per month, which they did not have due to their unpaid leave. They argued adverse effect discrimination. However, the Tribunal and the Federal Court held that since there were other employees on unpaid leave who were subject to the same rule as those on maternity leave there was no discrimination. The Court did not consider that absence from work due to maternity had a different impact than absence from work for any other reason.

118 Ontario (Human Rights Commission) and O’Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 (facially neutral policy that requires all employees to work on Saturdays has disproportionate effect on Jews. It was not designed to harm Jews but refusing to accommodate them perpetuates the social and political domination of some religious groups).

119 The American Congress, for example, listed four specific employment practices that it was concerned about, indicating that “older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs”, that “the setting of arbitrary age limits regardless of potential for job performance has become a common practice” and that senior workers should be promoted based on their ability. See also §§ 621(a)-(b) of the Age Discrimination in Employment Act, 29 U.S.C. (1967) [ADEA].

120 See Rhonda M. Reaves, “One of These Things is not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases” (2004) 38 U. Rich. L. Rev. 839 at 891-92, who argues that often employers opportunistically wish to dismiss senior workers due to their high costs although these costs represent deferred wages from the first years of the employment relationship when they earned much less.
hiring older workers". Courts looked for intent and evidence of whether age actually motivated the decision. Decisions based on other factors such as seniority and costs were widely accepted as legitimate despite the fact that they are strongly correlated to age. The U.S. Supreme Court seems to support the use of costs rationale in age discrimination cases. Costs were recognized as a business necessity and as a “good cause” for dismissal. Finally, although the higher cost of employing senior workers was not originally intended to constitute a “reasonable factor other than age” defence, it was widely identified as such.

More recently, the Supreme Court has recognized in Smith that the disparate impact doctrine applies to age discrimination. This means that the ADEA does not only address stereotyping, and that there is no longer a need to prove intent to discriminate based on age. Yet, although age discrimination cases can be brought based on adverse effect claims, it seems that the scope of liability in these cases is narrower than under Title VII. First, as illustrated by Sandra Sperino, the claim must challenge a specific practice that caused the

121 Samuel Issacharoff & Erica Worth Harris, “Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution” (1997) 72 NYU L. Rev. 780 at 805. § 621(b) proclaims the purpose of the Act: “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment”. Based on the Congressional Record (see supra note 119), Crawshaw-Lewis argues that the “arbitrary age discrimination” that the original legislation was intended to eliminate was discrimination against senior people based largely on negative stereotypes (S. Crawshaw-Lewis, ‘‘Overpaid’ Older Workers and the Age Discrimination in Employment Act” (1996) 71 Wash. L. Rev. 769. In Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), the Court states that the purpose of the ADEA was the address the concern that senior workers were deprived of employment based on inaccurate and stigmatizing stereotypes.

122 See Franck, supra note 116. See for example Holt v. Gamewell, 797 F2d 36, 37-38 (1st Cir 1986). But see Metz v. Transit Mix, Inc., 828 F2d 1202 (7th Cir 1987), where the Seventh Circuit ruled that replacing a senior worker based on his or her higher labour cost violates the intent of the ADEA. The Court held that age and salary were closely linked (the salary was directly based on years of service) and that the employer did not offer to reduce the salary paid to the senior worker.

123 See Hazen Paper, supra note 121 at 609, where it was held that an employer does not discriminate by relying on a factor correlated with age, such as pension status.

124 See e.g. Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001).

125 See e.g. Kehoe v. Anheuser-Busch, Inc., 995 F.2d 117, 118 (8th Cir. 1993).

126 See John Macnicol, Age Discrimination: An Historical and Contemporary Analysis (Cambridge: Cambridge University Press, 2006) at 249. Macnicol cites a 1997 case, Michael J. Marks v. Loral Corp. et al., where a California appellate court ruled that senior, highly paid employees could be replaced by younger, lesser-paid ones. This was confirmed by the Court of Appeal. See also Hanerbrink v. Brown Shoe Co., 110 F.3d 644 (8th Cir. 1997); EEOC v. Francis W. Parker Sch., 41 F.3d 1073 (7th Cir. 1994); EEOC v. Chrysler Corp., 733 F.2d 1183 (6th Cir. 1984).

127 See Smith v. City of Jackson, 544 U. S. 228 (2005). For the facts of the case see Chapter I, note 86. The Supreme Court held (by a majority opinion of four against three, while Justice Scalia concurred and Justice Rehnquist did not participate) that a disparate impact theory is cognizable under the ADEA, but is narrower in scope than under Title VII for two reasons. First, ADEA § 623(f)(1) significantly narrows its coverage by permitting any “otherwise prohibited” action “where the differentiation is based on reasonable factors other than age” (the RFOA provision). Second, the amendment to Title VII in the Civil Rights Act, 1991 did not amend the ADEA.
adverse impact (as opposed to Title VII cases, where it is enough to point at statistical disparity). 128

Second, an employer may defend its action by relying on the broad exception of “reasonable factor other than age” (RFOA). 129 According to the Court, this result is consistent with “the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment”. 130 In Smith, the Court held that reliance on seniority and rank was “unquestionably reasonable” given the defendant employer’s goals, 131 and that while there may have been other reasonable ways for the defendant to achieve its goals, the one selected was not unreasonable. The Court empathized that: “Unlike the business necessity test [under Title VII], which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement”. 132 Furthermore, as Aida Alaka explains, courts are often reluctant to make judgments about the reasonableness of business decisions. 133 Since employers often make decisions based on cost savings, efficiency or profit maximization reasons rather than explicit bias, these reasons are likely to be found reasonable regardless of their adverse

128 In a Title VII case, the employer then has to show that its actions are job-related and necessary to the business. The worker may still win if he or she proves that an alternative non-discriminatory business practice exists. Sperino argues that in age discrimination cases courts will tend to question the cause of any statistical disparity and hold that such disparities result from legitimate factors. Indeed, the Court has stated that in many instances a person’s age will permissibly correlate with a myriad of factors. Workers therefore have to show that a particular practice resulted in a statistical disparity and that this statistical disparity was caused by discrimination (Sandra F. Sperino, “Disparate Impact or Negative Impact?: The Future of Non-Intentional Discrimination Claims Brought by the Elderly” (2005) 13 Elder L.J. 339 at 379-82, 385).

129 The Supreme Court has however clarified that the employer bears the burden of proof of RFOA in Meacham v. Knolls Atomic Power Laboratory, 554 U.S. ___ (2008). Thirty out of the thirty-one laid off workers at the Knolls Atomic Power Laboratory were over 40. They were selected based on three scaled factors, “performance”, “flexibility”, and “critical skills”. A statistics expert demonstrated that this distribution was highly skewed by age and could not have occurred by chance. The Supreme Court held that the RFOA was an affirmative defense because of its placement in the Act. There is also a general convention that the side that claims for an exception has the burden to prove it. Clarifying some comments made in Smith (supra note 127), the Court stated that the employee had the burden of identifying which particular practices allegedly cause an observed disparate impact. The Court also clarified that the RFOA exception is not similar to the business necessity defense. The business necessity defense requires the defendant to demonstrate both that the neutral practice or criterion is job related and that it is necessary to the business. That is, if other alternatives are available without the disparate impact, the employer bears the heavy burden of demonstrating why it did not adopt those. Under the RFOA, by contrast, the employer has to prove only the reasonableness of the practice adopted even if other reasonable means were available. Now, the Second Circuit Court of Appeals will have to decide whether the employer proved reasonableness under the RFOA.

130 Smith, supra note 127 at 238-39.

131 “The City’s decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a ‘reasonable factor other than age’ that responded to the City’s legitimate goal of retaining police officers” (ibid. at 242).

132 Ibid. at 243.

133 Alaka, supra note 110 at 168-69. She then looks at cases from jurisdictions that did and did not previously allow disparate-impact liability under the ADEA, and finds our that in both jurisdictions courts’ focus on the RFOA provision demonstrates that the impact of Smith is likely to be minimal at best (ibid. at 169-74).
impact on senior workers and the fact that the employer could have adopted an alternative, nondiscriminatory practice.\textsuperscript{134}

Alaka, together with Sperino, therefore argues that \textit{Smith} will not have a substantial impact on the rights of senior workers.\textsuperscript{135} Alaka advocates “a revision to the law or a major reinterpretation of the ‘reasonable factor other than age’ provision” to provide adequate protection for senior workers who are significantly affected by layoffs while possessing invaluable skills and knowledge.\textsuperscript{136} However, she is skeptical about the prospects of legislative reform.\textsuperscript{137} This brings us back to the central normative question of this Chapter, whether age discrimination against senior workers matters and to what extent.

In Canada, the doctrine of adverse effect in age discrimination case is broader and more developed than the American doctrine. Although a common theme is that employers are “completely at liberty to cut costs and terminate employees in order to reduce expenses”, the adverse effect on senior workers is considered and the employer has to show that it dismissed the senior worker only after serious consideration, and a lack of alternative options. In \textit{Buchanan}, for example, the B.C. Human Rights Tribunal looked for reasonable and consistent evidence to support a business concerns claim.\textsuperscript{138} It is however not clear what will exhaust the requirement for “serious consideration” and “lack of alternative options”. Does it include dismissal of younger workers or an obligation to offer the senior worker the option to work for a lower salary?\textsuperscript{139} Does it unduly interfere with employer discretion?

To conclude, it remains a matter of dispute whether costs are a legitimate rationale for age discrimination against senior workers.\textsuperscript{140} In other forms of discrimination such as race and sex, mere cost savings may not be used to justify discrimination as “there is … a price – a cost – for securing more important remedial and social objectives”.\textsuperscript{141} The question remains whether the right to age equality similarly advances important objectives that may justify the denial of costs as a legitimate basis in age discrimination cases. It might be that the right to age equality is of lesser importance and that the law should therefore allow

\begin{itemize}
\item \textsuperscript{134} \textit{Ibid.} at 177; Sperino, supra note 128 at 382-83.
\item \textsuperscript{135} Alaka, supra note 110; Sperino, supra note 128.
\item \textsuperscript{136} Alaka, supra note 110 at 177-78.
\item \textsuperscript{137} \textit{Ibid} at 179.
\item \textsuperscript{139} According to Franck, it might be problematic as several studies show that “pay cuts and demotions foster resentment and anger in the workforce” and that senior workers who agreed to a pay cut tend to experience some decrease in productivity (supra note 116 at 1430-31).
\item \textsuperscript{140} There is also a debate about the relevance of cost rationale in EU Member States, where new age discrimination laws have been only recently introduced. According to Article 2(2)(b) and 6 of the 2000 EU Directive (supra note 10), both direct and indirect discrimination will be justified if it is a proportionate means of achieving a legitimate aim. Legitimate aim might include economic factors such as business needs and efficiency. In Israel, the law is also not clear on this issue. See Rabin-Margalioth, supra note 82 at 166-72.
\item \textsuperscript{141} See Kaminshine, supra note 115 at 231-32.
\end{itemize}
exceptions including cost rationales. Then, the question focuses on the scope of these exceptions (e.g. reasonableness or necessity test). Once again, the answer to these questions is strongly influenced by one’s conception of the right to age equality and its relative weight.

E. Increasing the Age of Eligibility for Full Pension Benefits to encourage Participation among Seniors in the Workplace

As was demonstrated in Chapter I, the implications of the aging workforce, including pension deficits and labour shortages, have motivated employers and policy-makers around the globe to develop initiatives that will attract and retain senior workers in the labour market. One of the main measures to be introduced by different countries is increasing the age of eligibility for full public pension benefits. In the U.S., mandatory retirement was abolished and the age of eligibility for full Social Security benefits was subsequently increased. In Israel and in several European countries (such as the U.K. and Germany) the age of entitlement to full public pension or social security benefits was increased without banning mandatory retirement practices. Several other countries, including Canada and Australia, are considering adopting similar measures. Furthermore, some countries that have already increased the age of eligibility for benefits have considered another rise. Should the age of eligibility be increased?

On the one hand, international organizations such as the World Bank advocate an increase in entitlement age to pensions. Given the new reality of increasing longevity, improved health of senior workers and reduced physical job demands, it is argued to be a reasonable adaptation. As well, it is considered an unavoidable step in tackling the actuarial deficits of pension funds and pending labour shortages. Yet, it is argued that government should make substantial efforts to create more jobs in the labour market.

On the other hand, some of the policy and legislative initiatives undertaken to increase senior workers’ labour force participation, including the increase in the age of eligibility for full pension benefits, have been called into question. Several countries were

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142 See Chapter I, section C.5. I use the term “public pension” to cover both public pension schemes such as Canada Pension Plan and Social Security schemes such as in the U.S. However, it is important to note that in Israel the age of eligibility for both old age allowance (public scheme) and public and private pension plans was increased from 2004. Also, in the U.S. there are strong voices that call for an increase in the age of eligibility for private pension plan benefits. See e.g. Jonathan Barry Forman & Bing Yung-Ping Chen, “Optimal Retirement Age” New York University Review of Employee Benefits and Executive Compensation [forthcoming] at 20-21, online: <http://ssrn.com/abstract=1148271>.

143 See Chapter I, section D.2.b.

144 See Chapter I, sections D.2.d and D.2.e.

145 See Kesselman, supra note 24 at 17. On the impacts of the aging workforce see Chapter I, section C.

accused of ignoring senior workers’ rights while focusing on economic and utilitarian considerations.\textsuperscript{147} Specifically, it has been argued that increasing the age of entitlement to full public pension benefits would mostly harm non-unionized, part-time, low-income seniors who do not have private pension plans and must rely on these programs as their major source of retirement income.\textsuperscript{148} These workers would be required to retire later in order to be entitled to full benefits. They would therefore receive benefits for fewer years. Others are likely to encounter difficulties in maintaining their jobs and retire early with substantially reduced benefits.\textsuperscript{149} Finally, even if they do find a job, it is argued that those who most need to work longer might not be able to extend their work lives due to health problems.\textsuperscript{150}

Furthermore, the effectiveness of this initiative is doubtful. It has been widely argued that increasing the Normal Retirement Age (NRA) for social security benefits in the U.S. will not solve any budgetary problems and will even produce new problems. According to Gary Burtless and Joseph Quinn, increasing the NRA would certainly save Social Security money, but its effect on actual retirement ages may be modest.\textsuperscript{151} They therefore suggest lifting the Social Security’s early eligibility age of 62 (EEA). This change might not save Social Security much money, but it would have a significant impact on the timing of some workers’ retirements, especially those who earn low-wages and have no other sources of

\textsuperscript{147} See \textit{e.g.} Colm O’Cinneide, “Comparative European Perspectives on Age Discrimination Legislation” in Fredman & Spencer, \textit{supra} note 29, 195 at 214; Malcolm Sargeant, “For Diversity, Against Discrimination: the Contradictory Approach to Age Discrimination in Employment” (2005) 21 Int’l J. Comp. Lab. L. & Ind. Rel. 629 at 630-34; and Macnicol, \textit{supra} note 126 at 47, and c. 3.

\textsuperscript{148} See \textit{e.g.} Monica Townsend, \textit{Growing Older, Working Longer: the New Fact of Retirement} (Ottawa: Canadian Centre for Policy Alternatives, 2006). Townsend describes how the responsibility for retirement income has shifted from collective actions and programs and onto individuals. In 2006, less than 40% of Canadians belong to a registered pension plan through their work, and many are not able to save enough on their own.


\textsuperscript{150} See \textit{e.g.} Alicia H. Munnell, Mauricio Soto & Alex Golub-Saa, “Will People Be Healthy Enough to Work Longer?” CRR Working Paper No. 2008-11 (August 1, 2008), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315487>. This study asks whether Americans are healthy enough to work longer. Using the National Health Interview Study, it shows that healthy life expectancy increased by about three years over 1970-2000 for the average 50-year old man. However, it also reveals that there are significant disparities in healthy life expectancy between different groups in the U.S.

retirement income except Social Security.\textsuperscript{152} Since people who have worked in physically demanding jobs or suffer from health problems might be harmed by increasing the EEA, Burtless and Quinn propose liberalizing eligibility requirements for Disability Insurance to permit retirement with a decent standard of living.\textsuperscript{153} However, it is argued that overly generous disability benefits could also undermine efforts to keep people in the workforce.\textsuperscript{154} Flexible work arrangements and other accommodations could keep more disabled adults in the workforce, yet they are still very rare.\textsuperscript{155}

To conclude, the various measures adopted by employers and counties to encourage labour force participation among senior workers and delayed retirement are often complex and highly contested as they entail rival interests and forces. Some of the initiatives described above might have an adverse effect on senior workers while their effectiveness in tackling the challenges of the aging workforce is uncertain. Although the initiatives adopted by each country are a matter of policy, the process of determining appropriate measures may also revolve around the issue of age discrimination. If one holds a weak conception of age equality, one might view the interests of senior workers as only one of many relevant considerations when designing a policy, and would mostly leave it to the parties to determine how they wish to tackle the myriad challenges of the aging workforce. However, if one holds

\textsuperscript{152} Yet, another study concludes that increasing the minimum age of retirement in industrialized countries is likely to have an insignificant impact on the labour force participation of senior workers. It explains that the overall increase in the labor force participation rate is linked to the performance of the labor market and its capacity to handle the challenges and opportunities of globalization. Globalization however often leads to job losses, lower wages and unemployment. Furthermore, in order to make delayed retirement more attractive, changes in the wage profile for senior people and measures to keep their productivity high and rising including life-long learning should be made. See Robert Holzmann, “Demographic Alternatives for Aging Industrial Countries: Increased Total Fertility Rate, Labor Force Participation, or Immigration” Institute for the Study of Labor Discussion Paper No. 1885 (December 2005), online: \texttt{<http://ssrn.com/abstract=875377>}.\textsuperscript{153} The study uses historical evidence to evaluate the impact of this kind of change. When the earliest age of eligibility for Social Security retirement benefits was reduced from 65 to 62, labor force participation rates of 60-64 year-old men decreased significantly. It is therefore expected that reversing all or part of this change would significantly increase participation. The magnitude of this increase is however unknown and would depend on potential changes to employer-based pensions and the extent to which eligibility criteria for Disability Insurance benefits were loosened. See Gary Burtless & Joseph F. Quinn, “Is Working Longer the Answer for an Aging Workforce?” Center for Retirement Research (December 2002, Number II) at 7-8, online: \texttt{<http://fmwww.bc.edu/EC-P/ WP550.pdf>}. Another study also recommends increasing the minimum age of retirement together with the redefinition of disability. According to this study, the availability of Social Security benefits at the age of 62 significantly affects workers decisions to retire as early as 59. In addition, the retirement earnings test at age 62, which reduces benefits for workers earning more than a certain amount, also encourages people to stop working (see Toder et al., \textit{supra} note 109 at 10).\textsuperscript{154} But see Xiaoyan Li & Nicole Maestas, “Does the Rise in the Full Retirement Age Encourage Disability Benefits Applications? Evidence from the Health and Retirement Study” Michigan Retirement Research Center Research Paper No. 2008-198 (September 1, 2008), online: \texttt{<http://papers.ssrn.com/so13/papers.cfm?abstract_id=1338198>}. Comparing the disability insurance application rates of two birth cohorts in the Health and Retirement Study, this study finds that the effect of increasing the Social Security full retirement age on the disability insurance program in the U.S. is small. That is, an average four month increase in the Social Security full retirement age slightly increases the two-year disability insurance application rate among people born between 1938 and 1940 by 0.04-0.30 percentage points. The effect is greater among those with health problems that limit their work capacity (0.22-0.89 percentage points). See Toder et al., \textit{supra} note 109 at 10.
a strong conception of age equality, one might argue that market ordering is not sufficient since employers might use senior workers as means of achieving their business aims. One may therefore advocate designing a policy that will recognize the importance of the rights of senior workers and will ensure that other means which are arguably less harmful are available to tackle the challenges of the aging society and to ease budgetary pressures.

**F. Performance Appraisals for Senior Workers**

Performance appraisal systems for appointing, promoting and discharging employees are widely practiced in numerous workplaces. As more and more countries abolish mandatory retirement, the use of appraisal systems to evaluate the job performance of senior workers is becoming increasingly common. As a consequence of this emerging trend, some senior workers might be dismissed before they reach the normal age of retirement (*i.e.* 65) if they are found to be incapable of performing the essential duties of their jobs. However, as argued above, it is preferable that the treatment of senior workers be based on their actual performance, rather than ageist assumptions regarding their abilities.\(^{156}\) As long as performance evaluation applies to all workers, it is even a desirable practice for many reasons. It requires employers to design a reliable long-term testing system. It may therefore promote fairness in processes such as promotion and allocation of bonuses. It also allows workers to follow their annual results, improve their performance (through for example training) or request accommodation. Furthermore, when results point to incompetence, any decision to dismiss or retire a worker will be based on information and evidence compiled over a long period of time. It may therefore help employers to better prepare against potential suits.\(^{157}\) Finally, it may promote efficiency and strategic planning by identifying and advancing employee and organizational goals thus increasing the profits of the organization.\(^{158}\)

It has long been acknowledged that performance appraisals should follow several rules.\(^{159}\) Among other rules, they should be valid and reliable,\(^{160}\) and where possible, they should focus only on job-related objective criteria. Whenever possible, job requirements

\(^{156}\) See text accompanying *supra* notes 40-41.

\(^{157}\) As Bisom-Rapp points out, “[e]mployee evaluations, for the most part, are not created when litigation seems a possible threat. Rather, they function as a long-term insurance policy safeguarding future employment decisions from potential challenge” (Susan Bisom-Rapp, “Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice” (1999) 26 Fla. St. U.L. Rev. 959 at 1001).


\(^{159}\) According to Geu, any check list of these rules would be incomplete (*ibid.* at 509).

\(^{160}\) Reliability depends on the degree to which a measurement instrument is consistent in what it measures; and can set statistical values. Validity is based on the degree to which a measurement instrument accurately reflects what it is designed to measure.
themselves (e.g. physical strength), rather than a proxy (e.g. age), should be examined. When the use of subjective criteria and evaluation are unavoidable, they should be supported by objective factors and measures. It is also recommended to establish internal guidelines for subjective evaluations to avoid errors and bias. As well, it is suggested to document the appraisals which may provide important evidence when decisions regarding, for example, termination and promotion are challenged. It is also important to notify workers of the results and provide them with an opportunity to respond. It might encourage or initiate revision of a job description to better reflect the job or the worker’s ability and needs.\(^{161}\)

However, there are still a few issues that are under dispute. First, it is unclear when a generalization should be allowed and when a case-by-case determination regarding job performance should be insisted on. That is, after the abolition of mandatory retirement should there still be certain jobs (such as pilots) that are subject to a mandatory retirement arrangement due to, for example, safety reasons? Second, there is some uncertainty with regard to the extent to which governments and courts should interfere in shaping performance appraisals and handling their results. Ben-Israel, for example, suggests that job performance appraisal for the purpose of proving that age is a \textit{bona fide} occupational requirement should be prohibited, and that concentration should be placed on the one criterion that may be more helpful in determining job performance in an advanced age: the worker’s physical condition. In her view, evaluating workers’ performance based on a periodical medical examination might neutralize the tension and uncertainty associated with job performance appraisals conducted in any other way.\(^{162}\) Tests for general physical condition, such as the GULHEMP test, have been developed. The system of GULHEMP is a medically-based analysis of employees, which was developed by Leon Koyl, a Canadian medical consultant, initially for purposes of hiring and job placement, but may also be used for retirement decisions.\(^{163}\)

However, if one focuses solely on a physical condition test, one should take into consideration the fact that decline in physical capacities does not necessarily mean decline in job performance, or worse still, incapacity to perform job duties. That is, the decline in

\(^{161}\) Geu, \textit{supra} note 158 at 508-09.


\(^{163}\) See Levine, \textit{supra} note 27 at 119. As Rowland describes it: “Under GULHEMP, the employer and medical consultants cooperatively analyze functions necessary for a particular job and develop medical tests to determine whether a person would be fit for those functions. GULHEMP grades seven factors for which its name is an acronym: General physique, Upper extremities, Lower extremities, Hearing, Eyesight, Mentality, and Personality. Each is graded on a scale of 1 to 7 and matched against the predetermined profile of job requirements. If an employee falls below the minimum for any of the functions, he does not pass” (Adam Bruce Rowland, “Age Discrimination in Retirement: In Search for an Alternative” (1983) 8 American Journal of Law and Medicine 433 at 449).
physical capacity may not be related to job performance, or “the capacity required for the job may be sufficiently below the capacities initially possessed by the worker so that, even after decline, the worker is still able to perform satisfactorily”.\footnote{Levine, \textit{supra} note 27 at 110.} Accordingly, there have been several cases where it has been held that individualized assessment of the claimant’s personal capacity was available at an affordable cost and therefore a generalized health standard used as a proxy for impaired performance was rejected as proof of a BFOR.\footnote{See \textit{e.g.} \textit{Canada (Attorney General) v. Thwaites} (1994), 3 C.C.E.L. (2d) 290 (F.C.T.D.) at 313; \textit{Wardair Canada Inc. v. Cremona} (1992), 26 C.H.R.R. D/351 (F.C.A.), at D/357; \textit{Andrews} (1994), 95 C.L.L.C. 230-005 (Can. H.R. Trib), at 145,087.} Furthermore, there are some physical abilities that, in spite of their decline, can be improved by technological means (eyeglasses, working tools and equipment, lighting, etc.). Additionally, the senior worker may be able to fulfill another job task, equally important and necessary in the employer’s eyes, which fits his or her particular capabilities.

After the adoption of the 1978 amendments of the ADEA in the United States, several scholars called for the establishment of formal and reliable techniques of performance appraisal.\footnote{See \textit{e.g.} Jeffrey Sonnenfeld, “Dealing with the Aging Work Force” (1978) 56 Harvard Business Review 81.} As Martin Levine notes, performance appraisal systems have been developed for private and public sectors, yet no system has accomplished its goals perfectly. Thus, there is a continuing attempt to improve job evaluation in order to produce more objective methods of evaluation.\footnote{Levine, \textit{supra} note 27 at 119.}

Adam Rowland suggests that an employer should first determine the necessary functions for a specific job at the workplace. Then, medical tests will be used to determine whether an individual is fit for those functions. This is because physical abilities can be easily assessed in many simple and inexpensive ways.\footnote{Rowland is however concerned that determining a passing grade of competence will produce arbitrary decisions similar to choosing a fixed age for age-based retirement. He therefore proposes using a formula based on the average grade of all employees or those at a “normal” retirement age. Since the average grade might still be greater than the job requires (as it was in \textit{Meiorin, supra} note 6), Rowland suggests that a special decisional calculus will be used to fail employees only when essential job ability becomes impaired \textit{(supra} note 163 at 453).} He proposes that a formal medically-based test of competence be determined for each job context \textit{ex ante} and that an administrative agency be created to review the appropriateness of testing procedures used for each job context.\footnote{\textit{Ibid.} at 458. After reviewing several BFOQ cases, Rowland argues that courts have reached inconsistent and incoherent outcomes and lack technological and creative competence \textit{(ibid.} at 460, 468-70). The administrative agency, by contrast, would have technical and creative competence, an ability to design a holistic approach and to avoid inconsistency; and neutrality \textit{(ibid.} at 477-79).} Rowland also advocates that the mandatory retirement age be transformed into a presumptive retirement age and that employees be allowed to rebut this presumption. Adopting a presumptive retirement age would decrease the number of

\footnote{Ibid. at 458. After reviewing several BFOQ cases, Rowland argues that courts have reached inconsistent and incoherent outcomes and lack technological and creative competence \textit{(ibid.} at 460, 468-70). The administrative agency, by contrast, would have technical and creative competence, an ability to design a holistic approach and to avoid inconsistency; and neutrality \textit{(ibid.} at 477-79).}
employees subject to expensive medical testing for competence, and reduce firm costs and workers’ psychological harm. Finally, Rowland suggests equal distribution of the cost of the medical testing:

Employers should develop the testing program, not because of superior competence, but because of a better ability to spread the cost. By contrast, the rebutting employee should bear the cost of individual testing since he or she alone stands to benefit. Such an expense would ensure that only those workers serious about continuing work would challenge the presumption.

To conclude, different performance appraisals exist in the workplace. While many countries have abolished mandatory retirement, it is as yet unclear when an age-based generalization should be allowed and when a case-by-case determination regarding job performance should be insisted on. Furthermore, it is not clear whether governments or courts should interfere ex ante with the design of these appraisals, and if so, what is the recommended method of performance appraisals, how they should be supervised, and who should bear their costs. Once again these questions depend on one’s conception of the right to age equality of senior workers. If the right to age equality is fundamental protecting important interests, then there is less room for exceptions to individualized assessment and a stronger justification for state intervention and strict guidelines. By contrast, if the right to age equality is not as critical as the right to gender or race equality, then employers should be given more freedom in fashioning these test, and exceptions to individualized assessment should be more acceptable.

G. The Duty to Accommodate Senior Workers

Generally speaking, people are living longer and staying healthier than ever before. Although the incidence and prevalence of disability increases with age, studies have indicated significant declines in the rates of disability and functional limitation among seniors. It is true that as mortality decreases, life expectancy increases and medicine advances, senior people are less likely to suffer from infectious diseases. Yet, they are more vulnerable to chronic health conditions such as arthritis, hypertension, heart disease and diabetes. They are also more likely to develop sensory or mobility-related disabilities. At

\footnote{170} \textit{Ibid.} at 457-58.  
\footnote{171} \textit{Ibid.} at 459.  
\footnote{172} In Canada, for example, a significant share of seniors report themselves to be in good or excellent health condition and until age 75 almost all of them are able to carry on daily life activities without assistance (See Martin Turcotte & Grant Schellenberg, \textit{Portrait of Seniors in Canada} (Ottawa: Statistics Canada, 2006) at 47).  
\footnote{173} For a summary of studies see He \textit{et al}, \textit{supra} note 27 at c. 3. There are numerous reasons for the decline in prevalence of disability, including improved medical treatment and technology enhancement.  
\footnote{174} Chronic disease and impairments are among the leading causes of disability among seniors. See Turcotte & Schellenberg, \textit{supra} note 172 at 47-48; and World Economic and Social Survey 2007: Development in an
the same time, medical advances, accommodation and technological innovation substantially increase the proportion of disabled people who are now able to work.\textsuperscript{175} Technological innovation, for example, allows more disabled people to participate in the labour market from their homes.\textsuperscript{176}

Many anti-discrimination laws impose a duty of accommodation on employers. However, these laws usually focus on disabled workers.\textsuperscript{177} As disability and age are closely linked, Malcolm Sargeant argues that the duty to accommodate disabled workers should apply to senior workers who may have a disability or be perceived as disabled.\textsuperscript{178} However, senior workers may also experience some decline in ability that does not amount to “disability”. Furthermore, they may have other special needs resulting from their age aside from any disability which may be experienced. The duty to accommodate disabled workers might be irrelevant in these circumstances. A more progressive response to the special needs of senior workers can be found in Canadian law. Apart from the duty to accommodate disabled workers which may include senior workers who have a disability or are perceived as disabled,\textsuperscript{179} employers are also obliged to accommodate other minority groups including senior workers in circumstances of both direct\textsuperscript{180} and adverse effect\textsuperscript{181} discrimination. That

\textit{Ageing World} (New York: United Nations, Department of Economic and Social Affairs, 2007) at 144, online: <http://www.un.org/esa/policy/wess/wess2007files/wess2007.pdf>. In the U.S., for example, around 80% of seniors have at least one chronic health condition and 50% have at least two. Around 20% of seniors have a chronic disability, about 7-8% have severe cognitive impairments, and about 30% experience mobility difficulty. About 14 million non-institutionalized seniors (41.9% of the senior population) had some type of disability. See He \textit{et al}, supra note 27 at c. 3.

\textsuperscript{175} For example, in 1991, around half of all Canadians aged 65 and over had a disability. The most common disabilities among senior persons were those related to mobility (74.2%), agility (65%), hearing loss (41.8%), visual impediments (26.5%), and speech-related disabilities (8.7%). However, among Canadians aged 65, only 15% report a disability affecting the ability to work due to medical advances, accommodation and technological innovations. See \textit{Discrimination and Age}, supra note 49 at 15. On the link between age and disability in the U.K. and other Member States see Malcolm G. Sargeant, “Older Workers and the Need for Reasonable Accommodation” (2008) 9:3 International Journal of Discrimination and the Law 163 at 168-69.


\textsuperscript{177} See for example the \textit{Americans with Disabilities Act of 1990}, 42 U.S.C. § 12101; the U.K. \textit{Disability Discrimination Act} 1995; and Article 5 of the EU Directive (supra note 10) regarding reasonable accommodation for disabled persons.

\textsuperscript{178} Sargeant, supra note 175. Sargeant argues that discrimination against senior workers is often motivated by employers’ fear that their workers will become less competent or disabled. In order to achieve substantive equality, he advocates extending the duty to accommodate disabled workers to senior workers (ibid. at 167).

\textsuperscript{179} See, for example, the definition of “disability” in s. 10 of the \textit{Ontario Human Rights Code} which includes “any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, a condition of mental impairment or a developmental disability, a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, a mental disorder …”. S. 10(3) adds: “The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability”.

\textsuperscript{180} According to s. 5 of the \textit{Ontario Human Rights Code}, “every person has a right to equal treatment with respect to employment without discrimination because of … age”. S. 24 states: “The right under section 5 to
is, when a *prima facie* (direct or indirect) case of age discrimination is established by an employee, employers in all provinces have to show, among other things, that they attempted to reasonably accommodate the special needs of the employee up to a point of undue hardship.\textsuperscript{182}

There is, however, very little case law on the duty to accommodate senior workers. Consequently, its extent and scope are subject to ongoing debate. One might argue that accommodation of senior workers should be left to market ordering. As looming labour shortages present a significant obstacle for many employers and the added value of senior workers is increasingly acknowledged, employers will voluntarily opt to accommodate senior workers and make the workplace more appealing to them in order to increase competitiveness. However, despite a growing awareness of the impacts of the aging workforce and the fact that employers may benefit from accommodating senior workers, who possess valuable skills and knowledge and may alleviate labour shortages, studies have shown that employers are not doing enough to recruit and retain senior workers in the workplace. Many jobs are still rigidly designed to reflect the needs of younger workers, ageist stereotypes are widespread, and training opportunities are often limited for senior workers.\textsuperscript{183}

Furthermore, even if it is agreed that a duty to accommodate senior workers should be imposed on employers, it is not clear what it should include – whether it should require

\begin{itemize}
  \item equal treatment with respect to employment is not infringed where, … the discrimination in employment is for reasons of age … if the age … of the applicant is a reasonable and bona fide qualification because of the nature of the employment. No tribunal or court shall find that a qualification … is reasonable and bona fide unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any".\textsuperscript{181}

  \item According to s. 11 of the *Ontario Human Rights Code*, “A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where, the requirement, qualification or factor is reasonable and bona fide in the circumstances. …The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any".\textsuperscript{182}

  \item In 1999, the Supreme Court of Canada in *Meiorin* (supra note 6) ruled that the duty of reasonable accommodation is implicitly incorporated into the BFOR defence in both direct and indirect forms of discrimination. Accordingly, today the law in all provinces is that an employer cannot successfully claim a BFOR until and unless it has attempted to reasonably accommodate the employee up to the point of undue hardship regardless of which form the discrimination takes. See also *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561 and discussion in Chapter, section D.2.c.\textsuperscript{183}

  \item See e.g. Kathleen Christensen & Marcie-Pitt Catsouphes, “Accommodating Older Workers’ Needs for Flexibility in Work Options”, Ivey Business Journal (July/August 2005), online: <http://www.iveybusinessjournal.com/view_article.asp?intArticle_ID=569>; and *Older Worker Recruiting & Retention Survey* (Manpower Inc., April 2007), online: <http://files.shareholder.com/downloads/MAN/119390825x0x91562/798c81f8-96ad-40b0-89ac-0f14eb000c7b/Older_Worker_Survey_Results_FINAL_20Apr07.pdf>.\textsuperscript{184}
\end{itemize}
only minor modifications to the job performed, or also extend to job reorganization, transfer to an alternative job, creation of a new job that the worker can perform (“job bundling”), creation of flexible work options (including part-time, job-sharing and phasing into retirement on a reduced-hours basis), and retraining. How should the employer discharge its duty? The term “undue hardship” suggests a balance between the interests and rights of employers and workers. How should this balance be struck? Finally, who should bear the costs of accommodating senior workers?

In disability cases, the American approach considers costs above de minimis as creating an undue hardship on the employer. "Reasonable" accommodation under the Americans with Disabilities Act is interpreted as one in which benefits are roughly proportional to costs. This approach has been widely criticized. Cass Sustein, for example, asserts that the cost-benefit analysis used in the inquiry into which accommodations are reasonable should take into account the harms of discrimination, which include daily humiliations, exclusion and stigmatization, and their “welfare effects”. These harms, he argues, generate significant costs, while their removal creates real benefits.

The Canadian approach is broader than the American. In disability cases, employers may have to modify, bundle, or alter the duties of a position, the work procedures, hours of work, the physical workplace, or any other aspect of the job to allow the disabled worker to perform the job without causing undue hardship to the employer. The duty of accommodation may include rewriting job descriptions as “there may be different ways to perform the job while still accomplishing the employer’s legitimate work-related purpose”. If this is not possible, the employer has to search for reasonable alternatives. It has to look for comparable work rather than an inferior position. It may have to provide the disabled worker with an alternative job that the worker can perform, or a job in a modified or re-bundled form to accommodate the worker. It may also have to transfer a person, or even to create a new job. The factors that may be considered when assessing an

185 See e.g. CAW-Canada, Local 2213 v. Air Canada, [2002] C.L.A.D. No. 113 (QL).
186 See e.g. York County Hospital (1992), 26 LAC (4th) 384; Niagara Hospital (1995), 50 LAC (4th) 34. The duty to accommodate requires the employer to consider whether the disabled employee can return to work performing a selection, or “bundle” of duties, that are within the worker’s medical restrictions. See VSA Highway Maintenance Ltd. v. British Columbia Government and Service Employees’ Union, [2002] B.C.C.A.A.A. No. 321 (QL). However, where there is insufficient work to create even one bundled light duties position, the employer has proved “hardship” and may layoff the worker. See LIUNA, Local 1089 v. Jacobs Catalytic Ltd., [2006] O.L.A.A. No. 119 (QL). Also, “bundling” light duties to create a position for a disabled worker is not an appropriate accommodation where doing so would compromise the health and safety of other workers.
employer’s duty to accommodate a disabled worker to the point of undue hardship are, among other things, the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other workers.

Furthermore, the Supreme Court of Canada held that employers have to be aware of both the differences between individuals and differences that characterize groups of individuals, and develop standards that accommodate the potential contributions of all employees up to the point of undue hardship. This broad duty is not exhausted by catering for the needs of a particular employee who is a member of a protected group. As Justice McLachlin clearly stated in Meiorin, employers are under a positive duty pro-actively to build conceptions of equality into their workplace rules and practices in order to reflect all members of society.

Should the scope of the duty to accommodate senior workers be as extensive as in disability cases? In practice, some of the few cases on the duty to accommodate senior workers do not follow this path. In Large, for example, where a senior police officer claimed that he could perform other tasks, Justice Sopinka held that the Court does not interfere with the type of job or job description. Also, in Bastide, employees were asked to pass a manual dexterity test that adversely affected senior workers. Although there was a significant relationship between age and failure rates on a manual dexterity test, and the

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190 Cost must be significant to be regarded as “undue hardship”. It is often determined based on the size of the business.

191 The list is not exhaustive and the results will vary from case to case (Meiorin, supra note 6 at para. 63). See also Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] S.C.J. No. 80 (QL) (S.C.C.) at 520-21, Wilson J.

192 See Meiorin, supra note 6 at para. 68.

193 Ibid. at para. 53.

194 Ibid. at para. 67-68. It is however worth noting that the Court did not incorporate the idea of looking at the entire workplace and making it more participatory for everyone. It only examined whether the chosen proxy was good (i.e. whether the minimum physical fitness standard chosen was not discriminatory), rather than examining the government’s assertion of what it means to be a good firefighter (that is, whether aerobic qualification in itself was the right and necessary way to determine whether a worker is a qualified firefighter). The Court found that since most women have a lower aerobic capacity than most men and there is no evidence that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter safely and efficiently, this test is discriminatory and the government had not discharged its duty of accommodation to the point of undue hardship (ibid. at paras. 69-82). It might be argued that there are various ways to save the lives of people caught in a fire. Therefore, the Court should have questioned the qualification chosen by the employer as it was not needed for all positions. This criticism was expressed by Professor Denise Réaume in a University of Toronto, Faculty of Law Course “Discrimination Law: Equality in the Private Sector”.

195 It was held that there was a preponderance of evidence to support the finding that the combination of the risk of cardiovascular disease and the declined of aerobic capacity discharged the employer’s obligation with respect to the objective limb of the BFOR defence. Individualized testing was not feasible. Therefore, a mandatory retirement policy at the age of 60 included in a collective agreement of police officers was found justified (Large v. Stratford (City), [1995] 3 S.C.R. 733 at paras. 32-34).
employer had never explored options for accommodating senior employees who failed the test, the Federal Court ruled that it was unnecessary for it to do so, because the test was “reliable and relevant”, measured “the qualifications that are truly required to perform the work in question in an efficient and optimal manner” and accurately predicted success in future job training. It was also held that the individualized nature of the corporation’s manual dexterity testing regime made it unnecessary to determine whether each individual complainant could be accommodated without imposing undue hardship (due to its inability to organize staffing in due time and the cost of training). 196

Furthermore, there are several considerations to support the claim that the duty to accommodate should apply differently to age than disability. Among other differences, it is argued that there is no history of hostility towards senior workers, 197 that age-based distinctions still exist in many laws, 198 and that pension schemes to replace employment income are available. 199 Moreover, the fact that (almost) all people will be senior one day, 200 and that more and more senior workers participate in the workplace, mean that it may create undue hardship to accommodate them all. Concerned by the number of employees who wish to work beyond the age of 65 but are no longer able to perform the essential duties of their jobs, Julie Jeffries suggests that the duty to accommodate workers be narrower in age cases than disability cases. She proposes that the duty to accommodate senior workers will only apply to employees who are determined, on an individual basis, to be able to perform their jobs. Alternatively, she recommends that the duty should be limited to minor modifications to a current job, rather than transfer to another job. 201

To conclude, accommodation of senior workers is an emerging topical issue that raises several questions. First, should the duty to accommodate disabled workers apply to senior workers who have a disability or are perceived as disabled? Second, should there be a duty to accommodate senior workers regardless of any disability? If so, should it be obligatory or encouraged on a voluntary basis? If it is obligatory, what should its scope be? Does it include only minor job modifications or also transfer to another job? Does it also include a proactive obligation to build a concept of age equality into all workplace practices

196 Acknowledging that “individualized assessment does not always constitute sufficient accommodation”, the Court explained: “The assessment must also assess the persons based on a realistic standard that reflects his or her true capacities and his or her potential contribution. In other words, the test must be reliable and relevant, and measure the qualifications that are truly required to perform the work in question in an efficient and optimal manner” (Bastide v. Canada Post Corp. [2005] F.C.J. No. 1724 (QL) (October 14, 2005), online: <http://www.lancasterhouse.com/decisions/2005/dec/FCC-Bastide-v-CanadaPost.pdf>).
197 This argument will be discussed in Chapter III, section D.4.c.
198 See for example discussion in Section C above.
199 Ibid.
200 This argument will be discussed in Chapter III, section E.
201 Julie McAlpine Jeffries, The Duty to Accommodate Aging Workers in Employment (Master of Laws Thesis, University of Toronto, Faculty of Law, 2008) [unpublished].
and norms? Finally, who should bear its costs? Once again, these questions boil down to our normative conception of the right to age equality and our view on which interests of senior workers ought to be protected and how the interests of senior workers should be balanced against the interests of other workers, employers or the society as a whole. If the right of senior workers to age equality is a fundamental human right that usually trumps other considerations, then the scope of the duty to accommodate senior workers should be as extensive as in disability cases. By contrast, if this right is not as important as other rights to equality, then the duty to accommodate senior workers should be limited at the very least and its costs should be imposed on those who request accommodation.

**H. Conclusion**

This Chapter has identified several doctrinal and policy questions posed by the global demographic trend towards an aging workforce. It has shown that there is enormous controversy over several issues among scholars, judges and policy-makers (including the legality of mandatory retirement arrangements and the extent to which a cost rational should constitute a justification for age discrimination). More importantly, it has emphasized the relevance of the question “what does age discrimination in the workplace mean?” to the resolution of these controversies. It is true that these controversies revolve around broad economic and social considerations. However, this Chapter argues that at the core of each issue identified above lies a normative question regarding our conception of age equality. It thus stresses the need for a richer theoretical account of age equality that will delve into its meaning and importance and better articulate the harm that age discrimination causes. The following chapters will therefore critically examine prevailing conceptions of age discrimination and develop a new account focusing on the employment setting that will offer new directions for further engagement with the controversies delineated in this Chapter.
Chapter III:
The Unequal Right to Age Equality: Towards a New Account of Age Discrimination Against Senior Workers

A. Introduction

As we have seen in Chapter II, our decisions as to the way we should address the emerging challenges of the aging workforce are strongly influenced by our conception and assessment of the right of senior workers to age equality. More specifically, they depend on the relative weight to be assigned to the right to age equality when it is balanced against other rights and interests of other workers, employers and society as a whole. However, as the battle against age discrimination is much less advanced than the battle against race or sex discrimination, the meaning and implications of age discrimination are not sufficiently understood. At the same time, age discrimination is extremely widespread especially in the employment setting. Furthermore, age discrimination is regarded as less important and outrageous than other forms of discrimination. Consequently, other interests and considerations often trump the right to age equality.

The question that this Chapter will attempt to answer is whether the current understanding of, and attitudes towards, age discrimination are defensible or should be revisited. Section B will start with a brief introduction to ageism and age discrimination in employment. Next, Section C will show that age discrimination is considered less critical and harmful than other grounds of discrimination, and consequently is often permitted under various exceptions to anti-age discrimination legislation, mostly due to economic considerations.

Section D will then argue that, while in some contexts age discrimination might be considered less significant than other forms of discrimination and even justified, age discrimination against senior workers should be taken more seriously because it is as wrong as other forms of discrimination. In other words, the relative weight that is currently assigned to age equality – at least in the context of senior workers – is undesirable. To this end, Section D will critically examine why age discrimination against senior workers is not taken seriously, and the unique characteristics of age compared to other grounds of discrimination. It will stress the need for a new account of age discrimination against senior workers and will explain why it is unjust. Then, the current moral and economic justifications for anti-age
discrimination law will be assessed. It will be argued that the common economic justifications support only a weak protection against age discrimination, that they are often based on false assumptions. Alternative arguments to support stronger protection will be then offered.

Section E will elaborate on the prevalent moral justification for anti-age discrimination law. It will demonstrate that it is founded on false assumptions and questionable philosophical theories. Most notably, it will critique the philosophical view according to which equality should be assessed based on a “complete lives approach” according to which it is argued that, since we all age, we get the same benefits and bear the same burdens at different stages of our lives. This approach has helped to justify many age distinctions in employment (including mandatory retirement) and in other spheres. Furthermore, it has often influenced the balance struck between the right of senior workers to age equality and other social and economic considerations and interests. The difficulties in this approach and in its modified version will be then identified. Among other things, it will be shown that this approach condones a severe disparity between the young and the senior, provided that the sum of each individual’s benefits and burdens over a lifetime is equal.

Finally, Section F will expose the fatal flaw of the complete lives approach to equality. It will maintain that assessing equality requires more than a mere comparison between two individuals. More fundamentally, it involves treating each individual on the basis that he or she has equal moral worth to other individuals at any particular time. Since the complete lives approach focuses on assessing and comparing the total share of resources obtained by individuals over a lifetime, it ignores some harms done to individuals within temporal stages of life. I will therefore argue for the development of a new and separate account of age discrimination against senior workers that will strengthen its moral justification. This account will be based a new approach to equality, the \textit{Dignified Lives Approach}, which entails substantive principles stemming from Ronald Dworkin’s notion of \textit{equal concern and respect}. As these principles are significant in and of themselves and ought to be respected at all points in time for each individual, considered independently, this account yields significant implications for age discrimination analysis and in particular for age discrimination against senior workers.

\footnote{As indicated in the introduction, the term “moral” is used here in contrast with “economic” justifications. That is, I do not argue that the relevant legal principles depend on “morality” in the sense of a separate domain of principles about right and wrong that govern human behaviour.}
B. Ageism and Age Discrimination in Employment

The term “ageism” was coined in 1969 by Robert Butler, an American gerontologist. In a nutshell, Butler defined ageism as a process of systematic stereotyping and discrimination against people because they are old. Naturally, his definition and those of others have been subject to criticism and modification over the years. Therefore, for example, Bill Bytheway developed a broader definition that captures discrimination against both old and young individuals, while deliberately avoiding words such as “aged” and “old”. According to Bytheway,

Ageism is a set of beliefs originating in the biological variation between people and relating to the ageing process. It is in the actions of corporate bodies, what is said and done by their representatives, and the resulting views that are held by ordinary ageing people, that ageism is made manifest. … Ageism generates and reinforces a fear and denigration of the ageing process, and stereotyping presumptions regarding competence and the need for protection. In particular, ageism legitimates the use of chronological age to mark out classes of people who are systematically denied resources and opportunities that others enjoy, and who suffer the consequences of such denigration, ranging from well-meaning patronage to unambiguous vilification.

Focusing on people of advanced age, the Ontario Human Rights Commission emphasizes the social dimension of ageism which is defined as a socially constructed way of thinking about senior people based on stereotypes. It is also evident in the “tendency to structure society based on an assumption that everyone is young, thereby failing to respond appropriately to the real needs of older persons”.

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3 For example, Bill Bytheway criticizes Butler’s definition, among other earlier definitions, and offers a new account of ageism. He argues that ageism is not a process but rather an ideology by which dominant groups (state, employers, etc.) justify and sustain inequalities between age groups and the belief that these age groups exist and are different. Bytheway also challenges the presumption of the existence of a well-defined group of senior people thereby arguing against the use of words like older, elders, elderly, and aged. He then critically examines the rationale for creating a category of people and calling it “the elderly”. He argues that old age has only existed as a result of the urge to divide the life course up into stages. In other words, Bytheway maintains that old age is a cultural concept, “a construction that has a certain popular utility in sustaining ageism within societies that need scapegoats” (Bill Bytheway, Ageism (Buckingham: Open University Press, 1995) at 28-35, and c. 9).
4 Ibid. at 14. See also Ian Glover & Mohamed Branine, “Introduction: The Challenges of Longer and Healthier Lives” in Ian Glover & Mohamed Branine, eds., Ageism in Work and Employment (Aldershot: Ashgate, 2001) 3 at 4, who define ageism as “unconscionable prejudice and discrimination based on actual or perceived chronological age. It occurs whenever a person’s age is erroneously deemed to be unsuitable for some reason or purpose. It can be used to the detriment of people of any age”. For more attempts to define ageism and for a discussion of the main reasons for age discrimination and its social, cultural, economic and political implications see ibid. at c. 2-7.
Jack Levin and William Levin argue that ageism is at least as serious and important as racism and sexism. Ageism is a major reason for age discrimination. Erdman Palmore and Kenneth Manton quantitatively compare race, sex and age inequalities in terms of income, education, occupation, and number of weeks worked between two distinctive groups (such as aged and non-aged, Whites and non-Whites). They conclude that age inequality was the most severe problem in education and in numbers of weeks worked. A recent Israeli collection of five MA dissertations reveals that age discrimination (together with migrant discrimination) is the most evident form of discrimination in hiring decisions (compared to discrimination based on sex, origin, and marital status). Similar results have recently emerged in Spain and France, where age discrimination in employment has been found to be as serious as racial discrimination.

Age discrimination operates at three different albeit interlinked levels. At the personal level, one expresses prejudicial attitudes towards aged persons and accordingly makes negative judgments. At the cultural level, age discrimination is constructed through, for example, media, families and educational figures. Our views and opinions are influenced by our culture. Language is also an important and powerful means of influencing our

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8 This research project was conducted based on a correspondence test in which fictitious résumés were sent to different workplaces in the high-tech industry in Israel and the number of positive responses was counted. In each case, two identical (in terms of traits and backgrounds) CVs were written except for one characteristic that was the examined ground (sex, origin, migrant status, marital status and age). In the sex research, 200 CVs were sent (100 for female applicants and 100 for male applicants) and there were 49 positive responses for men and 48 for women. In the age research, 162 CVs were sent (81 for senior applicants and 81 for younger applicants); and the younger workers received 12 positive responses, while the senior workers received only 3. The relatively small total positive responses in the age research was due to the fact that the research was conducted in the high-tech industry in 2001-2002, when this industry was badly affected by the economic recession in Israel. The fact that the “younger applicant” was 30 years old and the “senior applicant” was only 42 years old, suggests that the situation might be much worse for workers above the age of 42 (see Batia Ben-Hador et al., “Discrimination Evaluation in Hiring Decision-Making Using Correspondence Test” (2005) 11 Labour, Society and Law 381) (Hebrew).
10 On ageist stereotypes and ageism, see Chapter IV, section E.1.
11 Examples of how age discrimination is constructed in our culture include the ways in which senior people and old age are portrayed in birthday cards, television programs, advertisements and movies. Senior people are usually objects of derogatory humour and ridicule. The way they are portrayed often reflects anxiety about aging (See Sue Thompson, *Age Discrimination: Theory into Practice* (Dorset, UK: Russell House Publishing, 2005) at 17; Bytheway, *supra* note 3 at 63-72, 75-77; and Howard Eglit, *Elders on Trial: Age and Ageism in the American Legal System* (Gainesville, FL: University of Florida Press, 2004) at 10-12 and the relevant notes). Mass media provides a cultural mirror that reflects society (but also helps to shape its stereotypical
perceptions.\textsuperscript{12} This process makes age discrimination seem more legitimate.\textsuperscript{13} Finally, at the structural level, we are influenced and even constrained by the way in which society is structured through, for example, the educational and the legal systems that create distinctions between age categories, imposing roles and expectations upon individuals within different categories.\textsuperscript{14}

Age discrimination is widespread especially in the area of employment.\textsuperscript{15} Although there is little empirical evidence to support the claim that productivity or job performance declines with chronological age,\textsuperscript{16} age continues to be widely used in employment decision-making.\textsuperscript{17} The problem is compounded for the significant proportion of senior workers...
comprising women, immigrants, or the disabled, because they also endure discrimination based on other grounds. Studies have shown that senior workers are the group most likely to face dismissal due to downsizing or reorganization, are denied re-training programs, and are over-represented among the unemployed, and remain unemployed for a longer period of time than younger workers.

When they do find a job, it is often non standard work, not covered by labour laws; their incomes reduce significantly, and they are less satisfied with their work. Due to their


Age discrimination is often tied to other forms of discrimination such as gender, race and disability. On the links between ageism and sexism, racism and disabilityism, see Thompson, supra note 11 at 57-74. See also Realizing Decent Work for Older Women Workers (Gender Promotion Programme, ILO, 2000); J.M. Cloyle, ed., Handbook on Women and Aging (Westport, CT: Greenwood, 1997). Ontario Human Rights Commission has identified two particular groups that appear to experience significant disadvantage because of a combination of historical and social factors: senior women and senior persons with disabilities (The Changing Face of Ontario: Discrimination and our Aging Population (Consultation Paper, Toronto: Ontario Human Rights Commission, 2000) at 2, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/AgeConsultation/pdf>).

In 2004, the unemployment rate among senior workers was lower than among workers aged 25-49 in most OECD countries and much lower than for youth. In France, the unemployment rate among seniors was 7% and among younger workers 9%. In Spain it was 7% compared with 10%. In Canada (like the OECD average), it was 5% compared with 6%. In Japan, it was 4% for both groups. In Italy it was 8% compared with 4%. In the U.S., it was 4% compared with 5%. In the U.K., it was 4% compared with 3%. By contrast, in Germany the unemployment rate among people aged 50-64 was almost 11% and among 25-49 was almost 10%. However, this does not necessarily mean that senior workers face a lower risk of job loss than younger workers. On the contrary, senior workers spend a substantially longer period of time in unemployment and encounter greater difficulties in finding a new job compared with unemployed aged 25-49 in almost all OECD countries. They are therefore more likely to withdraw from the labour market once faced with a job loss and not be registered as unemployed. They may also be induced to retire. Furthermore, they suffer substantially greater wage losses in their new jobs than younger job seekers. Note, however, that while the rate of job exit is much higher for senior workers than for workers aged 25-49 in almost all OECD countries (because of retirement), the differences between younger workers and senior workers in terms of job loss rates are very small. See Ageing and Employment Policies: Live Longer, Work Longer (Paris: OECD, 2006) at 34-39, online: <http://browse.oecdbookshop.org/oecd/pdfs/browseit/8106021E.PDF>. Another study focusing on the U.S. reveals that senior workers encounter difficulties in re-entering the job market mainly in occupations with steep wage profiles, pension benefits and computer usage. Senior workers have the lowest chances of reemployment, the longest time to re-employment, high rates of part-time employment, and the largest wage losses. Steep wage profiles are associated with fewer senior workers and lower hiring of senior workers. Pension benefits are more common in jobs with senior workers yet these jobs limit access to hiring of senior workers. The study concludes that it would be unwise to generalize from the positive experience of some senior workers who are currently employed to the situation of most senior workers (Barry T. Hirsch, David A. Macpherson & Melissa A. Hardy, “Occupational Age Structure and Access for Older Workers” (2000) 53 Indus. & Lab. Rel. Rev. 401). In Canada see Aging and Employment Policies: Canada (Paris: OECD, 2005) at 58, 60, online: <http://www.oecd.org/dataoecd/17/50/35380923.pdf> (High proportion of workers aged 55-64 lose their jobs involuntarily and stay unemployed for longer period of time), 109-11 (on the negative association between age and training).

Contingent work, including temporary, part-time work, independent contracting, involuntarily self-employment, and casual work, is very common among senior people. Many workers are therefore not regarded as “employees” and are not protected by employment law including anti-age discrimination legislation. See Eglit, supra note 17 at 702-05. For empirical evidence from Canada see Katherine Marshall & Vincent Ferrao, “Participation of Older Workers” (2007) 8:8 Perspectives on Labour and Income 5 at 8-9, online: <http://www.statcan.gc.ca/pub/75-001-x/75-001-x2007108-eng.pdf>. See also Supporting and Engaging Older
low chances of finding jobs at an advanced age, senior workers often continue working under unbearable conditions, are forced into early retirement to avoid these conditions of employment or simply stop searching for a new decent job. The number of vulnerable senior workers has increased in the post-industrial era where job security and long-term employment relationships are increasingly scarce.

C. The Unequal Right to Age Equality: The Need for a New Theory

Unfortunately, despite its increasing prevalence and importance in an era of an aging workforce, it is still not clear what age discrimination means. There are errors in the understanding of age discrimination and anachronistic perceptions still dominate. In Israel, for example, courts tend to compare workers who are subject to a mandatory retirement

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22 According to the Israeli Central Bureau of Statistics, only 13% of senior workers who lost their jobs in 2005 resigned voluntarily. The participation rate of workers aged 55-64 is dramatically lower than the rate for age 45-54. It drops again at the age of 65 and above. At the first quarter of 2004 workers aged 45 and above represented 39% of the unemployed (registered at the employment exchange), while at the third quarter of 2006 they represented 44.5%. Women and non-academic people in this age group are in the most difficult position. However, the numbers are even larger. The majority of those dismissed do not register at the employment exchange. This implies that many senior people experiencing difficulties in finding jobs have decided to give up and not look for a job anymore. Since they are not actively seeking a job, they are not represented among the unemployed. Those who find jobs are employed in poor conditions. This problem is prevalent in both private and public sectors. Finally, unemployed people aged 50 and above spent substantially greater time in unemployment than younger workers. In 2004, they were unemployed for 40 weeks on average and in 2006 the duration was 46 weeks on average compared to 35 weeks for younger workers. See Avi Shauli, “Looking for a Job at the Age of 50? Mission Impossible” Ynet (May 4, 2007), online: <http://www.ynet.co.il/articles/0,7340,L-3386801,00.html> (Hebrew); Ruth Sinai, “Forty-Five Year-Old with Experience and Education? No Job for You” Ha’aretz Website (November 22, 2006), online: <http://www.haaretz.co.il/hasite/spages/790178.html> (Hebrew); and Sharon Rabin-Margalioth, “Distinction, Discrimination and Age: A Power Game in the Labor Market” (2002) 32 Mishpatim 131 at 137-38 (Hebrew).

23 On the decrease in job stability see Chapter I, note 7. On the decline in prevalence of long term employment contracts see Chapter II, note 69. More on the relationship between industrial changes (including the erosion of mass production, intensification of competition, technological advances, increased emphasis on flexibility and leaner organizations) and age discrimination see Wood et al., supra note 15 at 428-29 and the political economy literature they cited.

24 See Sandra Fredman & Sarah Spencer, “Introduction” in Fredman & Spencer, supra note 15, 1 at 2. The reason could be that democratic societies have been used to combating different forms of discrimination for more than five decades (starting with sex and race discrimination, followed by religion, marital status, disability, and sex orientation). While laws against these grounds of discrimination have been enacted since the 1960s, laws against age discrimination, if they exist, are much newer. In Australia, for example, laws prohibiting discrimination based on race and sex were enacted in 1975 and 1984 respectively. Yet, a federal prohibition on age discrimination was only enacted in 2004 (see Patterson, supra note 15 at 1). In the UK, legislation prohibiting age discrimination in employment was introduced in 2006 (see Chapter I, section D.2.e). In the last thirty years many laws have been enacted with regard to senior citizens. See for example the American legislative development described in Eglit, supra note 11 at 2 and the relevant notes.
police officers who have served for more than ten years must retire at the age of 55. Several employees filed a
Dar Altafel Alarabi Institution
permission to appeal, see B.R.A. 394/06
younger
setting an earlier age of retirement for all jailors and police officers. The Court reached this conclusion by first
discrimination. This error has led to many more. In one case, the policy in the institutions was that jailors and
Court ruled that the policy was discriminatory based on age and that there was no reasonable justification for
hardship on them as it did not allow them to accumulate enough pension benefits for their retirement. The
are not discriminated against
applies the general principle of equality and not age equality. When workers in different occupations retire at
different ages without any justification, it constitutes discrimination, but not age discrimination. The workers
are not discriminated against because of their age. The different age of retirement is not the ground for
discrimination. This error has led to many more. In one case, the policy in the institutions was that jailors and
police officers who have served for more than ten years must retire at the age of 55. Several employees filed a
petition to the High Court of Justice claiming that this policy was discriminatory and that it imposed undue
hardship on them as it did not allow them to accumulate enough pension benefits for their retirement. The
Court ruled that the policy was discriminatory based on age and that there was no reasonable justification for
setting an earlier age of retirement for all jailors and police officers. The Court reached this conclusion by first
identifying the “equality group”, the group of employees that one ought not to distinguish. The Court held that
the relevant equality group in this case was the entire workforce of the civil service as the employer is the State.
The new Retirement Age Law of 2004 mandates retirement at the age of 67 while the policy for jailors and
police officers is 55. See H.C.J. 10076/02 Rosenbaum v. Agent of Service of the Jails (not yet published; 12.12.2006), especially paras. 12-13 (Hebrew). In another case where the employer laid down a policy of
retirement at the age of 60 for all his employees, the Regional Labour Court in Jerusalem held that since there
were no special job requirements in the workplace, there was no justification for early age of retirement. The
court stated that the relevant comparator group was not the younger co-workers but rather the entire workforce
to which the Equal Opportunities in Employment Law applies. See B.Sh.A. (Jerusalem) 17306/04 Hanah v. Dar Altafel Alarabi Institution (not yet published; 1.5.2006), especially para. 15, online:

In H.C.J. 6051/95 Rakent (supra note 25), Justice Mishael Cheshin expressed the opinion that mandatory
retirement is simply not discrimination because it imposes the same rule on all workers at the same age: “Let
us suppose, for example, that a certain employer decides that her workers – all of them – are to retire at the age
of 55 – ten years before the acceptable age in the labour market. It is possible that this employer does not act
appropriately. It is possible that we should force her to act differently. … However, it could not be argued that
she discriminates between her employees based on their age. One cannot find her act as wrongful age
discrimination” (ibid. at 335) [translated by author]. Another example can be found in A.B. 912492/99 Ma’or –
The Open University (not published; 27.6.2000) (Hebrew). Ora Ma’or worked for more than twenty years at the
Open University and was fired at the age of 65 solely on the basis of her age. Her retirement was not governed
by any collective agreement. She was not entitled to any pension benefits. The Regional Labour Court denied
her claim that she was discriminated against based on her age. The Court ruled that according to the terms of
her employment contract, the parties were allowed to terminate it at any time by provision of notice. The Court
did not accept Ma’or’s argument that she was discriminated against based on her age as most workers in the
Open University retired at the age of 65. It compared Ma’or to other workers at her age and not to other
workers in general. The Court also stated that mandatory retirement at the age of 65 is not a form of
humiliation, deprivation, injustice or unfairness. It is not classic discrimination. It is not as severe and
outrageous as religious and race discrimination (ibid. at paras. 6, 9).
as justified because, for example, productivity declines with age and senior workers should make room for young workers. These assertions are based – even if not explicitly – on a philosophical approach to equality that was named the complete lives approach. According to this approach, a policy that distinguishes between the young and the senior is not unlawful discrimination as the young will be subject to the same policy when they age. The complete lives approach, which strongly influences age discrimination discourse, will be critically examined later in this Chapter. Another common misunderstanding is that age discrimination is inspired by stereotypes rather than prejudice or animus. However, as will be further explained in Chapter IV, alongside ageist stereotypes, ageism – which is a form of prejudice – is a major cause of age discrimination.

Moreover, although age is one of several enumerated grounds in many constitutions and anti-discrimination laws and codes, age discrimination is the most neglected form of discrimination in equality research and literature as well as in the eyes of the general public. It is widely accepted as the norm because it often goes unnoticed or is considered unproblematic, even by those who are discriminated against. It is often considered to be permissible because it may have social utility, such as creating more job opportunities for young people. These assertions are based – even if not explicitly – on a philosophical approach to equality that was named the complete lives approach. According to this approach, a policy that distinguishes between the young and the senior is not unlawful discrimination as the young will be subject to the same policy when they age. The complete lives approach, which strongly influences age discrimination discourse, will be critically examined later in this Chapter.

See Section E below.

32 See e.g. s. 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]; the American Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1967) [ADEA]; Finland’s Constitution, s. 6; the Israeli Equal Opportunities in Employment Law, s. 2; the 1998 Employment Equality Act (Ireland); the 1993 Human Rights Act (New Zealand).

In a society that worships youth, jokes and derisive comments about senior people are still fair game. Comments such as “she is too old for this job” or “he is too old to take risks in life” are very common. They are not regarded as unacceptable, in the manner of equivalent comments on women, the disabled or blacks. See e.g. Gaile McGregor, (Old) Age and the Law in Canada: Taking Stock (Terraconnaissance Inc. & MLEC, 1999) at 3-4; Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario (Toronto: Human Rights Commission, 2000) at 3, 7, 39, online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/DissAgeDiscrim2>.

34 See Thompson, supra note 11 at 1-2; Fredman & Spencer, supra note 24 at 1.
young workers. Many employers believe that age is a relevant consideration in employment decision-making. They proudly present their young team of workers who are claimed to bring “fresh” and “young” blood to their companies.

Consequently, there are generally more exemptions and exceptions in age discrimination laws than in laws against discrimination on any other ground. Economic and utilitarian considerations are accepted more readily in many countries, including the U.S., Canada and in Israel, and courts interpret exceptions to age discrimination legislation more broadly. In the U.S., constitutional judicial review of age discrimination is on a lower standard than other grounds of discrimination, as age discrimination is not considered to be


36 Many employers use these terms to explain why they wish to hire new young workers and why they pursue mandatory retirement policies. Friedman terms this behaviour the “vampire theory” (supra note 15 at 191).

37 For example, there are two defenses in the ADEA that have no Title VII equivalent: on the “good cause” defense and the “reasonable factors other than age” defense see §§ 623(f)(3) and 623(f)(1) of the ADEA and Chapter I, section D.2.b. Additionally, it was until recently uncertain whether the theory of disparate impact applies in claims under this Act. And even when the U.S. Supreme Court held that it is, it has left employers with a much broader defence than in cases of discrimination under Title VII of the Civil Rights Act, 42 U.S.C. 2000e et seq. (1964) (see Smith v. City of Jackson, 544 U.S. 228 (2005) and Chapter I, section D.2.b.).

38 See for example Reaves who writes about the “unbearable lightness” of accepting economic considerations in cases of age discrimination (supra note 30 at 843-44). Reaves argues that although neither Title VII nor the ADEA explicitly refer to cost justifications as an appropriate rationale supporting a defence to intentional discrimination, cost rationales have been formally rejected in race and sex cases yet have been increasingly accepted in age cases (ibid. at 870-71, 882-84). Similarly, Issacharoff & Harris note that cost-based discrimination serves as a defence to an age-based classification “in circumstances in which comparable defences would be unavailing were the challenged classifications to be triggered by race or sex”. For example, a legitimate business reason or economic purpose could justify a differentiation in benefits based on age (supra note 30 at 799).

39 See e.g. C.T. (Terry) Gillin & Thomas R. Klassen, “The Shifting Judicial Foundation of Legalized Age Discrimination” in C.T. (Terry) Gillin, David MacGregor & Thomas R. Klassen, eds., Time’s up!: Mandatory Retirement in Canada (Toronto: James Lorimer, 2005) 45, who argue that in McKinney (supra note 35) the Supreme Court of Canada rationalized discrimination with a socio-economic argument and that since then, socio-economic considerations, which were once denied, were widely acceptable.

40 In Israel, an employment contract of a university professor which did not provide for a pension plan of any kind yet forced the professor to retire at the age of 65 was upheld by the Regional Labour Court, on the ground that 65 is a legally and socially acceptable age of retirement for socio-economic reasons (see Ma’or, supra note 27).

41 Although the language of the ADEA and the Title VII is mostly similar (e.g. they both explicitly recognize a statutory bona fide occupational qualification defense (BFOQ)), courts tend to accept a broader range of defences to age discrimination than to race or sex discrimination. The BFOQ does not apply at all in race discrimination, and other defences are interpreted narrowly (Reaves, supra note 30 at 867-71). In addition, the common law defences of “legitimate non-discriminatory reason” and “business necessity” are recognized and applied in all cases, but the scope of the defences in age cases is more expansive (ibid. at 880-81). For more on the ways in which American courts and Congress treat age differently than race, see Andrea B. Short, “Recent Development: Discriminating Among Discrimination: The Appropriateness of Treating Reverse Age Discrimination Differently from Reverse Race Discrimination” (2005) 83 N.C.L. Rev. 1065; and Eglit, supra note 11 at 15-18.

42 There are three different standards of judicial review used by American courts when a law or government action is alleged to violate constitutional right. Allegations of race discrimination are determined on a standard of strict scrutiny (i.e., the government interest in pursuing this law or action must be compelling and the means must be necessarily related while there is no realistic, feasible alternative to achieve the government interest), and the standard in sex discrimination cases is intermediate scrutiny (i.e. the end has to be important and the
a suspect classification under constitutional law.\textsuperscript{43} Even laws that abolish mandatory retirement often contain exceptions allowing for continuing discrimination against senior workers.\textsuperscript{44} Finally, anti-age discrimination legislation is sometimes under-enforced, and penalties are not severe enough.\textsuperscript{45}

To conclude, age discrimination is often overlooked and underestimated. The attitudes and perceptions held by both the public and the legal profession intensify ageism and consequently age discrimination. Age discrimination is not considered to be serious and, as a result, many people take part in it intentionally or unintentionally. As age discrimination is also not treated seriously in legal literature and legal institutions, and by professors and practitioners, legislatures and judges, it is not successfully reduced. These legal and social attitudes are beginning to change albeit mostly due to demographic changes and their economic implications, while the social implications have been neglected.\textsuperscript{46} Given the prevalence of the phenomenon of age discrimination, there is a crucial need to critically examine the underpinning economic and moral justifications for anti-age discrimination law in order to determine whether the relative weight and importance currently accorded to the right to age equality is satisfactory.

**D. The Limitations of the Current Understanding of Age Discrimination**

**1. Introduction**

As we have seen, age discrimination is regarded as a lesser wrong than other forms of discrimination. Consequently, there are limitations to current legislation and policy with regard to the treatment of senior workers. Here, I will argue that these limitations have arisen as a result of some difficulties in the contemporary theoretical foundations of anti-age discrimination law, and misunderstandings underpinning the legal doctrine of age discrimination. Revisiting the legal account of age discrimination and its moral and economic foundations is therefore essential in order to offer new directions for future litigation and policy. I will first maintain that while age distinctions might be justified in various situations because of the unique characteristics of age as a ground of discrimination,
when senior workers are concerned, age distinctions should be taken as seriously as other forms of discrimination such as race and sex discrimination. I will therefore propose to develop a distinct legal account that will focus on age discrimination against senior workers, apart from other types of age discrimination. I will then point out the lack of robust economic and moral grounds of justification for the elimination of age discrimination against senior workers, and will suggest different ways to strengthen the justification.

2. Age Discrimination in General vs. Age Discrimination against Senior Workers

While some distinctions on the basis of age are indeed necessary and justified, such as in the matters of voting rights, driving license or sale of alcohol, 47 many others, especially with regard to seniors in the employment setting, constitute unlawful age discrimination. The problem is that the former group of cases tends to influence one’s judgment regarding the latter group of cases. This is part of the reason why age discrimination is perceived as less outrageous and critical than other forms of discrimination.

For example, in Gosselin, a case about age discrimination against younger people, 48 Chief Justice Beverley McLachlin of the Supreme Court of Canada implies that age discrimination is less critical than other forms of discrimination:

Many of the enumerated grounds correspond to historically disadvantaged groups. For example, it is clear that members of particular racial or religious groups should not be excluded from receiving public benefits on account of their race or religion. However, unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other enumerated or analogous grounds might. 49

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47 In these cases, mental maturity or capacity is required and it is very difficult to assess on an individual basis. For an elaborate discussion on children and youth, see Jonathan Herring, “Children’s Rights for Grown-Ups” in Fredman & Spencer, supra note 15, 145 at 159-61.
48 In 1984, the Quebec government created a new social scheme which, among other things, provides persons under the age of 30 with financial assistance at roughly one third of the amount payable to those 30 and over. The appellant, a welfare recipient, brought a class action challenging this scheme on behalf of all welfare recipients under 30. She argued that the scheme violated ss. 7 and 15(1) of the Charter and s. 45 of the Quebec Charter of Human Rights and Freedoms. The Supreme Court of Canada held that the appeal should be dismissed as the scheme did not infringe any of these sections. Chief Justice McLachlin, who delivered the majority decision, held that the appellant failed to prove the third limb of the test in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, as she did not demonstrate that the government treated her as less worthy than senior welfare recipients. Among other things, it was held that this was not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatization on the basis of their age.
Although Chief Justice McLachlin stresses that age is not a “lesser” ground of discrimination, and is aware of the differences between the young and the senior, she concludes that age distinctions do not evoke suspicion as race and gender discrimination cases do.

While it is indeed difficult to generally speak about age discrimination in terms of historical disadvantage, marginalization and arbitrariness, age discrimination against senior workers is different and therefore requires a distinct account. As Chief Justice Aharon Barak of the Israeli Supreme Court stated in response to the claim that age discrimination is not as harmful as discrimination based on race or religion, “Possibly, yet it is still very, very outrageous, when age discrimination against a senior worker is concerned … Discrimination against a person because of her advanced age – as opposed to other types of age discrimination – constitutes a severe harm to her dignity”.

Empirically and historically senior people have been identified as a distinct, disadvantaged group of people who have constantly and suffered from severe discrimination especially in the workplace, which plays a central role in everyone’s lives, while younger people have not tended to be identified as a distinct group. When decision making regarding children or youth is associated with age-based distinctions, the use of age as a proxy for capacity is usually reasonable and inevitable. Even when children and youth are exploited at work, it is usually not due to ageism or age discrimination. It is rather often associated with unfair labour practices and child labour. When young workers are concerned, there may be cases of age discrimination, but they are more sporadic and do not present a major concern as in the case of senior workers. While it is hard to speak about young workers in terms of a vulnerable group, their rights and interests should be protected as well and cases of unlawful age discrimination against young workers should be eradicated. However, the concerns for inequality among younger workers and the difficulties they may face are very different from the concerns and difficulties of senior workers. They require different protection based on different set of reasons and interests. Thus, there is a need for a clear theoretical distinction

50 McLachlin CJ notes that, unlike “people of advanced age who are presumed to lack abilities that they may in fact possess”, young people “do not have a similar history of being undervalued” (ibid. at para. 32).
51 Ibid. ibid.
52 H.C.J. 4191/97 Rakent, supra note 25 at para. 45 [translated by author].
53 See text accompanying supra note 15 and infra notes 60-66 and 142-146.
54 “Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being” [Reference Re Public Service Employee Relations Act (Alta.), 1987] S.C.R., 313 at 368, Dickson J]. See also Vicki Schultz, “Life’s Work” 100 (2000) Colum. L. Rev. 1881 at 1886-92 (paid work as a crucial component of our notion of citizenship, community and personal identity) and discussion in Chapter IV, section E.4.
55 See supra note 50.
56 See supra note 47.
between the two groups. Here I will focus on workers of advanced age. At the same time, the interests of the younger generations will not be ignored.

I therefore propose to develop a new legal account that will focus on age discrimination against senior workers as a distinct form of age discrimination. It will include any worker who was discriminated against based on his or her advanced age.\(^{57}\) As will be further argued, age discrimination against senior workers should be taken as seriously as sex and race discrimination because it is a comparable wrong. Although the prohibition on age discrimination should cover people of all ages in various spheres including employment, housing, education and health care,\(^{58}\) I will focus here on age discrimination against senior workers. It may be that my analysis will be also applicable to younger workers in some circumstances and to senior people in other spheres, especially since work is one of our central life activities and influences social status, and other rights and obligations in other fields. It might even be a desirable goal.\(^{59}\) Yet, my methodological preference is to start with the most pressing and visible problem facing senior workers, in order to present the strongest case that will convince the reader that age equality – at least in some contexts – is a fundamental human right.

### 3. The Distinctiveness of Age

Age discrimination is a unique ground of discrimination. Often, the distinctiveness of age discrimination is invoked to undermine age equality, and to allow counter-considerations to prevail. In this Section, I will critically examine different claims that emphasize dissimilarities between age and other grounds of discrimination, and different assumptions about the lesser importance of age discrimination. My main argument will be that the unique features of age discrimination might suggest that a new, distinct theory of age discrimination should be developed; however, they do not imply that age discrimination – at least not where senior workers are concerned – is less critical or significant than other forms of discrimination. In other words, one should distinguish between treating age discrimination differently and treating age discrimination unequally.

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\(^{57}\) See Introduction, note 10.

\(^{58}\) See Introduction, note 11.

\(^{59}\) Sandra Fredman, for example, argues that anti-age discrimination law should not focus solely on the employment setting. She favours a holistic approach that covers all public functions and the provision of goods and services. She maintains that the age discrimination in different spheres interacts and reinforces one another, and thus focusing on employment would be ineffective (Sandra Fredman, “The Age of Equality” in Fredman & Spencer, supra note 15, 21 at 53-54).
First, it has been widely argued that senior people do not constitute a disadvantaged or stigmatized “minority group” but rather a privileged group. Although senior people are not a typical minority group, they do share central characteristics of minority groups. They have identifying characteristics (such as grey hair) and share social and institutional expectations (such as retirement), yet they do not possess these criteria throughout their entire life (like blacks and women do). Furthermore, senior people are often subject to negative stereotypes and face discrimination in many spheres including employment, health, and housing. While some senior people may be privileged and possess political power, many others are economically deprived. It is true that most seniors do not share a group identity or enjoy political unity. Many are ashamed of their age and resist identification as old. Yet, this is also true of other minority groups. For instance, disabled persons would not necessarily identify themselves as disabled nor wish to be designated as belonging to the disabled group. As Gaile McGregor concludes, there is no such thing as a “typical old person”. Yet, senior people do constitute a disadvantaged minority group at least in the employment context.

Second, unlike certain human characteristics, such as colour of skin, race or sex, age, as a temporal concept, is indeed different: every day one’s age changes; one is growing older; one was once younger than one is now. Senior people are a group to which all of us, at least potentially, will belong, while race, colour of skin, and sex are immutable. There are,

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60 In the area of gerontology, there is a debate on this matter. Gordon Streib opposes considering seniors as a minority group, while others such as Milton Barron and Jack and William Levin argue that seniors share the main characteristics of minority groups and therefore do constitute a minority group or quasi-minority group (see Erdman B. Palmore, *Ageism: Negative and Positive*, 2nd ed. (New York: Springer, 1999) at 8; and Levin & Levin, *supra* note 6 at c. 3). The question has important legal implications. In the U.S., for example, the Supreme Court has identified a number of situations in which the Court would be justified in imposing limits on legislative power. One of them is where legislation has been motivated by prejudice against “discrete and insular minorities” (see *U.S. v. Carolene Prods. Co.*, 304 U.S. 144 at 152-53, n. 4 (1938)). Age groups are not considered to be “discrete and insular minorities” (see *Massachusetts Board of Retirement, supra* note 42).

61 See *supra* note 60 at 8-9. On age denial see infra note 86.

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77 See *supra* note 60 at 8-9. On age denial see infra note 86.
However, other grounds of discrimination, such as religion, that are changeable.\textsuperscript{68} Most importantly, although age is constantly changing, it is also immutable because it is unchangeable at a certain point in time. At a given moment, one is young or senior and is incapable of changing one’s age. One has no control over this characteristic, just as one has no control over race or sex.\textsuperscript{69}

Third, it is argued that age discrimination is often a more moderate form of discrimination than xenophobia or religious persecution, in terms of the emotions evoked, and the outrageousness of actions.\textsuperscript{70} Although I do not agree that age discrimination is only based on stereotypes rather than prejudice and animus,\textsuperscript{71} it may often be less malicious and hostile than other types of discrimination. Nevertheless, moderate or not, as will be further argued in Chapter IV, many cases of age discrimination are wrong and should be eradicated. As Eglit argues, while in some contexts age distinctions are reasonable and harmless, in others they are pernicious.\textsuperscript{72}

Fourth, according to Cliff Oswick and Patrice Rosenthal, since age discrimination is both “pervasive and dynamic”\textsuperscript{73} everyone is vulnerable to ageism at different life stages. Consequently, there is no clear distinction between discriminators and those who are discriminated against. Discrimination literature emphasizes the different role of the discriminator and the discriminatee (e.g. blacks versus whites and men versus women). Yet, age discrimination requires a different perspective, as it is not always the case that younger generations are the discriminators and senior people are the disadvantaged.\textsuperscript{74} The discriminators could, in other circumstances, be the discriminatees. Both senior and younger employers may discriminate against both senior and younger workers.\textsuperscript{75} Hence, Oswick and Rosenthal conclude that most discrimination theories do not fit age discrimination. They do not suggest that age discrimination is less important but rather offer an alternative theory that will be more compatible with its unique features.\textsuperscript{76}

\textsuperscript{68} Therefore, this requirement is sometimes recast as “constructive immutability”, a personal characteristic that is difficult to change or that one should not be required to change (see Dale Gibson, “Analogous Grounds of Discrimination under the Canadian Charter: Too Much Ado about Next to Nothing?” (1991) 29 Alta. L. Rev. 772 at 786).

\textsuperscript{69} See \textit{e.g.} McKinney, supra note 35 at para. 227, Bastarache J.; John Chandler, “Mandatory Retirement and Justice” (1996) 22 Social Theory and Practice 35 at 36-37.

\textsuperscript{70} Eglit, \textit{supra} note 11 at 23-24.

\textsuperscript{71} See Chapter IV, section E.1(d).

\textsuperscript{72} Eglit, \textit{supra} note 11 at 18-20.

\textsuperscript{73} Cliff Oswick & Patrice Rosenthal, “Towards a Relevant Theory of Age Discrimination in Employment” in Noon & Ogbonna, \textit{supra} note 17, note 17, 156 at 156.

\textsuperscript{74} \textit{Ibid.} at 157.

\textsuperscript{75} \textit{Ibid.} at 158, 165.

\textsuperscript{76} \textit{Ibid.} at 160-61, 166-67. They argue that Heilman’s “lack of fit” model provides a better basis for developing a theory of ageism (\textit{ibid.} at 167-69). According to this model, widespread gender stereotypes generates a perception that there is a lack of fit between the skills and abilities of women and the job requirements of certain jobs. As a consequence, women act out of sex bias (in their career choices for example) and experience
Finally, it has been argued that since (almost) all of us will become old and therefore are potential members of the group affected by age discrimination, it is impossible to discriminate against ourselves or, at least, we are less likely to discriminate against ourselves, or our future selves.\textsuperscript{77} For example, many employers and policy-makers are senior themselves and therefore are less likely to make ageist decisions regarding their own group.\textsuperscript{78} In the case of mandatory retirement, it is actually discrimination against ourselves, or our “future selves” as opposed to “discriminating against well defined other groups, whose oppression we may benefit from”.\textsuperscript{79} Age discrimination therefore seems less offensive and even more permissible than other forms of discrimination. As Justice John Sopinka of the Supreme Court of Canada stated in McKinney:

Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, … “the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws … that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older”.\textsuperscript{80}

However, the fact that we all age does not legitimize discriminatory behaviour against our own kind. The identity of the discriminator does not and should not play any role in determining the existence of discriminatory behaviour. If a woman discriminates against another woman, it is just as wrong as when a man discriminates against a woman. Thus, there is no excuse for considering cases of discrimination against senior people differently just because we are all going to be older one day. As John Munro argues, “If one were to choose to alter one’s sex (as some certainly do, by physical operations) or to change one’s religion … would any court seriously consider this to be a valid argument to permit sexual (gender) or religious discrimination?”\textsuperscript{81}

\textsuperscript{77} As argued by Chief Justice McLachlin, the fact that “‘[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages’ … operates against the arbitrary marginalization of people in a particular age group” (Gosselin, supra note 49 at para. 32).

\textsuperscript{78} Posner, for example, maintains that there is no “we-they” thinking in the treatment of senior workers. This is not because young people will be old one day (as Posner is aware of the multi-selves argument), but rather because most employers and managers, who make the hiring and firing decisions, are senior people themselves; and therefore they are unlikely to hold misconceptions about senior workers (Richard A. Posner, Aging and Old Age (Chicago: University of Chicago Press, 1995) at 320-21).

\textsuperscript{79} Morley Gunderson & Douglas Hyatt, “Mandatory Retirement: Not as Simple as It Seems” in Gillin et al., supra note 39, 139 at 146.

\textsuperscript{80} McKinney, supra note 35 at 297, Sopinka J.

\textsuperscript{81} John Munro, “The Debate about Mandatory Retirement in Ontario Universities: Positive and Personal Choices about Retirement at 65” in Gillin et al., supra note 39, 190 at 209.
Furthermore, the fact that we all age does not necessarily negate feelings of hostility and intolerance towards senior people, nor does it guarantee that as senior people, now or in the future, we will treat “our own kind” with respect and concern. Privileged seniors do not necessarily treat other seniors fairly. According to Oswick and Rosenthal’s empirical study conducted in Australia, senior workers are frequently discriminated against by managers of similar ages. Their study also reveals that a large majority of managers and personnel officers consider age discrimination to be legitimate at least some of the time even though most of those interviewed were at advanced age. As an anecdote, we may mention McKinney, where a majority of the Supreme Court of Canada held that 65 is an acceptable age for forced retirement based inter alia on the assumption that on average, capability declines with age although three of the majority Justices were over 65, and the age of retirement for judges is 75. This reality is not only ironic, but it also poses a problem for disadvantaged senior people. The fact that age discrimination affects most people at some point in their lives gives it “an air of legitimacy”. Instead of operating as a factor against the arbitrary marginalization of people in a particular age group, or feelings of hostility or intolerance towards senior people, the fact that we all age and will potentially experience age discrimination plays a major role in exacerbating discrimination.

Although we will become old one day, most people do not conceive of themselves as old or potentially old (“age denial”). We all want to stay young and tend to value the life of a younger individual more than the life of a senior person. Most people would not like to be referred to as “old” and do not consider themselves “old” even at an advanced age. They mentally separate themselves from “elderly people” even if they are in fact “old”. Hence,

82 Supra note 73.
83 Supra note 35 at 654.
84 See Jonathan R. Kesselman, “Challenges the Economic Assumptions of Mandatory Retirement” in Gillin et al., supra note 39, 161 at 173; and McGregor, supra note 33 at 15. Similarly, Gillin notes that Justice Peter Cory who wrote the Dickason decision (Dickason v. University of Alberta, [1992] 2 S.C.R. 1103) upholding a mandatory retirement policy was at the time aged sixty-eight and twelve years later became the Chancellor of York University (C.T. (Terry) Gillin, “Introduction: The Context of Mandatory Retirement” in Gillin et al., supra note 39, 11 at 31). In Israel, Ariel Sharon was the prime minister of Israel until the age of 77, and Shimon Peres served as a Minister and Member of Parliament, before he was elected as the President of the State at the age of 84. At the same time, allowances for senior and disabled persons decreased considerably.
85 See Oswick & Rosenthal, supra note 73 at 165.
86 Age denial is similar to the minority group reaction to racism known as “passing”. Many senior citizens refuse to identify themselves as old because of negative stereotypes and discrimination that senior people often face (see Erdman B. Palmore, “Age Denial” in Palmore et al., supra note 62 at 9-10).
87 The “Anti-Aging” industry (including plastic surgeries and Botox), TV commercials and TV shows (including reality shows such as the Swan by Fox) are good examples of the longing of modern society for youth. See also Eglit, supra note 11 at 33-34 and the relevant notes.
88 See Betty Friedan, The Fountain of Age (New York: Simon & Schuster, 1993) at 31. For more on the denial of age and viewing age as a problem see ibid. at c. 1.
since people do not want to “grow old” and do not see themselves as “old”, age is no different to gender, race or disability. As some of us are women, disabled or black and some of us are not and will never be – some of us are old and some of us are not and will, mentally, never be. Hence, the fact that we are all going to be older does not guarantee that we will think about the later stages of our lives and that our present decision-making and judgment will be fair towards senior people (the future us).

Not only do many people resist being “older” and seeing themselves as “older”, many of them fear aging and treat it as a “disease”. These feelings are no different to those expressed towards women, blacks or disabled people. Many people fear getting old or experience death anxiety. This dread causes some to be disrespectful or indifferent towards senior people. The dread is similar to feelings of fear and hatred of strangers (xenophobia). It is perhaps not “pure” hatred but it clearly involves reluctance, fear, estrangement and even hostility towards advanced age and senior people. Hence, the fact that we all age does not mean that we are less likely to discriminate against senior people. On the contrary, as Justice Claire L’Heureux-Dubé wrote in her dissenting opinion in Dickason: “Because, in our society, old age tends to be less associated with wisdom and tranquility and more with infirmity and dependence, we fear it. We may be more likely to discriminate against elderly people, in a futile attempt to distance ourselves from what will inevitably occur to each one of us.”

These deep psychological reactions are usually unintentional. But they clearly result in repression of senior people and denial of their rights.

To sum up, although age discrimination may have some unique features, these do not support the conclusion that it is less serious than other forms of discrimination, at least not...
when senior workers are concerned. It may, however, require the development of a new, distinct theory of age discrimination. To this end, I will examine the theoretical foundations of the contemporary doctrine of age discrimination and offer several ways to strengthen them.

4. Theoretical Grounds of Justification for the Elimination of Age Discrimination against Senior Workers

(a) Introduction

Relying on entrenched theories of rights and extensive economic literature, sex and race discrimination are widely considered immoral and inefficient.\(^94\) That is, sex and race equality are viewed as morally fundamental and often economically efficient, and thus deserving of robust legal protection. By contrast, the contemporary theoretical foundations of anti-age discrimination law are weak. Age discrimination is seldom considered immoral.\(^95\) Furthermore, the economic grounds of justification for anti-age discrimination laws are fragile and incomplete. There is only one strong theory in the economic literature to justify anti-age discrimination legislation, while other theories, such as “taste for discrimination” and statistical discrimination, are often rejected as irrelevant to age discrimination. In developing a new account of age discrimination against senior workers my major aim is therefore to strengthen the moral and economic foundations of anti-age discrimination law.

(b) Economic Justification

According to mainstream economic literature, anti-age discrimination laws (like any other anti-discrimination laws) are justified only when the gain from eliminating discrimination outweighs the costs of legal intervention. As a rational actor, the employer’s main consideration is the productivity of individual employees. In a competitive market, age discrimination would not be a problem as it works against the maximization of profits, and would therefore be dissipated by market ordering.\(^96\)


\(^95\) See Reaves, supra note 30 at 852-53.

\(^96\) For example, in British Columbia, prior to the 2007 legislation to end mandatory retirement, trade unions and universities had agreed on the abolition of mandatory retirement to fight a brain drain to the U.S. (where mandatory retirement was abolished years ago). The University of Northern British Columbia was on of the
Accordingly, Richard Epstein argues that age discrimination laws should be repealed, as the “firm that passes over superior older workers in favour of inferior younger ones will find itself at a cost disadvantage that it cannot recoup in the market”. He believes that decentralized markets provide substantial protection against discrimination. There may be some firms that for internal reasons do not prefer senior workers but he finds it important to distinguish between the position of a single firm and the overall structure of the industry.

However, there are cases where discrimination may persist even in competitive markets, for instance, as argued by Gary Becker, when employers, co-workers or customers have a “taste for discrimination”. That is, they prefer not to engage with members of certain protected groups. The cost of employing members of those groups therefore increases and their wages decrease. The persistence of discrimination in competitive markets constitutes an economic justification for anti-discrimination laws. Therefore, there might be an economic case for anti-age discrimination laws. Indeed, age discrimination in the workplace is far from sporadic. It is severe and widespread, negatively affecting the lives of millions. The harms done to senior workers might be argued to be the byproducts of market ordering. These harms suggest the existence of market imperfections and underline the necessity to legislate in the field of age discrimination in employment. They will be further illuminated as part of the moral justification for the elimination of age discrimination.

However, theories such as “taste for discrimination” are rarely used in the economic literature to justify anti-age discrimination. The economic literature provides only one strong justification for anti-age discrimination legislation, that is, in the case of a life-cycle contract of employment on a deferred compensation model. This model is argued to be economically efficient because, among other things, it provides incentive for workers to commit to a long term relationship and allows employers to invest in firm-specific training.
However, the employer might be tempted to dismiss senior workers because their labour costs are high relative to their marginal productivity. Laws prohibiting age discrimination prevent these opportunistic dismissals. They therefore serve as “pre-commitment devices” for life-cycle contracts. They ensure that senior workers are not dismissed because of their higher costs and that commitments are kept.\textsuperscript{105} Since this model is economically efficient, it justifies anti-age discrimination laws.

The life-cycle justification suffers from two main difficulties, yet in my opinion is still well-founded. First, as Epstein argues, if firms behave opportunistically they will harm their reputation. Furthermore, there are other tools to guarantee non-opportunistic behaviour, such as pension rights and severance payment.\textsuperscript{106} According to Epstein, legal intervention has a costly price: “Once workers know that they cannot be fired, demoted, or fined in the ordinary course of business, they have a form of legal protection that allows them to let their production fall further than might otherwise be the case”.\textsuperscript{107} Nevertheless, reputation alone is not a sufficient constraint against opportunistic behavior. Empirically it is questionable whether reputation constitutes an adequate inspection mechanism for preserving standards that are not clearly defined in a contract. Information about dismissal of senior workers is often not available to new workers and applicants. There are also cases where reputation is not an important interest of the employer (for example, in the public sector).

Second, it has been argued that even if this narrow economic justification of the life-cycle model is valid, it also justifies distinctions based on age. It explains why employers would like to set a mandatory age of retirement. Since senior workers are paid above their marginal productivity, there is no incentive for them to retire. Mandatory retirement is therefore essential as it provides a termination date for the employment relationship. However, as we have seen in Chapter II, the model of deferred compensation may flourish even without mandatory retirement.\textsuperscript{108} In addition, the life-cycle model illustrates why employers will be reluctant to hire senior workers or invest in their training. Their wage and benefits are higher while their life expectancy is shorter and it would be difficult to recoup

\textsuperscript{105} According to Neumark and Stock, these laws “serve as a pre-commitment device that makes credible the long-term commitment to workers that firms must take under long-term incentive contracts, by making it costly for firms to dismiss older workers to whom payments in excess of current marginal product are owed ... the predominant effect of the ADEA and other age discrimination laws may have been to strengthen the bonds between workers and firms, thus enabling greater use of Lazear contracts” (David Neumark & Wendy A. Stock, “Age Discrimination Laws and Labor Market Efficiency” (1999) 107 Journal of Political Economy 1081 at 1123). See also Christine Jolls, “Hands-Tying and the Age Discrimination in Employment Act”, in Symposium: The Changing Workplace (1996) 74 Tex. L. Rev. 1813. Jolls similarly views age discrimination legislation as a hands-tying device that prevents employers from breaking their commitment to age-based wages especially when wages rise above an employee’s marginal productivity.

\textsuperscript{106} Epstein, \textit{Forbidden Grounds}, supra note 94 at 450.

\textsuperscript{107} \textit{Ibid. ibid.}

\textsuperscript{108} See Chapter II, notes 65-70 and accompanying text.
their hiring and training cost. However, as we have seen in Chapter II, many senior workers are no less productive, experienced, creative and flexible than younger workers and possess valuable knowledge and skills. Furthermore, although younger workers have more potential working years ahead of them, it does not guarantee that they will stay in the same workplace. Senior workers are often more loyal and committed to their workplace than younger workers, thus reducing turnover costs. Finally, since the population is aging, projected labour shortages in various occupations generate a need to attract and retain senior workers. Hence, there is no tradeoff between equity and efficiency. Rather, equity promotes efficiency as it eliminates market imperfections. Anti-age discrimination legislation is therefore needed to ensure that employers are not shortsighted, led by immediate competitive pressures, and do invest in the long-term benefits of age equality.

Since only one economic justification is clearly identified in the literature, it has been widely argued that anti-age discrimination laws are economically inefficient and ineffective. Richard Posner, for example, argues that these laws unjustifiably interfere with the market mechanism, force costs on employers, and impose inefficiencies. Similarly, Samuel Issacharoff and Erica Harris argue that anti-age discrimination legislation reflects rent-seeking behaviour on the part of senior workers. While the original intention of the legislation was to eliminate maximum age limitation in hiring, most lawsuits deal with dismissals of senior white males and consequently discourage hiring of senior workers.

David Neumark and Wendy Stock, however, doubt the conclusion that anti-age discrimination legislation is best characterized as rent seeking. They note that cases of non-hiring are more difficult to prove and the damages to senior candidates are often insignificant. Moreover, the prevalence of dismissal cases may reflect employers’ opportunistic behaviour under the life-cycle model. Legislation is therefore needed to ensure

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110 See Chapter II, note 28 and 34 and accompanying text.
111 See Chapter II, note 35 and accompanying text.
112 See Chapter I, section C.5.
113 See, for example, a report by the Employment, Labour and Social Affairs Committee of the OECD and its Trade Committee that drew a number of conclusions (later endorsed by OECD ministries) from a study of trade and labour standards from 1996 (Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade (Paris: OECD, 1996)). Their conclusions are presented in a joint report (OCDE/GD(96)94). This report suggests that “improved enforcement of nondiscrimination standards may raise economic efficiency by ensuring that the allocation of labour resources moves closer to a free-market situation”.
114 See Fredman, supra note 59 at 50.
115 See Posner’s book on Aging and Old Age (supra note 78) at c. 13. In this book, Posner utilizes the economics of non-market behaviour to provide insights on a number of issues related to aging. The basic hypothesis of his book is the superiority of economics analysis – that economics can better shed light on the behaviour and attitudes associated with aging than any other discipline. See also Richard Posner, Economic Analysis of Law, 6th ed. (New York: Aspen Publishers, 2003) at 353-55.
116 Issacharoff & Harris, supra note 30.
that parties keep their promises under a life-cycle model of employment.\textsuperscript{117} That is, the legislation does not interfere with the market mechanism, but rather delivers on the parties’ intention by reducing employers’ opportunistic behaviour and strengthening long-term employment contracts.\textsuperscript{118} Furthermore, there is no strong evidence that anti-age discrimination laws discourage hiring of senior workers.\textsuperscript{119} The overall evidence from the U.S. on both state and federal levels suggests that the legislation promotes delayed retirement and consequently increased employment of senior workers.\textsuperscript{120}

Finally, while two main economic justifications for anti-discrimination legislation (taste for discrimination and statistical discrimination) have been deemed irrelevant or problematic in the context of age discrimination, I argue that they do have an important role in strengthening the economic justification for anti-age discrimination law. They both suggest that age discrimination persists despite competitive market conditions and therefore support legal intervention in the employment setting.

First, according to Becker, there are cases where employers have a “taste for discrimination”, that is, they act as if they are willing to pay to be associated with some persons instead of others.\textsuperscript{121} Many scholars have argued that under Becker’s model a competitive market will eliminate firms with a taste for discrimination in the long run unless there are some market failures.\textsuperscript{122} However, the situation is much more complex. As Stewart Schwab argues, markets will drive out tastes that people are not willing to pay for but will sustain tastes where value exceeds cost.\textsuperscript{123} For example, profit-maximizing employers in competitive markets may cater to the discriminatory tastes shared by a large number of co-workers or customers.\textsuperscript{124}

It has been widely argued that the “taste for discrimination” theory does not apply to age discrimination cases. In competitive labour markets with rational employers, senior workers who are productive will not be discriminated against. Accordingly, mandatory retirement is efficient otherwise employers would not use it. In addition, the people who make the hiring and firing decisions are generally senior people themselves; and therefore

\begin{itemize}
  \item See text accompanying \textit{supra} notes 104-105.
  \item See Neumark, \textit{supra} note 109 at 60-61; Neumark & Stock, \textit{supra} note 105.
  \item See Neumark, \textit{supra} note 109 at 60 and the studies of Ashenfelter & Card, and Von Wachter described in Chapter I, notes 208-209 and accompanying text.
  \item Becker, \textit{supra} note 100 at 14, 16-17.
  \item See, for example, Posner, “The Efficiency”, \textit{supra} note 94.
  \item As El Al Airlines argued when it asks to employ younger air stewards in the \textit{Rekant} case, \textit{supra} note 25.
\end{itemize}
are unlikely to make ageist decisions. Furthermore, since we all become old, it is argued that we will not be tempted to discriminate against ourselves or future selves.125

Nevertheless, it is a fact that productive senior workers do encounter difficulties in finding jobs.126 There is no empirical evidence to support the claim that senior and younger employers (who will become senior) do not tend to discriminate against senior employees. On the contrary, even senior employers and managers are often influenced by popular stereotypes.127 It seems that “rational” employers are also affected by prejudice as they irrationally refuse to hire productive female workers and visible minorities. As John Macnicol puts it, “Employers may have a ‘taste for discrimination’ or a ‘prejudice’ and be willing to incur some cost in order to indulge it: it is perfectly possible to envisage a situation where a prejudiced employer may consider a small drop in profits to be a price worth paying in order to keep his or her workforce exclusive members of a ‘club’ based upon race, gender, age or whatever”.128 Furthermore, customers may hold ageist beliefs and affect the way in which employers run their business.129

Another relevant economic justification is the model of statistical discrimination. According to this model, employers possess limited accurate information on workers’ productivity. It is therefore less difficult and costly for them to use group characteristics than individual assessment when they make workplace decisions. Basing their decisions on a good proxy for job-related characteristics does not amount to unlawful discrimination. Rather, it is economically justified behaviour. When the proxy is not reliable, it is prejudice and unlawful discrimination. Generally speaking, employers will not tend to rely on false

125 See Posner, supra note 78 at c. 13. Similarly, Epstein argues that unlike race or sex discrimination, employers have rational reason to discriminate on the basis of age. Age discrimination, including mandatory retirement, is a common practice: “In some cases there is good reason to be suspicious of common practice. Slavery may have been common practice, although slaves were rarely given a voice in shaping that peculiar institution. But the common practice here binds the very persons who institute it” (Epstein, Forbidden Ground, supra note 94 at 447). Age distinctions “are not some crude effort by one group of persons to obtain advancement at the expense of strangers. Men will never become women; whites will never become blacks” (ibid. ibid.). Younger employees will have no temptation to impose costs on senior employees as they will be bound by the very restrictions when they grow old (ibid. at 447-48).

126 See e.g. Victoria Büsch, Dennis Alexis Valin Dittrich & Manfred Königstein, “Bad Hiring Chances for Older Workers” (July 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434351>. This study examines managerial hiring decisions in German manufacturing firms. It finds a strong and statistically significant decline in hiring chances by applicant age. This decline is not due to productivity differences between the applicants as this study focuses on age-neutral jobs, and uses randomization of the questionnaires and productivity assessments to rule out any productivity differences and other economic explanations for declining hiring chances. That is, the study provides clear evidence of taste-based age discrimination revealing that applicants who share exactly the same personal characteristics, qualifications, and perceived productivity differ in hiring probability just because of differences in age.

127 See text accompanying supra notes 82-93.


129 See supra note 124.
stereotypes which put them at risk of a competitive disadvantage because they are not hiring the most productive workers.\textsuperscript{130}

It has been argued that this theory is irrelevant in the context of age discrimination because the use of age as a proxy for job-related characteristics is almost always economically justified, as ability declines with age.\textsuperscript{131} Even if the use of age as the basis for an employment decision is arbitrary, argues Posner, it minimizes the costs of information, while individualized assessment of workers’ abilities and other proxies are more expensive and less efficient.\textsuperscript{132} Moreover, as Epstein maintains, blanket rules are more simple, reliable and consistent than ad hoc decisions.\textsuperscript{133} Finally, Sharon Rabin-Margalioth argues that the prohibition on the use of age as a proxy for ability will not bring about any social good, such as the elimination of ageist beliefs, because the use of this proxy does not sustain its reliability nor perpetuate stereotyping.\textsuperscript{134}

However, as we have seen in Chapter II, age is a poor proxy for job performance (as well as for productivity, motivation and adaptability), while individualized assessment is usually feasible and not too costly.\textsuperscript{135} Furthermore, as Schwab argues, by tying individuals to generalizations that are beyond their control, statistical discrimination creates an externality that can impede overall efficiency.\textsuperscript{136} Also, it is questionable whether individualized assessment humiliates workers.\textsuperscript{137} On the contrary, using age as a proxy for job performance or ability undermines senior workers and reinforces stereotypes.\textsuperscript{138} Yet, many employers still prefer the use of age as a criterion due to ageism and ageist misconceptions. Statistical age discrimination in employment is therefore immoral and inefficient.

If there are some rational connections that can be drawn between age and, for example, health conditions that impose costs on employers engaging in individualized evaluation of their workers, the justification for not using age as a proxy cannot come from

\begin{itemize}
\item \textsuperscript{131} See Chapter II, section B.2.
\item \textsuperscript{132} See Posner, supra note 78 at c. 13. Posner therefore distinguishes between unjustified “animus age discrimination” and justified, efficient “statistical age discrimination”. “Animus discrimination” is “a systematic undervaluation, motivated by ignorance, viciousness, or irrationality, of the value of older people in the work place”, whereas “statistical discrimination” is “attributing to all people of a particular age the characteristics of the average person of that age”. The latter is a rational distinction based on age due to the high costs of individualized assessment (ibid. at 320-24). See also Epstein, Forbidden Ground, supra note 94 at 457.
\item \textsuperscript{133} See Epstein, ibid. ibid.
\item \textsuperscript{134} See Rabin-Margalioth, supra note 22 at 146.
\item \textsuperscript{135} See Chapter II, section B.2.
\item \textsuperscript{136} Schwab, supra note 123 at 580 (“Statistical discrimination uses average valuations, rather than marginal valuations which are necessary for efficient resource allocation. Individual incentives can be dulled”).
\item \textsuperscript{137} See Chapter II, section B.2.
\item \textsuperscript{138} This argument will be developed in Chapter IV, section E.1.
\end{itemize}
an economic perspective but rather from a moral one.\textsuperscript{139} As will be further explained in Chapter IV, individual evaluation is required not to promote economic efficiency but rather equality despite its economic costs. That is, even if age is a sound proxy, there will be some individuals who are members of the protected group and do not possess the job characteristics in question. Even though statistical discrimination could be \textit{economically} rational and need not be based on prejudice, it is still \textit{morally} unjust as it wrongs individuals who do not share their group characteristics.\textsuperscript{140}

\textit{(c) Moral Justification}

As Lawrence Friedman notes, contemporary literature is “obsessed with whether or not age discrimination law is ‘efficient’”. However, efficiency “is not the be-all and the end-all here. Freedom from discrimination is, plain and simple, an aspect of civil rights, of human rights”.\textsuperscript{141} The question is whether senior workers’ right to age equality is a fundamental human right. If age discrimination against senior workers is associated with certain wrongs and age equality of senior workers aims to protect fundamental interests and values, the justification for anti-age discrimination law will be much stronger. Accordingly, only compelling counter-considerations will be sufficient to warrant the infringement of the rights of senior workers.

One of the aims of anti-discrimination laws is to eradicate historical, pre-existing disadvantage, stereotyping, prejudice, or vulnerability of individuals or groups.\textsuperscript{142} While race discrimination goes back to the days of slavery, age discrimination does not have a comparable long history.\textsuperscript{143} However, although its “recognized history” is relatively short,\textsuperscript{144} it poses a very persistent and difficult problem nowadays. It might be argued that age discrimination has been “out there” for a long time yet it was historically denied and

\textsuperscript{139} See Rabin-Margalioth, \textit{supra} note 22 at 146-47.
\textsuperscript{140} See Chapter IV, section E.1(a).
\textsuperscript{141} Friedman, \textit{supra} note 15 at 186-87.
\textsuperscript{142} This is for example one of the contextual factors explored by the Supreme Court of Canada, in determining whether a distinction is discriminatory. See \textit{Law}, \textit{supra} note 48 at paras. 63-68, Iacobucci J.
\textsuperscript{143} Chief Justice McLachlin stressed this difference in her decision in \textit{Gosselin (supra) note 49). Similarly, the U.S. Supreme Court has identified a protected class as one that is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process” (see \textit{Massachusetts Board of Retirement, supra} note 42 at 313). The Court then referred to the question whether senior people were saddled with disabilities historically or currently, stating that: “While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike say, those who have been discriminated against on the basis of race or national origin, have not experienced a ‘history of purposeful unequal treatment’ or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities” (\textit{ibid.}).
\textsuperscript{144} The history of ageism as a political idea is only 30-40 years old. Age discrimination in employment has existed for years (at least since the Civil War in the U.S.) yet the phenomenon has been recognized only since the Cultural Revolution of the sixties (see Bytheway, \textit{supra} note 3 at c. 2; Bruce M. Burchett, “Employment Discrimination” in Palmore \textit{et al.}, \textit{supra} note 62 at 123; and Eglit, \textit{supra} note 11 at 24-27).
suppressed. Even today it is often invisible. Senior people have not yet fully acknowledged their situation and stood up for their rights. Furthermore, age discrimination is usually complex and confusing. At the same time, senior workers have long endured severe and persistent discrimination, devaluation and marginalization in the labour market.

However, even when looking at contemporary practices of age discrimination, current disadvantages of senior people and prevailing conceptions of age equality, the moral grounds of justification for anti-age discrimination laws appear to be weak. In my opinion, the main reason for the lack of robust moral justification is a philosophical view that feeds many arguments made in the age discrimination discourse. This view will be critically assessed in the next Section and an alternative view will be offered.

E. The Complete Lives Approach to Equality

1. The Basic View

According to this philosophical view, since we all age, we get the same benefits and bear the same burdens at different stages of our lives. Since burdens at one time of life are compensated for by benefits at another time, equality should be assessed according to a complete lives perspective. Inequality between age groups is insignificant because it represents inequality at a particular time between people of different ages. In order to measure inequality, one should add up the benefits and burdens in each life and compare the sum. People are treated equally if their complete lives contain equal total shares of

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145 See for example supra note 73.
146 See supra notes 15-23.
147 See supra note 95.
148 According to Dennis McKerlie, this view is held by most egalitarian moral theorists. McKerlie cites Rawls, Nagel and Dworkin as egalitarian writers who agree that egalitarianism is concerned with complete lives: “Rawls’ difference principle deals with the complete life prospects of social and economic classes. It tells us to maximize the life prospects of the worse-off group so as to make their predictable share of goods summed over the full course of their lives as great as it can be … According to Dworkin, our aim as egalitarians should be to ensure that each life receives an equal share of resources. To test for equality we must take into account every part of people’s lives, and not compare their shares of resources at particular times or during particular stages of their lives … Nagel says … that the subject of an egalitarian principle should be the prospective quality of our lives as wholes, from our birth to our death” (Dennis McKerlie, “Justice between Neighboring Generations” in Lee M. Cohen, ed., Justice Across Generations: What Does It Mean? (Washington D.C.: American Association of Retired Persons, 1993) 215 at 215-16; John Rawls, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971) at 78, 92-95, 178; Ronald Dworkin, “What is Equality? Part 2: Equality of Resources” (1981) 10 Philosophy and Public Affairs 283 at 304-05; Thomas Nagel, Equality and Partiality (New York: Oxford University Press, 1991) at 69).
149 According to McKerlie, there is another reason for thinking in terms of complete lives: since our situation is often influenced by our choices, this approach allows us to take this responsibility into account (Dennis McKerlie, “Justice between the Young and the Old” (2002) 30 Philosophy and Public Affairs 152 at 153-54).
resources. Age distinctions are justified as long as, from a full life perspective, the young and the senior receive benefits and bear burdens equally.

Accordingly, it has been widely argued that mandatory retirement is not unjust age discrimination. In Israel, for example, courts have more than once held that a 65-year-old worker, who is forced to retire, is not discriminated against if all other workers in the same workplace are forced to retire at the same age. In fact, every age distinction in hiring, promotion and other terms of employment may be justified if the policy is stable and applies uniformly to all workers. Furthermore, the balance struck between the right of senior workers to age equality and other social and economic considerations and interests is often influenced by the complete lives approach and a related view, “the fair innings argument”, according to which one should not examine inequality within particular stages of life, but rather take into account the cumulative opportunities available to an individual during her life. According to this view, senior workers have had their fair shares of resources and should now vacate their place and make room for younger workers.

Let us look at this example:

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Although mandatory retirement is objectionable because it “treats differently individuals who differ with respect to age, but are in other respects similar”, and although it apparently distributes harm differently (“since members of the younger age group (x) receive a benefit (the option of continued employment) than those reaching retirement age (y) are denied”, Gary Wedeking argues that it is not unjust: “For in the long or short term future they are all faced with mandatory retirement themselves”. Gary A. Wedeking, “Is Mandatory Retirement Unfair Age Discrimination?” (1990) 20 Canadian Journal of Philosophy 321 at 328.

This line of thought underpins many judicial decisions regarding mandatory retirement around the globe. See for instance the cases from Israel, Spain, Canada and the UK discussed in Chapter II, section B.2. The fair innings argument is also often employed as a justification for denying senior patients treatment when they are in competition with younger patients and resources are scarce. See e.g. John Harris, The Value of Life, an Introduction to Medical Ethics (London: Routledge & Keegan Paul, 1970) at c. 5. Harris assumes that there is a fair share of life for a person to have had a fair innings. Everyone should therefore “be given an equal chance to have a fair innings” and “to reach the appropriate threshold” (for example the age of 70). Yet, once they reach...
Few scholars have delved into the difficulties of the complete lives approach.\textsuperscript{157} The main difficulty, identified by Dennis McKerlie, is that this approach does not oppose even the most severe disparity between the young and the senior insofar as the sum of their benefits and burdens over a lifetime is even.\textsuperscript{158} It therefore would condone a situation where seniors are placed in extreme poverty, disadvantage and deprivation.\textsuperscript{159} That is, seniors, who receive considerable benefits at earlier stages of their lives, will not be able to argue against their discrimination at advanced stages in their lives. This difficulty is intensified when age-based distinctions occur in earlier stages of lives, for example, when most resources are confined to people under 40 and those over 40 are left with very little, or when life expectancy increases dramatically, and many people are considered “outsiders” for more than twenty years of living.

Furthermore, I argue that the complete lives approach to equality does not pay attention to the distinctive needs of the young and the senior at particular points of time. So long as their total shares of benefits are equal, the distribution between the two groups is irrelevant, on the complete lives model. Let us take for example two situations.

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this threshold, they receive their entitlement. In a situation where “two individuals both equally wish to go on living for as long as possible”, and “one individual has had a fair innings and the other not”, Harris argues that “only one would suffer the further injustice of being deprived of a fair innings – a benefit the other has received”. Accordingly, in a situation of scarce resources, it is permissible to favour a young patient who has not had a fair innings. However, it is impossible to quantify benefits and to determine what accounts for a fair share of life especially when the length of our lives is not known. Even if it was, as Rivlin maintains, life is not divisible and we cannot trade shares of our lives. See Michael M. Rivlin, “Why the Fair Innings Argument is not Persuasive” (2000) 1 BMC Medical Ethics 1, online: <http://www.biomedcentral.com/content/pdf/1472-6939-1-1.pdf>.

\textsuperscript{157} See for example Fredman (supra note 59 at 38) who argues that it is wrong to compare the complete lives of two individuals as the same burden or benefit might affect them differently even if they experience it at the same age, due to cultural differences between generations.

\textsuperscript{158} See see McKerlie, supra note 150 at 281. See also Larry Temkin, Inequality (Oxford: Oxford University Press, 1997) at c. 8. Temkin introduces three different forms of egalitarian concern: complete lives egalitarianism, simultaneous segments egalitarianism (which divides time into a series of temporal stages and measures inequality between temporal stages of lives of different people), and corresponding segments egalitarianism (which divides each person’s life into a series of stages like childhood, adulthood and old age and measures inequality between the comparable stages of people’s lives). His discussion relies heavily on McKerlie’s work (ibid. at 232). According to Temkin, each of these three views may seem plausible in some cases and implausible in others (ibid. at 235). He objects to severe disparities between people at a particular time even when their overall share is equal (ibid. at 236-38). At the same time, he argues that the complete lives approach should not be rejected entirely as alternatives suffer from difficulties as well (ibid. at 238-40).

\textsuperscript{159} Indeed, this inequality may be dealt with by facilitating, for example, progressive tax and providing different allowances through welfare institutions. However, this inequality is not only an economic one. It has other dimensions (see infra note 222 and accompanying text).
As we may see, the complete lives approach makes no distinction between the two situations and is indifferent to the inequality at time II. That is, it does not provide any normative distributional guidelines for allocation of resources within lives. Assessing the treatment of individuals at particular points of time is therefore essential.

2. Matthew Adler’s View

Taking a welfarism perspective, Matthew Adler also argues that inequality of individuals’ well-being should be measured over their lifetimes rather than during some temporal fraction of a lifetime (which he calls a “sub-lifetime perspective”). He bases his argument on the persistence of individual identity and the assumption that it is possible to compensate a person who has suffered at one stage of life in another stage of life (which he terms “the possibility of intrapersonal, inter-temporal compensation”). He acknowledges that a major implication of this view is that from a lifetime perspective age should not be considered a suspect class.

Although Adler advocates a lifetime perspective, I think that he is in fact concerned with sub-lifetime inequalities. His argument in favour of lifetime assessment is based on the assumption that an individual’s lifetime well-being is not a function of sub-lifetime well-being because there may be “cross-temporal interaction effects” that produce lifetime well-being. For example, when person A has less than person B at a particular point of time, it will have a negative impact on A’s lifetime well-being “because it is demoralizing, or frustrating, or lowers self-respect.” Since Adler’s presumption is that lifetime well-being

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161 As opposed to Parfit’s view (infra note 190 and accompanying text).

162 Adler, supra note 160 at 16-17.

163 “The average lifetime well-being of 80-year olds is greater than the average lifetime well-being of 35-year olds” (ibid. at 58). Lifetime perspective does not refute the recognition of race and gender as suspect classifications because “in a society where law or social norms stigmatize blacks as second-class citizens, or one where such norms have evaporated but existed in the recent past, the status of racial minority correlates with a lower level of both sub-lifetime and lifetime well-being” (ibid. at 58). Age is considered a protected ground of discrimination only according to a sublifetime perspective (“80-year olds tend to have a lower level of momentary well-being than 35-year olds: because of health problems, lower incomes, and social isolation”, ibid. at 58). “Since neither the attribute of being old, nor the attribute of being young, is strongly correlated with having a low level of lifetime well-being, neither the old nor the young should be a ‘suspect’ class for purposes of proxy tests that roughly implement lifetime welfarism” (ibid. at 59).

164 For example, when well-being gets better over time, there is an improvement effect. In his opinion, lifetime well-being is an outcome that depends on everything that happens during each period and cannot be compressed into a single utility number (ibid. at 13-14).

165 Ibid. at 18-22, 26. For example:

<table>
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<tr>
<th>Time</th>
<th>I</th>
<th>II</th>
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<td>Person A</td>
<td>10</td>
<td>10</td>
<td>1</td>
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<td>B</td>
<td>5</td>
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cannot be represented as a function of sub-lifetime well-being, he averts any argument in favour of a sub-lifetime perspective. At the same time, he takes sub-lifetime inequalities into consideration when assessing lifetime inequalities. Yet, instead of caring about temporal inequalities when they occur, he cares about them when he assesses the lifetime well-being. Nonetheless, his argument means that one cannot ignore temporal inequalities. That is, if inequality at a particular time has a negative impact on lifetime well-being, not all temporal inequalities can be compensated for. Thus, on Adler’s model, age discrimination claims remain valid.

3. Norman Daniels’ Modified Version of the Complete Lives Approach

Since merely adding benefits and burdens across a life (according to the basic view) seems morally insufficient, John Chandler advocates adopting distributive criteria that would apply to temporal stages in life as a complementary solution to the complete lives approach. He finds this integrated solution in Norman Daniels’ prudential lifespan account. In his book *Am I My Parents’ Keeper?*, Norman Daniels offered a modified version of the basic view, the “Prudential Lifespan Account” which focuses on the health care system but has implications for the labour market as well.

Daniels addresses the question of a just distribution of social resources between different age groups. He argues that this question poses a distinct problem of justice. He

According to McKerlie, we should help A at time III, although A has more from a lifetime perspective, because our intuition tells us to help worse off people at temporal stages of lives (see infra notes 198-199). According to Adler, we should help A but the justification for that comes from a lifetime perspective. A’s total well-being is not 31. It is much less because of the bad experience he or she had at time III. “The strongly negative effect in that period may ‘ruin’ that whole life” (ibid. at 26). 

This problem is distinguished from the problem of justice between birth cohorts or justice between generations. Rawls, for example, tackled this problem by utilizing a just savings principle. See John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly, ed., Cambridge, MA: Harvard University Press, 2001) at 160: “The correct principle … is one the members of any generation (and so all generations) would adopt as the principle they want preceding generations to have followed, no matter how far back in time. Since no generation knows its place among the generations, this implies that all later generations, including the present one, are to follow it. In this way we arrive at a savings principle that grounds our duties to other generations: it supports legitimate complaints against our predecessors and legitimate expectations about our successors”. See also ibid. note 39. But see Samuel LaSelva, “Mandatory Retirement: Intergenerational Justice and the Canadian Charter of Rights and Freedoms” (1987) 20 Canadian Journal of Political Science 149; Robert J. Drummond, “Comment on ‘Mandatory Retirement: Intergenerational Justice and the Canadian Charter of Rights and Freedoms’ by Samuel LaSelva” (1988) 21 Canadian Journal of Political Science 585; Samuel V. LaSelva, “Reply: Rethinking Equal Opportunity” (1988) 21 Canadian Journal of Political Science 597. As opposed to Wedeking (supra note 153) who argues that mandatory retirement is not unjust (“the weaker argument”), LaSelva argues that mandatory retirement is justified (“the stronger argument”). According to the stronger argument, abolition of mandatory retirement denies justice between generations. This problem is not a matter of individual justice. Mandatory retirement is justified because the abolition of mandatory retirement provides senior workers with unlimited possession of scarce employment opportunities at the expense of younger generations. Drummond objects and argues that this view is incompatible with a liberal conception of justice, as liberal rights generally inhere in individuals. He maintains that it is not necessary to abandon the concept of individual justice in order to address justice between generations. Birth cohort and generation are not collective.
accepts the basic propositions of the complete lives approach by articulating the differences between age and race or sex (i.e. we grow older, but we do not change our sex or race), and concluding that some forms of differential treatment based on age are not necessarily unjust. According to Daniels, since we all grow older, treating young people in one way and senior people in another systematically over a lifetime is to treat them equally. Similarly, his conclusion is that age discrimination should be discussed from a lifespan perspective rather than from a particular time perspective.168

Indeed, principles of distributive justice prohibit the use of morally irrelevant traits of individuals including race, gender and age. Daniels, however, claims that age could be sometimes morally relevant. Furthermore, since age is different, differential treatment of people according to age does not always generate inequalities. Thus, even if age is morally irrelevant, using it in certain distributive contexts will not generate inequality.169

Contrary to the complete lives perspective, Daniels does consider distribution between age groups to be a problem and therefore imposes certain constraints on the complete lives approach. He argues that the problem of finding a just distribution between distinct age groups should be solved by seeking a prudent allocation of resources for each stage of life. In other words, since we all age, and the young will become the senior, we should not view different age groups as distinct groups competing against each other but rather as different stages of the same life. Each stage of life will be represented in the lifespan approach an age group. According to Daniels, social institutions will distribute resources between age groups in the same way that a rational, prudent agent (with similar characteristics as under Rawls’ “veil of ignorance”) would choose to distribute his or her lifespan share between the different stages of one life.170 Every person will first receive a fair

attributes but rather a characteristic of individuals. The problem of intergenerational justice should be assessed by the treatment of individuals at a particular point of time. To evaluate whether a generation is treated justly, we should ask whether individuals in a particular generation are denied opportunities because of their membership of that generation.

169 Ibid., at 40-41.
170 Ibid. at c. 3. Daniels’ idea of the prudent agent relies in some aspects on Rawls’ idea that the principles of distributive justice will be chosen by people from behind a “veil of ignorance” (Rawls, supra note 148 at 136-42). Daniels explicitly refers to Rawls (Daniels, ibid. at 52, 61-65). The prudent agents do not know much about themselves, including their age and how long they will live. In addition, they have no conception of what is good except in terms of primary social goods. However, Daniels’ prudent agents have additional characteristics. He assumes, for example, that a rational agent would be equally concerned about all parts of her life (see Daniels, ibid. at 57). See also Dworkin’s application of prudence in the distribution of health care, Dworkin, supra note 151 at 311-19. Dworkin suggests the “prudent insurance test” to answer questions such as how much should America spend on its health care, and how should it be distributed. The test examines what people would decide to spend on their own medical care, as individuals, if they were using their limited fair share of money and were buying insurance under fair free-market conditions. According to Dworkin, if “very few prudent people would want to insure themselves to … expensive treatment that could prolong their lives only by a few months …, then it is a disservice to justice to force everyone to have such insurance through a
share of resources for his or her entire lifetime. Then, the prudent agent will budget the resources of one person over a lifetime across his or her different temporal stages of life in a way that would best promote the welfare of the life as a whole.\textsuperscript{171} As illustrated by Chandler:

Daniels thinks that prudent people would prefer an allocation of resources that improves their chances of attaining a normal lifespan to one that gives them a reduced chance of reaching normal life expectancy but a greater chance of living an extended span if they do achieve a normal span. Similar reasoning would give priority to ensuring maximum employment opportunities in early and mid-life over extending employment options into old age.\textsuperscript{172}

Chandler then maintains that according to the prudential lifespan approach, mandatory retirement at the age of 65 can be a fair means of rationing employment opportunities when employment is a scarce and desirable resource. The age of 65 is employed here not as a stereotype according to which human capacities decline with age, but rather as a just distribution of a “fair share” of opportunities between different stages of life.\textsuperscript{173}

Daniels himself refers to the implications of his account for employment in general and mandatory retirement in particular. Daniels argues that in the context of employment, race, sex, and religion are in general morally irrelevant with the exception of a \textit{bona fide} occupational qualification: “The social good being distributed – jobs or jobs opportunities – is one we generally think should be distributed in ways that match the requirements of a job to the talents and skills of applicants”.\textsuperscript{174} Daniels agrees that age is, in general, a morally irrelevant trait with regard to job placement, just as it is not, in general, a morally relevant basis for distributing health-care resources, and that age is not a good proxy for job performance.\textsuperscript{175} However, he argues that there are circumstances in which age becomes morally relevant to job placement, as for example where restrictions on senior workers’ access to jobs (compulsory retirement) serves to improve younger workers’ opportunities to obtain employment.\textsuperscript{176}

\textsuperscript{171} See Daniels, \textit{supra} note 168 at 52-53, 61-63.
\textsuperscript{172} Chandler, \textit{supra} note 69 at 40.
\textsuperscript{173} \textit{Ibid.} at 38.
\textsuperscript{174} Daniels, \textit{supra} note 168 at 98.
\textsuperscript{175} \textit{Ibid.} at 99.
\textsuperscript{176} He stresses though the need for a framework that will provide more “general principles of justice” including the regulation of “allowable lifetime inequalities in income and wealth, and … fair equality of opportunity with regard to jobs and careers” (\textit{ibid.} at 99-100).
4. Objections to the Modified View

Daniels’ modified view encounters similar difficulties to those of the complete lives approach to equality, and does not impose sufficient constraints on distribution between different age groups.

First, as McKerlie argues, Daniels’ shift in focus from distribution between age groups (simultaneous temporal stages of different lives) to distribution between stages of one life (non-simultaneous temporal stages of one life) is problematic. Daniels correctly advocates paying attention to need for resources as it varies through different life stages, but by switching focus from the different age groups to different stages in one life, the prudential lifespan approach conceals actual differences and conflicts between the young and the senior as distinct groups with no appropriate resolution. On Daniels’ approach, claims regarding the relation between domination, marginalization, and equality of status are no longer part of age discrimination discourse. Age inequality becomes narrow, focusing solely on the denial of differences.

Second, a prudent allocation of resources over different stages of a single life is designed in a way that will fit the complete lives approach, and thus still allows severe disparities between age groups. Daniels in fact supports the complete lives approach as he accepts inequality between age groups when it facilitates equality from a complete lives perspective. And in Daniels’ words: “unequal treatment of people by age appears to be budgeting within a life. … It is rational and prudent that a person take from one stage of his or her life to give to another in order to make his or her life as a whole better. … When considered part of a prudent lifetime plan, differential treatment of people by age still involves treating them equally over their whole lives.” Nevertheless, Daniels assumes that his account will prevent extreme inequalities between the young and the senior as prudent agents, acting under a “veil of ignorance”, will assess their well-being in a way that is neutral with regard to time.

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177 See supra notes 157-159 and accompanying text.
178 See McKerlie, supra note 150 at 283-84; McKerlie, supra note 149 at 158.
179 Norman Daniels, “The Prudential Lifespan Account: Objections and Replies” in Cohen, supra note 148, 239 at 244.
180 See also the example in Section E.1 above.
181 See McKerlie, supra note 150 at 281-84; McKerlie, supra note 149 at 156.
182 Norman Daniels, “The Prudential Lifespan Account of Justice between Generations” in Cohen, supra note 148, 197 at 200 [emphasis added].
183 Daniels, supra note 168 at 56-57. Daniels explains it as part of “a central principle of the theory of individual rationality”: “we must not, for example, ‘discount’ the value of our experience or well-being merely because it occurs later in life rather than earlier” (ibid. at 56). We are aware that our preferences and conception of what is good will change over time. However, we do not know in detail our future preferences. Therefore, we must ensure that basic resources and opportunities are available throughout our lives (ibid. at 57-58).
However, it is questionable whether prudence will inevitably lead to a fair distribution of resources across different stages of a single life and consequently among different age groups. Prudence does not necessarily manifest equal concern for all parts of one’s life. Prudent agents may accept inequalities especially in later stages of life. As mentioned above, Daniels argues that prudent agents will generate equal (or otherwise fair) distribution between different life stages as he believes that prudence means equal concern about every stage of life. A key element in his argument is that prudent agents know that their lives and life choices may change over time and therefore would like to keep their options open. However, as McKerlie argues, prudent agents do not know the length of their lives and therefore understand that they might not live long enough to use resources saved for advanced age. Also, the chance of experiencing extreme changes in their life goals when they are senior is rather small; and these goals are usually less central to overall life success than goals pursued in midlife. Finally, utilizing resources to improve well-being in advanced age is much more difficult. Therefore, prudent agents will tend to leave little, if any, resources for advanced life stages.

The fact that prudent agents are not time neutral is well illustrated by Daniels own observation that, even without the knowledge of our conceptions of what is good in life, “we know enough about the frequencies of disease and disability as we age to know that years late in life, say after age 75, are far more likely than earlier years to involve some forms of impairment. This knowledge suggests that it would be imprudent to count the expected

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184 As Derek Parfit argues, human beings are not temporally neutral. Rationality does not necessarily entail equal concern for all stages of life as we live different lives and are not the same persons at each stage. He therefore argues that it is not irrational for prudent agents to choose a scheme that distributes resources unequally over a lifetime. Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984) [Parfit, *Reasons*]; Derek Parfit, “Comments” (1986) 96 Ethics 832 at 832-833 [Parfit, “Comments”]. Similarly, Posner presents a major problem in economic analysis of aging. An economic analysis assumes that a person is a single economic decision-maker throughout her lifetime. The idea that an individual can have multiple selves as a result of age-related changes has been mostly disregarded in economic literature. According to Posner, “Aging brings about such large changes in the individual that there may well come a point at which it is more illuminating to think of two or more persons ‘time sharing’ the same identity than of one person having different preferences, let alone one person having the same preferences, over the entire life cycle”. Posner then concludes that we have a duty for our future selves. We have to take their distinct interests into account. As Posner argues, “The concept of multiple selves will be resisted by those who believe that a proper human life is one lived in accordance with a rational plan of life” (*supra* note 78 at 84-89).

185 See Daniels, *supra* note 168 at 58.

186 Indeed, Daniels argues that prudent agents assume that they will live through all stages of distribution. However, as McKerlie clarifies, this means that their entire lives will be lived under the distribution, and not that they will actually reach all of possible ages. See McKerlie, *supra* note 150, n. 16.

187 As Daniels himself maintains, “[u]nder some plans of life, the contribution of the last years to the overall meaningfulness of life might be very great. Still, such Golden Age plans are probably atypical. Most people are well aware of their mortality and construct plans in which the tasks and rewards of early and middle years are integral to their success. For them, later years can be wonderful, but they are gravy to the meat and potatoes of the rest of life” (*supra* note 168 at 90).

188 See McKerlie, *supra* note 150 at 281-88, 295; and McKerlie, *supra* note 149 at 159-61.
payoff of years late in life quite as highly as the expected payoff of years more likely to be free of physical and mental impairment”.

Third, according to Derek Parfit, we might view different parts of life as different lives, and people as holding multiple identities during their lives. Therefore, compensation across different stages of one life over time is not always possible. Benefits given to an individual at an earlier stage cannot always compensate for future burdens imposed on the same (but now different) individual and vice versa. Hence, we should aim for a fair distribution between the different parts of people’s lives. Accordingly, we should assist those who are worse off at particular times, rather than those who are worse off in their lives as a whole. However, the personal identity argument is complex and disputable. Furthermore, it works against our intuition as benefits and burdens are sometimes compensable. In these cases, we can allow inequalities within lives to exist as long as the sum of burdens and benefits over a lifetime is even.

Finally, the complete lives approach and Daniels’ account are based on the presumption that there is a limited share of resources available. We therefore must transfer resources from a stage of life in which they are not needed to another one in which they are. This presumption is often used to justify mandatory retirement especially where high rates of unemployment are evident. That is, employment is treated as a scarce and desirable

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189 Daniels, supra note 168 at 89-90.
190 Parfit, Reasons, supra note 184 at 337; “Comments”, supra note 184 at 869-70.
191 Parfit, “Comments”, ibid. at 869. Parfit explains: “Suppose that we must choose to which of two people to give some anesthetic. The first person’s pain is now worse, but it is the second person who, in his life as a whole, is worse off. If the principle of equality applies to whole lives, it tells us to help the second person. But it is not absurd to claim that, since there cannot be compensation over time, we should help the person whose pain is now worse. On this view, it is irrelevant that this person has been and will later be better off, since benefits at other times cannot now give him compensation” (ibid. at 869-70). Parfit then moves to discuss one person’s life: “If someone chooses to bear a burden now so as to benefit himself later, we should perhaps treat him now as he chooses. He is like someone who accepts a burden to benefit someone else. But what if the timing is reversed: what if he chooses a benefit now at the cost of a burden later? If there cannot be compensation over time, this is like choosing to benefit himself at the cost of burdening someone else. In such a case, we should ask whether this person’s preferences would later change. If they would not, we should treat him as he prefers. But suppose that, when he comes to bear his burden, he would regret his earlier decision. If he would at different times have such conflicting preferences, we may deny that he can, at any time, make decisions for himself at all future times. Why should his earlier preference have such priority? It may be said that, in making his decision, he commits himself not to complain later if we treat him as he now prefers. But, if he would later regret his decision, this commitment may not be enough to justify our act. Consider a young man who does not now care about himself in old age, and who therefore decides not to make payments to a pension fund, or to medical insurance. When he is old, sick, and poor, he regrets this decision. In such cases we may doubt that someone’s earlier decision settles what his fate should be. Treating him as he now wants may be unfair to this person later” (ibid. at 870).
192 See, for instance, the examples given by Wilkinson: “Few think it seriously inegalitarian that students are much poorer than many others, since later in life they will tend to have higher paying jobs. We think that later in life they are compensated for their earlier poverty. Nor do we think it bad that children are forced to do things, such as undergo education, for the sake of later benefits to them. … Most people do regard themselves as able to be compensated for things that happen in different periods of their lives” (T.M. Wilkinson, “Age, Equality, and the Prime of Life” (1994) 46 Political Science 91 at 94, 97).
193 See Daniels, supra note 168 at 18.
resource and mandatory retirement is regarded as an efficient mechanism that equally distributes limited jobs and promotion opportunities. However, while the share of resources might be limited in the context of health care systems, the labour market is not comprised of a fixed number of jobs that can be collected from senior workers and reallocated to younger workers. As we have seen in Chapter II, there is no empirical support for the assumption that employment of the young and the senior are substitutes. Furthermore, labour markets are flexible and dynamic and may create as many jobs as there are workers. That is, the proposition that every job held by a senior worker is one less job available for a younger worker has been widely rejected in the economic literature, and is known as the “lump of labour fallacy”.195

5. Alternative Approaches Offered
In light of the difficulties of the complete lives approach and its modified version, a few scholars have offered alternative approaches that apply moral principles to temporal stages of life. Chandler advocates concentrating on situations where senior persons do not get enough, or fall below a minimum standard of well-being:

Benefits at one stage of life can compensate for burdens at another stage of the same life, but only within limits. A situation whereby employees spend their earlier years in poverty-stricken apprenticeships in demeaning work relationships is not made just by the fact that apprentices can look forward to the benefits of doing the same to the next generation. There are minimum standards of welfare that should not be violated for the greatest good or even for the individual’s own good.196

However, it is not clear what these standards of welfare are and when they are violated. It is also questionable whether minimum conditions of welfare should be the sole constraint on the complete lives approach.197

In his early work, McKerlie put forward a complementary solution to the complete lives approach, a principle which gives priority to the interests of those who are worse-off

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194 See e.g. the discussion of McKinney, Kelner and Palacios de la Villa in Chapter II, section B.2.
195 See Chapter II, section B.2.
196 Chandler, supra note 69 at 39-40 [emphasis added].
197 As mentioned above, Chandler is satisfied with Daniels’ modification of the complete lives approach. According to Chandler, this approach puts constraints on the complete lives approach to eliminate severe disparities between the young and the senior (ibid. at 40-41). However, as we have seen, the constraints on the complete lives approach suggested by Daniels are insufficient.
198 He also put forward another view that he later abandoned. According to this view, inequality is morally significant in itself regardless of what happened or will happen. On this view, inequalities between people at a particular time are as problematic as inequality between complete lives. This view supports equal distribution over complete lives so long as it does not lead to inequality for significant parts of lives. This inequality is a bad thing in itself, whether or not it creates inequalities in the complete lives of the people concerned. The inequality at a particular time is objectionable because of its significance for inequality between people. Although inequalities between simultaneous stages of different lives may be compensated for in the past or in
even in temporal stages of life. According to this view, inequality is not wrong in and of itself. The view nonetheless promotes equality as it attaches special value to benefiting those who are worse-off. Therefore, it will support helping a senior person who is worse-off even if she will receive a larger lifetime share than others. It does not deny that within life, benefits at one stage compensate for harms at another stage. However, sometimes it will still be best to help those who are worse off now even if they were better off in the past.199

At the beginning, McKerlie presents his idea of priority as egalitarian because it holds that badly-off people have stronger claims than better-off people.200 He distinguishes between egalitarian priority and egalitarian principles of equality,201 and expresses a preference for a priority principle over an equality principle when addressing temporal stages of lives.202 Since the principle of priority does not assign intrinsic value to timing, it applies

the future, the inequality is not fully erased. The inequality between two people is therefore measured by adding together the inequalities between the simultaneous parts of their lives. See McKerlie, supra note 148 at 223; and McKerlie, supra note 150 at 288-95. This “simultaneous segments view” was first introduced in Dennis McKerlie, “Equality and Time” (1989) 99 Ethics 475.

199 McKerlie, supra note 150 at 288-95. This view was further developed in McKerlie, supra note 149 (the idea of “egalitarian priority”). Although Nagel argues that priority only applies to lifetimes, McKerlie holds that priority can also apply to people at particular times and that this application is even more natural than the application to complete lives. For example, many people feel that it is especially important to help those living in poverty: “They might claim that it is more important to help the poor in a small way than to provide larger benefits for the middle class. What matters for the present purpose is that the concern about poverty applies to people who are poor, not to those who used to be poor” (ibid. at 164). The same is true with regard to senior people. What matters in determining their priority is their current situation. If they are poor at present, it does not matter that they were much better off in the past, and that their complete lives are not worse than the complete lives of others. McKerlie calls this kind of priority the “time-specific priority view” to distinguish it from priority based on lifetimes (ibid. at 165). Indeed, benefits in earlier or later stages in life compensate for current burdens. However, it is not a full compensation as the “extra welfare” that one enjoyed in the past might be less significant than benefits that one receives during another time when one is worse off (ibid. ibid.). According to McKerlie, this view is a relevant moral concern in distributing benefits and harms, but it is not the only relevant concern nor will it always outweigh other concerns. The claims of senior people “do not depend on their being in a distinctive stage of life, old age. They receive priority because they are badly off, not because they are old. So their claims must compete against the claims of younger people who are also badly off” (ibid. at 166). Note that McKerlie’s view does not depend on Parfit’s theory of personal identity (ibid. at 169). McKerlie differs from Parfit by postulating an egalitarian principle of priority that applies to complete lives and within lives (supra note 148 at 221).

200 Dennis McKerlie, “Equality and Priority” (1994) 6 Utilitas 25 at 25. See also McKerlie, supra note 149 at 163-64: “Sometimes we think that it is more urgent and more important to benefit someone badly off because that person is badly off, even if we could help someone else more. … a smaller gain for someone badly off can be more important than a larger gain for someone better off”.

201 Ibid. at 163. McKerlie presents egalitarian principles as either committed to equality or giving priority to the interests of people who are worse off. However, he acknowledges that some egalitarians may accept both principles (McKerlie, supra note 148 at 215; McKerlie, supra note 200; Dennis McKerlie, “Priority and Time” (1997) 27 Canadian Journal of Philosophy 287 at 287).

202 The reasons we should pursue priority rather than equality in just distribution between temporal stages in lives are discussed in Dennis McKerlie, “Dimensions of Equality” (2001) 13 Utilitas 263. He presents the difficulties of applying egalitarian principles of equality to temporal parts of lives. Since benefits at some times can compensate for burdens during other times, the justification for applying egalitarian equality to temporal stages of lives is that inequality between different people at a particular time is bad in and of itself. However, it clashes with egalitarianism, which is concerned with complete lives, as it relies on the separateness of persons. The application of equality to temporal part of lives (the “simultaneous segments view”) “treats the temporal fact experiences in different lives’ being simultaneous as having intrinsic importance, but this is implausible” (ibid. at 277-79, 287-88). Moreover, egalitarian principles of equality might lead to the problem of leveling down. According to Parfit, the problem of leveling down is that telic egalitarians, maintaining that inequality is
at particular times as well as to lifetimes. Recently, McKerlie has presented this principle of priority as not essentially egalitarian.

Geoffrey Cupit also offers an alternative to the complete lives approach. He argues that assessing equality requires more than a mere comparison between two individuals. He therefore departs from a comparative perspective, and considers age discrimination as unjust only if it entails a false derogatory judgment: “It will be unjust to treat people as inferior simply on account of their age – unless age affects status in such a manner as to render the discriminating treatment appropriate”. Similarly, Sandra Fredman moves away from a comparative perspective and argues that an age discrimination claim should be established when a person is subject to a detriment because of her age or when a neutral policy has a particularly detrimental effect on an individual. Fredman’s discussion of the substantive values of equality (autonomy, dignity and participative democracy or social inclusion), which I elaborate on in Chapter IV, foreshadows an argument that a “detriment” or “detrimental effect” occurs when one of these values is not respected. However, there is still a need for a more profound theoretical explanation as to why (and when) unequal treatment based on age constitutes a “detriment” or has a “detrimental effect” (i.e. amounts to wrongful age discrimination) and how one should distinguish between subjective feelings and objective indicators of “detriment” or “detrimental effect”.

bad in and of itself, argue for obtaining equality by making some worse off and none better off. For example, when group A receives a benefit and group B does not, one might argue that equality is achieved if we deprive group A of the benefit. Parfit then offers the priority view, which is not egalitarian and denies (like deontological egalitarianism) that equality has any intrinsic value, to avoid the leveling down objection (Derek Parfit, “Equality or Priority?”, The Lindley Lecture, University of Kansas, November 21, 1991 (Department of Philosophy, University of Kansas, 1995) at 17-25). See also Joseph Raz, The Morality of Freedom (Oxford: St Martin’s Press, 1986) at 227 (egalitarian principles often lead to waste).

McKerlie, supra note 202 at 279, 287-88.


Geoffrey Cupit, “Justice, Age and Veneration” (1998) 108 Ethics 702 at 703-04, 708. See also Joel Feinberg, “Noncomparative Justice” (1974) 83 Philosophical Review 297 (Feinberg distinguishes between principles of justice “which essentially involve comparisons between various persons and those which do not”). While in some cases one’s due is determined independently of that of other people (noncomparative), in other cases it is determinable only by reference to his relations to other persons (comparative) (ibid. at 298). The examples he provides for noncomparative injustices are cases of unfair punishments and rewards, merit grading, and derogatory judgments (ibid. at 300). Parfit also distinguishes between comparative and noncomparative justice (“Whether people are unjustly treated, in this comparative sense, depends on whether they are treated differently from other people. … Another kind of justice is concerned with treating people as they deserve. … Whether people are unjustly treated, in this sense, depends only on facts about them. It is irrelevant whether others are treated differently”) (Parfit, supra note 202 at 3-4, 8).

Cupit, supra note 205 at 709.

Fredman criticizes the language of the EU Directive which defines direct discrimination as one that occurs “where one person is treated less favourably than another is has been or would be treated in a comparable situation on [grounds of age]”. She argues that since age is a “process rather than a fixed quality” it is not clear how much of an age difference is required between the plaintiff and the comparator (supra note 59 at 38-39, 55-56). See also Hepple, supra note 15 at 82.

Fredman, supra note 59 at 56.

Ibid. at 43-46.
F. Towards a New Account of Age Discrimination against Senior Workers

In contrast to McKerlie, I argue that equality is the principle that should apply to temporal stages of life. Yet, I consider equality to be a much broader notion than that encompassed by the complete lives approach. Like Cupit, I maintain that assessing equality requires more than a comparison between two individuals. In my opinion, it is most notably about treating individuals as having equal moral worth. At the same time, I find that McKerlie’s concern for the worse-off, which is similar to Chandler’s narrow concern for minimum conditions of welfare, to be a relevant and important concern of equality. Yet, I hold that it does not fully capture our motivation to eliminate inequalities between age groups. Rather, it is only one motivation among several. Similarly, I do not agree with Cupit, who considers age discrimination as unjust “only if it constitutes treating people as inferior on account of their age”. 210 This view is, in my opinion, too narrow and vague as it does not cover all circumstances in which age inequality is unjust and does not identify with sufficient clarity why it is unjust. It identifies the wrong of age inequality solely in terms of status. 211 It therefore requires theoretical elaboration and clarification. Finally, I agree with Cupit and Fredman that age equality should not be examined from a comparative perspective. Rather, it should be assessed on the basis of several substantive principles that give content to the value of equality which will be articulated in Chapter IV. I will now explain my argument in depth.

In my view, equality is not an intrinsic good in and of itself. The main concern of equality is not to put individuals in the same situation as others. 212 Also, I do not regard equality as an instrumental value emerging in pursuit of other essential principles such as alleviation of suffering and hunger, or overcoming domination and oppression. Rather, I view some extrinsic principles as a constitutive part of the account of equality. These principles stem from the idea of equal concern and respect.

Ronald Dworkin distinguishes between two dimensions of equality: equal treatment and treatment as an equal. While equal treatment means equal distribution of shares and can be reducible to sameness of treatment, treatment as an equal means treating a person with...

210 Cupit, supra note 205 at 710 [emphasis added].
211 This is actually one of the wrongs of inequality identified by Rawls (supra note 167 at 130-31). Among other things, Rawls mentions the wrong in inequality in itself which is often associated with inequalities in social status and with viewing those of lower status as inferior.
212 According to Temkin, an egalitarian is someone who attaches some value to equality itself. That is, someone who “cares at all about equality over and above the extent it promotes other ideals. …equality needn’t be the only ideal the egalitarian values, or even the ideal she values most” (supra note 158 at 7). Accordingly, “an egalitarian is someone who thinks equality is not merely extrinsically good” (ibid. at n. 9). This view does not exclude depriving those who are better off in order to equalize them with those who are worse off. On the leveling down objection, see supra note 202.
the same respect and concern as anyone else.\textsuperscript{213} The idea of equal concern and respect is derived from the philosophical, Kantian notion that all individuals have the same unconditional intrinsic worth; and therefore are all entitled to an equal degree of concern and respect and should not be used instrumentally as a means to some other end.\textsuperscript{214} Drawing on Rawls’ theory of justice, Dworkin considers equal concern and respect to be the most fundamental of political rights.\textsuperscript{215} He argues that “our intuitions about justice presuppose not only that people have rights but that one right among these is fundamental and even axiomatic”, that is the right to equal concern and respect.\textsuperscript{216} Will Kymlicka defines the abstract and fundamental idea of equal concern and respect (which, unlike equal distribution of income, can be interpreted in various ways) as an “egalitarian plateau”; “the heart of all plausible political theories”.\textsuperscript{217}

Dworkin’s interpretation of the ideal of equality rejects the first dimension of equality, and offers instead an idea of equality of resources as the best account of “treatment as an equal”. This account relies on the complete lives approach as it assesses inequalities based on a lifetime’s accumulated resources. The account also ensures that each individual receives an equal share of resources through a comparison, \textit{i.e.} whether one individual is jealous of another’s bundle of resources.\textsuperscript{218} My interpretation of “treatment as an equal” is different. In my view, while the first dimension of equality is comparative, the second, the idea of equal concern and respect, is much more fundamental and comprises various substantive principles. It bears distributive implications,\textsuperscript{219} yet it is not essentially comparative.\textsuperscript{220} It focuses on people’s needs at any particular time and often without relation to other people’s situation.\textsuperscript{221}

\textsuperscript{215} “Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern” (Dworkin, \textit{supra} note 213 at 272-73).
\textsuperscript{216} \textit{Ibid.} at xii. Equal concern and respect, according to Dworkin, is not defined by the first principle of justice by Rawls. It is rather “a condition of admission to the original position”. The right to equality does not emerge from the social contract, “but is assumed, as the fundamental right must be, in its design” (\textit{ibid.} at 181).
\textsuperscript{218} Dworkin, \textit{supra} note 151 at c.2.
\textsuperscript{219} “In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances”. While the right to treatment as an equal is fundamental, the right to equal treatment is derivative (see Dworkin, \textit{supra} note 213 at 227).
\textsuperscript{220} See \textit{supra} note 205. Although it is common to view equality as a comparative concept, not all inequality cases are inherently comparative. See for example, Westen’s examples: claims of equality such as the right of persons not to be tortured and their right to basic economic subsistence are not comparative. “To decide whether a person has been tortured or denied basic subsistence, one need not know how anyone else has been treated. One can assess each person’s claim solely by reference to the particulars of this treatment, without the necessity of referring to others” (Peter Westen, “The Empty Idea of Equality” (1982) 95 Harv. L. Rev. 537 at 552). The Supreme Court of Canada has adopted this view and stated that all three stages of the test in \textit{Law v.
In my view, the fatal flaw of the complete lives approach (and its modified version) is that it focuses on the first dimension of equality or economic equality, while other components of equality are ignored. Yet, inequality does not solely revolve around the denial of economic opportunities to members of disadvantaged groups. The marginalization of these disadvantaged group members does not only lead to their economic disadvantage but also — and most importantly — to their social exclusion from numerous spheres including employment, health care, education and housing. It also reinforces stereotypes about them, perpetuates their oppression, and negatively affects their exercise of free choice and autonomy. These burdens or harms constitute wrongs that are so significant in and of themselves that they may not always be compensated for by past or future benefits and are not embedded in a comparative treatment of individuals. That is, it does not matter that the young receives a benefit that the senior does not, or that the senior carries a burden that the young does not. The wrong is embedded in the compromise of the substantive principles that stem from the notion of equal concern and respect.

In other words, by focusing on assessing and comparing the total shares of resources obtained by individuals over a lifetime (which constitutes only the first distributional and comparative dimension of equality), the complete lives approach ignores some harms that are done within temporal stages of life such as stereotyping, social exclusion or
oppression.\textsuperscript{225} That is, it often fails to treat individuals as worthy, to cater for their special needs and interests at a particular time, and to give them what they need to lead meaningful lives.\textsuperscript{226} These concerns are associated with the second dimension of equality, the idea of equal concern and respect. They suggest that an age discrimination claim can be pursued, even if it is not considered as such from a complete lives perspective. They point at the wrong done to an individual at a particular time (\textit{i.e.} temporal inequality) and consider it to be unjust despite future and past benefits or the comparative situation of another individual.

Hence, when assessing cases of age discrimination, one should avoid employing a complete lives approach to equality. Instead, one should adopt an alternative approach to equality which entails substantive principles stemming from Dworkin’s idea of \textit{equal concern and respect}.\textsuperscript{227} According to this alternative approach (which I will name the \textit{Dignified Lives Approach} to equality), individuals should always be treated with equal concern and respect. This is an essential component of the notion that individuals have the same unconditional intrinsic worth. If all human beings are of equal moral worth, then they should be treated with equal concern and respect at any given time and not just when assessing their total lifetime well-being.

When one of the principles underpinning equality is compromised, even within a temporal stage of life, a wrong is done, and the right to equality is violated. When these principles are respected at any particular time, equality is advanced. That is, the \textit{Dignified Lives Approach} to equality is pluralistic and comprehensive; it takes into consideration economic and social, temporal and lifetime inequalities. It holds that if temporal inequalities are mitigated, lifetime equality will flourish. Like Adler, I think that lifetime well-being is not the sum function of sub-lifetime well-being. If the fact that a person receives less than another person at a particular point of time might have a negative impact on his or her lifetime well-being due to demoralization or frustration,\textsuperscript{228} catering for the special and different needs and interests of disadvantaged groups at particular points of time will not result in lifetime inequality. On the contrary, it will promote personal development, social inclusion and dignity and will therefore enhance equality.

Note that since the principles to be developed in Chapter IV are the building blocks of equality, my argument has implications for equality in general. Yet, I wish to focus on the significant implications that this new account has for age discrimination analysis, and in

\begin{itemize}
\item \textsuperscript{225} These harms will be delineated in Chapter IV.
\item \textsuperscript{226} See example above in Section E.1.
\item \textsuperscript{227} Fredman also relies on the notion of equal concern and respect (“the central aim of equality is should be to facilitate equal participation of all in society, based on equal concern and respect for the dignity of each individual” \textit{(supra} note 59 at 21)).
\item \textsuperscript{228} \textit{Supra} note 165.
\end{itemize}
particular for age discrimination against senior workers. In the next Chapter, I will therefore articulate the essential principles underpinning equality in the specific context of senior workers. I will illustrate when and why unequal treatment based on age wrongs senior workers by compromising these principles. I will argue that when one of these principles is undermined, senior workers’ right to equality is infringed and there is no need for a consideration of future or past prosperities or for a comparison between the young and the senior. This is because according to the Dignified Lives Approach, all individuals are morally equal and entitled to equal concern and respect regardless of their age or life expectancy.

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229 Comparison may support the claim of discrimination, yet it is not the reason for the prohibition of this treatment of the senior. It has only an argumentative function. It indicates that something can be done to improve things and helps us to point at those who are responsible for not doing enough. According to Raz, some principles of equality are designed to promote equality as such (“strictly egalitarian”), while others generate equality as an incidental by-product. Furthermore, some principles are expressed using “equality” or related terms but have nothing to do with egalitarianism. Arguments and claims that invoke equality but do not rely on strictly egalitarian principle are termed “rhetorical” (see Raz, supra note 202 at 227-28). “They are not designed to increase equality but to encourage recognition that the well-being of all human beings counts” (ibid. at 229). Poverty is bad in all societies to the same degree and for the same reasons. It does not matter if only some or all members are poor. “The wrong is poverty and its attendant suffering and degradation, not the inequality. But the inequality is an indication that there may be resources which can be used to remedy the situation. It is relevant to an argument about what can be done, as well as to arguments about responsibility for not doing enough to reduce the poverty” (ibid. at 229).
Chapter IV:
The Essential Principles of the Right to Age Equality

A. Introduction

In Chapter III, I argued that one should reject the complete lives approach to equality which focuses on a comparative, distributive dimension of equality and suffers from numerous difficulties while precluding any age discrimination claim. I maintained that the concept of equality is broader than what is encompassed by the complete lives approach. Alongside the derivative right to equal treatment, it also entails the fundamental right to equal concern and respect. I therefore propose to develop an alternative account – the Dignified Lives Approach to equality which views some substantive principles stemming from Ronald Dworkin’s idea of equal concern and respect as constitutive parts of the account of equality. According to the Dignified Lives Approach, inequality (or discrimination) occurs when an individual is not treated with equal concern and respect (i.e. when the substantive principles of equality are not respected) and a personal wrong is done to the individual. This may occur at any point of time and with no reference to other individuals. Adhering to substantive principles of equality at any particular time, this account ascribes significance to current inequalities irrespective of what has happened or may happen.

In this Chapter, I will articulate five principles of equality derived from the idea of equal concern and respect. While these principles are obviously relevant to any analysis of equality, and therefore can be utilized by any age group in any context and sphere, I will stress their significance in the specific context of senior workers in the employment setting. In other words, I will illustrate how unequal treatment based on age is a wrong against senior workers because it fails to respect the essential principles underpinning their right to age equality.

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1 One might argue that I should focus on a right to human dignity instead of a right to equality. I do not agree with this observation. First, technically most constitutions include a right to equality and not a right to dignity (but see for example the exceptional case of Israel. The Basic Law: Human Dignity and Liberty guarantees a constitutional right to Human Dignity but does not explicitly mention the right to equality). Second, dignity is widely considered as the moral justification for numerous human rights rather than a right in itself. Dworkin, for example, justifies human rights based on a human dignity principle. See Ronald Dworkin, Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1977) at 198-99; Doron Shulziner, “Human Dignity – Justification, Not a Right” (2006) 21 Hamishpat 23 (Hebrew). Finally, dignity is a much broader notion than equality. It may entail cases of humiliation that have nothing to do with equality. For example, there are cases of moral harassment, mobbing and bullying that do not correspond to prohibited grounds. Workplace bullying is “the repeated mistreatment of one employee who is targeted by one or more employees with a malicious mix of humiliation, intimidation and sabotage of performance”. Mobbing is group bullying. See Margaret R. Kohut, The Complete Guide to Understanding, Controlling, and Stopping Bullies and Bullying at Work (Ocala, FL: Atlantic Publishing Company, 2008) at c. 1.

2 While equality may encompass additional principles, these five are in my opinion the most relevant in the context of senior workers.
equality. When these essential principles are compromised at any particular time, a personal wrong is done to a senior worker and her right to age equality is violated. This personal wrong is so significant that it cannot be compensated for by earlier or later benefits. It does not stem from a comparative treatment of the young and the senior but rather from the denial of equal concern and respect.

This conceptual analysis has several implications. First, it reveals that age discrimination – at least when senior workers are concerned – may be as unjust as other forms of discrimination. That is, if one fully understands the wrongs associated with age discrimination against senior workers that persist despite competition and market ordering, one can articulate a strong, moral case for opposing this type of discrimination. The moral value of anti-age discrimination law may help to secure compliance, and to narrow the scope of exceptions and exemptions to the prohibition on age discrimination. Second, unequal treatment based on age, which amounts to a personal wrong for the reasons delineated above, is unjust, even in the absence of explicit legislation. Finally, the principles underpinning equality take us a step further and encourage us not just to refrain from age discrimination but also to actively promote age equality. This step, however, requires explicit legislation that obliges public and private actors to engage in proactive initiatives to promote age equality.

This Chapter is organized as follows. Section B discusses in general the wide array of philosophical and legal literature on the substantive principles underpinning equality. Section C then fleshes out the notion of equal concern and respect. It asserts that several fundamental principles stemming from this notion constitute the concept of equality. That is, equal concern and respect is an abstract notion that dominates and informs the different principles of equality. Next, Section D maintains that the principles underpinning equality are applicable to both public and private spheres and entail negative and positive duties. Failing to respect one or more of these principles undermines the idea of equal concern and respect, which informs these principles, and amounts to a personal wrong against an individual. That is, an individual has a personal claim or a right against public and private actors, even in the absence of a legislative prohibition on discrimination. Section E introduces and examines in depth the five principles of equality in the specific context of

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1 I use the term “unequal treatment based on age” for both direct and adverse effect age discrimination.
2 See Chapter III, section D.4.b.
3 See e.g. Tom R. Tyler, Why People Obey the Law (New Haven, CT: Yale University Press, 1990) at 175-76. In his sociological and psychological study of the relationship between citizens, legitimacy and deterrence, Tyler argues that people obey the law if they believe it is legitimate, and not because they fear punishment. Note that I use the term “moral” here in contrast with economic grounds of justification. I do not argue that legal principles depend on “mortality” in the sense of a separate domain of principles about right and wrong that govern human behaviour.
senior workers in the employment setting. Section F addresses concerns about the relevance of equality to the analysis of the wrongs associated with age discrimination. Finally, Section G sets out conclusions.

**B. The Essential Principles Underpinning Equality**

What essential principles of equality are significant in temporal stages of life? Many scholars, departing from an egalitarian approach to equality, have undertaken to give the concept of equality substantive content by identifying several principles that equality aims to protect. Compromising these principles, so it is argued, amounts to wrongful discrimination. While some define discrimination narrowly or advocate one idea for all cases of discrimination, others take a pluralistic approach that offers several ways of understanding discrimination.

Harry Frankfurt, for example, argues that the moral problem with inequality cases is not that A has less than B (an egalitarian concern) but rather that A has too little, or less than enough (a sufficiency concern). Elizabeth Anderson maintains that the ultimate concern of equality is to end oppression. Donna Greschner identifies the main purpose of equality as protecting the interest of belonging and not excluding members of protected groups from the benefits of full membership in social, economic, and political life. By contrast, T.M. Scanlon articulates five diverse reasons for eliminating inequality, including alleviation of suffering, prevention of unacceptable forms of power or domination, and elimination of stigmatizing differences in status. John Rawls, who drew heavily on Scanlon, identifies similar reasons as to why we should regulate social and economic inequalities, including hardship, hunger and oppression.

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9 T.M. Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003) at 202ff. He notes that most of these reasons “can be traced back to fundamental values other than equality”. The idea that equality is, in itself, a fundamental moral value playing a “limited role” in Scanlon’s analysis. His idea of equality leads us to “substantively egalitarian consequences only via other specific values … most of which are not essentially egalitarian”. Nevertheless, Scanlon does not mean “to attack equality or to ‘unmask’ it as a false ideal” (ibid. at 202-03).
10 John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly, ed., Cambridge, MA: Harvard University Press, 2001) at 130-31. Among other things, Rawls mentions the wrong that some will suffer hardship and hunger (he notes that our concern is not inequality of income and wealth but rather that “all should have at least enough to meet their basic needs”); the wrong in which one group dominating another; and the wrong in inequality in itself which is often associated with inequalities in social status and with viewing those of lower status as inferior.
The Supreme Court of Canada has recognized that dignity underpins equality. In an attempt to give the vague concept of dignity substantive, meaningful content, Denise Réaume articulates three forms of indignity associated with discrimination: prejudice, stereotyping, and exclusion from benefits that are significant for a life with dignity. In her analysis, Réaume relies on the four factors that the Supreme Court of Canada identifies as indications of differential treatment that infringes dignity.

Réaume also employs the idea of human dignity in her analysis of the harms associated with discrimination in the private sector and the standard of fault in actions against private actors. According to Réaume, anti-discrimination law should be understood as protecting the fundamental interest of human dignity which is associated with fair access

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11 In Canada, the Supreme Court of Canada created a three-stage test to establish a claim under s. 15. The plaintiff has to prove the existence of (1) differential treatment; (2) based on a prohibited ground; (3) that is discriminatory in the sense that it violates human dignity. See Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497 at para. 51, Iacobucci J (“[T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all person enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration”); and Gosselin c. Québec (Attorney General), [2002] 4 S.C.R. 429 at para. 18 (“a distinction made on an enumerated or analogous ground violates essential human dignity to the extent that it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others”). But see R. v. Kapp, 2008 SCC 41, where the Court suggested that while “there can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee”, employing human dignity as a legal test raises several difficulties. It is “an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants” (ibid. at paras. 21-22). The court held that Law does not impose a new test for discrimination but rather using the four contextual factors identifies perpetuation of disadvantage, prejudice and stereotyping as the primary indicators of discrimination (ibid. at paras. 23-24).


13 The most compelling factor identified was “pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group” (Law v. Canada, supra note 11 at para. 63). However, the proof of stereotype is not an essential element. There is more than one way to demonstrate a violation of human dignity: “any demonstration by a claimant that a legislative provision or other state action has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society … will suffice to establish an infringement of s. 15(1)” (ibid. at para. 64). For example, legislation that ignores the actual needs, capacity, or circumstances of the claimant in a manner that disregards his or her value as a human being and member of society is likely to have a negative effect on human dignity (ibid. at paras. 69-70). Another possible factor is when disadvantaged groups are excluded from the scope of ameliorative purpose or effects of impugned legislation or other state action (ibid. at para. 72). Another factor is the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. It is also relevant to consider whether the distinction restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (ibid. at para. 74).

14 By contrast to constitutional law (see supra note 11), in the private sector, the complainant has to prove that he or she was treated differently on the basis of a prohibited ground. No third step is currently needed yet it may be introduced in private discrimination cases in the future. It has already been introduced in the concurring judgment of Chief Justice McLachlin, Justice Abella and Justice Bastarache in McGill University Health Centre (Montreal General Hospital) v. Syndicat des employé de L’Hôpital general de Montréal, 2007 SCC 4. Justice Abella establishes a requirement for the complainants to establish arbitrariness either in purpose or effect. She writes: “Not every distinction is discriminatory. It is not enough to impugn an employer’s conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden” (ibid. at para. 49).
to important opportunities and due consideration of the needs and interests of different groups in the design of important social institutions. She maintains that as an independent, objective interest deserving of legal protection, human dignity justifies limitations on freedom of contract. The interest of human dignity might be infringed in her view by implicit or explicit conduct motivated by stereotypes or prejudice, or by a denial of a fair opportunity to participate in important activities and social institutions.

Similarly, applying Dworkin’s idea of equal concern and respect, Sophia Moreau articulates the nature of the wrongs done to individuals by the State when they are unfairly treated. She distinguishes between one abstract conception of this wrong and three more specific, substantive conceptions of the wrong. According to Moreau, unequal treatment is wrong when it is associated with stereotyping and prejudice, oppression, and denial of basic goods. Finally, in our specific context, Sandra Fredman identifies three substantive values that age equality (at any age and in several spheres) aims to achieve: autonomy, dignity and social inclusion.

Drawing on Fredman and on the wide array of philosophical and legal literature on equality, I wish to further articulate and theoretically ground several principles underpinning age equality. I also aim to provide a comprehensive explanation as to why “a detriment” or “detrimental effect”, to use Fredman’s terms, occurs when these principles are not respected, thereby establishing an age discrimination claim. This theoretical analysis will however focus on the specific context of senior people in the employment sphere. It will therefore emphasize questions such as why it is highly important to protect senior workers, and will contrast their interests vis-à-vis younger workers’ rights and interests. Nonetheless, the analysis may have relevance to younger workers and to other spheres (such as housing or service provision) as well. As opposed to Fredman, I do not consider dignity as one of the substantive principles of equality (or age equality). The next Section will discuss the role of dignity in my analysis. Finally, I will articulate three other relevant principles, apart from the principles of autonomy and social inclusion identified by Fredman, which I will name the

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15 See Denise G. Réaume, “Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination” (2001) 2 Theor. Inq. L. 349. In this article, Réaume tackles the question of fault in the context of transition from intentional to adverse effect discrimination. She offers a third path between two extremes – exclusive focus on the moral blameworthiness of the defendant, and a sole focus on the effects of discrimination on its victims. The third path builds on a broad notion of human dignity that anti-discrimination law must protect from infringement. She argues that discrimination is an affront to human dignity. Réaume argues that “the setting of norms implicitly based on the attributes of the dominant group … will inevitably tend to exclude or disadvantage those who do not share them” (ibid. at 376).

16 According to Moreau this is not an exhaustive list of the wrongs (ibid. at 314).


18 For reasons delineated in Chapter III, section D.2.
principles of *individual assessment, equal influence* and *sufficiency*. In my opinion, this composite of ideas underpinning the meaning of equality better reflects the complexity and manifoldness of our lives. True, the five principles may overlap in certain situations. However, I will argue that a breach of each principle constitutes a distinct wrong that is associated with discrimination. That is, unequal treatment which is based on stereotypes or prejudice, perpetuates oppression, denies access to minimum conditions of living, excludes individuals from full and meaningful participation in social lives, or reduces their autonomy and free will is wrong.

**C. Equal Concern and Respect**

As was argued in Chapter III, the concept of equality is broader than what is encompassed by the complete lives approach. Alongside the derivative right to equal treatment, it also entails the fundamental right to equal concern and respect. The idea of *equal concern and respect* is derived from the philosophical, Kantian notion that all human beings have the same unconditional intrinsic worth; and therefore they are all entitled to equal concern and respect and should not be used instrumentally as a means to some other end.21

According to the Supreme Court of Canada, equal concern and respect is concerned with “the realization of personal autonomy and self-determination”. It means that “an individual or group feels self-respect and self-worth”. It is harmed by “unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits” and is enhanced when the needs, capacities, and merits of different individuals are taken into account. It is undermined “when individuals and groups are marginalized, ignored, or devalued” and it is promoted when all individuals and groups are recognized as members of our society.22 Réaume explains how respect for one’s identity, life plans and community involvement is essential to respect for dignity:

First, human beings are capable of having a conception of the self. This makes respect for identity crucial to respect for dignity. Second, humans are capable of formulating and revising a conception of the good. This makes respect for people’s plans and projects relevant to protecting dignity. These two aspects of personality are connected, since one develops an identity partly through the life one creates for oneself, and a conception of the good partly in the context of one’s sense of who one is. Both aspects of personality can be understood as abstract capacities that all human beings have, but respect for the capacity requires some measure of respect for its use as well; people must be given some scope to be who they are and conduct their lives as they see fit. … Both identity development and formulation of a conception of the good are undertaken by

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22 *Law v. Canada*, supra note 11 at para. 53.
individuals, but they are undertaken in large part with and through relationships with others. For this reason, involvement in communities of various sizes and scopes can be crucial to the individual enjoyment of self-worth. That dependency must be recognized by any account of what respect for the dignity of others requires.\footnote{Réaume, supra note 12 at 677-78.}

Fredman considers dignity to be one of the substantive principles of equality.\footnote{“[A] potential aim of equality is to ensure that everyone is treated with equal dignity and concern” (Fredman supra note 19 at 44).} Although I agree that underpinning the concept of equality is the idea of equal concern and respect, I do not think that dignity should be considered as one of the essential principles of equality for two main reasons. First, as Fredman acknowledges dignity is “an opaque concept” and very difficult to measure.\footnote{Ibid. at 45.} It might have different meanings in different contexts and it may lead to conflicting results.\footnote{For example, it is argued that mandatory retirement protects the dignity of senior workers as it provides them with a dignified exit from the labour market and avoids constant monitoring and evaluation of workers’ performance. It is also argued that individual evaluation best promotes the dignity of workers because it assesses them on their own traits, whereas mandatory retirement is based on ageist stereotypes. See Chapter II, notes 40-41 and accompanying text.} That is, while equality is widely understood as a denial of one’s dignity,\footnote{The aim of the EU Directive is, for example, to ensure respect for human dignity by protecting of the right to equal treatment and enhancing the ability of all age groups to participate in employment and employment-related activities (see Recitals 4-6 in the preamble to the European Union Council Directive 2000/78/EC of 27 November 2000, OJ L303 at 16-22).} this might raise several difficulties. The Supreme Court of Canada has therefore backed away from the value of dignity – although recognizing that it is an essential underlying value of equality\footnote{R. v. Kapp, supra note 11 at para. 21.} – and turned to focus on disadvantage, prejudice and stereotyping as the primary indicators of discrimination.\footnote{Ibid. at paras. 23-24. See also para. 37: “… The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping”.} Yet, it is not clear which disadvantages amount to discrimination and whether some other sorts of unequal treatment might be objectionable.\footnote{The Court interprets disadvantage as “vulnerability, prejudice and negative social characterization” (ibid. at para. 55).} Like Moreau, I think that the underlying understanding of the notion of equal concern and respect should inform a more specific, substantive set of principles constituting equality, and that it is their compromise that constitutes discrimination.\footnote{Moreau, supra note 17.} That is, the notion of equal concern and respect interlocks and intertwines throughout the entire analysis of the five substantive principles underpinning the \textit{Dignified Lives Approach} to equality, yet it is not one of them. Second, while discrimination always
diminishes an individual’s feelings of self-worth, these subjective feelings are not the reason why unequal treatment is wrong. Objective indicators, which demonstrate an enhancement or diminution of the idea of equal concern and respect, are therefore needed. The essential principles of equality to be articulated in this Chapter, stemming from the idea of equal concern and respect, will provide these objective indicators.

D. Negative and Positive Duties applicable to both Public and Private Spheres

As will be argued throughout this Chapter, the Dignified Lives Approach to equality, and accordingly the principles underpinning equality, are applicable to both public and private spheres. That is, public actors as well as some private actors are under an obligation to respect and promote the principles of equality.

The obligation of the State towards its citizens is broader than the obligation of each person towards others. The principle of equality applies to every action or decision taken by the government. The government may also be subject to positive duties to enhance equality. For example, while citizens are required to obey the law no matter their sex, race or age, the government has a duty to provide them with the minimum conditions to maintain dignified lives. The obligations of one person towards another are more modest. People are autonomous moral agents. They are only obliged to respect others’ rights and liberties (including the right to equality) by not restricting or interfering with other persons’ freedom to enjoy their rights and liberties. Generally, they do not carry a positive duty to benefit or assist others.

However, in some spheres, such as employment, there may be a case for imposing broader obligations on private actors, such as employers. These private actors are distributors

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32 The only exception is when institutions are concerned. For example, when a government unequally distributes resources among different institutions based on their religious orientation, this does not involve any infringement of dignity.
33 See Moreau, supra note 17 at 312-13.
34 As the Supreme Court of Canada has stated, “the focus of the discrimination inquiry is both subjective and objective: subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant’s equality rights have been infringed only by considering the larger context of the legislation in question, and society’s past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances” (Law v. Canada, supra note 11 at para. 59). It concluded that “[t]he relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. … a court must be satisfied that the claimant’s assertion that differential treatment imposed by legislation demean his or her dignity is supported by an objective assessment of the situation” (ibid. at para. 60).
35 See e.g. the International Covenant on Economic, Social and Cultural Rights, Article 2 ("Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures").
of certain goods comparable to the State. They should therefore be subject to a duty to treat people as equals (i.e. with equal concern and respect). As Réaume argues, their liability stems from the harm done to the equal moral worth of workers by discrimination, whether it was intentional or not.\textsuperscript{37} That is, the harm is not only concerned with deliberate denial of a benefit out of malice or prejudice.\textsuperscript{38} It also includes an unintentional act or behaviour that denies fair access to opportunities that are integral to one’s dignity, based on a trait that is a prohibited ground.\textsuperscript{39} As Réaume argues, “there are ways of restricting self-fulfillment that are themselves sufficiently harmful to constitute a violation of dignity, even absent an underpinning in prejudice or stereotypes”.\textsuperscript{40} This may include interference with one’s pursuit of equal opportunity, freedom of occupation, attainment of minimum conditions of living or equal participation in important social institutions. These harms are intrinsically wrong as they constitute a violation of dignity.\textsuperscript{41} Employers are therefore under a duty to refrain from stereotypes and ageism and to eliminate oppression in the workplace. They are also obliged

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\item[\textsuperscript{37}] Réaume, \textit{supra} note 15.
\item[\textsuperscript{38}] Intent is not an essential component of discrimination but it may aggravate the harm to human dignity associated with discrimination. Réaume argues that the early Canadian cases “required not just intention [of the discriminator] but a very particular intention: the desire to cause harm because of one of the enumerated characteristics”. This, she argues “looks more like malice than mere intention”. Malice was viewed an intrinsic to the wrong-doing. She criticizes this practice because it requires that the injury to the other will be “an end in itself rather than merely a means to another end” thus allowing cases of discrimination motivated by ulterior ends. Also, effects of discrimination have the same severity whether imposed maliciously or not. As well, a malice standard cannot effectively fight discrimination against historically-disadvantaged groups. Réaume also maintains that “there is very little difference between a malice standard and an intention standard of fault”. The latter refers to the “defendant’s knowledge of the likelihood of his behaviour causing harm”. According to Réaume, knowledge of likely injury to the plaintiff is similar to a desire to injure her. The result is that “only someone who acted out of conscious prejudice would be found liable”. Réaume notes that there is a shift in the interpretation of anti-discrimination provisions – even in the American jurisprudence where discrimination was used to be based on prejudice – towards the emergence of the differential treatment conception of discrimination. See Réaume, \textit{supra} note 15 at 358-60, 363-65, 369; Robert Post, “Prejudicial Appearances: The Logic of American Antidiscrimination Law” (2000) 88 Cal. L. Rev. 1 at 9-10.
\item[\textsuperscript{39}] Often cases of adverse effect discrimination are actually cases of employers who learned how to mask their ageist intentions. As was recognized in \textit{British Columbia (Public Service Employment Relations Commission) v. British Columbia Government and Service Employees’ Union}, [1999] 3 S.C.R. 3 at para. 29 [Meiorin], “a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect -- or an even broader effect -- could be easily realized by couching it in neutral language”. Moreover, there are many cases of unconscious discrimination where employers unintentionally carry on policies that have roots in stereotyping and prejudice. See \textit{e.g.} Samuel R. Bagenstos, “Implicit Bias, Science, and Antidiscrimination Law” Washington University School of Law Working Paper No. 07-04-01, Harvard Law and Policy Review, online: \textltt{http://ssrn.com/abstract=970526}. However, this is not the main reason, in my opinion, why employers should be held liable for adverse effect discrimination.
\item[\textsuperscript{40}] Réaume, \textit{supra} note 12 at 673.
\item[\textsuperscript{41}] A different reason for the wrongfulness of adverse effect discrimination was offered by Arneson, who provides an account of wrongful discrimination in public and private spheres (Richard J. Arneson, “What is Wrongful Discrimination” (2006) 43 San Diego L. Rev. 775). According to Arneson’s narrow account, discrimination is intrinsically wrong when “an agent treats a person identified as being of a certain type differently than she otherwise would have done because of unwarranted animus or prejudice against persons of that type” (\textit{ibid.} at 779). He puts strong emphasis on intention, fault and motivation. He does not regard prejudice as including stereotypes, which are not morally wrong. Arneson argues that an action or policy that has a disparate impact on a group of people might not be intrinsically morally wrong because it might not be motivated by animus or prejudice. Still, it could be morally wrong for extrinsic reasons. That is, when it offends a substantive principle of equal opportunity that “is assigned moral priority over the principles that justify these policies” (\textit{ibid.} at 795).
\end{itemize}
to repair policies that are neutral on their face but which have a disproportionately negative effect on members of a disadvantaged group, including by denying access to a benefit or opportunity available to others, which is significant to a life of dignity. That is, employers are required to recognize the actual differences and special needs of members of disadvantaged groups and provide them with reasonable accommodation. As Réaume argues, the interest in fair access to opportunities as an aspect of human dignity is sufficiently important to warrant the imposition of obligations on employers to accommodate at least some differences between individuals.42

A failure to treat a worker with equal concern and respect (i.e. a failure to show respect to the principles underpinning equality) amounts to a personal wrong, akin to tort, against the individual. Consequently, the individual has a personal claim or a right against the State or a private actor such as an employer to refrain from discrimination as well as to positively act in order to promote equality even in the absence of any legislative prohibition of this kind of behaviour. As Réaume argues, the wrong (or the detriment) is embedded in the violation of human dignity. As will be shown in Section E, an unequal treatment which is based on a stereotype or prejudice, perpetuates oppressive relationship or violates one’s autonomy, clearly undermines the notion of equal concern and respect, and the “fault” of the discriminator is obvious. By contrast, a neutral action or policy which results in social exclusion or denial of access to minimum living conditions has the effect of undermining the notion of equal concern and respect, yet it is difficult to show how the policy or action itself involves any “fault”. Drawing on Réaume (as well as on Iris Young’s theory which will be discussed later), I will argue that the fault in these cases is embedded in the failure to treat individuals as of equal moral worth and to recognize actual group differences by, for example, accommodating their special needs up to a point of undue hardship.43

Some scholars reject the analogy between unequal treatment based on prohibited grounds and tort.44 Richard Epstein, for example, compares discrimination and fraud. While the latter case justifies public force to constrain aggression because it promises “some release from what otherwise would be an endless set of violent interactions with people”, markets offer a radical contrast: “The person who wishes to discriminate against another for any reason has it in her power only to refuse to do business with him, not to use force against

42 Réaume, supra note 15 at 380.
43 In the Canadian context, for example, the Ontario Human Rights Code, R.S.O. 1990, c. H.19, s. 24(2): “The Commission, the Tribunal or a court shall not find that a qualification under clause (1) (b) is reasonable and bona fide unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any”.
That is, even if 90 percent of people refuse to deal with someone because of his race, he can concentrate on doing business with the remaining 10 percent. He argues that the “victim of discrimination, unlike the victim of force, keeps its initial set of entitlements – life, limb, and possession – even if he does not realize the gains from trade with a particular person”.

To conclude, Epstein argues that free market will provide ample protection to all workers, “even those faced with policies of overt and hostile discrimination by some employers”.

However, as we have seen in Chapter III, discrimination in employment is persistent despite competitive market conditions. Furthermore, as we will see in this Chapter, Epstein does not adequately grasp the harm done by discrimination against members of a disadvantaged group. Differential treatment might undermine the notion of equal concern and respect. Among other things, it affects people’s ability to define themselves, it pushes them into poverty, it marginalizes them, and it takes away their power to effectively make choices in life and to fully contribute to society. It is therefore warranted to impose some legal limitations even on private parties negotiating a contract.

Furthermore, in cases of socially constructed, systemic discrimination where no personal wrong against an individual can be identified, and it is difficult to point at specific liable discriminators, the principles underpinning equality may establish a useful platform to impose positive duties on public and private actors to enhance equality. While one might argue that this is a public problem stemming at least in part from public attitudes and social structures for which the government bears responsibility, I think that there is also a justification for private responsibility. In a neo-liberal capitalist era, employers – especially large corporations – have gained tremendous power and exert as much control over an individual’s life as governments. They help to form our views and to influence our perceptions. They assume an important role in the way that our society is structured and discrimination is manifested. They are in a position to redistribute benefits and resources to disadvantaged groups. Hence, even if some employers are not directly or indirectly responsible for discrimination against their employees, as a matter of policy they should be held liable and be subject to some positive obligations as they have the ability to create social change.

As Fredman argues, “[r]ecognizing that societal discrimination extends well

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46 Ibid. ibid.
47 Ibid. at 59.
48 According to John Gardner, once one enters a quasi-public sphere, one is an “agent of distributive justice” (which others might view as the state’s exclusive responsibility). This view portrays discrimination law as more close to tort law (strict liability) than to criminal law (strong fault). Individuals and institutions are recognized as discriminators because they are in a good position to distribute goods or services and therefore have a duty of fair distribution. In the employment context, employers are “agents of distributive justice” because, as the
beyond individual acts of prejudice, the duty goes beyond compensating identified victims and aims at restructuring institutions. This duty is not derived from a personal fault or responsibility for creating the problem. Rather, it stems from the recognition that in order to enhance the idea of equal concern and respect, refraining from discrimination is not enough and that there are bodies – public and private – that are in the best position to pro-actively eliminate institutional, structural and systemic discrimination, and, by taking positive actions, to promote fair participation in the workplace. In these cases, there is no need to initiate a complaint. Public and private actors have a responsibility to identify and deal with problems of structural and institutional discrimination such as marginalization in the workplace. Here, the duty of accommodation, for example, is not exhausted by tailoring an individual solution for a particular employee who has been discriminated against. It requires proactive solutions that would enhance equality in every workplace rule and practice. The magnitude of their duty depends upon their quasi-public nature and relative power and size. Again, it is subject to the “undue hardship” doctrine. However, it should be clear from the outset that while there is a strong public interest in imposing responsibility on those who

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49 Fredman, supra note 19 at 62.

50 “Both direct and indirect discrimination are limited in that they do not require any action to be taken unless it can be proved that an individual respondent was responsible for the discrimination, and that the complainant was a direct victim of that discrimination. On the other hand, a positive duty to promote equality, because it is pro-active, sidesteps many of the limitations of direct and indirect discrimination provisions. The law identifies those in the best position to promote equality (e.g. public authorities and employers), and the duty is triggered by visible patterns of under-representation” (Bob Hepple, Mary Coussey & Tufyal Choudhury, Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Oxford: Hart, 2000) at 32). This thought-provoking report advances a so-called “four generation” anti-discrimination law which is enhanced by positive obligations to promote equality as opposed to a sole reliance on a negative obligation to refrain from discrimination (ibid. at 34-35). Based on the experience of other countries including the U.S. and Canada, it argues that significant improvement cannot be achieved without positive action (ibid. at c. 3). It suggests, among other things, imposing positive duties on public authorities (ibid. at 61-65) and on public and private employers of more than ten full-time employees. These duties would be limited by the undue hardship doctrine (ibid. at 71-72).

51 Fredman, supra note 19 at 62. On the positive duties of the state see also Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford: Oxford University Press, 2008). In this book, Sandra Fredman revisits the traditional understanding of human rights as protecting individual freedom against state intervention. She argues that human rights are based on a deeper understanding of freedom which pays attention to individuals’ ability to exercise their rights. This view requires the state to act positively to remove barriers and facilitate the full exercise of freedom by all human beings.

52 See Chief Justice McLachlin’s rhetoric in Meiorin, supra note 39 at paras. 64, 67.
have power to affect people’s lives, this requires explicit legislation and the legal duty cannot be implied from a general prohibition on discrimination.

E. The Essential Principles of Age Equality

1. The Principle of Individual Assessment

(a) Unequal Treatment Based on Stereotypes

One of the essential concerns of equality, and the historically prevalent conception of discrimination, is with action motivated by stereotypes and prejudice. That is, unequal treatment is unjust when a deprivation of a benefit or an imposition of a burden is motivated by or justified in terms of prejudice or stereotyping. A stereotype is any generalization or classification (accurate or false) with a negative or positive connotation, which attributes essential features to individuals without consideration of their individual traits and circumstances. There are two reasons why stereotypes harm individuals.

The first reason stereotypes are harmful may be better understood if we break them into four categories. Stereotypes are essentially assumptions that members of a group have a particular characteristic. They can have a positive or negative connotation, and they may be based on an accurate or false generalization. Hence, there are positive-accurate, negative-accurate, positive-inaccurate, negative-inaccurate generalizations. The wrong of inaccurate generalizations is self-explanatory. They are inaccurate for all (or most) members of a group. The wrong lies in the untruth of the description of the group as well as an individual.

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53 See Moreau, supra note 17 at 297-99. Scanlon argues that it is wrong to treat people as inferior and that equality is therefore needed for the prevention of stigmatizing differences in status (supra note 9 at 204). Scanlon identifies the reason behind equality as “clearly egalitarian” (ibid. at 207). Similarly, Rawls identifies this wrong as “inequality in itself” and connects it with inequality in social status and with viewing those of lower status as inferior (see supra note 10). Finally, Cupit points at the wrong of inferiority as the ultimate wrong of age discrimination (see Chapter III, section E.5. and infra note 61). However, as will be further argued in this Section stereotyping is not merely about treating an individual as inferior. Rather, it is broader and includes treatment of an individual other than according to her own attributes. It is also not essentially egalitarian, as it does not rely on a comparative treatment of two individuals.

54 See Moreau, supra note 17 at 298. See also Law, supra note 11 at para. 64: “A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess. … it reflects and reinforces existing inaccurate understandings of the merits, capabilities and worth of a particular person or group within Canadian society, resulting in further stigmatization of that person or the members of the group or otherwise in their unfair treatment”.

55 I agree with Moreau that the negative content of stereotypes may add an additional dimension to the wrong of stereotyping but it is not an essential part of it. There are generalizations “that treat one feature as a proxy for another based on relatively reliable statistical evidence”. Others do not carry negative connotations (Moreau, supra note 17 at 300). By contrast, according to Réaume, stereotypes “are inaccurate generalizations about the characteristics or attributes of members of a group”. Also, she refers only to negative characteristics (supra note 12 at 681). Similarly, Levine distinguishes between generalization and stereotype. Generalization is “the ascription to a person of characteristics without individualized assessment, because of membership in a category or group thought usually to possess those characteristics. A generalization may be positive, negative, or neutral. It may also be true or false to varying degrees….”, while a stereotype is only a negative, incorrect generalization (Martin Lyon Levine, Age Discrimination and the Mandatory Retirement Controversy (Baltimore: The Johns Hopkins University Press, 1988) at 140).
Therefore, it is clear why two of the four categories (positive-inaccurate and negative-inaccurate) harm individuals.

Negative-accurate generalizations wrong individuals for a different reason. Although the generalization might be accurate for many members of the group, it may yet be inaccurate for an individual. While false generalization wrongs the group as a whole, an accurate generalization can wrong an individual if the generalization does not correlate to his or her traits or circumstances. The individual may be arbitrarily denied a benefit, based on a negative-accurate generalization, although given an individualized assessment she may be eligible for it.\(^56\) Treating individuals with equal respect and concern means that because individuals have unconditional, intrinsic value, they should be treated, judged and assessed as individuals, \(i.e\). according to their own merits and not according to irrelevant characteristics.\(^57\) The essential wrong of action based on a negative-accurate generalization is that an individual is denied a benefit available to others based on his or her membership of a group even though he or she is individually eligible for it. The wrong is intensified by the negative connotation of the generalization because it implies the inferiority of those subject to the generalization. It is further aggravated when individual assessment is feasible yet denied.

Finally, positive-accurate generalization is wrong because it may lead to negative outcomes. For example, it is still generalization that might wrong those who do not fulfill its expectations. It might increase pressure to perform according to assumptions. Positive stereotypes might also imply other negative stereotypes.\(^58\) Also, it might wrong those who are not perceived as members of the group that possesses this positive quality, or even justify derogating from the rights of others.\(^59\) And in any case, there is another reason stereotyping wrongs individuals, which also applies to positive-accurate stereotypes.

The second reason stereotyping is wrong is that it categorizes people and defines them (both positively and negatively) according to society’s own conceptions and not according to what they really are. Even if a stereotype is, on average, accurate, it may mischaracterize an individual. A stereotype is an image of an individual rather than an actual individual. Stereotyping thus reduces the power of an individual to define her life, to shape her identity, and to determine for herself which groups she belongs to. In this way, it lessens

\(^{56}\) See Moreau, \textit{supra} note 17 at 298.
\(^{57}\) Sometimes treating an individual according to his or her own merits might result in a wrong. This is why the principle of individual assessment does not constitute a complete account of equality. See discussion in Section E.4. below.
\(^{58}\) For example, the stereotype of hard-working immigrants might imply that immigrants need to work harder because they are not skilled (see Moreau, \textit{supra} note 17 at note 24).
\(^{59}\) For example, the generalization according to which whites are smart people implies that non-whites are not.
the autonomy of a person. The wrong of stereotyping is therefore much broader than just treating a person as inferior.

(b) Stereotyping of Senior Workers

Senior workers have long endured ageist stereotypes including the beliefs that these workers are slower, less ambitious, flexible, creative, productive and hardworking, encounter more difficulties in training, are less likely to grasp new technology and handle changes, frequently absent, and have reduced physical capacity. These beliefs and attitudes, held by both senior and young individuals, have significantly intensified the difficulties faced by senior persons. Senior workers are more frequently denied training than younger workers. They are over-represented among the unemployed and remain unemployed for a longer period of time than younger workers. When they do find a job it is often a temporary, low paid job. Deprivation of a benefit or imposition of a burden on a senior worker based on stereotyping is wrong in and of itself. It does not matter what the comparative situation of members of other age groups is or whether the senior worker was or will be better off in earlier or later stages of her life.

To understand why ageist stereotyping is wrong in and of itself, we should distinguish between two main types of ageist conceptions. Most assumptions and generalizations that are made with regard to seniors at work are inaccurate. They falsely correlate certain characteristics to age. For example, creativity, flexibility or ambition has nothing to do with age. Those who are uncreative or lazy were the same when they were young.

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60 See Moreau, supra note 17 at 299.

61 Cupit’s suggestion presented in the previous Chapter that age discrimination is unjust only if it entails a false derogatory judgment (i.e. treating people as inferior simply on account of their age) is therefore too narrow. Not only does it offer provide a description of the wrong of age discrimination based on stereotyping, it also fails to capture other wrongs of age discrimination as will be detailed in this Chapter (Geoffrey Cupit, “Justice, Age and Veneration” (1998) 108 Ethics 702 at 709-10).


63 See, for example, a study conducted in Calgary according to which the most common reasons for non-hiring of senior workers were their assumed lack of qualification, education, training and new technology skills; their high labour cost due to high wage expectation, high health benefits and inability to recoup their training costs; inability to adapt to new age corporate culture; and other stereotypes on senior workers (Kevin J. Gibson, Wilfrid J. Zerbe & Robert E. Franken, “Employers’ Perceptions of the Re-employment Barriers faced by Older Job Hunters” (1997) 48 Rel. Ind. 321). See also Time for Action, supra note 62 at 41-42; Bill Bytheway, Ageism (Buckingham: Open University Press, 1995) at c. 4 and 7; Sue Thompson, Age Discrimination: Theory into Practice (Dorset, UK: Russell House Publishing, 2005) at 13-33.

64 See Chapter III, section B.
young, or have become uncreative and lazy for reasons other than age. Generally speaking, senior workers are no less creative, adaptable and flexible than younger workers. These misconceptions are a wrong against the entire group of senior workers because they are incorrect. They sometimes, for example, apply social perceptions about the young to senior people.

A few ageist conceptions pertain to characteristics that may be relevant to the aging process, but which are not inevitable or universal. These conceptions are not valid for the entire group of senior workers although they may be true for some of them. For example, serious health problems are more common among senior people, yet the majority of senior people do not suffer from them. Some conceptions may even be accurate on average (such as the perception that there is a decline in physical strength with age). Yet, while some senior people are physically weak, others maintain high fitness. That is, some people experience some decline while many others do not. Those who do, experience reductions in physical capacity in different ways and at different points of time and they might not even be job-related. As far as productivity and job performance is concerned, it has been widely proven that age is a poor proxy. That is, there is little systematic overall relationship between age and productivity or job performance. Moreover, if an individual experiences some decline in ability, it can often be offset against his or her skills, experience, networking, leadership, mentoring and loyalty. In any case, attributing characteristics that may be true for some or even the majority of the group (generalization) is a wrong against those individuals who do not experience phenomena that might be connected to aging and do not share the ascribed characteristics. It inaccurately describes them and arbitrarily denies them a benefit that they would be eligible for if given an individualized assessment.

Furthermore, in most cases individualized assessment is feasible and not too costly. Performance evaluation systems for appointing, promoting and discharging employees have been widely practiced by many employers. Nonetheless, even if age is an accurate-on-average proxy that is justified in terms of cost, it might be still wrong to use it as a proxy

65 See John Grimley Evans, “Age Discrimination: Implications of the Ageing Process” in Fredman & Spencer, supra note 19, 11 (Evans argues for example that senior workers might be slower learners and less functional than younger workers because the educational techniques are adapted to the prime age culture).
66 See Chapter II, note 28 and accompanying text.
67 This process has been termed the “infantilization of the old”. See Howard Eglit, Elders on Trial: Age and Ageism in the American Legal System (Gainesville, FL: University Press of Florida, 2004) at 11-12. There are age restrictions for children and youth that we find justified because it is clear, for example, that a three-year-old child is not mature enough to drive a car. However, we tend to implicitly attribute the same characteristics to senior citizens as if they were losing their capacity just like children. This is clearly wrong as the situation of seniors is completely different from the situation of children and youth. No three-year-old child can drive a car whereas plenty of 75-year-old workers can still work and perform well.
68 See e.g. Eglit, ibid. at 35-37, who provides data from the U.S. to support this claim.
69 See Chapter II, section B.2.
70 See Chapter II, section F.
because it has undesirable social consequences. It might cause resentment and reinforce the predicted behaviour, and foster bias and other inaccurate stereotypes. \(^{71}\) Barth \textit{et al} argue, for example, that when the productivity of senior workers is lower than that of younger workers, it is usually due to less access to training. \(^{72}\) Employers tend to discriminate against senior workers in the provision of training due to stereotypes about their inability to grasp new technology and prefer to train younger workers with whom they have a longer time to recoup their investment. Consequently, stereotypes are reinforced and senior workers’ productivity is negatively affected. \(^{73}\) As Thurow argues, while it might be economically efficient for employers, it is unfair for the individual and inefficient for society and economy as a whole as it “leads to treating both individuals and groups unfairly relative to their productive characteristics” and “stops the economy from making use of the talents and working desires that are available to it”. \(^{74}\)

By contrast, most generalizations made with regard to children and youth, such as in the matter of voting rights or driving licenses, are accurate on average (statistically rational), and no other feasible alternative is available. Furthermore, even when some kind of harm is done to children and youth by using generalization, it is only temporary and not too severe. For example, age restrictions on voting rights exclude children and youth from full participation in democratic lives. However, the exclusion is only temporary (while a child will grow up and be entitled to vote, a senior will never be young again) and it is reasonable given the fact that other civil duties are not applicable to youth and children.

Finally, not only does stereotyping wrong senior workers by not treating them in accordance with their own traits, it also wrongs those workers by categorizing them in a way

\(^{71}\) See Larry Alexander, “What makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies” (1992) 141 U. Pa. L. Rev. 149 at 170-71; and \textit{infra} notes 102-103. Alexander seeks an answer to the question of what amounts to wrongful discrimination by examining discrimination as an expression of various types of preferences while focusing on discrimination in the private sector. He concludes that “[d]iscrimination may be intrinsically wrong because it is based upon biases, the incorrect judgments of lesser moral worth, or upon the shallow aversions or inaccurate negative stereotypes that are produced by such judgments. Discrimination may be intrinsically wrong because it is based on an unjustifiable ideology of moral role. Discrimination based on deep-seated aversions, accurate stereotypes, or reactions may be wrong, but it is not intrinsically so. Rather, particular types of such discrimination will be wrong in particular cultures, historical eras, and contexts, and not wrong in others. Discrimination resulting from preferences for goods and services, while wrong on occasion, is rarely so. … disparate impact … rarely, if ever, warrants the conclusion that the ordinary preference-based discrimination that produces it is wrongful. … discriminatory preferences are intrinsically morally wrong if premised on error, moral or factual, about the dispreferred. Discriminatory preferences are extrinsically morally wrong if their social costs are large relative to the costs of eliminating or frustrating them. And if a discriminatory preference is morally wrong – and there is no moral right that protects its exercise – then it is a case for legally prohibiting its exercise if the costs of legal prohibition and enforcement are low relative to the social gains to be achieved” (\textit{ibid.} at 218-19).


\(^{73}\) \textit{Ibid.} at 338-39.

that affects their ability to define themselves as they wish. Stereotyping based on age fails to show due concern for the actual identity and circumstances of senior workers. Stereotyping traps senior workers. While some like to proudly define themselves as seniors but are often subject to social expectations and discrimination, others try to hide their real identity. They lie about their age, dye their hair and adopt “young” customs. Sometimes they are forced to do so in order to get a job. Others adopt “young” behaviour because they fall into believing stigmas about themselves and their group members and resist being considered as seniors. Others do so as they want to feel younger or truly feel younger but are often blamed by society for not “acting their age”. Many senior people are surrounded by these misconceptions and act the way they are expected to thus creating a dissonance between how they see themselves and who they really are. Either way, they do not freely express and define themselves as they wish to. Their ability to shape their identity is infringed. They are trapped in the pre-defined categorizations of dominant groups in society.

To conclude, unequal treatment based on ageist stereotypes is wrong not because of a comparative argument according to which senior workers do not receive benefits that younger workers receive. The reasons why it is wrong are that senior workers are not treated as individuals in and of themselves, and that their freedom to define themselves is constrained. This wrong is significant at any particular time and not just from a lifetime perspective.

(c) Unequal Treatment Based on Prejudice

According to Moreau, unequal treatment which is motivated by prejudice is wrong because it involves a malicious desire to harm an individual. The wrong is embedded in the abuse of power for a malicious purpose. Indeed, courts as well as scholars tend to look for “animus” in cases of discrimination motivated by prejudice thus limiting the doctrine of prejudice to conscious cases. However, in my opinion, maliciousness or animosity is not an essential part of the definition of prejudice. While stereotypes do not necessarily carry negative connotations but rather simply associate members of certain groups with certain characteristics (generalization) that seem to follow “rational” reasoning, prejudice involves negative attitudes, evaluation and feelings that are less reasonable. It treats people as inferior

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75 Moreau, supra note 17 at 302.
76 Ibid. at 302-03.
77 See Levine, supra note 55 at 141. Réaume, for example, looks for animus or contempt in cases of prejudice: “A legislative distinction based on prejudice denies a class of persons a benefit out of animus or contempt. It directly connotes a belief in their inferiority, a denial of equal moral status. ... It thus treats members of a group as loci of intrinsic negative value, rather than intrinsic moral worth” (supra note 12 at 679). Réaume recognizes that lack of respect human dignity can also be conveyed unwittingly, but says that this occurs by reason of stereotypes (ibid. at 681).
and as unworthy of basic human respect. However, prejudice does not necessarily equal hatred. It may embody a variety of conflicting feelings of respect, reluctance, fear and avoidance. As an emotional state, it could also be unintentional and unconscious. Prejudice is therefore wrong simply because of its biased, irrational, categorical nature; because of its negatively defamatory character which denies the equal moral worth of all individuals, whether it is intentional or not.

(d) Ageism against Senior Workers

Some scholars argue that unequal treatment based on age is inspired mostly by stereotypes and not by prejudice or animus. However, it does involve irrational beliefs about a target group. There are many misconceptions about senior people regarding, for example, their creativity and motivation that have no rational connection to the aging process. Furthermore, the increasingly common phenomenon of age discrimination against workers aged forty and even less suggests that unequal treatment on the basis of age is not always based on a rational and well-founded correlation between age and other characteristics. Also, ageism entails feelings of dislike or distaste (the affective element of prejudice) whether it is directed towards senior people or their assumed characteristics.

Finally, the feelings that motivate age-based decision-making at work are often ambivalent and complex. As Bill Bytheway notes, advanced age is associated with power and wisdom but at the same time with illness, weakness and dependency. Senior people are simultaneously respected and rejected by society. Ageism operates on two levels: conscious (aware, controlled or explicit) and unconscious (unaware, automatic, or

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78 Réaume, supra note 12 at 679.
80 See e.g. Samuel Issacharoff & Erica Worth Harris, “Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution” (1997) 72 NYU L. Rev. 780 at 798; Rhonda M. Reaves, “One of These Things is not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases” (2004) 38 U. Rich. L. Rev. 839 at 849-50. Based on Gordon W. Allport’s definition of prejudice (infra note 83) which includes three elements (cognitive, affective and conative), Eglit concludes that “it is debatable whether ageism rises to the level of a prejudice” (supra note 67 at 23). He therefore prefers to label ageism as a bias rather than prejudice.
81 See supra notes 65-67 and accompanying text.
84 Bytheway, supra note 63 at 22-23.
implicit). Hostility towards senior workers may be therefore unconscious and co-exist with conscious feelings of respect. For example, a younger manager might find it hard to supervise, evaluate or fire a senior worker, who may be her father’s age. Employers may also avoid hiring senior workers due to their aging anxiety, fear of death or reluctance to supervise those who remind them of their parents. That is, alongside the social interactions with senior people that almost everyone has (for example parent care-giving) there are many cases of avoidance and reluctance. This is also true of male-female relationships. Similarly, managers might wish to avoid humiliating senior workers and embarrassing themselves when their work performance declines or appears to have declined and therefore prefer to use a mandatory retirement policy. Hence, while ageist behaviour or decisions are usually not motivated by clear, intentional maliciousness, ageism is still a form of prejudice that wrongs individuals because it is biased and irrational, and wrongly ascribes negative worth to the attributes of senior workers. Once again, this wrong is significant at any particular time and is not embedded in a comparative treatment of individuals.

2. The Principle of Equal Influence

(a) Unequal Treatment which perpetuates Oppression

Another concern of equality revolves around the perpetuation of oppressive power relations. Anderson regards the perpetuation of oppression as the ultimate wrong of inequality. Anderson argues that “the proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by


86 See Chapter III, section D.3. Young discusses the emerging cultural and medical association between advanced age and disease, degeneracy, and death. She argues that the “normalizing discourse of science and medicine endows such associations with the authority of objective truth” (Iris Marion Young, Justice and the Politics of Difference (New Jersey: Princeton University Press, 1990) at 129). She maintains that the aversion that senior people evoke arises from the cultural connection of these groups with death: “… old people produce a border anxiety like that structuring homophobia. I cannot deny that the old person will be myself, but that means my death, so I avert my gaze from the old person, or treat her as a child, and want to leave her presence as soon as possible” (ibid. at 147).

87 As Eglit himself argues, “it is also true that antipathy, condescension, and depreciation are directed toward the elderly” (supra note 67 at 24).

88 Levine, supra note 55 at 133-37, 142. See also Duncan, supra note 82 at 27.

89 See Moreau, supra note 17 at 303-07. See also Scanlon who claims that inequalities provide some individuals with an excessive degree of control over the lives of others, and therefore equality is about preventing unacceptable forms of power or domination (supra note 9 at 205).

90 Anderson critiques recent egalitarian writing, which focuses on correcting bad luck as the fundamental aim of equality while neglecting “the distinctively political aims of egalitarianism” (supra note 7 at 288).
definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others”.  

Similarly, Young challenges contemporary theories of justice that are dominated by a distributive paradigm. Instead of focusing on distribution, so she argues, a conception of justice should begin with the concepts of domination and oppression. She maintains that a denial of difference contributes to social group oppression. She advocates the recognition rather than the repression of group differences.

Perpetuating oppression does not necessarily entail prejudicial attitudes or stereotypes. Also, it does not have to be intentional or conscious. In cases of systemic discrimination, oppressive power relations can be the result of institutional and social structures. Sometimes discrimination is socially constructed but has roots in prejudice, sometime it does not. That is, sometimes it is not deliberately designed to harm individuals but nevertheless it perpetuates the social or political domination of certain groups. Oppression is therefore a distinct wrong among other wrongs associated with discrimination. It wrongs individuals because it denies them an opportunity to have equal influence in certain social contexts which is valuable in and of itself as an essential component of the notion of equal concern and respect.

91 Ibid. at 288-89. Anderson then compares the implications of two conceptions of equality. The first conception “takes the fundamental injustice to be the natural inequality of the distribution of luck” (“luck egalitarianism”). Anderson argues that it fails the most fundamental egalitarian test: that its principles express equal respect and concern for all citizens. The theory she defends is “democratic equality”. It integrates principles of distribution with the expressive demands of equal respect. It requires an end to oppressive social relationships (ibid. at 289). Scheffler also defends an account of equality that focuses on eliminating oppression. According to Scheffler, the social and political ideal of equality is not a distributive ideal and its aim is not to compensate for misfortune. “It is, instead, a moral ideal governing the relations in which people stand to one another. ... It claims that human relations must be conducted on the basis of an assumption that everyone’s life is equally important, and that all members of a society have equal standing. ... [I]t emphasizes the irrelevance of individual differences for fundamental social and political purposes. As a moral ideal, it asserts that all people are of equal worth and that there are some claims that people are entitled to make on one another simply by virtue of their status as persons. ... [However, it] has distributive implications” (Samuel Scheffler, “What is Egalitarianism?” 31 (2003) Philosophy & Public Affairs 5 at 21-22).

92 Young, supra note 86 at c. 1. Young identifies five forms of oppression (exploitation, marginalization, powerlessness, cultural imperialism, and violence) (ibid. at c. 2).

93 Ibid. at c. 3.

94 Oppression is “systemic constraints on groups that are not necessarily the result of the intentions of a tyrant. Oppression ... is structural, rather than the result of a few people’s choices or policies. Its causes are embedded in unquestioned norms, habits, and symbols, in the assumptions underlying institutional rules and the collective consequences of following those rules” (ibid. at 41).

95 For example, a facially neutral policy that requires all employees to work on Saturdays has a disproportionate effect on Jews. It was not designed to harm Jews but refusing to accommodate them perpetuates the social and political domination of some religious groups. See Ontario (Human Rights Commission) and O’Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 [O’Malley].

96 See Moreau, supra note 17 at 304-05.
(b) Oppression of Senior Workers

The imbalance of bargaining power in the employment relationship has been widely documented. This imbalance is reinforced in circumstances of unequal treatment based on age. Senior workers are often treated as a means rather than an end in the labour market. As Simitis explains, during economic crisis or in times where labour demand exceeds labour supply and there is a need for downsizing or reorganization, senior workers are the first to be dismissed from the workplace. Unfortunately, their prospects of reentering the labour market are very low even in times of economic growth. They are over-represented among the unemployed and remain unemployed for a longer period of time than younger workers. They are only needed for limited times and purposes, such as in times of labour shortages, and are employed as casual and temporary low-wage workers.

Even where employers facing downsizing encourage senior workers to retire early through financial incentives, early retirement packages might have coercive elements. While in the 1970s downsizing involved the provision of generous pension benefits to senior workers, nowadays senior workers are often forced to accept early retirement packages in order to avoid lay-off and unemployment. These packages often target senior workers and contain penalties. Senior workers have to accept the offer or their jobs will be downsized. Already facing ageism and offensive working conditions, many senior workers surrender and involuntarily accept these offers. Others are compelled to stay at the same workplace.

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97 See e.g. Harry Braverman, Labor and Monopoly Capital (New York: Monthly Review Press, 1974) at 52-58. The inherent inequality of bargaining power is mostly due to the fact that normally the employer possesses information that the employee lacks. Furthermore, the individual employee has to bear the costs of switching jobs and the risk of not finding a new job, while the replacement of an employee is much easier and less costly for the employer, who also usually has a deeper pocket (see Guy Davidov, “Collective Bargaining Laws: Purpose and Scope” (2004) 20 Int’l J. Comp. Lab. L. & Ind. Rel. 81 at 84-85).

98 Simitis compares the perceived “natural” role of women as “housewives” and “mothers” to the “natural” status of senior workers as “pensioners”. He argues that the societal alternative status of senior workers pushes them away from employment. And in Simitis’ words: “just as with women, the alternative role transforms older employees into a group whose presence on the labour market can be steered by activating or deactivating their additional status. The ‘natural’ alternative thus develops into a key policy element for absorbing shocks or remedying a shortage of labour supply”. Spiros Simitis, “Denationalizing Labour Law: The Case of Age Discrimination” in Roger Blanpain & Manfred Weiss, eds., The Changing Face of Labour Law and Industrial Relations, Liber Amicorum for Clyde W. Summers (Baden-Baden: Nomos Verlagsgesellschaft, 1993) 177 at 184. See also Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, “Age Discrimination and Working Life: Perspectives and Contestations – A Review of the Contemporary Literature” (2008) 10:4 International Journal of Management Reviews 425 at 429 (senior workers are “perceived to be complaint and thus willing to put up with more. … [They] bear a disproportionate share of the costs of periodic structural changes under capitalism. In particular, it is more socially acceptable, even to the older workers themselves, for older workers to bear the brunt of job losses. Since older workers are nearer to ‘normal’ retirement age than other age cohorts, they are also more easily persuaded and pressured to take early retirement”).

although they are dissatisfied with terms and conditions of employment, in order to avoid unemployment. In an era of increasing outsourcing and decreasing job security, senior workers are at greater risk of exploitation and systemic subordination.  

As oppression of senior workers is institutionalized, senior workers are denied the opportunity to have equal influence in the labour market. There may even be senior workers who would be overcome by this oppression. Some might “exhibit symptoms of fear, aversion, or devaluation toward members of their own groups”. Others would say that they are quite content with their situation and would not protest. Moreover, quite often age-based rationing through systemic subordination of senior workers has the impact of a self-fulfilling prophecy affecting their choices and personal development. Senior workers often believe and act as they are expected to. They internalize the oppression and when they are expected to do badly, they will eventually do worse and when they are expected to retire, they will often do so involuntarily and will not look for other jobs although they have a lot to offer.  

Once again, the wrong which results from perpetuating oppression does not involve a comparative treatment of a young worker and a senior worker and is significant at any particular time. It does not matter that over a lifetime senior workers are treated equally to young workers, if in later life they are being oppressed and denied their opportunity to have an equal influence in the workplace.

<http://www.ohrc.on.ca/en/resources/discussion_consultation/DissAgeDiscrim2>; Wood et al., supra note 98 at 429.

100 See Chapter III, section B. On the debate over job security see Chapter I, note 7.

101 Young, supra note 86 at 147. Young argues that, “Insofar as members of these groups assume the position of subjects within the dominant culture, they experience members of their own group abjectly” (ibid. at 148).

102 On the different reactions to ageism see Erdman B. Palmore, “Responses to Ageism” in Palmore et al., supra note 85 at 261-64. Some senior people respond to ageism with acceptance which may vary from reluctant surrender to full endorsement. Some voluntarily disengage from social life and remain satisfied. Others are apathetic. They do not like their situation but they feel they have no choice. They might not be aware of ageism, accepting age limits as legitimate.

103 See John Macnicol, Age Discrimination: An Historical and Contemporary Analysis (Cambridge: Cambridge University Press, 2006) at 65; Young, supra note 86 at 148; Wood et al., supra note 98 at 429. See also Supporting and Engaging Older Workers in the New Economy – Report by the Expert Panel on Older Workers (Ottawa: Human Resources and Social Development Canada, 2008) at 14-15, online: <http://www.hrsdc.gc.ca/en/publications_resources/lmp/cow/2008/older_workers_2008.pdf>. This report has examined, among other things, the challenges faced by displaced senior workers who wish to re-enter the Canadian labour market. It found that these workers face economic as well as physiological barriers to achieving re-employment. Among these barriers, “individuals reported that, despite a feeling that they had much to offer, they perceived that employers would not see value in them through expressions such as ‘I’m too old’, or ‘Who would want to hire me?’ Others expressed a lack of confidence and/or motivation to undertake something ‘new’ at an older age, including a new job, training or education, or self-employment”.

104 If there is a comparison here it is between the oppressed and the oppressor (See Moreau, supra note 17 at 306).
3. The Principle of Sufficiency

(a) The Principle of Sufficiency as opposed to Priority

Another essential principle of equality is that individuals should be provided with access to basic goods that allow minimum conditions of living.105 Harry Frankfurt presents an extreme perspective of this view. He argues that the moral problem (i.e. the ultimate, only problem) with inequality is not that A has less than B (an egalitarian concern) but rather that A has too little, less than enough (a sufficiency concern).106 He thus proposes to replace our concern for equality with a concern for sufficiency.107

A different, pluralistic view is offered by Scanlon, who recognizes the humanitarian concern to alleviate suffering of individuals as one reason out of five for advocating the elimination of inequalities.108 Scanlon recognizes cases where the condition of those who are worse off has improved, yet there is still a significant, even increased, gap between them and other members of a society that we wish to reduce or eliminate. His account implies that there are other reasons for caring about equality as detailed above and discussed further below.109 The sufficiency concern might be the only concern when economic equality is concerned, but since the concept of equality is broader, it embodies multiple concerns.

Derek Parfit and Dennis McKerlie also write about the concern for the worse off. They both distinguish between the principle of equality and the principle of priority and tie the concern for the worse off to the latter. Parfit distinguishes between egalitarianism that cares about equality for its own sake, and priority. He argues for benefiting the worse off and denies that equality has an intrinsic value.110 Priority strives for equality “not to make the

105 Ibid. at 307-12.
106 Frankfurt, supra note 6 at 134-35, 146-48. See also Raz on rhetorical egalitarianism, the wrong of poverty vs. inequality and the concern for the alleviation of hunger vs. the concern for equality (supra note 36 at 227-29, 239-40).
107 Similarly, Cowen argues that we should give special moral attention to those individuals with a low absolute standard of living. Our basic concern is with their absolute insufficiency regardless of how much better off other individuals are. He maintains that since egalitarianism centers upon the differences between individuals rather than the suffering of specific individuals, the claims of the worse off are misrepresented (Tyler Cowen, “Comment on Daniels and McKerlie” in Lee M. Cohen, ed., Justice Across Generations: What Does It Mean? (Washington D.C.: American Association of Retired Persons, 1993) 227 at 228, 233).
108 Scanlon, supra note 9 at 203.
109 Ibid. at n. 3.
110 Parfit distinguishes between deontological (deontic) and teleological (telic) egalitarianism. While telic egalitarianism objects to inequality because inequality is considered bad in and of itself, deontic egalitarianism objects to inequality because it involves wrong-doing or injustice. Deontic egalitarianism, unlike telic egalitarianism, can therefore avoid the leveling down objection (see Chapter III, note 202). However, Parfit argues that deontic egalitarianism is too narrow. It does not object to cases that egalitarians find problematic even though no wrong-doing was involved (for example, it does not object distribution of assets by nature because it focuses on inequalities generated by human-beings). He therefore argues for a distinct principle of priority. According to Parfit, since people hold multiple identities during their lives (see Chapter III, note 184), compensation within life over time is not always possible. We should therefore assist not those who are worse off in their lives as a whole, but those who are worse off at particular times. The priority view denies that equality has any intrinsic value. It is not egalitarian (Derek Parfit, Reasons and Persons (Oxford: Clarendon Press, 1984) at 337; Derek Parfit, “Comments” (1986) 96 Ethics 832 at 869-70; Derek Parfit, “Equality or
outcome better, but for some other moral reason”. Similarly McKerlie views priority as “not essentially egalitarian”. According to McKerlie, in distributing resources among age groups we should follow a priority principle which gives priority to those who are worse off. We should help a senior person who is worse-off even if she receives larger lifetime shares compared to others because of the special value attached to benefiting those who are currently worse-off. The current situation is what matters. It would not matter if those who are poor at present were once much better off or that that their complete lives are not worse than the complete lives of others.  

I prefer the principle of sufficiency to the principle of priority. Like Frankfurt, I think that the stronger moral concern of equality is for those who do not have enough, rather than for those who have less than others but still have a lot. Inequality might lead to situations in which people are living under terrible conditions. The concern here focuses on relieving suffering or severe deprivation, and not on bringing the worse-off to the same level of the better off. It is therefore not essentially egalitarian or comparative. It does not matter how much another group received. What matters is that the denial of a benefit to some individuals leaves them without minimum conditions of living. It is also not relevant if there have been attempts to improve the position of other groups. What is important is securing a decent minimum for everyone.

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111 Parfit, “Equality or Priority?”,” The Lindley Lecture, University of Kansas, November 21, 1991 (Department of Philosophy, University of Kansas, 1995) at 18-25 [Parfit, “Equality or Priority?”]).
112 Parfit, “Equality or Priority?”,” supra note 110 at 3-4.
113 His preliminary view was that equality and priority are both egalitarian concerns but later he changed his mind. See Chapter III, note 204.
115 First, the principle of priority does not provide us with substantial tools to answer questions such as how much to transfer from one individual to another. Second, while the worse off should be given a priority, it is morally justified only to a limited extent (i.e. until they reach a certain threshold where they have enough). Intuitively, we are not concerned by inequalities between the rich and the super-rich. See Nils Hotug & Kasper Lippert-Rasmussen, “An Introduction to Contemporary Egalitarianism” in Nils Hotug & Kasper Lippert-Rasmussen, eds., Egalitarianism: New Essays on the Nature and Value of Equality (Oxford: Clarendon Press, 2007) 1 at 28.
116 By contrast, Andrei Marmor claims that above the level of absolute needs, people’s needs are relative to the norms of a society and to its culture. The content of “sufficient goods” is therefore comparative as it is determined in relation to other members of society and to the actual availability of resources to others (Andrei Marmor, “The Intrinsic Value of Economic Equality” in Lukas H. Meyer, Stanley L. Paulson & Thomas W. Pogge, eds., Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz (Oxford: Oxford University Press, 2003) 127). Marmor’s argument may be more relevant for the next category as I distinguish here between minimum conditions of living, and social exclusion which is concerned with needs beyond the level of exigently.
117 See Moreau, supra note 17 at 312.
118 The implications of embracing a sufficiency concern rather than priority principle at temporal stages of lives may be demonstrated by the following example:

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Finally, like Scanlon, I consider that a concern for the worse off can be inferred from the concept of equality. The denial of access to minimum conditions of living is an essential concern of equality when these conditions are available to some individuals to allow them a life of dignity, while others are denied access to them and are thus treated as not worthy of equal concern and respect.\(^\text{119}\) However, it wrongs the deprived individuals not because of the comparison to those who had access but rather because there are certain living conditions (such as food, clothing, and shelter) that are crucial to a life with dignity.\(^\text{120}\)

\(\textbf{b) Senior Workers are often denied Access to Minimum Conditions of Living}\)

Since work is a major source of means of living, unequal treatment based on age may lead to deprivation resulting from inadequate income. Workers in their 50s and 60s are at great risk of being dismissed and laid-off in downsizing or reorganization. They are often denied learning and training opportunities. Consequently, their employability is substantially eroded. They encounter great difficulties in re-entering the job market and stay unemployed for a longer period of time than younger workers.\(^\text{121}\) Some of them are forced to retire although they wish to continue working. Others settle on working in part-time and low wage jobs, or are re-hired by their previous employers on new terms of employment, which are usually substantially lower than before even when they perform the same duties.\(^\text{122}\)

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Here, our intuition tells us that we should help person B at Time III, although his or her total well-being is higher than person A (Adler might argue that its total is not higher as the fact that person B had less than minimum at Time III negatively affects his or her total, see Chapter III, section \(E.2\)). Now compare the above example with the following situation:

119 See Moreau, supra note 17 at 309.
120 On the adequate level of living conditions, see e.g. Johannes Binswanger & Daniel Schunk, “What is an Adequate Standard of Living during Retirement?” Center Discussion Paper Series No. 2008-82 (September 25, 2008), online: <http://ssrn.com/abstract=1275702> (this paper addresses the question of what is the adequate standard of living during retirement with a survey, individually tailored to each respondent’s financial situation, conducted both in the U.S. and the Netherlands. Among other things, it finds that adequate levels of retirement spending exceed 70% of working life spending).
121 See Chapter III, section \(B\).
122 See e.g. Thomas Walkom, “The Dignity of Work” Toronto Star (February 26, 2005). John Munro teaches at the University of Toronto. According to Walkom, Munro “is considered an expert in his field of medieval economic history and has published plenty. He continues to get good reviews from his students and carries the same workload he always did”. “My academic life is completely unchanged”, he says. “I’m up at 7:30 in the morning and go to bed at 1:30 in the morning. I’m in my office most weekends”. What has changed are his wages. When he turned 65 he had to retire according to the university rules. His office was reassigned to
many of them are not yet entitled to pension benefits they are pushed into poverty, dependence and insecurity.\textsuperscript{123}

Indeed, in some countries poverty levels among senior people are higher than in other sectors of the population.\textsuperscript{124} Without paid income or an adequate pension, one cannot survive or live an independent life while still preserving one’s inherent worth. Bad economic situations or lack of physical activity and interest in life may also negatively affect physical and mental health and life expectancy.\textsuperscript{125} As Bytheway explains:

another professor. Then, the university hired him back for a lower salary to do exactly what he was doing before.


\textsuperscript{124} In the U.K., there is a long-standing correlation between advanced age and poverty. See e.g. Peter Townsend, \textit{Poverty in the United Kingdom} (Harmondsworth: Penguin, 1979) at 787 (Townsend’s well-known study compared incomes of senior and non-senior people thereby underlining the strong link between advanced age and poverty in the UK); Jim Ogg, “Social Exclusion and Insecurity among Older Europeans: The Influence of Welfare Regimes” (2005) 25 Ageing & Society 69 (pensioners are more likely to be affected by poverty than paid workers); “Pensioners in Fuel Poverty more than Doubled in Four Years” \textit{Age Concern} (March 11, 2008), online: <http://www.ageconcern.org.uk/AgeConcern/2E07679FC6694452BB0F08AF28B94E55.asp>.

\textsuperscript{125} (according to the National Energy Action (NEA), senior people in the UK are the group most at risk of fuel poverty and account for around 50% of households affected. The number of senior people in fuel poverty is likely to have more than doubled in the last 4 years alone. New estimates from the Age Concern British charity organization (based on the most recent figures from the Department for Trade and Industry and NEA figures) put the number of pensioner households living in fuel poverty now at 2.25 million, with an estimated 250,000 pensioner households pushed into fuel poverty by the price rises this year. Fuel Poverty is when a household needs to spend 10% or more of its income to meet fuel costs). In Australia, see \textit{Final Report of the Commission of Inquiry into Poverty} (1976) by the late Professor Ronald Henderson that drew attention to the connection between poverty and enforced unemployment due to age, cited in Sol Encel, “Age Discrimination in Australia: Law and Practice” in Zmira Hornstein, ed., \textit{Outlawing Age Discrimination} (London: Joseph Roundtree, Policy Press, 2001) at 12 at 12. In Israel, it was reported that one third (200,000) of the senior people in Israel lives in poverty (Yitzhak Brick, “Elderly in the Poverty Circle” in Yitzhak Brick, ed., \textit{Poverty and Aging} (Tel Aviv: Hakibbutz Hameuchad, 2005) 9 (Hebrew)). By contrast, in Canada poverty levels (measured by low income after tax) have fallen dramatically among senior people (aged 65 and above) from 13% of the senior population in 1988 to 5.4% in 2006 (as opposed to 11.3% for both 18-64 and under 18 groups in 2006) (see Statistics Canada, “Person in Low Income after Tax, by Prevalence in Percent”, online: <http://www40.statcan.gc.ca/l01/cst01/famil19a-eng.htm>). These low rates are mainly due to greater access to Canada and Quebec Pension plans and benefits received from government transfers such as Old Age Security, Guaranteed Income Supplement and Spouse’s Allowance (97% of seniors received income from one or more of these sources in 2005). The main problem may be among those who are 60-64 and are still not entitled to these benefits. Still, Canadian rates are lower than in most industrialized countries. According to the Luxembourg Income Study comparative data, 23% of senior people in Spain, 22% in Australia, 21% in the U.S., 21% in Israel, and 16% in the UK are poor (see Luxembourg Income Study (LIS) Key Figures, online: <http://www.lisproject.org/key-figures/key-figures.htm>). The senior poverty rates are computed at 50% of the median equivalent income.

\textsuperscript{124} As Friedan notes, the groups that live the longest in our society are usually those who are still working and using their abilities to the fullest (e.g. Supreme Court Justices) (Betty Friedan, \textit{The Fountain of Age} (New York: Simon & Schuster, 1993) at 216-17). A recent study conducted in the U.S. estimates the effects of retirement on health status (measured by indicators of physical and functional limitations, illness conditions, and depression). It finds that complete retirement leads to a 5-16% increase in difficulties associated with mobility and daily activities, a 5-6% increase in illness conditions, and a 6-9% decline in mental health, over an average post-retirement period of six years. It also indicates a decline in physical ability and social interactions. These negative effects might intensify in a case of involuntary retirement. It concludes that retiring at a later age may lessen or postpone poor health outcomes for senior adults and raise well-being (Dhaaval Dave, Inas Rashad & Jasmina Spasojevic, “The Effects of Retirement on Physical and Mental Health Outcomes” Andrew Young School of Policy Studies Research Paper Series No. 07-35 (October 2007), online: <http://ssrn.com/abstract=1024475>). According to a new Israeli book, the poor economic condition of many
Paid employment grants us activity, mobility, experience and expertise, as well as income. Those who are excluded – children, people over pensionable age – as well as those on the margins – women, the unemployed, older workers – live lives in which their freedoms are greatly reduced by their lack of secure and adequate income. Most are financially dependent upon members of their families who are not excluded – the economically active – and upon the state. Like the state itself, the economically active are able to exercise power over those who are dependent upon them.¹²⁶

Employment can reduce poverty.¹²⁷ This does not suggest that employers have a positive duty to hire senior workers. But it does imply a duty not to interfere with one’s pursuit of equal opportunity and freedom of occupation. By presenting age barriers in hiring, promotion and training decisions, by failing to recognize the special circumstances and needs of senior workers – even if it is done through a neutral-on-its-face policy – and by forcing workers to retire while they are still active and wish to continue supporting their families, especially in times of economic crisis,¹²⁸ employers do not treat senior workers with equal concern and respect. They dramatically affect senior workers’ ability to pursue liberties to which society attaches great value, such as equal opportunity and freedom of occupation. Consequently, they limit their access to basic goods and harm their attainment of minimum conditions of living that are essential to a life of dignity. Furthermore, by failing to increase the level of jobs available, to mandate the provision of pension benefits, or to prohibit mandatory retirement, the State does not fulfill its duty to provide all citizens with minimum conditions of living.

Unequal treatment based on age which leads to insufficiency wrongs senior workers. It fails to treat them as of equal moral worth. Once again, this wrong is not comparative. It is not embedded in the fact that the young has more than the senior has. It does not matter that the senior received a fair share of resources when she was young. It is irrelevant that the situation of the senior is due to an attempt to improve the situation of the young. What matters is that the senior does not have the minimum necessary to live a decent life now. Even if the senior and the young are equal over a lifespan, the current suffering of the senior makes a moral demand on our attention.

¹²⁶ Bytheway, supra note 63 at 52.
¹²⁷ One of the major strategies used by the UN to prevent poverty is the enhancement of senior people’s employment (see Robert Venne, “Mainstreaming the Concerns of Older Persons into the Social Development Agenda” (UN Programme on Ageing, Division for Social Policy and Development, Department of Economic and Social Affairs), online: <http://www.un.org/esa/socdev/ageing/documents/positionpaper.pdf>).
¹²⁸ See Chapter I, section E.
4. The Principle of Social Inclusion

(a) Social Exclusion

While the core of the concept of equal concern and respect guarantees basic goods necessary for human survival, around it there is another layer which aims at enhancing the realization of the personal potential of every human being according to his or her traits and aspirations and social and cultural background. It includes the rights of individuals to be involved in communities, to participate meaningfully in social life, to be able to develop themselves, and to pursue their goals and aspirations. According to Greschner, this layer, which she names protecting “the interest of belonging” or protection against the harm of exclusion, is the main purpose of equality. Prohibited grounds of discrimination (such as race, sex and age) are therefore unacceptable justifications for excluding members of protected groups from the benefits of full membership in different groups and participation in social, economic, and political life activities. Similarly, according to Young’s *Politics of Difference*, (social) equality requires the full participation and inclusion of all groups in major social institutions.

Exclusion is often the consequence of stereotyping and prejudicial behaviour. It may also manifest itself through a policy that is neutral-on-its-face yet fails to take into consideration the circumstance of minority groups as it is built on the characteristics of dominant groups. Social exclusion is a distinct concern of equality, and is pertinent in cases where denial of a benefit is not deliberately designed to harm members of protected group, or perpetuate oppressive relationships, and does not necessarily result in poverty and denial of minimum conditions of living. Yet, social exclusion may still wrong individuals through denying their participation in social and productive life and access to broader goods such as cultural, educational and social benefits, opportunities or institutions that are essential to a life of dignity. As Réaume argues, “the importance of specific opportunities

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129 Greschner, *supra* note 8 at 315, 321; Donna Greschner, “The Right to Belong: The Promise of Vriend” (1998) 9 National Journal of Constitutional Law 417 at 422. See also Fredman, *supra* note 19 at 45-46. The British sociologist T.H. Marshall argues that citizenship has three dimensions: civil, political and social. The third dimension includes social rights and economic welfare to guarantee employee human dignity. According to this approach citizens share not only the right to participate in the civil and political spheres through for example elections, but are also entitled to participate in different processes and actions in social and cultural life including at work (T.H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950)).

130 Young, *supra* note 86 at c. 6.

131 For example, when physical requirements for employment are based on the image of a younger worker.

132 See Réaume, *supra* note 12 at 686-88. As Réaume explains, “there are some benefits or opportunities, some institutions or enterprises, which are so important that denying participation in them implies the lesser worth of those excluded” (*ibid.* at 688).
or benefits to the ability to craft one’s life means that denying access itself implies the lesser worth of those denied”.  

Therefore, when individualized assessment points to, for example, an actual decline in physical ability or health condition, treating the individual according to her own traits might still wrong this individual as it denies the equal moral worth of all persons. As Fredman argues, individual assessment can never be entirely accurate or objective. Usually, the measures chosen will be based on norms held by dominant groups thus disadvantaging others. Furthermore, as Young argues, sometimes in order to allow oppressed and disadvantaged groups to develop and exercise their capabilities and realize their choices, equality requires the recognition of differences and the advancement of special treatment. This is an active approach of equality which may be fulfilled through, for example, the duty of accommodation up to a point of undue hardship that will allow diverse groups to have an equal opportunity in various spheres.

(b) The Exclusion of Senior Workers

According to Fredman, the primary aim of age equality is participative democracy or social inclusion. Unequal treatment based on age (through, for example, forced retirement or a policy of non-hiring senior workers) excludes senior workers from the labour market. It might consequently weaken their ability to belong to certain groups and to fully participate in an active social life. It sometimes denies their access to social, cultural and political institutions and activities that are major components and consequences of work. It wrongs senior workers because the denial of access to these important benefits, opportunities and institutions means not treating those excluded with equal concern and respect. As Réaume argues, there are some goods such as employment that are “too important to participation and survival in modern society not to be made accessible to all on fair terms. Being systematically … excluded from them confines some members of society to an impoverished life – not just in material terms but in terms of their hopes and ambitions”.

Réaume, supra note 12 at 689.
Fredman, supra note 19 at 39-41.
Young, supra note 86 at c. 6.
Fredman, supra note 19 at 45-46.
While unemployment might result in social exclusion, employment – let alone forced employment – will not necessarily generate social inclusion and integration. It is clear that additional measures to enhance equality in other spheres (such as housing and health) are also needed. The quality of the jobs available is also important. On the myth that social inclusion is identical to labour market inclusion, and that work will always play a positive role in alleviating poverty, mitigating economic disparities and enhancing social citizenship see Amir Paz-Fuchs, “Welfare to Work: Myth and Fact, Social Inclusion and Labour Exclusion” (2008) Oxford J. Legal Stud. 1.
Réaume, supra note 15 at 376
Certainly, people tend to complain about their work and fantasize about retirement. Simone de Beauvoir wrote on the ambivalence of work and retirement:

Work almost always has a double aspect: it is a bondage, a wearisome drudgery; but it is also a source of interest, a steadying element, a factor that helps integrate the worker with society. Retirement reflects this ambivalence, and it may be looked upon either as a prolonged holiday or as a rejection, a being thrown upon the scrap-heap.¹³⁹

However, overall, work is indeed a key component in most people’s lives. Besides being a major source of the means of living, work plays, as Schultz argues, a significant role in our notion of citizenship, community and personal identity.¹⁴⁰ First, work is what makes one independent and strengthens one’s entitlement to political rights and power.¹⁴¹ Second, work is a place where individuals can fulfill their human desire of “belonging”, “being part of something” or “being involved” in something valuable to a larger group than themselves. It is a major means of developing social life and friendships outside working hours. It also provides access to cultural, spiritual and recreational resources, and educational and training opportunities. Without work, active social life is possible but is much more difficult to obtain and retain. Furthermore, work has a strong effect on our social status. As Schultz puts it “we are what we do for a living”.¹⁴² The way society sees us and we see ourselves is strongly affected by our jobs or positions. When work is not available, people tend to feel unneeded and ineffective in society.¹⁴³ This leads us to the final point, which is that work is central to workers’ sense of self-worth. Work provides one’s life a meaning. Most of us spend more hours a day at work than with our families. It is our “second home”. Being occupied with paid or unpaid work (volunteering) has a major influence on one’s quality of life, health condition,¹⁴⁴ and most importantly on the way one sees his or her role and purpose in society. It promotes one’s self-esteem, self-confidence and personal development. It is an essential part of our identity and self-fulfillment. It is a major means of contributing to our society and of expressing ourselves.¹⁴⁵

¹³⁹ Simone de Beauvoir, The Coming of Age (New York: G.P. Putnam’s Sons, 1972) at 263.
¹⁴¹ Ibid. at 1887-88.
¹⁴² Ibid. at 1884.
¹⁴³ Schultz cites several studies that shows how factory shutdowns and downsizing have negatively affected workers who became “politically and socially inactive”, and “lost a sense that they can be efficacious in the world” (ibid. at 1889). See also Maximiliane E. Szinovacz, “Contexts and Pathways: Retirement as Institution, Process, and Experience” in Gary A. Adams & Terry A. Beehr, eds., Retirement: Reasons, Processes and Results (New York: Springer Publishing Company, 2003) 6 at 15 (since retirement benefits are tied exclusively to employment history and earnings, employment is strongly identified with productivity and implicitly with social status and recognition).
¹⁴⁴ See supra note 125.
Unequal treatment based on age might therefore deprive senior workers of vital underpinnings of self-worth and self-esteem. It might frustrate their personal development and self-fulfillment. It might involve the loss of identity, social ties and status as it forces workers’ “disengagement” from society.\(^{146}\) It might also cause extreme psychological and emotional damage to those who are used to working full-time and are still fully capable of working. For example, the sharp transition associated with mandatory retirement from full participation in active and productive life to a forced situation in which workers are regarded as useless might be destructive.\(^{147}\) Many senior workers experience a real loss of interest in life’s activities after being forced to retire. They feel rejected like “an old pair of worn out shoes”.\(^{148}\) Furthermore, as Fredman points, “[d]eparture from the labour force frequently gives the impression that individuals are no longer active contributors to society”.\(^{149}\) As a consequence, they are disrespected and deprived of citizenship rights.\(^{150}\) The problem has intensified in recent years as life expectancy has increased dramatically and the health condition of many has improved, leaving many senior workers inactive for a longer period of time. At the same time, technology has improved and accommodation is often feasible through minor work adjustments.

There are many people whose social lives are quite independent of their jobs and colleagues. They make friends in their religious, neighborhood and other communities. Yet age discrimination manifests itself in many areas of life including the provision of services, health and housing. Together with its effects in the employment sphere described above, and given the strong links between poverty and advanced age,\(^{151}\) age discrimination does create a substantial impediment to seniors leading active social lives, meaningfully developing themselves and pursuing their aspirations.\(^{152}\)


\(^{147}\) Munro describes first hand these feelings: “it’s the indignity of being told you have to go” (see Walkom, *supra* note 122). See also the numerous life stories of senior workers (including their expectations and experiences of retirement) explored on this unique website, “The Dilemma of Mandatory Retirement”: <http://diversityinretirement.homestead.com/DMR/mrdilemma.html>. For more on the negative effects of “guillotine retirement” see Geneviève Reday-Mulvey, *Working Beyond 60: Key Policies and Practices in Europe* (New York: Palgrave Macmillan, 2005) at 36-37.

\(^{148}\) See *Time for Action*, *supra* note 62 at 35-36.


\(^{150}\) See Thompson, *supra* note 63 at 14-15.

\(^{151}\) See *supra* note 124.

\(^{152}\) For some empirical evidence from the U.S. on the decline in social interaction post-retirement see Dave *et al.*, *supra* note 125. On the isolation and social exclusion of senior people in Israel see also Brick, *supra* note 125. For empirical evidence on poverty and social exclusion of senior people in Europe see Hoff, *supra* note 123 at c. 4-6.
While the State has primary responsibility for ensuring that people are able to lead active social and cultural lives at any age, employers, who assume an important role in the way that society is structured and discrimination is manifested in the workplace, might also be held liable. By denying the right of senior workers to equally participate in the labour market, employers ignore senior workers’ actual differences, dramatically affect their ability to develop themselves and to lead meaningful lives, and thus fail to treat them with equal concern and respect. Employers’ liability should therefore include accommodation of factors which relate to the unique capabilities and circumstances of senior workers.\textsuperscript{153}

Furthermore, even if employers are not directly or indirectly responsible for specific cases of age discrimination, they should be held liable for systemic age discrimination because it is socially valuable to impose positive duties on well-situated agents that have the power to effectuate social change.\textsuperscript{154} As was illustrated in Chapter III, age discrimination against senior workers is not only concerned with a refusal to trade with a particular person. It operates at three different levels: personal, cultural and structural. As it is socially constructed, it systematically deprives seniors of important resources and opportunities.\textsuperscript{155} In any case, employers’ liability to enhance age equality and increase senior workers’ labour force participation rates through accommodation is limited by the doctrine of undue hardship. As Réaume argues, a balance should be struck between the protected interest in a fair opportunity to participate in important activities and social institutions and the competing interests of the employer in maintaining its policies.\textsuperscript{156} Finally, the actions required by employers as part of the duty to pro-actively build the concept of equality into their workplace rules and practices should be explicitly prescribed by a primary legislation as they are not derived from a personal wrong or fault.\textsuperscript{157}

5. The Principle of Autonomy

(a) Autonomy and Free Will

According to Dworkin, autonomy constitutes an integral aspect of equality: equality requires an adequate process of discussion and choice, and “[a] substantial degree of liberty is necessary to make any such process adequate because the true cost to others of one person’s having some resource or opportunity can be discovered only when people’s ambitions and convictions are authentic and their choices and decisions reasonably well tailored to those

\textsuperscript{153} Compare Meiorin, supra note 39 at para. 62.
\textsuperscript{154} See supra notes 48-52 and accompanying text.
\textsuperscript{155} See Chapter III, section B.
\textsuperscript{156} Réaume, supra note 15 at 379-80.
\textsuperscript{157} Compare Meiorin, supra note 39, where Chief Justice McLaclin implies this broader duty from the existing legislation and case law on accommodation.
ambitions and convictions”. A society that does not protect the liberty of its members cannot treat them with equal concern and respect. As Réaume argues, “respect for autonomy is part of respect for the inherent worth of persons. Control over the major determinants of how one’s life goes is part of what gives one’s existence meaning and value”.

The principle of autonomy has already been implied from the aforementioned principles. It might be argued therefore that the enhancement of one’s autonomy constitutes the complete account of equality. Indeed, each principle of equality articulated so far engages some aspects of autonomy discourse. However, in my view autonomy has a different role and meaning in relation to each principle.

As mentioned above, stereotyping wrongs individuals because it lessens their ability to define themselves. For example, a policy of non-hiring senior workers based on the generalization that ability declines with age categorizes senior workers as unproductive and unhealthy. By using age as a proxy, it does not allow individuals to prove otherwise. Yet, the wrong to autonomy done by unequal treatment based on age is much larger. Age inequality denies one’s ability to define oneself, but also to choose, behave and interact as one wishes. It infringes one’s right to free choice. Hence, while the aspect of autonomy revealed in the discussion of stereotypes is that of identity, autonomy is much broader.

Another element of autonomy is the one portrayed in the concern of oppression. As a result of the perpetuation of the oppressive relations between employers and workers, the latter are losing their ability to shape their lives and choices. However, the emphasis here is on the denial of certain goods (such as the opportunity to have equal influence in certain

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158 Ronald Dworkin, *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000) at 122. On the relation between equality and liberty see Dworkin, *supra* note 1. Where Rawls gives liberty an important role within the two principles of justice, Dworkin argues that the right to liberty is not a fundamental right. The parties to the original position select basic liberties to protect basic goods they value rather than as goals in themselves (*ibid.* at 178-83). Dworkin therefore asserts that there is no general, abstract right to liberty as such. Yet, individuals do have rights to specific liberties such as freedom of speech and freedom of occupation. These distinct liberties are derivative – not from a more abstract right to liberty but from the right to equality (*ibid.* at xii and c. 12). According to the “liberal conception of equality”, government “must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s”. Specific liberties are to be recognized only when the fundamental right to equality requires them (*ibid.* at 273-74). Dworkin develops these ideas in *Sovereign Virtue*, *ibid.* at c. 3 (“if we accept equality of resources as the best conception of distributional equality, liberty becomes an aspect of equality rather than … an independent political ideal potentially in conflict with it” (*ibid.* at 121)). By contrast, Raz rejects the notion that rights (including the right to equality) provide the foundation of political morality of liberalism. He argues, however, that morality can include rights at its foundation. Rights are not fundamental but derive from interests. According to Raz, liberalism is based on a doctrine of political authority which promotes liberty and autonomy. A powerful argument in support of political freedom is derivable from the value of personal autonomy. Morality “regards personal autonomy as an essential ingredient of the good life, and regards the principle of autonomy, which imposes duties on people to secure for all conditions of autonomy, as one of the most important moral principles” (Raz, *supra* note 36 at 415 and c. 7-9, 15).

159 Dworkin, *Sovereign Virtue*, *ibid.* at 133, 148, 181.

160 Réaume, *supra* note 12 at 689.
social contexts), which, as Moreau notes, are valuable in and of themselves apart from their instrumental value of promoting individual autonomy.\textsuperscript{161}

The denial of minimum living conditions also shares elements of infringement of autonomy. As we have seen, unequal treatment based on age negatively affects opportunities for employment, education or training. It might therefore put workers at great risk of poverty and dependency. As a consequence, the full exercise of their autonomy is also at risk. However, the emphasis here is on survival and living conditions and not on means for exercising autonomy. These means are better characterized by reference to the principle of social inclusion. Differential treatment based on age which excludes individuals from participation in active social life is wrong partly because it reduces one’s capability of expressing oneself.

Nevertheless, the principle of social inclusion does not fully capture the comprehensive principle of autonomy which includes, for instance, one’s right to shape one’s own identity apart from a well-defined group. In other words, Greschner’s idea of belonging does not apply to all women, all senior people, all gays or all disabled persons.\textsuperscript{162} Equality is not always about preaching for uniformity and sameness. It is also about celebrating diversity and pluralism. Autonomy includes not only the pursuit of a vision of good but also the creation of one’s own vision of good. As Raz asserts, there is a difference between autonomy and self-realization: “The autonomous person is the one who makes his own life and he may choose the path of self-realization or reject it. Nor is autonomy a precondition of self-realization, for one can stumble into a life of self-realization or be manipulated into it or reach it in some other way which is inconsistent with autonomy”\textsuperscript{163}. Morality, according to Raz, presupposes competitive pluralism: “it presupposes that people should have available to them many forms and styles of life incorporating incompatible virtues, which not only cannot all be realized in one life but tend to generate mutual intolerance”.\textsuperscript{164}

Finally, there is a major pivotal aspect of autonomy, which has not yet been fully revealed in the other principles of equality. As spelled out by Raz, “[t]he ruling idea behind

\textsuperscript{161} See supra note 96 and accompanying text.
\textsuperscript{162} Not all individuals want to belong to a certain group, wish for recognition as members of a certain group, or desire to develop a certain identity. While some grounds of discrimination are closely related to group identity (such as religion), others are not. For example, while some persons with disabilities would like to be recognized as members of a certain disabled group, others would prefer to assimilate into a general, “healthy” society. Similarly, there may be individuals who would like, as part of their unique identity, to be excluded and not belong to any group in particular. They will resist any attempt to define them as defining people according to identity groups inevitably makes assumptions about these groups and individuals. Therefore, Greschner’s “presumption of inclusion” (supra note 8 at 320) might also constitute a wrong in and of itself.
\textsuperscript{163} Raz, supra note 36 at 375.
\textsuperscript{164} Ibid. at 425.
the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives”.  

Raz emphasizes the importance of choice, of exercising the capacity to choose, and of having an adequate range of options to choose from. “Autonomy is opposed to a life of coerced choices”; it also “contrasts with a life with no choices, or of drifting through life without ever exercising one’s capacity to choose”. Autonomy is not just the power to choose but also “the power to bring about what one has chosen”. Similarly, Fredman argues that one of the aims of equality is “to give all people, regardless of their sex, race, or age, an equal set of alternatives from which to choose and thereby pursue their own version of a good life”.

(b) The Denial of Senior Workers’ Autonomy

Unequal treatment based on age violates senior workers’ autonomy in the sense that they are not able to exercise free choices and make voluntary decisions that would allow them to pursue their own version of a good life. Due to increased life expectancy and improved health and living conditions, many senior people wish to continue to be independent, active, and productive. Many people wish to be involved in their communities and work longer, yet this choice is often taken away from them. For example, mandatory retirement at a fixed age and age barriers to training, and to phased or gradual retirement violate senior workers’ right to choose when and how to work and retire. They deny senior workers’ autonomy and free will and their right to freedom of occupation. They obstruct their desire to continue working or to pursue phased retirement. Furthermore, unequal treatment based on age often forces senior workers into unemployment or into sub-standard terms and conditions of employment. There are senior workers who involuntarily exit the labour market because they are expected to do so by society, or because they wish to avoid unemployment or bad jobs. Their choice is not based on free will, but rather constrained by personally and socially constructed age discrimination. Again, it does not matter that the senior and the young are equal over a lifetime if the autonomy of the senior is violated at a particular time.

It is questionable whether freedom of occupation entails an employer’s duty to provide an individual with a job. The prevailing opinion is that freedom of occupation is a liberty. It involves a duty of State and other private actors not to interfere with, limit or

165 Ibid. at 369.
166 Ibid. at 371.
167 Ibid. ibid.
168 Fredman, supra note 19 at 43.
169 Ibid. at 43-44.
deprive one’s pursuing equal opportunity and freedom of occupation. There is, however, no positive duty to hire senior workers. Freedom of occupation does not extend to a right to be employed or to a right not be dismissed.\textsuperscript{170} Freedom of occupation is merely the freedom to employ or not employ others.\textsuperscript{171}

However, freedom of occupation does entail the right of an individual to be engaged in work or occupation, to seek and find sources of livelihood. Freedom of occupation has been linked more than once to the idea of equal concern and respect. As the former Chief Justice of the Supreme Court of Israel, Aharon Barak, stated, “occupation enables human beings to shape their identities and social status. Depriving their freedom to choose their profession will also take away the meaning of life”.\textsuperscript{172} And in another place, he stated that, “the freedom of occupation aimed at providing constitutional protection to the individual’s freedom to shape her image and social status as a creative human being in the society she lives in. Against this background, we may regard occupation as a continuous human activity that may bestow a basis for life”.\textsuperscript{173} In Investment Managers, the Supreme Court of Israel held:

The freedom of occupation, as a constitutional right, is derived from the autonomy of the free will. It is an expression of human self-determination. Through freedom of occupation, a person shapes her image and status and contributes to the social fabric. It is so according to the values of the State of Israel as a democratic state. It is so according to its values as a Jewish state. Labour distinguishes human beings and expresses the image of God in them.\textsuperscript{174}

Gradually, freedom of occupation has been deemed a unique expression of the general notion of equal concern and respect. It aims at protecting human beings’ ability to seek a source of living. Therefore, although it does not generally impose an active duty on the State and other employers to employ, where monopolies are concerned, for example, and deprivation of employment equals deprivation of employability, freedom of occupation is infringed.\textsuperscript{175} Even Chief Justice Barak agrees that there are cases where freedom of occupation transforms into a right to occupation. So, for example, when the State provides

\begin{footnotes}
\item See Aharon Barak, Interpretation in Law: Constitutional Interpretation, vol. 3 (Jerusalem: Nevo, 1994) at 597 (Hebrew).
\item \textit{Ibid.} at 583 [translated by author].
\item Aharon Barak, “The Economic Constitution of Israel” (1998) 4 Mishpat Uvimshal 357 at 369 (Hebrew) [translated by author].
\item H.C.J. 1715/97 \textit{The Bureau of Investment Managers in Israel v. The Minister of Finance}, P.D. 51(4) 367 at 383 (Hebrew) [translated by author].
\item See H.J.C. 5936/97 \textit{Dr. Lam v. Dal}, P.D. 53(4) 673 at 682 (Hebrew).
\end{footnotes}
the only workplace for the occupation of an individual, the refusal to employ the person equals the prevention of his or her occupation.\textsuperscript{176}

In light of these assertions, it might be argued that laws and collective agreements imposing mandatory retirement at a chronological age, combined with the strong reluctance of employers to hire, promote and train senior workers, \textit{de facto} deprives workers from exercising their freedom of occupation and limits their ability to look for sources of livelihood. That is, obliging workers to leave the labour market at a chronological age even though they may still be productive, and making it difficult for them to enter or re-enter the labour market or retain their jobs at advanced age, constitutes a substantial violation of their freedom of occupation.\textsuperscript{177}

**F. What does Equality have to do with it?**

One objection to the analytical framework, comprising five essential principles, articulated above might be that these principles are not essentially egalitarian or comparative, and as such should not be addressed within the boundaries of equality discourse.\textsuperscript{178} In other words, it might be argued that unequal treatment which does not respect the abovementioned principles does not constitute discrimination but rather simply amounts to socially undesirable forms of behavior that should be prohibited.

However, I argue that the principles articulated above are firmly embedded in a notion of equality. They are derived from the abstract idea of equal concern and respect which is the value underpinning equality. They all correspond to a prohibited ground – age. They entail a distributive element. That is, when a distributive criterion fails to accord equal concern and respect to some members of a protected group (by not respecting one of the five principles), their right to equality is violated. When one of these principles is compromised, we might identify in the background one age group that received a benefit and another age group that did not receive it. Yet, this has no meaningful role in clarifying why discrimination is unjust and it does not constitute a basis for an entitlement claim.\textsuperscript{179} It has only an argumentative function. It indicates that something can be done to improve things and helps us to point at those who are responsible for not doing enough.\textsuperscript{180} Finally, although the principles are not essentially egalitarian, like Scanlon, I do not intend “to attack equality

\textsuperscript{176} Ibid. at 691-93.

\textsuperscript{177} See Ruth Ben-Israel, “Retirement Age Analysed from an Equality Perspective: Biological or Functional Retirement?” (1997) 43 Ha’praklit 251 at 285 (Hebrew).

\textsuperscript{178} For example, in the context of the \textit{Canadian Charter of Rights and Freedoms}, why should the concern for the worse-off (as part of the third principle) be addressed within the boundaries of s. 15 rather than s. 7?

\textsuperscript{179} See Moreau, \textit{supra} note 17 at 317-18.

\textsuperscript{180} See Chapter III, note 229.
or to ‘unmask’ it as a false ideal”\textsuperscript{181} as was done by Peter Westen.\textsuperscript{182} As Greenawalt argues, substantive principles of equality sometimes rest on fundamental values that are non-egalitarian. The principles of equality can be grounded in non-egalitarian norms and vice versa: “A norm that an advanced society should afford its citizens roughly equal opportunity in life can be used to support a noncomparative right to a minimal level of nutritional and medical support”.\textsuperscript{183}

G. Conclusion

According to the Dignified Lives Account, which recognizes temporal inequalities and allows the pursuance of age discrimination claims, every individual should be treated with equal concern and respect at all life stages, viewed in isolation. In this Chapter, I have unpacked the abstract idea of “equal concern and respect” by articulating five essential principles of equality: \textit{individual assessment}, \textit{equal influence}, \textit{sufficiency}, \textit{social inclusion} and \textit{autonomy}. Focusing on the specific context of age discrimination against senior workers, I have shown that when these principles are not respected, senior workers are not treated as having equal moral worth. Together, these principles form the basis of the moral justification for the elimination of age discrimination in employment. The right of a senior worker to age equality is infringed when a personal wrong is done to him or her. This wrong is so significant that it does not matter what his or her situation was in the past, or will be in the future, or in comparison to a younger worker. That is, not every unequal treatment of senior workers is unlawful age discrimination. It is when the unequal treatment is based on ageist stereotypes or ageism; when it perpetuates oppression of senior workers; when it denies senior workers access to basic goods, thus pushing them into impoverished circles and unreasonable conditions of living; when it excludes them from full and meaningful participation in social lives; or when it reduces their autonomy and free will.

\textsuperscript{181} Scanlon, \textit{supra} note 9 at 203.

\textsuperscript{182} Westen argues that Aristotelian equality, according to which people who are alike should be treated alike, and unlike people should be treated differently, proportionately to their dissimilarity, is empty of any substantive moral content; it is circular and tautological. It suggests that we treat “like people” alike but “like people” are defined as “people who should be treated alike”. The content of equality will therefore be determined by external sources of moral values that determine which persons and treatments are alike. However, since these external sources rely on normative judgments cast in other terms, equality becomes unnecessary and should be abandoned (Peter Westen, “The Empty Idea of Equality” (1982) 95 Harv. L. Rev. 537).

\textsuperscript{183} Kent Greenawalt, “How Empty is the Idea of Equality” (1983) 83 Colum. L. Rev. 1167 at 1183. “If it is a claim of equality that people similarly subject to an established standard should be treated the same way…, surely claims that people should be treated the same way with regard to one or many benefits or burdens because they share relevant characteristics, and claims that people should not be denied the same treatment on the basis of irrelevant differences… are also claims of equality” (\textit{ibid.} at 1180).
These wrongs may occur at various times including during hiring, training, promotion and dismissal. They may be intensified in certain circumstances. For example, it is harder to point to any rational connection between abilities and age when a 50 year-old worker is unequally treated based on her age, than when a 80 year-old worker is treated unequally. Thus, the wrong of ageist stereotyping and even ageism (prejudice) is highly significant in the case of the 50 year-old worker. Furthermore, if this worker were dismissed due to unequal treatment based on age and encountered great difficulties in finding a new job, she might be at great risk of poverty for years before she could collect pension benefits. Thus, the wrong of insufficient living conditions is also strongly evident.

The Dignified Lives Approach to equality reveals that age discrimination against senior workers is as wrong as, for example, sex and race discrimination. It supports the conclusion that age equality of senior workers is a fundamental human right protecting considerably valuable interests. The severe and repeated compromise of the principles of the right to age equality of senior workers suggests that competitive markets and rational employers cannot eliminate age discrimination against senior workers. There is a need for anti-age discrimination legislation that will defend the fundamental right of senior workers to equality in accordance with the analysis in this Chapter. The analysis strongly demonstrates that only compelling counter-considerations can justify an infringement of the right to age equality in employment. This does not mean that we should absolutely proscribe any efficiency-based evaluation. Yet, the relative weight of economic considerations should be limited as age equality is a fundamental right of senior workers.

Also, it is important to note that anti-age discrimination legislation would not impose excessive constraints on human autonomy or liberty. While it is true that equality may sometimes clash with autonomy or liberty, by for example limiting one’s freedom of contract, it is often necessary to enhance liberty. First, liberty should not be understood as a negative freedom which protects individuals against state intervention. As Rawls argues, certain primary goods are necessary so that people can have a similar chance to actually exercise the liberties they have. That is, equal concern and respect is a primary good that is often necessary in order to provide the conditions under which people can meaningfully exercise their liberty. Second, according to Raz, rights necessarily entail obligations: “X has a right if and only if X can have rights, and, other things being equal, an aspect of X’s well-

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184 Epstein for example argues that “employment discrimination laws represent the antithesis of freedom of contract”, “a principle that allows all persons to do business with whomever they please for good reason, bad reason, or no reason at all” (supra note 44 at 3). He maintains that antidiscrimination laws force people to enter into transactions against their will. That is, heavy external pressure is imposed on the unwilling party and even increases in disparate impact cases (ibid. at 445).

185 Rawls, supra note 10 at 57-59. See also Fredman, supra note 51 at 3 and c. 1.
being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.”\textsuperscript{186} The obligations a right entails are an inseparable part of its definition. The interest underpinning the right is the reason for the imposition of these obligations. According to Raz, at the very foundation of the political morality of liberalism lies a doctrine of political authority, which promotes liberty and autonomy. Since personal autonomy is valuable as an essential ingredient of a good life, and one needs certain abilities to lead an autonomous life, the principle of autonomy imposes duties on people to secure for all the conditions of autonomy, as one of the most important moral principles. Society is obliged to provide its members with the ability to live autonomous lives. Liberalism does not contradict a social obligation to provide fundamental values and rights.\textsuperscript{187} Finally, anti-age discrimination legislation should leave a high degree of flexibility and freedom for governments and private parties. While state action and private negotiation should be exercised within this legal framework, the \textit{Dignified Lives Approach} to equality would defend a range of acceptable actions and negotiation outcomes, provided that they respect the five essential principles articulated above.

\textsuperscript{186} Raz, \textit{supra} note 36 at 166.
\textsuperscript{187} \textit{Ibid.} at 373, 408, 415, 417.
Chapter V:
Concrete Examination of the Challenges of an Aging Workforce Based on the *Dignified Lives Approach* to Equality

A. Introduction

As was illustrated in the previous chapters, the *Dignified Lives Approach* to equality considers senior workers’ right to age equality to be a fundamental human right that serves five significantly valuable principles: *individual assessment, equal influence, sufficiency, social inclusion* and *autonomy*. This approach to equality bypasses the difficulties inherent in the complete lives approach to equality as it recognizes that wrongs done to senior workers at any particular time can constitute unjust age discrimination, without reference to any comparison between a senior worker and a younger worker, or a senior worker’s past situation. Several general conclusions can be drawn from the application of this approach in the specific context of age discrimination.

First, the *Dignified Lives Approach* to equality may provide us with useful insights with regard to potential exceptions to the general prohibition on age discrimination. Currently, there are many exceptions to the prohibition, and these are readily established in court proceedings. Some scholars have called for strengthening the protection against age discrimination. Colm O’Cinneide argues, for example, that age-based distinctions should be reviewed on a strict standard of scrutiny and be allowed only in rare cases where strong justification is available and it is clearly necessary to limit the fundamental right to age equality.\(^1\) Similarly, Fredman argues that although there is sometimes a good reason to subject an individual to a detriment on grounds of age,\(^2\) any restriction on age equality should be justified only when it aims to pursue a legitimate goal and is a proportionate means to that goal. Furthermore, she maintains that it should not be enough to show that it is reasonable to limit age equality in order to achieve that goal (a rationality standard). Rather, the restriction should be necessary to achieve that goal, *i.e.* it should be shown that there is no non-discriminatory alternative available to achieve that goal (a necessity standard).\(^3\)

By contrast, the *Dignified Lives Approach* does not view every age-based distinction as detrimental, thus requiring a strict standard of review. It rather acknowledges the unique characteristics of age as a prohibited ground. It suggests that there is a strong case for

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\(^3\) Ibid. at 50-51.
blocking out counter-considerations other than in rare cases of necessity when there is a significant or extreme breach of the principles of equality. This often happens in the context of senior workers in the employment sphere (but may also be relevant to young people\(^4\) and in other spheres\(^5\)). Less strict standards of review, such as the rational connection test, may be sufficient in other cases, where the principles of equality are not severely compromised (for example, age-based distinctions in cases of voting rights, driving licenses, or sale of alcohol) or where the compromise of these principles could be successfully mitigated.\(^6\)

Second, the *Dignified Lives Approach* focuses on wrongs done to senior workers which are significant in and of themselves, rather than on the comparative dimensions of equality. It may therefore suggest a need to modify anti-age discrimination laws that use comparative language.\(^7\) Accordingly, plaintiffs would have to show that a significant wrong was done (i.e. one or more of the principles underpinning equality was not respected).\(^8\) Significant wrongs occur when an individual is subjected to unequal treatment, based on an ageist stereotype or ageism, that perpetuates their oppression, denies them access to

\(^4\) A younger worker may establish a strong case if he or she shows that the principles of equality were not respected in the specific context. Recently, it has been argued that the global economic crisis has adversely affected younger workers as employers are reluctant to dismiss senior workers and be exposed to age discrimination suits. However, as Jeffery Hirsh argues, there is no empirical evidence to support this claim. Generally speaking, there are more lay offs in times of economic crisis. However, senior and younger workers share this burden. While the unemployment rate for those between ages 25-34 was 9.6% in April 2009 (compared with 4.9% a year earlier), it was 6.2% for those aged 55 and older in April 2009 (compared with 3.3% a year earlier). See Dana Mattioli, “With Jobs Scarce, Age becomes an Issue” *The Wall Street Journal* (May 19, 2009), online: <http://online.wsj.com/article/SB124270050325833327.html>; Jeffery Hirsh, “The Curse of Youth?” *Workplace Prof Blog* (May 20, 2009), online: <http://lawprofessors.typepad.com/laborprof_blog/2009/05/the-curse-of-youth.html>.

\(^5\) Take for example the case of reevaluation of seniors’ driving license. While medical conditions may affect one’s ability to drive, decline in capabilities cannot be attributed to a certain age. However, some countries use age as a criterion for reevaluation of drivers. They reexamine their ability to drive and impose some other medical tests (such as vision) after a certain age. Since it is health condition and not age that may adversely impact driving performance, this generalization wrongs many senior individuals. Furthermore, alternative mechanisms are available. Medical evaluations may be performed periodically on all drivers at all ages. Finally, a decision to reexamine ability to drive should be made individually on the basis of medical tests, traffic offences or accidents.

\(^6\) Take for example the right to vote which may be limited to people over the age of 18 (or 17). This age-based distinction is not based on stereotypes or prejudice. It involves generalization but there is no other means of assessing mental maturity or capacity. It does not perpetuate oppression. Younger people are not historically undervalued. It does not exclude them from full participation in society and if it does it is only temporarily and reasonable given the correlation between their rights and duties as citizens before the age of 18. It would be therefore sufficient to demonstrate that a rational connection exists between the age limit and the goal of achieving election results which reflect the true political preferences of the citizens.

\(^7\) See for example, the language of the EU Directive establishing a general framework for equal treatment in employment and occupation, European Union Council Directive 2000/78/EC of 27 November 2000, OJ L303 at 16-22 [hereinafter: the EU Directive] and the *Employment Equality (Age) Regulations* in the UK (discussed in Chapter I, section D.2.e). Even the Canadian and American laws which do not use comparative terms were interpreted as such. In Canada, a worker has to establish a *prima facie* case of age discrimination by showing (in hiring or promotion situation) that he or she was a member of the protected group, qualified for the position, and was denied the opportunity while another applicant or worker who was no better qualified got it or the employer left it open and is still searching for candidates (see Chapter I, sections D.2.b. and D.2.c.).

\(^8\) It will be examined from the perspective of the plaintiff as well as from the perspective of a reasonable person in circumstances similar to the plaintiff’s.
minimum living conditions, socially excludes them, or reduces their autonomy and free will. They would not have to show that other (younger) workers or applicants were treated differently. As well, the respondent employer would not be able to defend his or her action by arguing that he or she has hired or promoted other senior workers, since a wrong was still done to the particular plaintiff.

This approach is sound and reasonable given the ambivalent feelings employers may have towards senior workers which motivate their age-based decision making at work. While they may have respect for some senior workers, they may devalue and reject others on the same ground: their advanced age. This approach also provides a more useful rejoinder to a respondent’s attempt to defend its action or decision. That is, it provides a strong moral justification for the prohibition on age discrimination in employment by identifying the personal wrongs done to an individual as the basis for his or her claim, and emphasizes the need for compelling considerations to override senior workers’ right to age equality. It also strengthens the justification for awarding substantial damages (including punitive damages), and reinstating workers who were discriminated against, when the principles of equality are not respected to a great extent. Finally, this approach shifts the focus from stereotyping and prejudice as the major, essential components of age discrimination, adopting a more comprehensive approach which examines diverse personal harms and embraces unintentional cases of age discrimination.

Third, it may be difficult to establish and prove a case of non-hiring on grounds of age, even on the Dignified Lives Approach to equality. However, it is clear that systemic age discrimination in hiring cannot be resolved through private litigation alone. State and private actors should pursue meaningful steps towards treating senior workers with equal concern and respect. The principles underpinning equality create a useful platform for innovative legislation that can impose positive duties on public and private actors to enhance equality. This may include vocational training and professional consultation for senior workers who are looking for a job as well as incentives for employers to hire senior workers. This matter will be discussed at length as part of the various measures pursued to encourage labour force participation among senior workers and the duty to accommodate senior workers.

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9 See Chapter IV, section E.1.d.
10 See e.g. Fredman, supra note 2 at 53-54.
11 Fredman for example stresses the need for monitoring, reports and sanctions. She argues that voluntary cooperation is not sufficient and recommends the establishment of a commission that will initiate age discrimination complaints and will promote age equality (ibid. at 66-69).
12 Positive duties that cannot be inferred from a personal wrong associated with discrimination require explicit legislation. See Chapter IV, section D.
13 See the discussion in Sections E. and G. below.
Finally, the *Dignified Lives* approach constitutes an important theoretical framework for tackling the myriad challenges posed by the global trend towards an aging workforce. I will now turn to examine the various doctrinal and policy challenges identified in Chapter II through the lens of the five principles underpinning the right to age equality in the workplace. I will argue that general policies or laws permitting or forcing mandatory retirement should be banned as they constitute a significant breach of the five principles underpinning the right of senior workers to age equality. I will however suggest ways to mitigate the effects of the breach and allow specific arrangements to prevail. Next, I will argue that legislative age-caps and age-based distinctions should be, in general, repealed as they undermine the principles of equality to a great extent. I will propose alternative methods to mitigate this effect. Then, I will maintain that decisions or actions based on cost considerations which do not respect the principles of age equality should be upheld only when no other less discriminatory means are available. As for the trend towards increasing the age of eligibility for full pension benefits, I will stress the need to take into account the right of senior workers to age equality in the design and execution of any labour market policy that aims at tackling the implications of the aging workforce by encouraging senior workers to work longer. I will also draw some general guidelines with regard to performance appraisals. Finally, I will argue for a broad duty to accommodate senior workers, in line with the *Dignified Lives Approach* to equality.

As will be shown in this Chapter, the *Dignified Lives Approach* strikes an appropriate balance between the different rights and interests involved in each challenge raised by the aging workforce. While efficiency and other economic considerations are still legitimate and relevant even under the *Dignified Lives Approach*, the act of balancing between the rights and interests involved is calibrated distinctively. That is, the *Dignified Lives Approach* emphasizes that the right of senior workers to age equality, on the one hand, and economic considerations, on the other hand, are not of equal weight. The fundamental right of senior workers to age equality usually trumps other considerations. Nevertheless, the *Dignified Lives Approach* does not offer an “all-or-nothing” solution. It generates great flexibility and creativity. It stresses the need for compelling counter-consideration to justify the infringement of the right to age equality in employment. Yet, it often points to multiple alternative mechanisms, and allows some limitation on the right to age equality provided that*

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14 By contrast, where younger workers can prove that there is a potential harm to their right to age equality, the right to age equality of senior workers and the right to age equality of younger workers, which are of equal standing, will have to be balanced against each other to resolve the conflict. Each of these fundamental rights will have to be compromised while still preserving their essence to allow the two rights to co-exist.

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any compromise of the principles underpinning equality can be mitigated, and senior workers are treated with equal concern and respect.

**B. Should Mandatory Retirement be Banned in all Circumstances?**

According to the complete lives approach to equality, which compares two individuals based on their lifetime share of resources, mandatory retirement does not constitute unlawful age discrimination and should be allowed as long as it applies to all workers. Furthermore, the complete lives approach holds that senior workers have had their fair shares of resources and should now vacate their place and make room for younger workers.\(^{15}\)

By contrast, the *Dignified Lives Approach* provides a strong argument in favour of viewing mandatory retirement as a human rights issue. A general rule (legislation or policy) allowing mandatory retirement does not respect the five principles of equality. It constitutes unlawful age discrimination. Accordingly, the legislation in Israel that sets mandatory retirement at a fixed age or the legislation in the U.K. that allows employers to dismiss workers who reach 65 solely based on their age (as a default rule) should be repealed.\(^{16}\) However, the *Dignified Lives* approach does not provide an “all-or-nothing” solution. It may allow exceptions in certain circumstances where the compromise of the five principles can be mitigated. I will now expand on this position.

A general rule allowing mandatory retirement is an unequal treatment which is often based on ageist stereotypes and ageism.\(^{17}\) As was demonstrated in Chapter II, age is a bad proxy for job performance.\(^{18}\) Accordingly, mandatory retirement based on an inaccurate generalization that job performance declines with age wrongs the entire group of senior workers. It inaccurately describes them and arbitrarily denies them a benefit for which they may be eligible. Even if it is an accurate-on-average generalization that productivity declines with age,\(^{19}\) mandatory retirement still wrongs many members of this group. Since

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\(^{15}\) See Chapter III, section E.1.

\(^{16}\) For more information on both legislations see Chapter I, sections D.2.d and D.2.e.

\(^{17}\) Levine’s analytical and empirical study of mandatory retirement reveals the dominance of cultural and psychological factors rather than of economic rationality. It points to the conclusion that mandatory retirement policies have been largely driven by these factors. Even economic analyses are often based on ageist and stereotypical assumptions such as that job performance of senior workers declines on average (Martin Lyon Levine, *Age Discrimination and the Mandatory Retirement Controversy* (Baltimore: The Johns Hopkins University Press, 1988) at 165).

\(^{18}\) See Chapter II, section B.2. It might also be based on other ageist stereotypes that falsely correlate certain characteristics such as creativity, flexibility or ambition to age. On ageist stereotypes see Chapter IV, section E.1.b. Mandatory retirement might also be based on ageism (prejudice). Ageism involves irrational beliefs about senior workers regarding for example their creativity, flexibility or motivation. Employers who practice ageism may prefer to use mandatory retirement over individual evaluation to avoid humiliating senior workers. See Chapter IV, section E.1.d.

\(^{19}\) There may be for example some correlation between health condition and age. See Chapter IV, note 68 and accompanying text.
individuals have unconditional, intrinsic value, they should be treated and assessed as individuals.\textsuperscript{20} However, mandatory retirement uses chronological age as a proxy for job performance rather than evaluating individuals’ job-related characteristics, and requires people to retire at a specified age. It may be that it is the simplest, most efficient way to assign responsibilities and impose burdens, and that it provides a high degree of certainty. Yet, there are many senior workers who are willing to work and are capable of working beyond the fixed age of retirement.\textsuperscript{21}

To conclude, mandatory retirement wrongs many senior workers as it denies them a benefit available to others simply on the basis of their age even though they are capable of working. This wrong is intensified by the negative connotation of mandatory retirement, which implies the inferiority of those subject to its generalization. It is further aggravated as individual assessment is usually feasible and not too costly.\textsuperscript{22} Even if mandatory retirement is justified in terms of cost, it still carries undesirable social consequences. It might perpetuate other ageist stereotypes and operate as a self-fulfilling prophecy negatively affecting senior workers’ productivity.\textsuperscript{23} Finally, mandatory retirement wrongs senior workers as it categorizes them in a way that affects their ability to define themselves as they wish to and fails to show due concern for their actual identity and circumstances.

A general rule allowing mandatory retirement also constitutes an unequal treatment which might perpetuate oppression of senior workers. This oppression is not necessarily intentional. It is usually the result of institutional and social structures. It is embedded in the assumptions underlying mandatory retirement (\textit{e.g.} that abilities decline with age) and its consequences (\textit{e.g.} social inactivity and isolation). Mandatory retirement has a strong effect on the way we see and treat senior workers. It casts senior workers as useless, as “dead wood” who were given their chance and should now vacate their place for younger generations. Mandatory retirement is also an example of how often senior workers are treated as a means rather than an end in the labour market, and are exploited and marginalized. Employers and states wishing to tackle problems of labour shortages and pension deficits induce senior workers to work longer through pension penalties and increasing the age of eligibility for full public pension or social security benefits. At the same time, they force many capable senior workers to retire at a fixed age based on the contested assumption that it would ease youth unemployment, and in order to facilitate

\textsuperscript{20} See Chapter IV, section E.1.a.
\textsuperscript{21} See Chapter I, section E. There are also employers who argue that they prefer to hire younger workers because senior workers demand or expect to earn higher salaries. This is still a generalization that should be examined individually.
\textsuperscript{22} See Chapter II, note 39 and accompanying text.
succession planning. This practice therefore perpetuates the social and political dominance of younger groups and affects the choices that senior workers are making upon retirement.

As well, a general rule permitting mandatory retirement is an unequal treatment which might deny many senior workers minimum living conditions. Since work is a major source of livelihood, mandatory retirement that is not attached to an adequate pension plan might lead to deprivation among senior people. Many workers are not covered by private pension plans and rely heavily on public pension or social security systems as their main source of livelihood, yet these plans provide only modest benefits. As the financial sustainability of many public plans is questioned, delaying retirement may allow senior workers to live a life of dignity. It is true that retirees are free to look for a new job upon retirement; however, they often encounter great difficulties in re-entering the job market. They compromise and work in part-time and low wage jobs, or stop searching for a job.

Even when public and private pension plans are available, some workers (such as women, immigrants, disabled workers and other visual minorities) have not had enough time to accumulate pension benefits and are at great risk of poverty if forced to retire.

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24 See for example the case of Israel (Chapter I, section D.2.d.).
25 Many senior workers internalize the oppression and believe they are incapable and should retire. They often do not look for alternative jobs and become inactive although they are capable of contributing to society. See Chapter IV, section E.2.
26 According to the National Union of Public and General Employees, most Canadians do not have either a workplace pension plan or private retirement savings. Over 60% do not have a private pension plan. One-third of working Canadians have no private retirement savings at all. Most Canadians rely on OAS and CPP. However, the CPP amounts to only one-quarter of contributors’ average lifetime earnings up to the average wage. See Pension Tension: What We’ve Lost Matters: What We haven’t Lost, because We Never had it, Matters More (Nepean: The National Union of Public and General Employees, 2009), online: <http://www.nupge.ca/files/publications/MiscPDFs/nupge_pamphlet_pension_tension_may09.pdf>; and Monica Townson, Growing Older, Working Longer: the New Fact of Retirement (Ottawa: Canadian Centre for Policy Alternatives, 2006). Also see Chapter I, section D.2.c. Accordingly, financial need was identified as the most important reason for returning to work after retirement. Yet, there is a great variety of reasons for returning to work after retirement. The combined reasons of boredom and simply wanting to return to work were greater than the reason of financial need. See Morley Gunderson, Retirement and Return to Work Decisions of Retirees (Report to Human Resources Development Canada, March 1999) at 45-47 and discussion in Chapter I, section E. In the U.S., only around half of all private-sector workers (mostly those with higher income) have workplace pension plan (see Chapter I, section D.2.b.). Those who do have pension plans often do not save enough. According to the latest available data on senior population income, social security was still the largest source of income for Americans currently age 65 and older in 2005 (40.1% of an average income). Pension and annuities income was 19.3%, income from assets was 13.6%, and income from earnings was 24.8%. However, it is expected that the new automatic enrollment provisions in the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780, will increase levels of participation and savings in 401(k)-type plans (see Kenneth J. McDonnell, “Income of the Elderly Population Age 65 and Over, 2005” (May 2007) 28:5 EBRI Notes 2, online: <http://ssrn.com/abstract=987903>; Jonathan Barry Forman & Bing Yung-Ping Chen, “Optimal Retirement Age”, New York University Review of Employee Benefits and Executive Compensation [forthcoming] at 20-21, online: <http://ssrn.com/abstract=1148271>.
27 See Chapter III, section B.
28 The problem of female workers is multiple. First, their wages are usually lower than male wages. Second, since women earn lower incomes, their accumulated pension contributions are also lower. Third, women are often employed in sectors and workplaces that do not provide pension plans. Fourth, they are often employed in part-time work, which affects their entitlement to and scope of pension plans. Fifth, they are often employed through agency companies, which provide minimum working conditions and seldom offer pension plans. Finally, women are often compelled to leave their job for several years to take care of their children or senior
Neither the Israeli nor the U.K. legislation that sanctions mandatory retirement confers any pension entitlement or imposes any obligation on employers to provide an adequate pension.\textsuperscript{29} Furthermore, in Israel, there was no mandatory pension legislation until very recently.\textsuperscript{30} Only half of the adult population had pension plans in 2006, while the social security benefits are very modest.\textsuperscript{31} Even now when there is a law that mandates that employers provide all workers with a pension, both employers’ and workers’ contributions are very modest and cannot guarantee minimum living conditions especially for those who are already at an advanced age and have not had the chance to accumulate sufficient benefits.\textsuperscript{32} Furthermore, enforcement has always been a major obstacle.\textsuperscript{33} Indeed, although many collective agreements in different sectors require that employers allocate money to pension funds, many employers in sectors where low-paid workers are employed (such as maintenance, security and services) violate these agreements.\textsuperscript{34} Finally, according to new reforms in the pension system in Israel, pension funds which were once offered by trade unions were privatized and are governed today primarily by insurance companies and their value is tied to the stock market, which makes them risky and weakens workers’ social

family members. In those years that they are absent from the labour market, they often do not accumulate money to pension plans. Therefore, many women do not have pension plans or have lower contributions for shorter times, resulting in lesser pension benefits. They may be compelled to delay retirement or live their later years in poverty. For elaboration on the types of paid work carried out by women and the considerable implications for their transition into retirement, see Miriam Bernard \textit{et al.}, “Gendered Work, Gendered Retirement” in Sara Arber & Jay Ginn, eds., \textit{Connecting Gender & Ageing: A Sociological Approach} (Buckingham: Open University Press, 1995) 56. See also Hugh M.K. Grant & Greta Wong Grant, \textit{Age Discrimination and the Employment Rights of Elderly Canadian Immigrants} (Ottawa: Law Commission of Canada, 2002), online: \texttt{<http://dsp-psd.pwgsc.gc.ca/collection_2007/icc-cdc/JL2-33-2002E.pdf>}. This paper argues that mandatory retirement imposes an undue economic hardship on senior immigrants who enter the labour force at an advanced age, earn low wages at least at the beginning, and are not able to accumulate sufficient savings prior to age 65.\textsuperscript{29}

By contrast, the Spanish law allowing employers to impose retirement is subject to pension entitlement. See Chapter II, section B.1.

\textsuperscript{30} On the importance of a formal system of pension see \textit{World Economic and Social Survey 2007: Development in an Ageing World} (New York: United Nations, Department of Economic and Social Affairs, 2007) at 91, online: \texttt{<http://www.un.org/esa/policy/wess/wess2007files/wess2007.pdf>} (senior people in countries with comprehensive formal pension systems are less likely to fall into poverty than younger people, whereas the proportion of poor seniors in countries with limited coverage often corresponds to the national average).

\textsuperscript{31} See Chapter I, section D.2.d. Interestingly enough, more than 90\% of the population thinks that the employer and the state are responsible for ensuring reasonable living standards for retirees. See the Central Bureau of Statistics, “Pension and Retirement” (August 26, 2003), online: \texttt{<http://www.cbs.gov.il/hodaot2003/19_03_200.htm>} (Hebrew); the Central Bureau of Statistics, “International Day of the Elderly – Selected Data” (October 1, 2003), online: \texttt{<http://www.cbs.gov.il/hodaot2003/12_03_239.pdf>} (Hebrew).

\textsuperscript{32} As of 1.1.2009, the worker contributes 1.66\% from his or her salary and the employer 3.34\% (total of 5\%). The rates will increase and reach a total of 15\% by 1.1.2013.

\textsuperscript{33} Eight months after the extension order came into effect, 800,000 workers were still not covered by any pension plan. One of the problems is that this duty is embedded in an extension order and not in a primary legislation. As a result, no criminal sanctions are involved. Furthermore, monitoring and enforcement mechanisms were not yet established. See Alizpan Rosenberg, “Eight-hundred Thousand Workers Still without Pension” \textit{YNet} (September 11, 2008), online: \texttt{<http://www.ynet.co.il/articles/0,7340,L-3574457,00.html>} (Hebrew).

\textsuperscript{34} See Ruth Sinai, “One Million Workers do not have Pension” \textit{Ha'aretz Website} (January 29, 2007), online: \texttt{<http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=819048&contrassID=1>} (Hebrew).
security.\textsuperscript{35} Even the new mandatory pension system is not a public plan. It is governed by private actors. Not surprisingly, poverty levels among senior people are higher than in other sectors of the population in both Israel and the U.K.\textsuperscript{36}

Furthermore, a general rule allowing mandatory retirement constitutes an unequal treatment excluding senior workers from the labour market. Even if it is not based on ageist stereotyping and ageism (but rather on actual differences between the young and the senior), mandatory retirement is still built on the characteristics of dominant groups and wrongs senior workers who are denied the right to belong to the social group of working people. That is, it denies the recognition of differences that is essential in order to allow disadvantaged groups to develop and exercise their capabilities and realize their choices. Consequently, mandatory retirement weakens senior workers’ ability to belong to certain groups and to fully pursue active social lives. It implies that senior workers who no longer actively contribute to their society are of lesser worth. It negatively affects their social ties and their social status. The wrong has been aggravated in recent years as people are living longer and staying healthier yet are compelled to live inactive lives for a longer period of time despite the availability and feasibility of various accommodation solutions.\textsuperscript{37}

Finally, a general rule allowing mandatory retirement is an unequal treatment which might reduce senior workers’ autonomy. It forces many workers to retire against their will and assume inactive lives at the very time when an increasing number of workers around the world have expressed their intention to work past the age of 65.\textsuperscript{38} Indeed, mandatory retirement does not mean that senior workers cannot look for another job. Yet, they often find it very difficult to re-enter the labour market at an advanced age due to age discrimination. In Israel, the Equal Opportunities Law does not even protect those over 67 against age discrimination.\textsuperscript{39} Mandatory retirement is therefore a vocational death penalty for many senior workers.\textsuperscript{40} While workers wish to be involved in their communities and in paid employment longer as their life expectancy increases and health condition improves,

\textsuperscript{35} While workers have been given the freedom to choose and mobilize their pension fund, most of them do not possess the required knowledge of the complicated world of pension, nor are they provided with adequate guidance.

\textsuperscript{36} According to the Luxemburg Income Study comparative data, 23% of senior people in Spain, 22% in Australia, 21% in the U.S., 21% in Israel, and 16% in the UK were poor (compared with 5.4% in Canada) in 2006. See Luxemburg Income Study (LIS) Key Figures, \texttt{<http://www.lisproject.org/key-figures/key-figures.htm>}. The senior people poverty rates are computed at 50% of the median equivalent income. For more information see Chapter IV, note 124.

\textsuperscript{37} Senior workers often become inactive after dismissal or retirement because they can hardly find a way to re-enter the labour market. See Chapter III, section B.

\textsuperscript{38} See Chapter I, section E.

\textsuperscript{39} See Chapter I, note 163 and accompanying text.

mandatory retirement (combined with employers’ firm opposition to hiring, promoting and training senior workers) takes this choice away from them. It violates senior workers’ right to choose when and how to retire. It denies their autonomy and their right to freedom of occupation. It defeats their desire to continue working or pursue phased retirement. Both Israel and the U.K.’s laws accurately demonstrate this wrong as mandatory retirement is set by primary legislation without any level of consent by workers or their unions. The laws are also not compatible with the rationale of increasingly common defined-contribution pension plans, which essentially work as saving programs “allowing workers to decide when, how and how much to draw from their accumulated pension wealth”. Mandatory retirement negates the flexibility and choice provided by those plans.

To conclude, according to the Dignified Lives Approach a general policy or rule advanced by governments or employers to allow mandatory retirement fails to treat senior workers with equal concern and respect. This failure amounts to a severe personal wrong, similar to a tort. Senior workers have a personal right of action against employers who implement mandatory arrangements, even prior to the enactment of anti-age discrimination legislation. That is, the fundamental right of senior workers to age equality requires the imposition of some legal limitation on the right to freedom of contract and overrides other interests such as the employer’s interest in running its business, because of the severe personal wrongs associated with its violation.

Accordingly, the legislation in both Israel and the U.K. should be repealed. As far as the U.K. legislation is concerned, the European Court of Justice held that it is compatible with the EU Directive. However, the British government and employers should not regard this decision as a victory. On the contrary, the European Court of Justice clearly indicated that the government’s interpretation of the legislation was wrong. While the government intended to create a default rule that would allow employers to retire workers at the age of

41 For similar reasons, pension plans that penalize workers who remain employed beyond the plan’s retirement age should also be altered. These penalties serve as a substitute for mandatory retirement and aim at promoting job opportunities for younger workers. However, they are built on generalizations and stereotypes about the capacity of senior workers and ignore the economic advantages of employing senior workers. They might cause financial hardships to some senior workers and substantially reduce their autonomy and free will. Finally, their aim is highly contested (see the discussion on the lump-of-labour fallacy in Chapter II, section B.2.).


43 Ibid. at 5-6.

44 See ECJ Case C-388/07 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform (delivered on March 5, 2009), online: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-388/07&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>. For more information on this case see Chapter I, section D.2.e.
65, no strings attached, the European Court of Justice subjected this rule to Article 6 of the EU Directive. That is, the legislation had to be justified as a proportionate means of achieving a legitimate aim. If the government interpretation had been accepted, the European Court of Justice would have declared the law incompatible with the EU Directive. Now, the High Court of Justice of England will have to determine this issue.

The UK government will have to point to a legitimate social policy, “such as those related to employment policy, the labour market or vocational training”, which is “distinguishable from purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness”. Indeed, the court also states that “a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers”. However, generally succession planning or generating job opportunities for younger workers should not constitute legitimate aims justifying the infringement of a fundamental right. It is true that the European Court of Justice set a low burden of proof in a case regarding Spanish legislation. Upholding mandatory retirement at the age of 65, the Court accepted that the creation of job opportunities for the unemployed is a legitimate aim, despite the fact that this aim is highly contested. Nevertheless, the UK government will still need to prove that the means chosen were appropriate and necessary to achieve this aim. The legislation is, however, not appropriate because it is over-inclusive, too broad and arbitrary. It is also not necessary as there are less discriminatory ways of pursuing government aims.

Nevertheless, the Dignified Lives Approach to equality takes into account the rights and interests of employers and other workers and may allow some mandatory retirement arrangements as long as the principles of equality are respected and the harm to senior workers is mitigated. Take for example the case of a contractual agreement based on a deferred compensation model. There may be some circumstances in which such an

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45 Except for the rules set out in schedule 6 (employers need to inform their workers of the intended date of retirement between 6 and 12 months before it occurs and of their right to request not to retire).
46 C-388/07, supra note 44 at para. 46.
47 Ibid. ibid.
48 Ibid. ibid.
49 It is questionable whether planning alone can justify the infringement of a fundamental right. Also, the aim of creating job opportunities for younger workers is highly contested (see Chapter II, section B.2.). At the same time, the State should act positively to eliminate youth unemployment through for example the creation of new jobs and facilitation of targeted employment services and training for younger workers. See for example in the New Deal for younger workers aged 18-24 in the U.K.
50 See Palacios de la Villa v Cortefiel Servicios SA Case C-411/05 (16th October 2007). For more information on this case see Chapter II, section B.1.
51 See supra note 49.
52 See for example Rowland’s proposal in Chapter II, section F.
53 Under this model, the worker is paid less than her marginal productivity at the earlier stages of the employment relationship and more than her marginal productivity in later stages. The model provides employees with incentives to stay with the firm for a long time. It also allows employers to invest in job-
agreement would be allowed under the *Dignified Lives Approach*. Like Bob Hepple, I suggest that an independent commission should have the authority to approve these arrangements *ex ante* and to disqualify those which do not respect the five principles of equality. First, it would be necessary to determine that mandatory retirement was pursued to ensure certainty, personnel planning and to cap wages that increase with seniority, rather than to perpetuate ageist stereotypes or ageism. This may be achieved, for example, if the arrangement set retirement based on years of service rather than chronological age.

Second, these arrangements should be evaluated on a case-by-case basis to ensure that they do not perpetuate oppression of senior workers. When a contractual agreement between an individual worker and his or her employer is concerned, the employer should be ready to prove that the worker understood and agreed to its terms, especially the mandatory retirement provision, due to the risks of power imbalance between the parties and exploitation of senior workers. As for unionized workplaces, mandatory retirement might also play a role in reinforcing oppressive power relations. Historically, many workplace policies, even those that have been freely bargained, incorporated systematic discrimination. This concern can be resolved if it is proven on a case-by-case basis that no oppression or marginalization of senior workers is institutionalized in the workplace, that the trade union has pushed towards the agreement on mandatory retirement, and that the workers benefit from this agreement.

Third, the arrangement should be accompanied by an adequate pension plan, so that it does not deny senior workers minimum conditions of living. This may be achieved through a public mandatory pension plan or governmental supervision of registered pension funds to ensure decent living conditions. A government allowing such an arrangement

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55 Compare David M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen’s University Press, 1987) at 103-04, who argues that this solution would enhance equal opportunity especially among females who enter the labour market at a later stage. By contrast, other scholars maintain that this solution may adversely affect workers (especially women and low income workers) who have fewer years in the labour market due to unemployment, child-rearing and family care and will be forced to continue working longer. This problem could be solved by granting work credits for these periods of absence. See Teresa Ghilarducci & John Turner, “Introduction: Determining the Quality of Work Options for Older Americans” in Teresa Ghilarducci & John Turner, eds., *Work Options for Older Americans* (Notre Dame, Indiana: University of Notre Dame Press, 2007) 1 at 7.

56 See C.T. (Terry) Gillin & Thomas R. Klassen, “The Shifting Judicial Foundation of Legalized Age Discrimination” in Gillin et al., *supra* note 40, 45 at 69. See also Chapter II, section B.2.

57 The current financial crisis stresses the importance of state responsibility and involvement. See, for example, a recent C.D. Howe paper which critiques the inadequacy of current retirement savings plans and offers a new plan that would provide an adequate standard of living for Canadian retirees (“the Canada Supplementary Pension Plan”). This plan would have automatic enrolment, investment and annuitization features and could operate either nationally or at a provincial level (Keith Ambachtsheer, “The Canada Supplementary Pension Plan”)
should also be obliged to take the appropriate steps towards increasing the number of jobs available for workers who wish to continue working after being forced to retire by, for example, creating more workplaces. As well, it should provide people of all ages with protection against age discrimination. Finally, it should provide financial assistance for employers to fulfill their obligations stemming from this analysis. Note that the scope of these duties would vary based on national data regarding poverty among senior workers compared with other sectors of the population. While in the U.K. and Israel there are high levels of poverty among seniors, the rates are much lower in Canada. The reason for this difference is, among other things, the fact that Canada has already taken several steps to improve senior workers’ access to pension and social security benefits.\footnote{See supra note 124 and accompanying text.}

Fourth, consideration should be given to the consequences of mandatory retirement for workers’ self-esteem, identity, social ties and status. In order to mitigate their potential social exclusion, employers should be ready to provide workers who are subject to a mandatory arrangement with the option to continue contributing to their society or community in one way or another. This may include extending opportunities for part-time or voluntary work, appointing senior workers as consultants and mentors, and facilitating gradual and flexible approaches to retirement. These mechanisms would empower senior workers, preserve their abilities, allow them to benefit from continuing training and keep them active and involved in society.\footnote{See supra note 124 and accompanying text.} A government allowing such an arrangement should also provide training to retirees who wish to re-enter the labour market to allow them to have an equal opportunity in the workplace.

Finally, a deferred compensation scheme coupled with mandatory retirement limits workers’ freedom to choose when and how to retire. However, it may be based on an agreement (employment contract or collective agreement). The parties should be therefore allowed to enjoy the freedom of contract which is derived from the principle of autonomy. However, sometimes these agreements do not reflect real negotiation and are forced on workers and their unions by employers. This was the case in many Canadian universities where mandatory retirement was unilaterally imposed on unions by university management.\footnote{See David MacGregor, “The Ass and the Grasshopper: Canadian Universities and Mandatory Retirement” in Gillin et al., supra note 40, 21 at 22} Even when these arrangements are freely negotiated between employers and trade unions and most workers agree with them (through for example a ratification process),

they are imposed on many other workers who did not want them. Indeed, collective agreements are more like a statute than a private contract in the eyes of the worker. However, I do not intend to argue here against the model of collective bargaining. It is clear that it is impossible to acquire the agreement of all employees to all the agreement provisions. Workers delegate this authority to their union and are protected by the duty of fair representation. However, these arrangements are different from provisions regarding, for example, wages or hours of work. As they negatively affect members of a protected group they are more similar to provisions discriminating against women or blacks, which are banned.

These concerns can be mitigated if it is proven on a case-by-case basis that the worker or the union freely negotiated the mandatory retirement provision in their agreement. Furthermore, in unionized workplaces, Hepple suggests that all workers would have to provide their informed consent to the mandatory retirement arrangement after taking independent advice. As workers are usually eager to start a new job and are often not in a position to argue against terms in a collective agreement the minute they join a new workplace, another option would be to allow workers to opt out of the mandatory retirement arrangement in later stages of the employment relationship. Of course, this facility creates a problem of certainty and planning for the employer. However, the potential impact on personnel planning would be only minor. Not too many workers are expected to opt out, and those who do, are likely to be capable and efficient workers. Workers who are not capable may be legitimately dismissed if their job performance declines and reasonable attempts of accommodation have failed. As well, workers may be required to notify their employers at least one year before retirement about their plans to opt out. Flexible retirement arrangements may also induce workers to declare their retirement plans and facilitate succession planning. A similar solution would be to allow those who want to and are

61 See Beatty, supra note 55 at 98.
62 Some scholars have challenged the notion that collective bargaining promotes democracy, equality, and fairness. Providing an employee with representative powers, according to some critics, might lead to abuse of powers and to misrepresentation of minorities. Other critics have argued that unions’ monopoly power to raise wages fosters corruption and non-democratic elements in the union movement. Beatty, for example, argues that collective bargaining does not help the employees who most need it and have limited power to negotiate over benefits and even fosters other injustices of its own. See David Beatty, “Ideology, Politics and Unionism” in Kenneth P. Swan, eds., Studies in Labour Law (Toronto: Butterworths, 1983) 299 at 301-21.
63 See Chapter II, section B.2.
64 Hepple, supra note 54 at 92. See also Rafael Gomez & Morley Gunderson, The Impact of Age Distinctions in Law and Policy on Transitions to Retirement (Ottawa: Law Commission of Canada, December 2004).
proved to be in good shape in both terms of health and job performance (based on an annual
evaluation after the age of 65) to continue working. Finally, in order to allow senior
workers to exercise their autonomy in a meaningful way within the framework of mandatory
retirement arrangements, employers should be required to introduce re-employment
opportunities and governments should be required to create more jobs for senior workers,
extend vocational training opportunities to increase their employability, and launch
employment services to guide and assist those who are looking for post-retirement jobs.

As for a mandatory retirement arrangement that uses age when it is necessary due to
the unique characteristics of the job in question (under exceptions such as BFOR, BFOQ or
GOR), it should be allowed only in rare cases. The employer has to show that there is a clear
necessity, such as safety issues, to put an age limit, that individualized assessment will
amount to undue hardship, and that no other less strict means is available. Hepple suggests
that the aim of creating job and promotion opportunities for younger workers may
sometimes serve as a *bona fide* occupational requirement to justify mandatory retirement
arrangements at the plant level. However, under the *Dignified Lives* approach this will
rarely be the case. A senior worker’s fundamental right to age equality, which is severely
harmed by mandatory retirement as argued above, must be balanced against the legitimate
interest of younger unemployed workers in finding decent jobs. Yet, this interest is not of
equal standing to the right to age equality. The right of younger workers to age equality is
not infringed by the prohibition on mandatory retirement. No wrong is done to younger
workers. They may not be hired at a specific workplace because there is no space available.
However, this outcome is not based on stereotypes or prejudice towards younger workers. It
does not perpetuate oppression of younger workers. It does not leave them without minimum
living conditions, does not exclude them for active social lives, and nor does it limit their
autonomy as there are other jobs for younger workers available in the labour market. The
younger workers’ legitimate interest in finding jobs cannot be pursued at the expense of

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67 See Rowland’s proposal in Chapter II, section F. In short, Rowland suggests that the mandatory retirement
age will transform into a presumptive retirement age and that employees will be allowed to rebut this
presumption through individualized assessment.

68 Hepple, *supra* note 54 at 93. Hepple argues that the “lump of labour” fallacy is only relevant at the macro
level, while “in individual undertakings there may be a limited number of senior positions” (*ibid.* at 90-91).
Similarly, Beatty maintains that mandatory retirement arrangements may be justified if the state or an employer
can show that it has taken steps “to ensure that the employment opportunities created by retirements did not
disappear” but are rather transferred to the youth (*supra* note 55 at 104-05).

69 It could be however that in other circumstances the right of younger workers to age equality (or another
right) would be infringed. Then, there would be a justification for limiting the right of senior workers to age
equality in order to allow both rights to co-exist. This may happen when promotion opportunities are denied or
when an employer in a specific workplace can show that employment and promotion opportunities created by
retirements are transferred to younger workers.
senior workers. In other words, it cannot constitute a justification for the wrongs done to senior workers by mandatory retirement.

Mandatory retirement can only be defended as a BFOR, if the employer proves that the essential duties of the jobs in question require the hiring of new younger workers instead of presently employed senior workers. However, such an argument is usually problematic as it is likely to be grounded in ageist stereotypes (such as the need for “fresh blood” in the workplace or to adapt to the “organizational culture”). If some senior workers in a specific workplace are not productive and there is a need to replace them, mandatory retirement as a BFOR is not the answer. Workers should be periodically assessed and dismissed if they are unproductive. Even in workplaces that are governed by a tenure system, there may be creative solutions that are less discriminatory than mandatory retirement.\(^70\)

Finally, for reasons delineated above, there is a need to revisit the interpretation accorded to the *bona fide* retirement or pension exception (such as in New Brunswick) which views some mandatory retirement arrangements as necessary terms or conditions of pension plans for actuarial reasons. The Supreme Court of Canada held that this exception is only subject to one requirement: that the pension plan, which lays down a mandatory retirement age, is not a sham.\(^71\) According to the *Dignified Lives* approach, this requirement is not sufficient. It cannot stand alone as a justification for the infringement of the right of senior workers to age equality. A more substantive and restrictive test is needed to ensure that mandatory retirement is necessary as a term or condition of a pension plan for actuarial reasons and that no other less discriminatory means of achieving these legitimate actuarial goals is available.

**C. Age Caps and Age-Based Distinctions**

As mentioned in Chapter II, several countries have abolished mandatory retirement yet still allow unequal treatment of senior workers above a fixed age in the provision of benefits such as health and life insurance. They also exempt employers from the duty to reemploy and accommodate injured workers when they reach the age of 65, and limit those workers’ entitlement to loss of earning benefits on grounds of age. These age caps and age-based distinctions, as in the current legislation in Ontario, are often justified by economic reasons.\(^72\)

The complete lives approach to equality argues that due to the problem of scarce resources employers cannot provide services and benefits to workers with no definite

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\(^70\) See *infra* note 152.

\(^71\) See Chapter I, section D.2.c and Chapter II, section B.1.

\(^72\) See Chapter II, section C.
termination date. This means that there should be an age limit on the provision of benefits and other obligations employers may have regarding injured workers. On the complete lives approach, these age caps and age-based distinctions do not amount to age discrimination because they apply to all workers when they age. That is, all injured workers – young and senior – will stop receiving these benefits when they reach 65 even if they decide to continue working. Similarly, all injured workers – young and senior – will not be re-employed, accommodated or receive loss of earning benefits when they reach a fixed age. Furthermore, since the complete lives approach views age-based distinctions as legitimate, it allows economic considerations to easily outweigh the interests of senior workers who have already had “their fair shares of resources” in life.  

By contrast, the Dignified Lives Approach to equality considers these age caps and age-based distinctions as wrongful forms of age discrimination as they involve a serious breach of the principles underpinning equality. First, age-based distinctions in the provision of benefits deny several important benefits from workers aged 65 and above simply because of their age. It values senior workers less than their younger co-workers. Also, age caps in the context of workplace injury stigmatize senior workers above the age of 65 as incapable of actively participating in the labour market. It has been argued that denial of loss of earning benefits after a fixed age is not based on unfounded ageist stereotypes such as that ability declines with age but rather on an accurate-on-average generalization that most workers usually retire by the age of 65. Nevertheless, the denial is still wrong as it is inaccurate for many individuals. It does not treat them in accordance with their own traits and circumstances. That is, it does not require employers to re-employ and accommodate workers above the age of 65 although they may well be capable of working. It also deprives many individuals who do not retire at 65 of a benefit (loss of earning) for which they may be eligible were they individually assessed. That is, it ignores the specific circumstances of the injured worker who may have continued working past the age of 65, had he or she not been injured and continued to earn employment income rather than pension income. It categorizes them according to what society excepts them to do and not to according to what they really are. This wrong is intensified by the negative connotation of the generalization because it

73 See Chapter III, section E.1.
74 This point was stressed by the Court in Zaretski. The Court stated that “it is not an objective of the Act to guarantee the payment of pre-injury income compensation to an injured worker for the rest of his or her life. Rather, the legislature has determined that the scheme of the Act should provide injured workers compensation based upon their loss reflecting normally expected and reasonably anticipated employment and benefit patterns. The scheme of the Act provides lost employment income benefits to age 65 and lost pension income benefits thereafter” (Zaretski v. Saskatchewan (Workers’ Compensation Board), [1997] S.J. No. 319; 148 D.L.R. (4th) 745 at paras. 70-71). It was also argued in Laronde v. New Brunswick (Workplace Health, Safety and Compensation Commission), 2007 NBCA 10.
implies that senior workers are inferior. This in turn might reinforce negative and ageist stereotypes and assumptions about their abilities and contribution to society and act as a self-fulfilling prophecy if workers accede to these misconceptions and act in the way they are expected to, as minor contributors to the labour market and as unproductive workers.

Second, these age caps and age-based distinctions might perpetuate oppression of senior workers. They provide a clear example of how senior workers are treated as a means rather than an end by public and private actors who wish to tackle the challenges the aging workforce. On the one hand, senior workers are allowed to continue working past the age of 65. On the other hand, they are not given the protection needed to be able to work in decent conditions past the age 65. They are treated as second class workers. They are exploited and taken advantage of for business and economic purposes. A senior worker can work in the same job as his or her younger colleague but not get the benefits the younger one is getting. A senior worker who was injured but is now capable of working can be refused reemployment or accommodation simply because he or she has turned 65. Their marginalization and subordination to economic needs harms their opportunity to have equal influence in the labour market.

Third, age-based distinctions impose a substantial burden on senior workers and especially on vulnerable groups such as women and immigrants. These groups of workers often choose to continue working due to financial difficulties and are therefore in most need for disability or health benefits. As for age caps in compensation laws, it is of course impossible to guarantee the payment of pre-injury income compensation to an injured worker for the rest of his or her life. However, the alternative benefits available for injured workers aged 65 and above are greatly reduced thus pushing them into poverty. In Zaretski, for example, Saskatchewan provides transformation at the age of 65 from loss of earning benefits, permanent or partial disability to a guaranteed supplement pension (annuity), but the latter provides greatly reduced benefits. 75 Similarly in Laronde, the Court recognized that the immediate effect of the impugned legislation was that injured workers aged 65 and above had less money to live on. 76 However, it chose not to consider the specific facts of the case, 77 and concluded that the overall economic impact was not substantial. 78

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75 It was $1,403 as opposed to about $70 per month (See Zaretski, ibid. at paras. 14-17).
76 Laronde, supra note 74 at para. 24.
77 Before Laronde reached 65, he received about $1,500 per month (from provincial workers compensation, Canada Pension and Canada Pension Disability) and a one-time payment of $6,800. When he reached 65, the workers compensation benefit ceased and he got a one-time annuity of $6,437 and a monthly payment of $1,262 (from Canada Pension and Old Age Security) (ibid. at para. 4).
78 Ibid. at para. 32 (“… there is no evidence that the termination of benefits forces injured workers into a situation where they are living at or below the poverty line …. As well, there is no evidence surrounding the
Fourth, age caps on the duty to re-employ and accommodate injured workers wrong senior workers as they undermine their ability to participate in the workplace and consequently weaken their ability to contribute to their community, develop their personal identity and maintain social connections. Even though senior workers are usually entitled to pension benefits, they still possess a strong right to equal participation in the labour market. This argument will be further developed as part of my discussion of the duty to accommodate senior workers.79

Finally, these age caps and age-based distinctions negatively affect senior workers’ autonomy and free will. While many workers wish to work longer due to increased life expectancy, good health or financial considerations, age caps and age-based distinctions often thwart this desire because they do not provide senior workers with comprehensive protection against age discrimination. They make it difficult for them to continue working under decent conditions and exempt them from post-injury reinstatement and accommodation.

To conclude, these age caps and age-based distinctions do not respect the principles underpinning equality. Even if they are not based on misguided or unfounded stereotypes, they are still wrong for the reasons delineated above. They therefore constitute a violation of the right of senior workers to age equality. The question remains whether they are justified. Since the right to age equality constitutes a fundamental human right that aims to protect important values and interests, a rational connection between the means and the aim is not sufficient. There is also a need to determine whether the chosen means minimally impairs the right or whether other less strict alternatives are available. Also, economic considerations should not readily prevail.

As far as the provision of benefits is concerned, there is no justification for a blunt rule that allows employers to discriminate against senior workers due to general economic considerations. Employers should be allowed to justify age-based distinctions in the provision of benefits on a case-by-case basis using the *bona fide* or *genuine* occupational requirement exception. A real economic consideration may trump the right to age equality when no other less harmful ways are available. American law provides another solution to economic concerns. It allows differentiation in the provision of benefits between younger and senior workers as long as the offered benefits are of the same cost to the employer.80 For example, if the employer pays an insurance company $1,000 per year for a younger worker,
it should spend the same amount of money on its senior workers although the actual benefit might be lower.\textsuperscript{81} The legislation in Ontario already contains a similar mechanism permitting employers to take (any) age into account in actuarial calculations for insurance purposes.\textsuperscript{82}

As for the duty to reemploy or accommodate, there is no justification for excluding workers once they reach 65 if the law allows workers to work past this age. There is no justification for differentiating between them and younger workers who were injured and are now ready to go back to work. The duty is already subject to the “undue hardship” doctrine and this constitutes a sufficient response to any economic concern employers may have.

As for loss of earning benefits of injured workers, it is indeed a legitimate objective to create a distinction between loss of earning benefits and retirement benefits. It is not reasonable to except employers to pay pre-injury income compensation to injured workers for the rest of their lives. There is also a rational connection between the objective and the chosen mechanism of achieving it. That is, since most workers retire by the age of 65, loss of earning benefits are available up until this age. This mechanism is however not proportional. That is, there are other non-discriminatory means available to determine the termination date of loss of earning benefits. Alberta, for example, allows an age cap on loss of earning benefits entitlement to be waived and benefits to continue if there is sufficient evidence to show that the worker would have continued to work, had the injury not occurred.\textsuperscript{83} This is a sound solution that takes under consideration the fact that there should be a distinction between work life and pension life but at the same time there should be allowance for case by case consideration where it is clear based on an individual assessment that the worker intended to continue working.

\textbf{D. Cost as a Legitimate Rationale for Age Discrimination against Senior Workers}

Senior workers are often refused a job or dismissed for economic reasons such as their higher labour costs compared to younger co-workers, and the inability to recoup firm investment due to the short time of service ahead of them. According to the complete lives approach to equality, it might be argued that these actions do not amount to unlawful age discrimination. Rather, they constitute a legitimate age distinction which applies to all


\textsuperscript{82} See s. 44(1) of the \textit{Ontario Employment Standards Act}, S.O. 2000, c. 41, which permits employers to make age-based distinctions in the provision of pensions, life insurance and disability benefit plans based on actuarial rationale. The Supreme Court of Canada has upheld the use of age as an actuarial basis for insurance rates, although the Court has recommended looking for alternatives (\textit{Zurich Insurance Co. v. Ontario (Human Rights Commission)}, [1992] 2 S.C.R. 321).

\textsuperscript{83} Alberta Workers’ Compensation Board, Policy 04-04 Part II; June 24, 2003.
workers when they age. It might also be argued that even if they are age discrimination, they are justified as compelling economic considerations trump the rights and interest of senior workers, which are considered as not too critical. By contrast, the *Dignified Lives Approach* to equality strengthens the moral justification for anti-age discrimination laws. It specifically illustrates how the principles underpinning equality are compromised when employers use cost rationales in decision on the hiring and dismissal of senior workers.

First, a decision or a policy to dismiss or not hire senior workers due to cost considerations including concerns regarding investment return is often motivated by ageist stereotypes and ageism. Indeed, traditional employment contracts that offer higher wages as workers age are less common today. Instead, wages are increasingly tied to job performance. Also, the shift towards defined-contribution pension plans decreases the cost differential between the young and the senior. That is, many senior workers will become less expensive in years to come.\(^84\) Moreover, due to competitive pressures many employers are deterred by immediate costs while ignoring the long term benefits of age equality.\(^85\) As for the costs of training senior workers, Barth *et al* argue that they are largely overestimated by employers.\(^86\) Furthermore, it does not always take a long time to recoup training investment. Also, in a world of rapid technological changes both young and senior workers are required to periodically upgrade their skills. Lifelong training and education are therefore essential for all employees.\(^87\) As well, since turnover rates among senior workers are lower compared with younger workers, the latter may be more likely to raise concerns of investment return.\(^88\) Finally, the abolition of mandatory retirement coupled with an improvement in health condition and increase in life expectancy has enabled many senior workers to work longer. There is therefore no need to speculate when they will leave the workplace.\(^89\)

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85 See Fredman, supra note 2 at 50. See also Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, “Age Discrimination and Working Life: Perspectives and Contestations – A Review of the Contemporary Literature” (2008) 10:4 International Journal of Management Reviews 425 at 438 (“there is little justification for age discrimination in terms of physical capabilities and higher wage costs. Job can be redesigned to match the specific demands of the incumbents, while higher wage cost can be offset through greater organization, specific wisdom and higher organization commitment. Why, then, does age discrimination occur? While some can be ascribed to historically embedded cultural norms and values, the causes often appear to be economic. Nor are the causes necessarily a market distortion or irrational. Many liberal market national economies are highly dependent on low-cost, low-wage, ad insecure work to staff low-value-added areas of work in the service sector and related areas of economic activity: the immediate cost advantages and opportunities for quick return may deter managers from adopting a long-term perspective, even if the latter may be more mutually beneficial”).

86 Barth *et al*., supra note 84 at 339.


88 See Chapter II, note 35 and accompanying text.

Hence, such a decision or policy is based on an inaccurate generalization that senior workers are not only more expensive but also less ambitious, flexible and productive than younger workers.\textsuperscript{90} This generalization wrongs almost the entire group of senior workers. It traps senior workers in specific categories and induces them to hide their real identity by for example lying about their age and dying their hair. Even where such a decision or policy rests on an accurate-on-average generalization,\textsuperscript{91} it may still wrong many individuals who do not belong to the category of expensive workers who cannot return the investment in their training.\textsuperscript{92} It fails to treat senior workers in accordance with their own traits and to take into consideration their added value including significant knowledge, experience and skills.\textsuperscript{93}

Second, such a decision or policy might sometimes oppress and marginalize senior workers. Indeed, employers tend to opportunistically use senior workers and benefit from their long term service and experience up to the point where their cost exceeds their productivity. When an employer wants to get rid of a senior worker due to his or her higher costs, it usually resorts to stigmatization and defamation of the worker to justify their dismissal on grounds other than age or mere cost concerns.\textsuperscript{94}

Third, a decision or policy to dismiss or not hire a senior worker due to cost considerations negates his or her chance of leading a decent life and excludes him or her from full participation in the labour market. Once dismissed, the senior worker encounters great difficulties in finding another job for the same reason: cost concerns. Consequently, many senior workers often exit the labour market earlier than they had intended.\textsuperscript{95} Since, generally speaking, senior people are living longer and staying healthier, they spend longer time as “retirees” or even “outsiders”. Their social status and self esteem are often consequently harmed. Indeed, such a decision or policy may be neutral on its face being

\textsuperscript{90} See \textit{e.g.} Victoria Büsch, Dennis Alexis Valin Dittrich & Manfred Königstein, “Bad Hiring Chances for Older Workers” (July 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434351>. This study examines whether hiring opportunities decline with age. Focusing on age-neutral jobs in German manufacturing firms and using a small age-gap of 14 years between the youngest and the oldest fictitious applicants, the study collected questionnaire responses of personnel managers making hiring decisions (in which respondents have to suggest which one out of three fictitious applicants should be hired for a job). Despite the fact that the questionnaire was designed in a way that allows to control for possible productivity differences and other economic explanations for declining hiring chances, the study reveals that there is a 60 percentage point difference in hiring probabilities between the youngest and oldest applicants, thus providing clear evidence for taste-based age discrimination.

\textsuperscript{91} On the rational connection between cost and age see \textit{e.g.} Ian Glover & Mohamed Branie, “Therefore get Wisdom” in Ian Glover & Mohamed Branie, eds., \textit{Ageism in Work and Employment} (Aldershot: Ashgate, 2001) 329 at 333 (employers who discriminate against senior workers are often acting rationally due to the higher costs associated with employing a senior worker).

\textsuperscript{92} Indeed, employers may well assess on an individual basis whether the workers is too expensive or whether the job in question requires long term and expensive training that could be recouped only after a specific number of years of service.

\textsuperscript{93} See Chapter II, note 34 and accompanying text.


\textsuperscript{95} See Chapter III, section B.
based on his or her labour costs rather than age. Nevertheless, it harms senior workers. However, the fault of the employer is not embedded in the effect of the decision he or she has made or the policy he or she has drafted. Rather, it is embedded in the failure to treat individuals as having equal moral worth and to recognize actual group differences by for example accommodating their special needs up to a point of undue hardship. That is, while it is reasonable to consider the labour costs of senior workers, it is not always a necessity. By way of recognizing the actual group differences of senior workers and accommodating their special needs, employers have to consider non-discriminatory alternatives that will allow senior workers to meaningfully exercise their capabilities and realize their preferences.

Finally, a policy or a decision to dismiss or not hire a senior worker due to cost considerations lessens senior workers’ autonomy. Many senior workers wish to stay independent and active and are willing to contribute to society through various working arrangements and adapted wages. However, such rigid decisions and policies obstruct their chances of realizing their aspirations. It is true that the freedom of occupation does not entail a duty on part of the employer to provide senior workers with a job, especially not when the company is facing financial problems. However, a frequent use of economic problems to justify a strict policy of non-hiring or dismissing senior workers makes it difficult for them to enter the labour market or retain their jobs at advanced age. It might deprive de facto workers from exercising their freedom of occupation and limit their ability to look for a source of living.

Consequently, the frequent use of cost rationales as a legitimate basis for terminating and refusing to hire senior workers should be revisited. The interest of the employer in reducing costs should be balanced against the worker’s right to age equality. It should be allowed only in limited circumstances where costs are very high and create a major obstacle and no other less harmful ways to achieve the legitimate goal are available. This also includes cases where pension eligibility and proximity to retirement (rather than age itself) are used as criteria for distinction. This means that once the plaintiff shows that one of the principles underpinning equality was not respected in his or her case, the onus of proof lies on the respondent (an employer or a government) to show that their breach was justified. The respondent will have to show that there was a rational connection between the act of non-hiring or dismissal and a legitimate goal. For example, it will have to show that the company is in financial difficulties and that non-hiring a senior applicant or dismissing a senior worker will reap a particular saving for the company. Furthermore, employers will have to show that they considered other alternatives and that there are no other non-discriminatory solutions available. Alternatives may include a general policy of non-hiring, a salary reduction...
applying to all workers, and other ways of increasing efficiency in the company that do not involve personnel changes.\(^{96}\)

Accordingly, the broad American exception in indirect age discrimination cases, “reasonable factor other than age”, should be amended. It should include a necessity test which examines non-discriminatory alternatives.\(^{97}\) It is true that age is a unique prohibited ground. Furthermore, some criteria such as seniority are closely related to age yet may constitute reasonable and legitimate factors for differentiation even where other reasonable ways are also available. Nevertheless, in the case of senior workers, unequal treatment based on age often does not respect the principles of equality and wrongs individuals to a great extent. There is therefore a strong case for prohibiting it except in rare cases of necessity. In other contexts, it might be sufficient to use a reasonableness test.

As well, Article 6 of the EU Directive’s illustrative provision for justified differential treatment on grounds of age (“the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement”) should be interpreted narrowly. Employers will have to show on a case-by-case basis that the training requirements for the post are especially extensive and costly, and that turnover rates are high among senior workers in particular. If there is in fact a high general turnover rate in the workplace, it will be hard to justify a policy to not hire workers above a certain age.

E. Increasing the Age of Eligibility for Full Pension Benefits to Encourage Seniors’ Participation in the Workplace

Unlike the matters discussed above, this question of the age of eligibility for full pension benefits is not essentially doctrinal. On the contrary, it is almost purely a matter of policy. There is a wide array of legitimate arguments for and against increasing the age of eligibility for full pension benefits. Many arguments pertain to economic considerations (including budgetary and actuarial) and exceed the scope of this dissertation. Furthermore, since various factors affect one’s decision to retire,\(^{98}\) there is also a large debate over the effectiveness of increasing the age of eligibility for full pension benefits compared with other measures to increase labour market participation among senior workers.\(^{99}\) It is therefore difficult to make

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\(^{96}\) It should be noted that employers who justify their opportunistic decision to dismiss workers who were employed based on a deferred compensation model due to their high cost should not succeed as these costs represent deferred wages from the first years of the employment relationship when they earned much less.

\(^{97}\) See Chapter II, section D.

\(^{98}\) See Chapter I, section E.

\(^{99}\) It is argued that increasing the age of eligibility for full pension benefits will have an insignificant effect on actual retirement age and will not solve budgetary problems. It is also asserted that it will increase demand for
a recommendation that addresses the circumstances of all countries. However, the *Dignified Lives Approach* to equality still provides an important normative framework for discussion as it stresses the need to take into account the right of senior workers to age equality in the design and execution of any labour market policy that aims at increasing labour force participation among senior workers.\(^{100}\)

Increasing the age of eligibility for full pension benefits does not respect some of the principles underpinning equality. Most notably, increasing the age of eligibility means that workers will have to work more years in order to be entitled to full benefits. It might therefore impose financial hardship on many senior workers, especially on those who rely on public plans in the absence of other private plans, assets or savings,\(^{101}\) have limited skills or work in physically demanding jobs.\(^{102}\) That is, increasing the age of eligibility is based on the assumption that since people are living longer they can work longer. However, many senior workers are especially vulnerable and are more likely to lose their jobs years before being entitled to collect full benefits due to age discrimination.\(^{103}\) Since they are also more likely to face special hurdles in re-entering the labour market at an advanced age, they might be forced to work in low paid jobs and unbearable conditions at the secondary labour market in order to survive. Others might not find a job and might be induced to take on early retirement with substantially reduced benefits and suffer undue hardship.\(^{104}\) There also might be workers (especially low-income and blue-collar workers) who would wish to collect full benefits due to financial need but might find it hard to work longer because of poor health, disability or the physical or other demands of their jobs.\(^{105}\) Other benefits (such as low disability benefits and that increasing the minimum age of entitlement may be more effective. See Chapter II, section F.\(^{106}\) By contrast, the complete lives approach to equality would allow an increase in the age of eligibility so long as benefits become available to all workers when they reach this age.\(^{107}\) For evidence from the U.S. and Canada see supra note 26.\(^{108}\) See Kesselman, supra note 65 at 17.\(^{109}\) See Yung-Ping Chen & John Turner, “Raising the Retirement Age in OECD Countries” in Ghilarducci & Turner, supra note 55, 359 at 359.\(^{110}\) As Weller explains, increasing the age of eligibility for full pension benefits means benefit cuts for several reasons. Among other things, it reduces the number of years a worker is entitled to full benefits. Also, if a worker cannot find a job, he or she will turn to their pension plan at the earliest possibility and will be eligible for substantially reduced benefits. Weller also stresses the great disparities between workers in terms of life expectancy due to economic and demographic factors and the consequent negative impact on the already most-disadvantaged workers. Low-income men for example who reach age 65 typically die before 73 and suffer from health problems. Health problems may also affect women, African Americans, the less educated, blue-collar workers and the poor. Many of them will be forced to retire early and take a significant benefit cut in order to maintain their health (Christian E. Weller, “Raising the Retirement Age: The Wrong Direction for Social Security” Briefing Paper (Washington D.C.: Economic Policy Institute, September 2000), online: <http://www.epi.org/page/-/old/briefingpapers/raisingretirement/raising_retirement.pdf>).\(^{111}\) See Weller, *ibid*; Alicia H. Munnell, Mauricio Soto & Alex Golub-Saa, “Will People Be Healthy Enough to Work Longer?” CRR Working Paper No. 2008-11 (August 1, 2008), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1315487>; and Chris Phillipson, “Is Extending Working Life Possible? Research and Policy Issues” in Wendy Loretto, Sarah Vickerstaff & Phil White, eds., *The Future for Older Workers: New Perspectives* (Bristol: Policy Press, 2007) 185 at 187-90.
income allowances or disability benefits) may be sometimes available, but they are often insufficient, and eligibility for them may be very restricted.\textsuperscript{106}

Moreover, state and private action to increase senior workers’ participation is often motivated by utilitarian considerations and does not cater for senior workers’ rights and needs.\textsuperscript{107} States and employers often use senior workers as a means rather than an end in their attempts to tackle labour shortages and pension deficits.\textsuperscript{108} Most companies have not begun to think about specific strategies to recruit and retain senior workers,\textsuperscript{109} and various legal and institutional barriers to delayed retirement remain,\textsuperscript{110} yet other drastic actions have already been taken. These actions, which often impose financial and other hardships on senior workers, might perpetuate and even escalate the marginalization of senior workers. Finally, these actions do not provide senior workers much of a free choice. On the contrary, they create new (often worsened) conditions that induce senior workers to retain their jobs even if they do not wish to do so.

The aim of these initiatives is of course legitimate. Increasing the age of eligibility will induce workers to work longer. It will therefore increase tax revenues and help to ease the financial pressure on pension funds by reducing the number of years that employees receive full benefits. It will also help tackle the problems of looming labour shortages and dependency ratios. It is however questionable whether increasing the age of eligibility is a proportionate means of achieving this aim. First, the labour force participation and retirement decisions of senior workers are influenced by a great variety of factors including financial incentives in both public and private pensions and other formal and informal early retirement schemes (such as unemployment, sickness and disability benefits), working conditions, unemployment, family responsibilities, and physical and mental health.\textsuperscript{111} As

\textsuperscript{106} Furthermore, in Israel, the age of eligibility for old age allowance was raised in conjunction with the age of eligibility for full pension benefits, thus putting many senior workers who will not be able to work or to find a job and maintain it until the age of 67 for men and 62-64 for women at great risk of poverty. See Chapter I, section B.2.d.

\textsuperscript{107} See e.g. O'Cinneide, \textit{supra} note 1 at 214; and Malcolm Sargeant, “For Diversity, Against Discrimination: the Contradictory Approach to Age Discrimination in Employment” (2005) 21 Int’l J. Comp. Lab. L. & Ind. Rel. 629 at 630-34.

\textsuperscript{108} In Germany, for example, mandatory retirement at the age of 65 is permitted, while the pensionable age of retirement will rise to 67 by 2010. In 2009, Germany abolished mandatory retirement for doctors only, in direct response to a shortage of doctors in rural areas and small towns (see Chapter I under title D.2.e).

\textsuperscript{109} A global survey of 28,000 employers in 25 countries by Manpower Inc. found that only 14% of employers have a strategy for recruiting senior workers, and only 21% of employers have a strategy for retaining senior workers past retirement age. Recruitment strategies specifically targeting senior workers are more common in Singapore (48%), Hong Kong (24%) and Austria (21%). Senior worker retention strategies are more prevalent in Japan (83%), Singapore (53%), South Africa (34%) and New Zealand (33%). See \textit{Older Worker Recruiting \& Retention Survey} (Manpower Inc., April 2007), online: <http://files.shareholder.com/downloads/MAN/119390825x0x91562/798c81fb-96ad-40b0-89ac-0f14eb000d7b/Older_Worker_Survey_Results_FINAL_20Apr07.pdf>.

\textsuperscript{110} See infra note 120.

\textsuperscript{111} See Chapter I, section E.
Crown argues, “[e]mployers and public policy makers who attempt to alter the timing of retirement decisions invariably are able to influence only a portion of the total set of factors that enter into the retirement decision”. 112 The effectiveness of this means, especially when standing alone, is therefore questionable.113 Second, and most importantly, it seems that there are other less harmful ways to encourage senior workers to participate in the labour market.114

Thus, governments and employers should advance solutions that will be less harmful to senior workers.115 They should first eliminate any form of age discrimination in workplace policies and practices.116 Governments should introduce anti-age discrimination legislation, increase awareness, initiate campaigns to fight stereotypes against senior workers, and strengthen the enforcement of these laws.117

113 See supra note 99. As Crown explains, raising the normal retirement age for social security may not succeed in encouraging delayed retirement due to private pension incentives for early retirement (ibid. at 397-400).
114 In Sweden, for example, instead of increasing the age of eligibility for full pension benefits, senior workers may take a full or partial national pension at age 61 or later with no upper age limit and continue working. See Charles Jeszeck et al., “International Responses to an Aging Labor Force” in Ghilarducci & Turner, supra note 55, 321 at 333.
115 This, of course, also depends on how acute the problem of pension deficit and labour shortage is in a particular country. If it already faces major problems, there might be a stronger justification to “jump” to more drastic solutions.
116 See, for example, the Age Positive Campaign in the U.K. which aims at tackling age discrimination, promoting age diversity in the workplace and providing practical guidelines to employers (the Code of Practice on Age Diversity in Employment) (Ageing and Employment Policies: Live Longer, Work Longer (Paris: OECD, 2006) at 106, online: <http://browse.oecdbookshop.org/oecd/pdfs/browseit/8106021E.PDF>.
117 In Japan, for example, there is no anti-age discrimination legislation. The Employment Measures Law 2001 requires employers to make efforts to give equal opportunities in recruitment, regardless of age. Indeed, employment rates of senior workers are relatively high mostly due to cultural norms and the wide practice of “bridge jobs” allowing senior workers to work part-time after leaving their career jobs. The challenges of the aging workforce are mounting in Japan as in any other industrialized country, yet Japan lacks adequate policies and practices to improve the employability of senior workers. The Law Concerning the Stabilization of Employment of Senior Workers (Law No. 68 of May 25, 1971) only recommends that employers will make efforts “to secure employment opportunities for their senior employees in accordance with their abilities and desires by taking measures for the development of, and improvement of occupational ability, improvement of working facilities and other conditions and assistance in re-employment and the like”. In May 2004, employers were required to gradually increase the retirement age to 65, or to introduce a system for continuing employment. The age of eligibility for a fixed-based public pension for private subscribers and civil servants has been raised gradually from 60 to 65. Again, there is no anti-age discrimination legislation yet employers are obliged to provide a senior worker applying for a new job with a work reference and to clearly indicate the reasons for setting an age limit during recruitment and hiring processes. Finally, public employment security officers assist senior workers by providing various services including job offers, re-employment and preparation for retirement. Still, there is more to be done in order to increase employability among senior workers given, for example, that a disproportionate share of training resources is allocated by employers to younger workers. See Alexander Samorodov, Ageing and Labour Markets for Older Workers (Geneva: Employment and Training Department, ILO, 1999) at 30-31; Labor Situation in Japan and Analysis: Detailed Exposition 2005/2006 (Tokyo: The Japan Institute for Labour Policy and Training, 2005), online: <http://www.jil.go.jp/english/laborinfo/library/documents/20052006LaborSituation.pdf>; and Bernard Casey, “The Employment of Older People: Can We Learn from Japan?” in Loretto et al., supra note 105, 43.
Next, governments and employers should eliminate general rules allowing mandatory retirement. Increasing the age of eligibility for full pension benefits may compel workers who do not want to work longer. In contrast, ending mandatory retirement will enable workers who want to work longer to do so. It is true that even ending mandatory retirement might not have a sufficient impact. Therefore, the abolition of mandatory retirement should be complemented by the removal of legal and institutional barriers to senior workers’ labour market entry, reentry and participation and disincentives to delayed and phased retirement. People are living longer, staying healthier and are willing to work more. However, there are numerous legal and institutional barriers that make it difficult for senior workers to stay in the labour market. Removing these barriers will specifically enhance the principle of autonomy as it will allow senior workers to choose when and how to retire. Furthermore, governments and employers should revisit policies of early retirement.

118 In the U.K., for example, while the default rule allowing employers to retire workers at the age of 65 should be repealed, some exceptions may still be legitimate (see the discussion in Section B above).

119 See Chapter I, section E.

120 In Canada, workers who wish to take their CPP benefits early (i.e., between 60 and 64), are required to cease working or earn less in their job than the current monthly maximum CPP payment for the period of two months. Although they may return to work or increase their earnings after this period, they might find it harder. This work cessation requirement therefore discourages workers from continuing to work either full or part-time at an advanced age. It inhibits phased retirement. Another example is that workers are not allowed to work and receive CPP retirement benefits while still contributing to the CPP. Earning additional income once retired may also impact Old Age Security benefits. Retirees are required to pay back 15% of net income earned above a certain limit. Finally, the Guaranteed Income Supplement (GIS) contains a claw-back provision by which each additional dollar of earnings reduces the benefit received under the program by 50 cents. This creates a strong disincentive to work. See Morley Gunderson, “Flexible Retirement as an Alternative to 65 and Out” C.D. Howe Institute (May 1998) at 6-13, online: <http://www.cdhowe.org/pdf/gundersn.pdf> (who argues that while some claw-backs reduces payments to persons who have other sources of income to facilitate more benefits to those most in need, others simply discourage senior workers to postpone retirement and should be removed); Gomez & Gunderson (supra note 64); and Kevin Milligan, “Making It Pay to Work: Improving the Work Incentives in Canada’s Public Pension System” C.D. Howe Institute Commentary No. 218 (October 2005). In the U.S., early Social Security benefits at age 62 and early-retirement incentives in traditional pension plans discourage continued employment and delayed retirement. The minimum age for drawing pension benefits without penalty is 59.5 (see the I.R.C. § 72(t) (1994)). Furthermore, § 401(a)(9) of the I.R.C. generally requires participants in pension plans to begin taking distributions soon after they reach age 70.5 (otherwise they may be subject to a high penalty). There are also pension regulations that discourage employers from offering phased retirement and age discrimination laws that may keep employers from giving some of their senior workers benefits or flexible work options that others do not receive. See Eric J. Toder et al., “Capitalizing on the Economic Value of Older Adults’ Work: An Urban Institute Roundtable” The Retirement Policy Program, Occasional Paper No. 9 (Urban Institute, Alfred P. Sloan Foundation, May 2008) at 2, 10; Forman & Chen, supra note 26 at 23-27. In Europe, there are statutory provisions that impose mandatory age of retirement and financial disincentives to postpone retirement. There is also a lack of vocational training. Gradual retirement is not very common. Also, early retirement schemes encourage senior people to be inactive. See Dragana Avramov & Miroslava Maskova, Active Ageing in Europe (Population studies, No. 41, Volume 1, Council of Europe, September 2003) at 85-98. See also Live Longer, Work Longer, supra note 116 at c. 4 (This OECD report critiques policies and laws in twenty-one countries that discourage work at an advanced age such as penalties or low rewards for carrying on working in old-age pensions and other parts of the tax and welfare systems).

121 The federal, provincial and territorial Ministers of Finance have recently proposed several changes to the Canada Pension Plan (CPP). Among other things, these changes, which will take effect in 2011 following approval by the Parliament of Canada and provincial governments, would provide greater flexibility for senior workers to combine pension and work income. The work cessation requirement (see supra note 120) would be removed. As of 2012, employees would be able to take their benefits as early as age 60 without any work
which work against the aim of encouraging continued employment to counter the challenges of the aging workforce.

The abolition of mandatory retirement should also be accompanied by various public and private policies and workplace practices that will increase the number of people who voluntarily work longer. This will ensure that both retirement and work are a matter of choice. Governments and employers should put emphasis on policies that will promote employment throughout life.\footnote{\textsuperscript{122}} This may include the promotion of health and safety at work and improvement of the quality of work (to reduce the risk of injury, disability and early retirement).\footnote{\textsuperscript{123}} Furthermore, as part of the duty to accommodate senior workers, governments and employers should adapt working conditions to senior workers’ needs and capabilities and create attractive and flexible working arrangements (which are currently very limited). They should also facilitate flexible methods of work and retirement including phased retirement and post-retirement part-time employment while collecting pension benefits.\footnote{\textsuperscript{124}} Workers should be able to choose whether they wish to receive a full pension, a partial pension and continue accumulating benefits or increased pension when they retire.\footnote{\textsuperscript{125}} Finally, they should increase workers employability and productivity at advanced age by providing them with lifelong learning and training. This in turn will encourage continued employment.\footnote{\textsuperscript{126}} The scope of the duty to accommodate senior workers will be discussed later in this Chapter.

\footnote{\textsuperscript{122}} See Phillipson, supra note 105 at 190-96.
\footnote{\textsuperscript{123}} Governments can for example provide grants for ergonomic improvements.
\footnote{\textsuperscript{124}} Currently, flexible retirement options are rarely offered by employers. Limited opportunities to collect a pension while reducing working hours might push senior workers into retirement. See Supporting and Engaging Older Workers in the New Economy – Report by the Expert Panel on Older Workers (Ottawa: Human Resources and Social Development Canada, 2007) at 44, online: \textit{<http://www.hrsdc.gc.ca/eng/publications_resources/lmp/eow/2008/older_workers_2008.pdf>}; and Penner, Perun & Steuerle, supra note 66). On the model of part time work while collecting pension benefits, its advantages to workers, employers and the society, and its implementation see Reday-Mulvey, supra note 87 at c, 5.
\footnote{\textsuperscript{125}} Another recent proposal by the federal, provincial and territorial Ministers of Finance to change the CPP is to allow those who receive CPP benefits and return to work to continue paying CPP contributions. While workers under the age of 65 and their employers would be obliged to make CPP contributions, it would be voluntary for workers above the age of 65. Yet if they decide to participate, their employers would also be required to contribute. See Information Paper, supra note 121.
\footnote{\textsuperscript{126}} Due to constant technological and organizational changes, all workers are required to maintain and upgrade their skills. Governments and employers should therefore strive to expand workers opportunities for vocational training and lifelong learning to enhance their employability. At the same time, a special focus should be given to senior workers for two main reasons. First, senior workers are currently deprived of these opportunities. Second, they may require targeted training to help them re-enter the labour market, while taking advantage of their experience and knowledge.
Also, working longer should become more financial rewarding through for example incentives for delayed retirement in the pension and tax systems. Governments should also award grants, incentives and subsidies to employers who recruit, employ, retain and re-hire senior workers who were unemployed, and to those who offer extended health care benefits, flexible working arrangements, flexible retirement arrangements, paid education leave and vocational training. This may include subsidizing the cost of employing a senior worker, reducing this cost in another way (for example financing social security deductions), and awarding special grants for expansions that will lead to recruitment of senior workers or for purchasing new equipment that will promote employment of senior workers. Most importantly, governments should endeavour to create more jobs in the market. If there is a large job shortfall for senior workers, the above initiatives are meaningless.

When the above steps are insufficient, countries should explore the option of penalizing early retirement. If this does not work, countries may consider increasing the minimum age of eligibility for pension benefits. This may have a more significant impact on the timing of some workers’ retirements. They should, however, take into account vulnerable groups that might be negatively affected. Flexible working arrangements and other accommodations should be offered to those who wish to continue working but encounter difficulties. Furthermore, those who are not able to work for disability reasons

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127 Fineland and Luxembourg, for example, offer higher accrual pension rates for workers at advanced age. See Live Longer, Work Longer, supra note 116 at 94.

128 As part of a federal “50 plus” initiative, German employers are offered “integration subsidies” as incentives to hire workers aged 50 and over. Also, unemployed people, who accept a job which is lower-paid than their previous position, will receive wage supplements provided by the government to help compensate for the resulting difference in income between the two jobs. This initiative is argued to be very successful. The OECD reports that in the two-year implementation phase (2005-2007) of the “Perspective 50 plus Programme – Regional Pacts for Older Workers”, around 20,000 former long-term unemployed over 50 years of age have been integrated into regular jobs. The German Parliament has therefore decided to extend this programme until 2010. See Oliver Stettes, “Wage Incentives aim to boost Employment of Older Workers” (Eironline: European Industrial Relations Observatory On-Line, October 9, 2006), online: <http://www.eurofound.europa.eu/eiro/2006/08/articles/de0608039i.htm>; “Perspective 50plus – Employment Pacts for Older Workers in the Regions, Germany” (OECD), online: <http://www.oecd.org/dataoecd/38/53/39954250.pdf>. The Singapore Workforce Development Agency (WDA) has implemented an incentive program called the Advantage Program that encourages companies to formulate and implement re-employment policies before the enactment of re-employment legislation by 2012. It also trains and guides them through this process. Employers can earn a financial grant of up to $400,000 for several initiatives including changes to working environment; retention and re-employment of senior workers through for example job redesign, introduction of flexible working arrangements and career and retirement counseling. For more details see the WDA website: <http://app2.wda.gov.sg/web/Contents/Contents.aspx?ContID=370>.

129 See e.g. the example of the U.K. where several regions especially in the north experience a sizable job shortfall and cannot fully benefit from initiatives such as the New Deal 50+ (Christina Beatty & Steve Fothergill, “Moving Older People into Jobs: Incapacity Benefit, Labour’s Reforms and the Job Shortfall in the UK regions” in Loretto et al., supra note 105, 65).

130 In Canada, for example, it was recently proposed to gradually increase the early pension reduction to 0.6% per month (starting in 2012) and the late pension raise to 0.7% per month (starting in 2011). See Information Paper, supra note 121.

131 See Chapter II, section F.
should receive disability benefits, and those who are not able to find work (usually due to age discrimination) should get unemployment insurance benefits for the period of time that they cannot claim their pension benefits. Another option would be to vary the earliest eligibility age according to the worker’s health, risk of hardship, and earnings. Countries should consider increasing the age of eligibility for full pension benefits only when the above measures are exhausted and have not enhanced senior workers’ participation in the labour market. The increase should, however, be very gradual so that it will not heavily penalize current generations of workers but rather affect future generations as a natural consequence of increased life expectancy. As well, governments that opt for this last-resort solution should be under a heavy duty to create more job opportunities for workers who wish to continue working until eligible for full pension benefits. They should also provide a substantial protection against age discrimination to senior workers who are unsuccessfully looking for a job. This may include the provision of job placement services including assistance and monitoring of job search, job and career counseling and promotion of lifelong learning and training. They should focus on senior workers who involuntarily exit the labour market before they are eligible for pension benefits and help them to find jobs or financially support them. Promotion of training should include specific training for senior workers at the establishment level subsidized by the government and various vocational training programs provided by governmental centers. Training would increase the employability of lower-skilled senior workers and help retirees to reenter the job market after several years. It would be also very relevant to workers who can no longer continue in physically demanding jobs and to other workers who simply wish to make a career.

132 Similarly, Haverstick et al. suggest that an increase in the early age of entitlement to social security benefits should be tied to individuals’ Average Indexed Monthly Earnings (AIME). They argue that allowing workers with low AIME to continue to be eligible for benefits at age 62 would protect workers who have low earnings and are in poor health from hardship associated with an increase in the early age of entitlement (see Kelly Haverstick et al., “A New Approach to Raising Social Security’s Earliest Eligibility Age” FRB of Boston Public Policy Discussion Paper No. 08-4 (October 2007), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153415>).


134 See Fornero & Sestito, supra note 42 at 3.

135 A good example is the Targeted Initiative for Older Workers (cost-shared between the Government of Canada and provinces and territories) which aims at helping unemployed senior workers to improve their employability through activities such as prior learning assessment, skills upgrading, and experience in new fields of work. See Human Resources and Skills Development Canada website: <http://www.rhdc.hrsdc.gc.ca/eng/cs/sp/hrsd/epd/tiow.shtml>. In the UK, voluntary schemes such as “New Deal 50+” and “Pathways to Work” provide tailored support for senior workers to help them move back from receiving unemployment or disability benefits to employment by, for example, provision of tax-free employment credits, training grants once hired and financial support for job interviews. See New Deal 50 Plus (Job Centre Plus, the Department for Work and Pensions, November 2007), online: <http://www.jobcentreplus.gov.uk/ICP/stellent/groups/icp/documents/sitestudio/dev_015301.pdf>. In Japan, an “experience utilization centre” was established to provide senior workers over 60 with jobs, including temporary work. There are also so-called “Silver” human resource centres which specialize in placing senior workers. Employers agreeing to hire senior workers can be subsidized (see Samorodov, supra note 117 at 29).
change. Finally, eligibility for other benefits should be eased to provide unemployed senior workers with minimum standards of living.

Of course, these initiatives cost money. I therefore suggest that countries with higher levels of age discrimination and poverty among senior workers should be subject to a higher standard than countries with lower levels. While some countries (such as Canada) have been successful in addressing poverty among seniors, others have been less successful and should give priority to this issue. Most importantly, longer working lives and delayed retirement have benefits for senior workers, employers, the economy and society as a whole that outweigh their cost in the long term. As Fredman argues, only positive actions by both private and public actors (including pension reforms, promotion of lifelong education and removal of barriers to social inclusion) can effectively promote equality. Many workers have expressed their wish to remain active in the labour market as their life expectancy is

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137 Nevertheless, most of the proposed initiatives are also relevant in the Canadian context. See Supporting and Engaging Older Workers in the New Economy, supra note 124. This report examines, among other things, barriers to participation of senior workers in the Canadian labour market, and the circumstances of displaced senior workers and their labour market prospects. It recommends that both public and private actors initiate a campaign to promote the value and benefits of continued and active participation in the labour force, to reduce ageism and to remove negative stereotypes surrounding senior workers. It also supports the elimination of mandatory retirement in the federal jurisdiction. As well, it suggests promoting the training, education and lifelong learning required to enhance the prospects of current and future cohorts of senior workers. It also advocates the removal of systemic barriers and disincentives to work within the tax and pension systems to allow more choice and flexibility for senior workers who wish to participate in the labour market. This includes allowing eligible individuals to work and receive benefits while still contributing to a pension plan, and promoting phased retirement through facilitative changes in the tax and pension systems.

138 Fredman, supra note 2 at 63. See also Bob Hepple, Mary Coussey & Tufyal Choudhury, Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation (Oxford: Hart, 2000), who advocate positive duties for specific public authorities to eliminate unlawful discrimination and to promote equality. These duties include collecting and publishing information to facilitate the performance of these duties, publishing an equality scheme to assess compliance, monitoring policies and consulting on different matters (ibid. at 61-65). The authors also propose to impose positive duties on employers with more than ten employees including to conduct a periodical review (once every three years) of employment practices (affecting recruitment, training, promotion or redundancy) for the purpose of determining whether members of disadvantaged group enjoy fair participation in employment. If there is a significant under-representation of any group, the employer is obliged to initiate and implement an employment equity plan to identify and remove barriers to the recruitment, training and promotion of these people. This includes a duty of accommodation up to a point of undue hardship (ibid. at 71-72). However, the authors limit these positive duties of employers to race, gender and disability discrimination. As Hepple explains elsewhere, age is different. It may be a relevant criterion in some circumstances. Also, the purpose of fair representation makes less sense in the context of age, as “[o]lder workers, unlike women and ethnic minorities, are not segregated into particular job categories. … There is no expectation that firms should have a particular age structure which exists in other firms or in the labour market generally” (Hepple, supra note 54 at 84). Yet, there are other positive duties that may be imposed on employers in the context of age including removal of barriers, accommodating special needs, and providing training. Some duties (such as lifelong training) are part of a wider personnel strategy which benefits senior workers as well (ibid. at 85).
increasing and their health is improving. These reforms would increase senior workers’ participation rates and allow them to work longer. This would be especially helpful for workers in financial need, and those who wish to maintain their social connections and live meaningful lives. It would also be beneficial to businesses. As Fredman argues, employers should not wait for individual complaints but rather should take positive actions to remove age discrimination from their policies and practices and promote training, thereby avoiding costly litigation and retaining talented workers. Finally, it would help to ease the pressure on pension funds, health and long term care systems, increase tax revenue, promote economic growth, and prevent a potential labor shortage.

**F. Performance Appraisals for Senior Workers**

According to the complete lives approach to equality, generalization based on age should be allowed. It is not unlawful age discrimination as it applies to all workers when they reach a certain age. The complete lives approach would therefore permit, for example, a workplace policy which does not allow promotion of workers above 50. Furthermore, when performance evaluation is concerned, this approach would provide employers with a broad prerogative over its design, execution and frequency. It would also allow age-based distinctions in the appraisal system so long as all workers are subject to these appraisals when they reach a certain age. For example, it would permit a workplace policy which subjects the promotion of those over 50 to a designated performance appraisal.

By contrast, the Dignified Lives Approach to equality favours treatment and assessment of senior workers as individuals according to their own traits and circumstances rather than by reference to their age, which is a characteristic beyond the worker’s control, and typically a poor proxy for job performance. The Dignified Lives Approach would promote individualized evaluation where it is feasible and does not amount to undue hardship. It would allow age generalization (including mandatory retirement) only in rare cases where age is a *bona fide* or genuine occupational requirement. Furthermore, it would subject performance appraisals to several strict rules which are in line with the substantive principles underpinning equality. Finally, it would require governmental supervision on and judicial review of these appraisals. I will now elaborate on these points.

Fredman, *supra* note 2 at 64.

For more on recent public policies and private practices in several European countries to increase labour force participation among senior workers and the absence or inadequacy of these policies and practices in other European countries see Reday-Mulvey, *supra* note 87 at c. 7, 8, 10. For more on techniques to retain and sustain senior workers in employment including the adoption of a life-course perspective, the promotion of occupational health, and flexible work arrangements see Loretto *et al.*, *supra* note 105 at c. 7-10.

See the discussion in Section B above.
As was argued earlier in this Chapter, any general rule allowing mandatory retirement arrangements should be abolished. Workers should be allowed to work as long as they are capable. The question is how employers can determine incapability without undermining the notion of equal concern and respect and the right of senior workers to privacy. Rowland’s suggestion is a fine solution, in line with the *Dignified Lives Approach*, that provides senior workers with real choice and autonomy. He proposes to use the age of eligibility for full public pension benefits in each country as the “rebuttable presumption” of retirement.\(^\text{142}\) If an employer wants to terminate the job of an employee before the pensionable age, he or she will have to defend this decision through individualized testing, if feasible, to show that the age of the employee is a *bona fide or genuine* occupational requirement. Those employees who reach the age of public pension eligibility, and would like to continue working, would have to rebut the presumption. They would be required to pass an individualized test, unless individualized testing is not feasible or practical, and the employer has proven that an age-based mandatory retirement policy is a *bona fide or genuine* occupational requirement. The results of individualized tests will be kept confidential, allowing an employee who did not successfully pass them to retire like the rest of his or her colleagues without them knowing the real reason for retirement. Every year employees at the pensionable age and above will have an “exit point”, where they will have to pass an annual test or retire at their free will.\(^\text{143}\)

It should be noted, however, that continuation of employment beyond the age of eligibility for pension benefits would be a matter of right and would not rely on the employer’s good will. The employer would not be able to force retirement so long as an employee adequately performs his or her job. In cases where the examination does not reveal any significant physical and medical impairment, and the employee’s work performance stays more or less at the same level as before the normal retirement age, the employee will be entitled to continue working beyond the pensionable age.

Furthermore, as opposed to Rowland, I do not think that employees should share the cost of performance appraisals for several reasons.\(^\text{144}\) First, imposing an economic burden on employees might reduce their ability to choose when to retire, and they operate as a substitute for mandatory retirement. Second, since there is no strong support for the assumption that senior workers have lower productivity or worse job performance than younger workers,\(^\text{145}\) the burden proof of the contrary and the cost of individualized testing

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\(^{142}\) As described in Chapter II, section F.


\(^{144}\) Rowland suggests that a senior worker who wishes to work past the pensionable age should bear the cost of individual testing since he or she alone stands to benefit (*ibid.* at 459).

\(^{145}\) See Chapter II, section B.2.
should fall solely on the employer. Finally, as Geu concludes, it is in the best interest of employers to design and implement valid and accurate performance appraisals resulting in an effective allocation of resources within the firm and in profit maximization.\footnote{Thomas Earl Geu, “Are Employee Appraisals Making the Grade? A Basic Primer and Illustrative Applications of Federal Private Employment Discrimination Law” (2000) 47 S.D. L. Rev. 430 at 510.}

The employer should be responsible for designing the tests and running them, or for referring his or her employees to a licensed private company that provides approved job-related tests and will design, together with the employer, the tests according to the needs of a particular workplace and specific jobs. In unionized workplaces, trade unions should, of course, be part of this process. As Rowland suggests, the employer should first analyze the necessary functions for a specific job at his or her enterprise. Medical and performance tests should then be designed to determine whether an individual is fit to perform those functions. That is, evaluation should be a combination of a medically-based examination and a job performance appraisal based as much as possible on objective and job-related criteria. A special government agency would publish guidelines and basic principles for the design of the tests, and would instruct employers during the whole process of designing and conducting tests. The tests would be valid only after approval by the agency.\footnote{Rowland, \textit{supra} note 144 at 458.} Determinations of test validity will reflect the balance between the employer’s rights to run his or her own business and earn a profit, and the employee’s rights to privacy,\footnote{See for example in Canada, the \textit{Personal Information Protection and Electronic Documents Act}, S.C. 2000, c. 5. This \textit{Act}, which was enacted by the federal government, sets out ground rules for how employers can collect, use or disclose personal information about their employees. Since January 1, 2004 the \textit{Act} applies to provincial jurisdictions unless a province can show that it has enacted “substantially similar” safeguards.} equality and fair evaluation and due process.

Testing results should not be dichotomous, meaning that the employee would be given one of two options – to stay and continue working or to retire. The results may indicate some decline in an employee’s medical condition, which may be accommodated. Accommodation would allow employees to gradually phase into retirement and adjust to life after work. It would also allow employers to retain senior workers, continue relying on their knowledge and experience while preparing for their final exit.\footnote{See Levine, \textit{supra} note 17 at 33-35.}

There are, however, certain jobs that are less appropriate for a medically-based test. Hence, more emphasis should be given in these cases to job performance \textit{per se}. Certain jobs require testing for “sudden incapacitation” (by heart attack or stroke) which cannot be reliably predicted. This is especially crucial in safety-related jobs. Mandatory retirement policies at the age of 60 for police officers, firefighters and others have therefore been
justified as a bona fide or genuine occupational requirement. Nevertheless, this exception should be interpreted as narrowly as possible, on a case-by-case basis, to avoid an over-inclusive rule. Whenever it is possible, Rowland’s suggestion of a “rebuttable presumption” at the age of 60 (or even 65), which allows for a periodical, individual assessment, should be preferred over the blunt rule of mandatory retirement.

In other jobs, physical ability is not an important factor in performance, and the critical factors, such as intelligence, judgment and creativity, are difficult or inappropriate to measure. This might be the case when assessing managerial and professional employees, such as university professors or judges. However, some scholars have recently claimed that even these types of jobs may be subject to individualized testing. They propose tests based on objective and subjective measures of performance already used in these systems. These measures are preferable to a blunt rule of mandatory retirement.

Additionally, there are certain jobs that are not so easily evaluated. For instance, low-skilled jobs may be difficult to measure. It is also hard to assess individual job performance where productivity depends on team work. In these cases, employers may put more stress on a general medical examination. In any event, employers should address their concerns and difficulties to the governmental agency and ask for some guidance. This agency could instruct employers and offer lawful and creative alternatives.

Finally, the administrative agency would have supervision powers. For example, the employer will have the authority to decide who passed these tests and who did not, but in any case of disagreements between the parties, the agency will have the authority, based on its technical and creative competence and neutrality, to make the final decision. Management and workers (or their unions) may decide on a joint internal committee that will deal with appeals instead of the agency.

G. The Duty to Accommodate Senior Workers

A distinction should be drawn between senior workers who require accommodation because of disability and senior workers who require accommodation because of their age. As far as senior disabled workers are concerned, Julie Jeffries argues that since age is different from

150 See Chapter I, section B.2.c.
151 See Rowland, supra note 144 at 451.
152 See e.g. Christopher R. McFadden, “Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges” (2000) 52 S.C. L. Rev. 81, and John Munro, “The Debate about Mandatory Retirement in Ontario Universities: Positive and Personal Choices for Retirement at 65” Working Paper Presented to the Public Policy Committee of RALUT (Retired Academics and Librarians at the University of Toronto) (Toronto: Department of Economics, University of Toronto, January 2004)). In his article, Munro argues that performance monitoring is very common in North American universities. He therefore refutes arguments pertaining to the economic and psychological costs of monitoring faculty members.
153 See Levine, supra note 17 at 144.
disability, the right of senior disabled workers to participate in the workforce is less than that of younger disabled workers.\textsuperscript{154} This opinion seems to be based on arguments in line with the complete lives approach to equality. For example, Jeffries asserts that senior disabled workers have had their opportunity to contribute to the workforce,\textsuperscript{155} that “losing one’s employment due to age does not have a significant negative effect on dignity given the work lifecycle and the general expectation that people will age”,\textsuperscript{156} and that since senior disabled workers are entitled to a pension, they have less of a right to participate in the workforce.\textsuperscript{157} Consequently, she suggests that the duty to accommodate workers should be narrower for senior disabled workers than in general disability discrimination cases, by only requiring reemployment of workers who can perform their jobs (through individual assessment) or minor job modifications rather than requiring that an employee be transferred to another job.\textsuperscript{158}

By contrast, according the \textit{Dignified Lives Approach} to equality, senior workers who are disabled or perceived as disabled should be entitled to accommodation similar to that of younger disabled workers. First, it is impractical to distinguish between impairments caused by age and impairments caused by disability. It might also lead to problematic conclusions.\textsuperscript{159} A distinction in terms of accommodation between a person aged 55 who has a hearing impairment as a result of an accident or a disease and a person aged 55 who has a hearing impairment because of his or her age seems absurd. They are both disabled and should be accommodated based on their disability.

Second, it does not seem right to limit accommodation of disabled workers to a certain age (say, 65) or to gradually reduce its scope with age.\textsuperscript{160} As argued in Chapter IV, senior workers have a strong right to participate in the labour market. The fair innings argument should be rejected. The right of senior workers to equality is not embedded in their treatment relative to younger workers, and should not be influenced by past or future benefits. A duty to accommodate disabled workers which ceases, or gradually decreases, at a certain advanced age wrongs senior workers. It values senior workers less than their younger peers simply because of their age. Since age discrimination against senior workers is often

\textsuperscript{154} See Julie McAlpine Jeffries, \textit{The Duty to Accommodate Aging Workers in Employment} (Master of Laws Thesis, University of Toronto, Faculty of Law, 2008) at 128-30 [unpublished].
\textsuperscript{155} \textit{Ibid.} at 129.
\textsuperscript{156} \textit{Ibid.} at 124.
\textsuperscript{157} \textit{Ibid.} at 100-02.
\textsuperscript{158} \textit{Ibid.} at 88.
\textsuperscript{159} As Jeffries herself admits: “If the individual only suffered age-related incapacities, it would seem that the particular age at which [a different application of the duty to accommodate] struck would be irrelevant; as long as they were age-related, the age-based analysis would apply. On the other hand, if the incapacities were disabilities, at which point would the disability analysis end and the age analysis begin?” (\textit{Ibid.} at 135-36).
\textsuperscript{160} As suggested by Jeffries (\textit{Ibid.} at 135-36).
motivated by employers’ fear that a senior worker will become less competent or disabled, it is crucial to facilitate individualized assessment of senior workers.

Even if an unequal treatment is not based on generalization, limiting accommodation to younger disabled workers might reinforce the ageist stereotype that senior workers are incapable of actively participating in the workplace. That is, it perpetuates assumptions about the work lifecycle embedded in our legislation, and reinforces social expectations about the eroded role of seniors in our society. It also perpetuates the oppression of senior workers who are encouraged (and even compelled) to work longer but are not provided with adequate protection in the workplace. It also denies senior workers access to minimum conditions of living by limiting their ability to work longer. True, some workers may be eligible for generous pension benefits upon retirement. However, the right of senior workers to age equality is not driven solely by the need to ensure minimum conditions of living. It is also grounded in the social and psychological meanings of work. As well, it is implied from the important principle of autonomy. Therefore, even if a senior worker is entitled to pension benefits which may substitute for employment income, his or her right to participate in the workplace continues. Accommodation promotes the inclusion of senior workers in the labour market and enhances their autonomy by being attentive to their different needs and abilities (including declining capabilities and changing interests) and by ensuring that they can work despite these differences.

To conclude, the duty to accommodate senior workers due to disability should be similar to the duty to accommodate younger workers due to disability. It should therefore include job modifications as well as a transfer to another job. However, while its scope is similar, factors such as proximity to retirement or the availability of pension benefits may be relevant when determining whether accommodation would cause undue hardship to the employer. That is, the term “undue hardship” suggests a balance between the interests and rights of senior workers, employers and other workers. While on the one hand, the right of senior workers to age equality is a strong fundamental right, the employer, on the other hand,


162 See the discussion above in Section C.

163 An employer may, however, pursue an undue hardship argument based on this factor. That is, it may argue that while accommodation of a particular senior worker is complex and expensive, this worker is entitled to a generous occupational pension upon retirement. This may mitigate the wrong against the principle of sufficiency.

164 “…the goal of accommodation is to ensure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship” (Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ), 2008 SCC 43 at para. 14).
has strong interest in running its business effectively and efficiently. When accommodation imposes a heavy burden on an employer (to be determined, among other things, by the employer’s size, quasi-public nature and financial stability), the senior workers’ right to age equality will yield.

I will now turn to discuss accommodation of senior workers because of their age. These cases may include accommodation due to light disabilities that are not detailed in legislative definitions of disability, burnout, the need to take care of family members at advanced age, the need to update skills, or the need to gradually prepare for retirement. Unequal treatment based on age is often wrong, especially in the context of senior workers. There is a strong case for obliging governments and employers to refrain from age discrimination against senior workers. This obligation entails taking into consideration the particular needs and circumstances of a senior worker through accommodation. In other words, when a personal wrong is done to a senior worker by unequal treatment based on age, this worker has a strong claim against the wrongdoer not only to refrain from this action but also to positively act to alleviate their suffering through accommodation. This claim is valid and binding even in the absence of explicit legislation due to the personal wrongs akin to tort done to the individual. In this sense, there is no difference between countries that have enacted a duty to accommodate senior workers (such as Canada) and those that have not. It would, however, be preferable to introduce legislation which clearly imposes a duty to accommodate senior workers in order to rebut any assumption that the duty is only voluntary. Finally, the wrongdoer (public or private) should bear the cost of accommodation because it is personally responsible for the harm done to the individual.

While age is different to other grounds of discrimination, it does not follow that the duty to accommodate senior workers is weaker than the duty to accommodate any other disadvantaged group and should have a limited scope. True, the shorter time senior workers have ahead of them in the labour market may cause undue hardship to the employer who invests in training a senior worker for a new job or restructuring the workplace to find a job for this worker as part of the duty of accommodation. However, it would be wiser to assess its scope on a case-by-case basis for several reasons. First, the cost of accommodation is often insignificant, and in any case is limited by the undue hardship doctrine. Second, senior workers often have lower turnover rates compared to younger workers and therefore

\[165\] See Jeffries, supra note 154 at 103-06.

their proximity to retirement is not an issue.\textsuperscript{167} Third, Jeffries argues that the increasing number of senior workers in the workplace means it will be an undue hardship to accommodate them all,\textsuperscript{168} and that since all workers are expected to age, accommodating senior workers constitutes undue hardship.\textsuperscript{169} However, not all senior workers require accommodation. On the contrary, those who remain in the labour market are the most likely to be competent.\textsuperscript{170} Finally, if accommodation of senior workers imposes heavy burdens on employers due to demographic shifts and the fact that (almost) all workers will become old one day, it is more reasonable to develop a scheme according to which the State and all employees – young and senior – share these costs with employers than to eliminate accommodation at all.

To conclude, the unique features of age do not suggest that the duty to accommodate senior workers should be limited \textit{ex ante}. Rather, its scope should be determined on a case-by-case basis. In principle, its scope should be similar to that of the duty to accommodate disabled workers, including by job modifications and a transfer to another job, because age discrimination is as severe and critical as any other form of discrimination. The duty may extend to work reorganization and job redesign, a shift to a part-time job or longer breaks (especially if the job is physically demanding), through for example job sharing or reassignment.\textsuperscript{171}

However, as was argued in Chapter IV, a more holistic approach to the duty to accommodate is required. That is, as age discrimination in employment is widespread and systemic, governments and employers should not wait for individual requests for accommodation.\textsuperscript{172} Compensating individual victims of discrimination is not enough. In order to effectively eliminate discrimination and promote equality, a broader approach is needed. It is socially desirable to impose some positive duties towards the entire group of senior workers upon those public and private actors (such as employers), who are in the best

\textsuperscript{167} See Chapter II, note 35 and accompanying text.
\textsuperscript{168} Jeffries, \textit{supra} note 154 at 107-08.
\textsuperscript{169} Ibid. at 120.
\textsuperscript{170} See \textit{supra} note 65.
\textsuperscript{171} It means that accommodation is not all about individualized testing and non-discriminatory standards of evaluation. The decision in \textit{Bastide}, where a manual dexterity test had an adverse effect on senior workers, should therefore be revisited as the employer should have been required to consider accommodation in other positions or even job modifications. Similarly, in \textit{Large} the Court should have examined whether the job description of a police officer could be modified to allow the plaintiff to work beyond the age of 60 (\textit{Bastide v. Canada Post Corp.}, [2005] F.C.J. No. 1724 (QL) (October 14, 2005), online: <http://www.lancasterhouse.com/decisions/2005/dec/FCC-Bastide-v-CanadaPost.pdf>; and \textit{Large v. Stratford (City)}, [1995] 3 S.C.R. 733).
\textsuperscript{172} See \textit{British Columbia (Public Service Employment Relations Commission) v. British Columbia Government and Service Employees’ Union}, [1999] 3 S.C.R. 3 at paras. 64, 67 [\textit{Meiorin}] (The duty of accommodation is not exhausted by tailoring an individual solution for the particular worker. A more proactive solution is required, one that will build the concept of equality into workplace rules and practices). See also Fredman, \textit{supra} note 2 at 61-63.
position to lead substantial social changes, and to pursue and initiate schemes that would promote the inclusion of senior workers in the workplace. This may include a duty to implement general norms to promote the health and well-being of all workers throughout their working lives and to examine workplace policies and practices to eliminate any age discrimination. Governments and employers should provide vocational training and retraining to increase senior workers’ employability. Furthermore, employers should revisit their work arrangements to suit senior employees and allow them to find their appropriate work-family balance. This may include flexible work schedules, part-time work, flexible retirement arrangements, job sharing, career breaks and re-entry, working from home, or a formal transition to contracting, consulting or mentoring, which would allow senior workers to gradually phase into retirement. Finally, it should include modifications to the job performed, offering alternative jobs that the worker can perform, or creating new jobs (“job bundling”).

This type of accommodation, by contrast, requires explicit legislation to ensure that different public and private actors incorporate the value of equality into their institutions and corporations. It requires explicit legislation because no personal wrong or specific wrongdoer can be identified and it may carry significant costs. Accordingly, Canadian case law imposing a general duty of accommodation on the government and all employers proactively eliminate discrimination and promote equality is a desirable end. However, such a duty requires explicit legislation (with regard to any kind of discrimination) which, among other things, will deal with the distribution of costs between the state, employers, and workers of all ages. Once a proactive scheme is in place, the costs are likely to gradually reduce.

It is true that age discrimination in the workplace is a public problem stemming at least in part from public attitudes and social structure. The government has a strong incentive to promote age equality in the workplace due to the challenges of the aging population. It should therefore be responsible for accommodating senior workers and also for

173 It should be noted, however, that although flexible work arrangements and working hours are often attractive to senior workers, these schemes might involve marginal low-paid jobs. Some senior workers might choose these jobs because they need to survive and have no other options (see Wood et al., supra note 85 at 428). In these circumstances the principles of autonomy and oppression might be undermined. To mitigate these potential harms countries should strive to create more jobs and establish a mandatory pension scheme that will provide adequate living conditions to all.

174 Governments should encourage employers to develop formal phased retirement plans and flexible working schedules, allowing workers to work for reduced hours and receive pension benefits. In the U.S., informal schemes are more common at the moment and are available mostly to well-paid workers (see Toder et al., supra note 120 at 12-13). Similarly, in Canada the use of flexible work arrangements (including formal job sharing and tele-work programs) is very rare (see Chris Higgins, Linda Duxbury & Sean Lyons, Reducing Work-Life Conflict: What Works? What Doesn’t? (Ottawa: Health Canada, 2008) at c. 3.2, online: <http://www.hc-sc.gc.ca/ewh-semt/pubs/occup-travail/balancing-equilibre/index-eng.php>.

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compensating employers for some of the costs of providing senior workers the choice of
remaining in the workplace. However, employers should also be held liable. They have a
mutual interest in increasing the participation of senior workers in the labour market, due to
labour shortages. As well, they are in best position to lead a social change. Again, once these
schemes are in place the cost of accommodation is expected to decrease and in any case the
duty to accommodate senior workers even from this systemic approach is limited by the
undue hardship doctrine.

Furthermore, it is important to note that the benefits of accommodation to senior
workers, younger workers, employers and society as a whole are enormous. It is likely to
have a strong impact on senior workers’ participation in the workplace which is a desirable
goal in an era of an aging workforce, labour shortages and pension deficits.\(^{175}\) It allows
senior workers to continue working according to their changing abilities, reduce their
workload and work in flexible arrangements thus making continued employment and
delayed retirement more attractive. It provides them with a gradual transition to retirement,
allowing them to earn an income and maintain active social lives. It generates a large and
meaningful variety of choices about when and how to work and retire. It increases senior
workers’ employability through lifelong training. It is beneficial both for their health and self
fulfillment. It fights economic inactivity and poverty at advanced age. It eases the pressures
on pension funds and health care systems.\(^{176}\) It also allows employers and younger workers
to benefit from the knowledge and experience of senior workers while preparing for their
final exit. It allows employers to enhance their firm’s numerical flexibility.\(^{177}\) Finally, it
reduces litigation costs and increases the retention of talented workers.\(^{178}\)

Despite the immense benefits of accommodation, voluntary codes of practice are
often insufficient and ineffective. Employers are often shortsighted, focusing on the
immediate costs of accommodation. Most of them have not implemented innovative
mechanisms to encourage greater participation among senior workers.\(^{179}\) Since employers
might avoid the hiring of senior workers due to accommodation costs, governments should
put a strong emphasis on enforcement and provide professional and financial assistance
(including incentives) to employers in order to encourage accommodation of senior workers.

\(^{175}\) See Samorodov, supra note 117 at 32-33.
\(^{176}\) See Avramov & Maskova, supra note 120 at 96-97.
\(^{177}\) See Wood et al., supra note 85 at 427-28.
\(^{178}\) See Fredman, supra note 2 at 64.
\(^{179}\) See supra note 109.
Conclusions

This dissertation develops a new approach to equality which has profound implications for how we think about and address age discrimination. The analysis centers upon age discrimination against people at advanced age in the employment sphere for two main reasons. First, this serves to focus on the emerging challenges posed by the global demographic shift towards an aging workforce for litigation and policy-making in the field of labour law and employment discrimination law. Among other things, there is ongoing debate over the global tendency towards the abolition of mandatory retirement practices and great controversy exists around the various mechanisms advanced by different countries to increase the labour force participation of senior workers. While meeting these challenges requires engagement with broad economic and social considerations, at their core lies a normative question regarding our conception and assessment of the right of senior workers to age equality, its importance and relative weight compared with other rights and interests. Second, the aim of this dissertation is to critically review the current understanding of the right to age equality and to strengthen its moral and economic justification. Senior workers present the strongest case study, exposing the limited and fragile theoretical foundations of the contemporary understanding of age discrimination and demonstrating the need for a new account that strongly emphasizes the wrongs associated with unequal treatment based on age.

As we have seen, the contemporary discourse of age discrimination often relies on the philosophical view, named the Complete Lives Approach, according to which equality should be assessed based on a lifetime experience because since we all age, we get the same benefits and bear the same burdens at different stages of our lives. This approach has justified many age-based distinctions in employment (including mandatory retirement) and in other spheres as long as they apply to all people when they age. Furthermore, it has often influenced the balance struck between the senior workers’ right to age equality and other social and economic considerations and interests. However, this approach and its modified versions suffer from various difficulties.

By contrast, the new Dignified Lives Approach to equality proposed in this dissertation comprises two major components. First, it considers all human beings as of equal moral worth, and as such requires that every individual will be treated with equal concern and respect at any given time, not just when assessing his or her total lifetime well-being. Second, equality is not assessed through a comparison between two individuals who receive benefits and bear burdens, but rather through a set of substantive principles
stemming from the notion of equal concern and respect. These principles are viewed as a constitutive part of the account of equality. When one of these principles is not respected at any particular time with regard to a particular individual, this individual suffers a personal wrong which is so significant in and of itself that his or her right to age equality is violated. This wrong is not embedded in a comparative treatment of individuals. Also, it cannot be compensated for by past or future benefits. Consequently, unequal treatment based on age may be unjust even if it would not be considered as such on the complete lives approach.

While the substantive principles identified in this dissertation are not essentially egalitarian, they are strongly embedded in a notion of equality. They entail a distributive element. That is, when a distributive criterion fails to accord equal concern and respect to some members of a protected group (by not respecting one of the five principles), their right to equality is violated. When one of these principles is compromised, we might identify in the background a member of one group that received a benefit and a member of another group that did not receive it. Yet, this comparison has no meaningful role in explaining why discrimination is unjust and it does not constitute a basis for an entitlement claim. It has only an argumentative function. It indicates that something can be done to improve things and helps us to identify those responsible for not doing enough to remedy the inequality.

In this dissertation, five substantive principles are articulated: the principle of individual assessment, the principle of equal influence, the principle of sufficiency, the principle of social inclusion and the principle of autonomy. All are examined in the specific context of senior workers. As we have seen, not every unequal treatment based on age is unjust. It is unjust only when the principles underpinning equality are not respected and the equal moral worth of senior workers is disregarded. This may happen when the unequal treatment is motivated by ageist stereotypes or ageism towards senior workers; when it perpetuates oppression of senior workers; when it denies senior workers access to basic goods thus pushing them into poverty and unreasonable living conditions; when it excludes them from full and meaningful participation in social life; or when it reduces their autonomy and free will. These wrongs may occur at any stage of employment including hiring, training and dismissals. They may be intensified in certain circumstances including when the worker is relatively young. When the principles of equality are not respected to a great extent and the harm cannot be mitigated, counter-considerations should not prevail except in rare cases of necessity. A less strict standard of review such as rational connection may be sufficient in other cases, where the principles of equality are not severely compromised.

The principles underpinning equality should be respected by public authorities as well as some private actors who are in the position to distribute significant goods such as
employers. The liability of these employers stems from the harm done to their workers whether intentional or not. A failure to treat a worker with equal concern and respect (i.e. a failure to show respect to the principles underpinning equality) amounts to a personal wrong, akin to tort, against this individual. Consequently, this individual has a personal claim (or a right) against the State or a private actor such as an employer to refrain from discrimination as well as to positively act to promote equality, even prior to legislative prohibition on this kind of behaviour. Unequal treatment, which is based on stereotyping or prejudice, perpetuates oppressive relationships or violates one’s autonomy, clearly undermines the notion of equal concern and respect, and the “fault” of the wrongdoer is obvious. By contrast, when a neutral action or policy, which results in social exclusion or denial of access to minimum living conditions, has an harmful effect, it is more difficult to identify the fault of the wrongdoer. According to the Dignified Lives Approach to equality, the fault of the wrongdoer is embedded in the failure to treat individuals as of equal moral worth and to recognize actual group differences by, for example, accommodating their special needs up to a point of undue hardship.

Furthermore, in cases of socially constructed, systemic discrimination where no personal wrong against an individual can be identified and it is difficult to point at specific liable wrongdoers, the principles underpinning equality create a useful platform to impose positive duties on public and private actors to enhance equality. While this type of discrimination is mainly considered a public problem to be dealt by public authorities, the Dignified Lives Approach to equality provides a strong justification to impose some duties on private actors such as employers. Employers have enormous control over the lives of their workers, their views and perceptions. They assume an important role in the way that our society is structured and discrimination is manifested. Furthermore, they are in the best position to create social change by pro-actively eliminating institutional, structural and systemic discrimination. This kind of responsibility, however, requires explicit legislation and cannot be extracted from a general prohibition on discrimination.

This dissertation has examined six of the most topical challenges of the aging workforce in the field of labour law and employment discrimination law, through the lens of the Dignified Lives Approach to equality. First, it is argued that under the Dignified Lives Approach to equality, general policies or laws permitting or forcing mandatory retirement (such as in Israel and the UK) constitute unjust age discrimination as they entail a serious breach of the five principles underpinning senior workers’ right to age equality. They amount to severe personal wrongs, similar to tort wrongs, against senior workers. These policies and laws should therefore be banned. Furthermore, other legislative exceptions to
the prohibition on age discrimination which allow mandatory retirement should be interpreted narrowly. At the same time, specific mandatory retirement arrangements may be allowed so long as they mitigate these harmful effects. This may include, for example, a contractual agreement based on a deferred compensation model meeting several standards in line with the five substantive principles of equality.

Second, legislative age-caps and age-based distinctions (such as in the Ontario legislation), which, for example, limit the provision of benefits to workers aged 65 and less, amount to unjust age discrimination as they undermine the principles of equality to a great extent. Since the right of senior workers to age equality constitutes a fundamental human right that aims at protecting important values and interests, the Dignified Lives Approach to equality requires that legislatures explore other, less strict alternatives to achieve their goals. As we have seen, some of these alternatives have already been introduced in other jurisdictions.

Third, the Dignified Lives Approach to equality illustrates how the principles underpinning equality are compromised when employers frequently use cost rationales in hiring and dismissal decisions regarding senior workers. As in the case of age-caps and age-based distinctions, these decisions may be upheld only when no other less discriminatory means are available. As we have seen, there is usually a wide array of non-discriminatory solutions that may enable employers to cut costs while respecting the equal moral worth of senior workers. Broad exceptions to adverse effect cases of age discrimination, such as in the “reasonable factor other than age” in the American Age Discrimination in Employment Act, should therefore be revisited.

Fourth, while heavy pressures on pension funds and looming labour shortages should have had a strong impact on the treatment of senior workers, experience suggests that voluntary actions are not a panacea and the elimination of age discrimination cannot be left to market ordering. Employers are not doing enough to recruit and retain senior workers in the workplace. Ageist stereotypes are still widespread. Most importantly, some of the measures adopted to increase senior workers’ labour force participation rates are harmful and ineffective. The Dignified Lives Approach to equality therefore suggests that the right of senior workers to age equality should be taken into account in the design and execution of any labour market policy that aims at tackling the implications of the aging workforce by encouraging senior workers to work longer (including an increase in the age of eligibility for full public pension or social security benefits). At the same time, it only provides a general normative framework in which different countries may pursue different measures. That is, it first pinpoints the wrongs done to senior workers by an increase in the age of eligibility for
full public pension or social security benefits. It then suggests a great variety of initiatives to achieve the legitimate aim of increasing labour force participation among senior workers that minimally impair the rights of senior workers.

These include, for example, the introduction of anti-age discrimination legislation, the promotion of health and safety at work, the improvement of quality of work, and the elimination of any form of age discrimination in workplace policies and practices. They also entail the abolition of general rules and policies allowing mandatory retirement, complemented by the removal of legal and institutional barriers to senior workers’ labour market entry, reentry and participation and disincentives to delayed and phased retirement. Finally, they may involve the adjustment of working conditions to senior workers’ needs and capabilities, the enhancement of workers’ employability through lifelong training and the facilitation of attractive working arrangements and flexible methods of work and retirement (including phased retirement and post-retirement part-time employment while collecting pension benefits).

Countries should only consider increasing the age of eligibility for full public pension or social security benefits when these other measures are exhausted and do not secure greater participation of senior workers in the labour market. The increase should, however, be very gradual and accompanied by robust protection against age discrimination (including job placement services) and strong governmental efforts towards creating more job opportunities for senior workers who wish to continue working until eligible for the full amount of benefits. As we have seen, while the various initiatives to increase the level of participation among senior workers requires a substantial budget, the advantages and benefits of longer work and delayed retirement to senior workers, employers, the economy and society as a whole would overweigh their cost in the long term.

Fifth, under the Dignified Lives Approach to equality individualized assessment is almost always preferable over generalization. Furthermore, this approach subjects the design and execution of performance appraisals to several strict standards in line with the five substantive principles underpinning the right of senior workers to age equality. It also requires governmental supervision and judicial review of these appraisals.

Finally, the Dignified Lives Approach to equality advocates a strong right of senior workers to participate in the labour market. Accordingly, it supports a robust duty to accommodate senior workers’ disability impairments and age-related needs. As we have seen, a duty to accommodate disabled workers, which ceases, or contracts progressively, from a certain advanced age, does not respect the principles of equality. Furthermore, under the Dignified Lives Approach to equality the obligation of both public and private actors to
refrain from age discrimination includes taking into consideration the particular needs and circumstances of a senior worker through accommodation. Hence, the duty to accommodate senior workers due to disability impairments or age-related needs includes, similarly to disability cases, not only job modifications but also a transfer to another job. At the same time, factors such as proximity to retirement or the availability of pension benefits may be relevant when determining whether accommodation would cause undue hardship to the employer. While this duty is binding even in the absence of explicit legislation due to the personal wrongs akin to tort done to the individual, and its cost should be born by the (public or private) wrongdoer, a more comprehensive duty of accommodation which aims at tackling systemic discrimination requires further explicit legislation as no personal wrong or specific wrongdoer can be identified. It is true that the cost of accommodation may be high at first, but once a comprehensive scheme is in place, the cost will be reduced. Furthermore, the benefits of accommodation to senior workers, younger workers, employers and society as a whole are enormous.

To conclude, since the Dignified Lives Approach to equality considers senior workers’ right to age equality to be a fundamental human right serving significant valuable principles, the analysis of each one of these six challenges emphasizes the wrongs associated with age discrimination against senior workers and stresses the need for compelling counter-considerations to justify the infringement of the right to age equality in employment. Nevertheless, as we have seen, the Dignified Lives Approach to equality does not offer “all-or-nothing” solutions. Rather, it generates great flexibility and creativity. Often it points to multiple alternative mechanisms that allow some limitation on the right to age equality as long as the compromise of the principles underpinning equality can be mitigated and senior workers are treated with equal concern and respect. The Dignified Lives Approach to equality is therefore a very promising theoretical framework for addressing the other, as yet unforeseen, challenges of the aging workforce. Moreover, further thought should be given to the potential application of this approach to the treatment of younger workers as well as to the treatment of senior people in other spheres.
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