

**20.12.17 Note for Pensions Commission relating to the issue of mandatory retirement ages |Aisling Carey|****Summary of points made in this academic paper:**

- This paper argues that the setting of a mandatory retirement age is an out-dated practice, a practice which is rooted in ageist attitudes deriving from age stereotypes. At the very least, the setting of a mandatory retirement at the ‘normal retirement age’ of 65 appears to be out-dated.
- Given the volume of cases taken to the WRC challenging mandatory retirement, this paper argues that there is a strong desire amongst many workers aged over 65 to continue working past their contracted ‘normal retirement age’.
- This paper offers several reasons why such older workers have a desire to work past the age of 65. Such reasons include, financial dependency, social interactions, sense of purpose and identity and psychological wellbeing.
- The original objectives of the implementation of EU age discrimination law should be considered carefully when developing new legislation around mandatory retirement ages.
- In Ireland and across many other EU countries we are facing a demographic crisis due to the low birth rates and increasing life expectancy. We are becoming more and more dependent on the older members of our population.
- This paper highlights that age stereotypes have significantly impacted the way we view older workers and subsequently how we view mandatory retirement ages. However, if we challenge these stereotypes and also take into account the desire for many older workers to work past the age of 65, the author argues that the setting of a mandatory retirement age does more harm than good both economically and socially.
- The case law demonstrates that it is becoming more difficult for employers to objectively justify mandatory retirement policies as the courts are taking a strict approach when applying the ‘objective justification’ test.
- Such narrow interpretation by the courts plays a key role in sending a message to private sector employers that they need to be more thoughtful when setting a retirement age and possibly urge them to consider abolishing their mandatory retirement age policies altogether. The author argues that this would go a long way in reconciling the existing gap between normal retirement age of 65 and the entitlement age for State Pension, in addition to satisfying the evident desire of many older workers to continue working past the age of 65.



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**Author: Aisling Carey**

**Title:**

**‘An examination of the application of the objective justification test in cases challenging mandatory retirement age’**

**This thesis is solely the work of the author and is submitted in partial fulfilment of the requirements of the Degree of MSc in Human Resource Management.**

## **Abstract**

The current ageing demographic calls for prolongation of working life and postponed retirement in most EU member states. The success of policies promoting these ideas, is reliant on a range of factors, such as the impact of the older worker stereotypes on employer's perception of their older employees and the extent to which current age discrimination legislation assesses employers use of mandatory retirement ages. As a result of the ageing population, Ireland's pension system will be under huge financial strain and subsequently, the threat of 'pensioner poverty' will become a reality if older workers are not encouraged to continue employment past normal retirement age. With so many older workers now challenging mandatory retirement age, the onus falls on the Workplace Relations Commission to ensure that employers are putting real thought behind the mandatory retirement ages that they are choosing to set. This thesis highlights that the Workplace Relations Commission is taking a strict approach when applying the objective justification test and is therefore, making it more difficult for employers to justify the setting of a mandatory retirement age, particularly those set at the age of 65.

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## CHAPTER ONE – INTRODUCTION

### 1.1 Overview of demographic concerns

As the birth rates in the majority of EU member states remain low and life-expectancy continues to increase, the need for older workers participation in the labour market is more pressing than ever (Baltes *et al.* 2012). Recent statistics show that in Ireland birth rates are lower than the death rates, and it is projected that approximately 844,900 older workers will make up the Irish labour market by 2031 (Central Statistics Office 2020). In July 2017, the Citizens' Assembly discussed ways to tackle the challenges of an ageing population with a particular focus on the fragility of the State's pension system (Citizens' Assembly 2017). From this assembly, it was reported that 86% agreed that mandatory retirement ages (MRAs) should be abolished and 96% agreed the gap between when a person is made retire at 65 but cannot receive the State pension until 66 needs to be reconciled (Ryan *et al.* 2017). The age of entitlement to State pension is due to rise to 67 in 2021 and 68 by 2028 (Citizens Information 2019). Not only will the State financially struggle to sustain the State pension system, but given the existing anomaly between mandatory retirement age (MRA) and the age entitled to receive pension, 'pensioner poverty' is a real threat to Ireland's elderly citizens (Ryan *et al.* 2017).

### 1.2 Older worker considerations

Traditionally, retirement was seen as a single event marking the transition from the status of paid worker to the status of full-time retiree whereas nowadays, it is viewed as a more fragmented process (Bélanger *et al.* 2016). Contemporary research recognises that the path to full retirement may be interspersed with episodes of part-time leaves, bridge employments, or second-career jobs (Bélanger *et al.* 2016). Despite evidence that older workers have a desire to continue employment past normal retirement for varying reasons (Marvell and Cox 2017), they are met by the ageist obstacle of MRA. Experiencing ageism as an older person is generally seen as an inevitable consequence of ageing (Palmore 1999; Nelson 2005). Subsequently, ageism also exists within the workplace and is manifested through older worker stereotypes (Hamilton and Sherman 1994). The older worker stereotypes have led employers to negatively perceive older workers, thus making it difficult for older workers to remain in or return to work (Shea and Hassen 2006; Gordon and Arvey 2004).

### 1.3 Legislative and judicial overview

As there is no statutory guidance on the issue of MRA in Ireland, the onus has fallen on the European Court of Justice (ECJ) and Workplace Relations Commission (WRC) to provide guidance on the issue and interpret the true intentions of the objective justification test as outlined in Article 6(1) of the Council Directive 2000/78/EC. However, it is widely recognised that the ECJ have provided very limited guidance on how national courts should apply the objective justification test in cases challenging mandatory retirement (Vahey 2013; Dewhurst 2013). Therefore, this thesis has closely

considered the recurring objective justifications for MRAs present WRC cases, in order to provide guidance for Irish employers on how MRAs may be objectively justified in today's workplace.

#### **1.4 Importance of this research from a HR perspective**

From a HR perspective, this research is important to shed light on the ambiguity surrounding the issue of MRA justifications and provide guidance for HR practitioners on what sort of legitimate aims objectively justify the use of mandatory retirement. In 2018, the WRC reported that employment equality complaints increased by 343%, the majority of which were retirement-related (Graphite HRM 2020). HR practitioners would benefit from this research as its aim is to provide clearer guidelines for employers when setting MRA, thus reducing the potential for age discrimination litigation.

## CHAPTER TWO - LITERATURE REVIEW

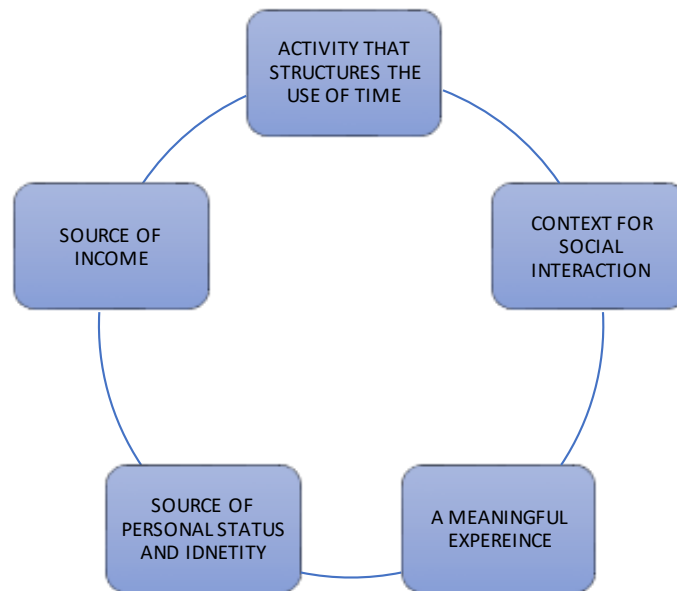
### 2.1 Literature Review: Introduction

The following literature review provides an account of scholarly literature relating to age discrimination at work and the legislation that prohibits age discrimination in employment. Firstly, the author outlines several reasons why older workers are motivated to work past normal retirement age. Secondly, this section discusses the definition of ageism and how it manifests itself in the workplace stemming from stereotypes. Thirdly, will discuss the impact of older worker stereotypes on how employers treat older workers. Then, this section will present the European Union's rationale for implementing age discrimination legislation and how this legislation has been transposed into Irish law. Finally, this section will draw attention to concerns arising from the demographic crisis.

### 2.2 Reasons that older workers are motivated to work past normal retirement age

Normal retirement is age is generally recognised as the age at which individuals become eligible for receiving the state pension (Oude 2019), which in Ireland is currently 66 years of age (Citizens Information 2019). Choosing to retire is a very important life decision and is generally driven by multiple interacting factors such as gender, age, family, and socio-economic status as well as organisational and contextual factors (Bélanger *et al.* 2016; McCarthy *et al.* 2014). According to Marvell and Cox's (2017) report, older workers are motivated to work if it is: personally meaningful, flexible, intellectually stimulating, sociable, age-inclusive and offers any adjustments needed for health conditions and disabilities inside of work. Figure 2.0 outlines Friedmann and Havighurst's (1954) five functions of work which they have also cited as reasons why older workers do not want to retire at normal retirement age. Some theories which attempt to decipher individuals' decision to retire include economic models, continuity theory (Atchley 1999), role theory (Ashforth 2001; Carter and Cook 1995), and the life course perspective (Elder 1995).





**Figure 2.0 Friedmann and Havighurst's (1954) five functions of work**

Combining the insight from such theories with Freidman and Havighurst's (1954) five-point typology this thesis has identified four key factors to focus on, that influence an individual's desire to retire or continue working: (1) financial dependency, (2) continuity and daily structure, (3) social interaction and relationships and (4) sense of purpose and identity, which will be further discussed below.

(1) *Financial dependency*

Economic models of retirement generally assume that people who continue to work after their MRA only do so as a means to survive (Beehr 2014). For example, rational choice theory assumes that when making retirement decisions, individuals assess various life course transitions in light of the perceived costs and benefits of increased leisure time (Beehr 2014; Cortijo *et al.* 2019). Schellenberg *et al.* (2005) reported that financial consideration is the most cited reason (38%) for retirees returning to work. Contemporary research has shown that older workers leaving a long-term job were more likely to go back to work if their financial situation was less favourable, and they also tended to return to work sooner (Bonikowska and Schellenberg 2014). The William Fry Employment Report (2016) found that 63% of employees aged 55 years or over either don't wish or don't expect to be financially able to retire when they reach the current state pension age of 66 years old.

In Ireland currently, in order to qualify for the receipt of State Pension (Contributory) one must reach the age of 66 years and the qualifying age is set to raise to 67 by 2021 and 68 by 2028 (Citizens Information 2019). The Pensions Survey of Quarter 3 2019 showed that only 60% of people in Ireland have some sort of private pension and those with no pension coverage were asked what the main reason for this was (Central Statistics Office 2019). One third (33.2%) stated that they could not afford a pension while 36.2% cited that they never got around to organising it (Central Statistics

Office 2019). This survey further indicated that almost six in every ten (59.7%) workers cited the State Pension as their future expected source of income, while one in ten stated that they would rely on savings or investments while one fifth (20.1%) were undecided (Central Statistics Office 2019).

Financial factors such as outstanding mortgage payments and unpaid loans are amongst some of the reasons why older people feel that they cannot afford to retire at their MRA (Bélanger *et al.* 2016).

Pension shortfalls in addition to people's inability to save during the recession are amongst other cited reasons why it is imperative for some to stay in work (Keogh 2017). Furthermore, some people want to leave money to support family, friends or other entities (Jahoda 1982).

### (2) *Continuity and daily structure*

Continuity theories focus less on money and tangible goods as reasons for choosing to retire or not and argues that "people only change slowly and moderately as they age, in terms of their psychological characteristics, such as personalities, interests, and favoured activities" (Beehr 2014, p. 1094). For example, Atchley (1986) argues that a sociable younger worker will remain relatively sociable as an older worker and also as a retiree. Further to this, continuity theory suggests that older workers have interests that are similar to the interests that they had in the early stages of their working life (Atchley 1999; Baltes *et al.* 2012). In support of this suggestion, the literature on continuity theory and retirement has extensively examined link to the concept of 'bridge employment' which refers to "having paid work after receiving an old age pension and spans the period from full-time work to full retirement" (Sewdas *et al.* 2017, p. 2). According to Wang *et al.* (2008), continuity theory in relation to the concept of 'bridge employment' emphasizes that the desire of older workers to maintain their daily structure through post-retirement work, is critical for retirees to maintain their psychological well-being. Although the literature portrays that older workers' motives for continuing employment past normal retirement age may differ, the results from Kooij *et al.* (2011) meta-analysis suggest that older worker's look to work to satisfy intrinsic interests. Such interests include: the nature of the work, satisfaction gained from the work, the motivation of succeeding through work in addition to social stimulation from work (Kooij *et al.* 2011; Alcover *et al.* 2014).

### (3) *Social interaction and relationships*

For many older workers one of the main benefits from working in later life is the social side of work: contact with others, team-based working and forming professional and personal relationships through work (Maxwell and Cox 2017; CIPD 2014). Social contact is often cited by older people as one of the things they miss most about work once retired (Bright 2010). Compared to younger employees, most older workers place greater importance on being part of the 'social fabric' of their company (Bright 2010). Older workers with mental health conditions report benefits that the social aspect makes their work meaningful and strengthens their bond to their employer (Büsch *et al.* 2012; Nilsson *et al.* 2011).

#### (4) *Sense of purpose and identity*

According to Sterns and Chang (2010) feeling valued, appreciated and respected at work is a key contributor to older workers' desire to continue their employment past normal retirement age. Numerous sources in the role theory literature argue that work roles contribute to the maintenance of one's positive self-image (Feldman 1994; Adams *et al.* 2002). House *et al.* (1988) note that individuals who have several social-type roles, like an employment role, are often better off both physically and psychologically, as they acquire a sense of purpose, identity and community. However, as individuals become older they typically experience a decline in both family and nonfamily roles, due to children leaving home, the death of a spouse and leaving employment (Moen 1996). Thus, when a person gets older, their retirement must be viewed in the context of other role losses, particularly as it may be the only role left providing them with a sense of purpose and identity (Moen 1996). Role theorists argue that the role loss resulting from retirement can cause people to feel anxious or depressed (Thoits 1992), which leads to overall deterioration of the older individual's well-being (Adams *et al.* 2002). Therefore, Moen (1996) proposes that older individuals who delay retirement or continue working following their retirement are better off than those who retire from work without compensating roles and relationships.

### **2.3 Evidence of health benefits of working into later life**

Although contemporary scientific research and empirical evidence is inconclusive, there is a general consensus amongst the literature that working beyond normal retirement age benefits the physical and mental health of older individuals (Farrell 2017; Shea and Hassen 2006). Sterns and Chang (2010) notes that most jobs do not require an excessive amount of mental or physical performance and can be performed by healthy, moderately educated adults, regardless of age. In 2016, a study of 3,000 people published by the Journal of Epidemiology and Community Health, suggested that working even one more year beyond retirement age was associated with a 9% to 11% lower risk of dying during the 18-year study period, regardless of health (Harvard Health Publishing 2018). There is evidence which indicates that compared with people who retire, people who worked past the age of 65 are about three times more likely to report being in good health and about half as likely to have serious health problems, such as cancer or heart disease (Harvard Health Publishing 2018).

### **2.4 Ageism**

Although the literature shows that older workers have numerous reasons for staying in employment, they are often met by the obstacle of ageism at work. While there has been extensive research on the 'concept of ageism', uncertainty still shrouds the issue of 'defining ageism'. In its most basic form, ageism can be defined as "negative or positive stereotypes, prejudice and/ or discrimination against (or to the benefit of) aging people because of their chronological age" (Iversen *et al.* 2009, p. 4). This

stems from the first ageism definition coined by Butler (1969) which he then expanded to the following in 1975. Butler's definition of ageism:

“systematic stereotyping and discrimination against people because they are old, just as racism and sexism accomplish this for colour and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills... Ageism allows the younger generations to see older people as different from themselves, thus they subtly cease to identify their elders as human beings.” (Butler 1975, p. 12 and Butler 1995, p. 35)

Butler's definition has been labelled by numerous sources as the “ultimate definition” (McCann and Giles 2002; Iversen *et al.* 2009). Although, some academics argue that the scope of this definition wrongfully excludes young people as victims of ageism (Bytheway and Johnson 1990; Snellman 2016). Similarly, the literature highlights that age discrimination creates an ‘us-them divide’ (i.e. the old versus the young) which has had an impact on how ageism has been defined (Solem 2016; Snellman 2016; Iversen *et al.* 2009). Nelson (2005) claims that ageism of the elderly is the most consequential form of ageism, although he recognises the term also encompasses young people. Similarly, Andersson (2008) has shown that older people are those most affected by ageism. Nelson (2016) notes that in recent years, significant research has been conducted to show when and why younger people feel prejudice against older adults. The Succession, Identity, and Consumption model by North and Fiske (2013) proposes that ageism arises in younger people because older people fail to pass down enviable resources (succession), (e.g. retire to create job opportunities for young workers) they consume more than their fair share of limited resources in society (consumption), and they fail to act their age (identity).

## **2.5 Ageism: a culturally accepted situation?**

Ageism or age discrimination is the most socially-condoned form of discrimination which has led to far less research in the area when compared with racial or gender discrimination (Palmore 1999; Nelson 2005). For generations now, a culture has existed that denounces the natural ageing process, for example through the promotion of anti-ageing medication, surgery, exercises etc. (Weintraub 2010; Solem 2016). In this way, it makes sense that there is then a build-up of contempt for the ageing process and moreover, contempt for those who have aged (Haber 2004).

## **2.6 Workplace age stereotypes**

This thesis will now take a closer look at how ageism manifests itself in the workplace through workplace stereotypes. Fiske and Neuberg (1990) describe stereotypes as negative, inaccurate, or distorted opinions about people based on their membership to a particular group. Additionally, stereotypes may be based on preconceived ideas or unfounded assumptions which then incorrectly infer that all members of that group are the same (Fiske and Neuberg 1990). According to Posthuma

and Campion (2009) age stereotypes can operate at a more subtle or unconscious level in comparison to other stereotypes. According to Hamilton and Sherman (1994), workplace age stereotypes are beliefs and expectations about workers based on their age. The literature highlights that ageist stereotypes are central to the establishment of ageist attitudes, discourse and behaviours that are commonplace within the working environment (McCann and Giles 2004; McCarthy *et al.* 2014; McCarthy and Heraty 2017). According to Marshall (1995) at p. 421, "the tragedy of ageist attitudes is that people tend to acquire them early in life but then reach the point where they are the targets of their own stereotypes".

## 2.7 Older worker stereotype

Looking more specifically at the older worker stereotype, Gordon and Arvey (2004) notes that this stereotype creates barriers to older workers' employment opportunities. Robertson and Tracy (1998) at p. 85 highlight Peterson and Coberly's (1988) five main stereotypes that are often related, either directly or indirectly, to the health of older workers which this thesis has listed in Table 1.1.

1.	Poor health, loss of physical energy, and increased illness, are stereotyped as the results of increased age leading to the assumption that older workers have a reduced capacity to perform workplace tasks, suffer from a loss of stamina, and engage in absenteeism.
2.	Growing older results in more workplace accidents, more lost workdays, and increased insurance and medical expenses, leading to the assumption that older workers will cost the company more money, increase the company's risk, and are a hazard to themselves and other employees.
3.	Ageing is associated with lowered productivity because of slower actions, greater absence, and less dedication to the employer, leading to the assumption that older people are less valuable than younger workers.
4.	The beliefs that older people are set reluctant to change their behaviour, are unable to learn new skills, and will reject innovative changes, leads to the assumption that older workers are unsuitable for retraining and challenging assignments that require learning new skills.
5.	Ageing is believed to reduce the potential value of retraining and skill upgrading, which leads to the assumption that older workers are unworthy of the company's investment of resources.

**Table 1.1. Older worker stereotypes regarding their health**

Shea and Hassen (2006) at p. 44-45 of their book note eight general concepts associated with older workers which this thesis lists below in Table 1.2.

1.	“Older people should retire to make way for younger employees.” (p.44)
2.	“Most older people are pretty much alike.” (p.44)
3.	“The basic job needs of older people in general are different from those of younger people.” (p.45)
4.	“As people age, they tend to focus on the past.” (p.45)
5.	“Most older employees cannot, or will not, change to meet the changing needs of the organisation. They prefer to coast and shy away from promotions or challenges.” (p.45)
6.	“Age is a disease- a slow, but continuous, process that cannot be reversed.”
7.	“Old age is (or should be) a period of relative calm and stability, an that’s what older people want.” (p.45)
8.	“As people age, they become more critical, complaining, and suspicious.” (p.45)

**Table 1.2 Concepts associated with older workers (Shea and Hassen 2006, p.44-45)**

### **2.8 Ageism at work**

Furunes and Mykletun (2010) identify three stages in the working life where age discrimination is likely to occur (1) recruitment and appointment, (2) incidents at the workplace and (3) what happens at the exit. The literature has documented numerous manifestations of ageist beliefs including the tendency for older candidates to be less likely to be hired or promoted than equally qualified younger candidates, or when transitioning careers (King and Bryant 2017). Additionally, older workers are known to be excluded from training and development opportunities, wage increases as well as being excluded from new technology and change processes (Solem 2016; Peterson and Coberly 1988). It is common for employers to encourage or force older workers into early retirement buyouts while also remaining reluctant to hire or offer training to such older workers (Sterns 2010). Faced with the aforementioned age stereotypes, older workers tend to become less willing to accept challenging assignments and are more likely to retire (Zientara *et al.* 2018). Ageism often affects older worker’s self-image and as a result they internalise society’s biases towards them, thus creating a self-fulfilling prophecy as they begin to act in accordance with older worker stereotypes (Shea and Hassen 2006).

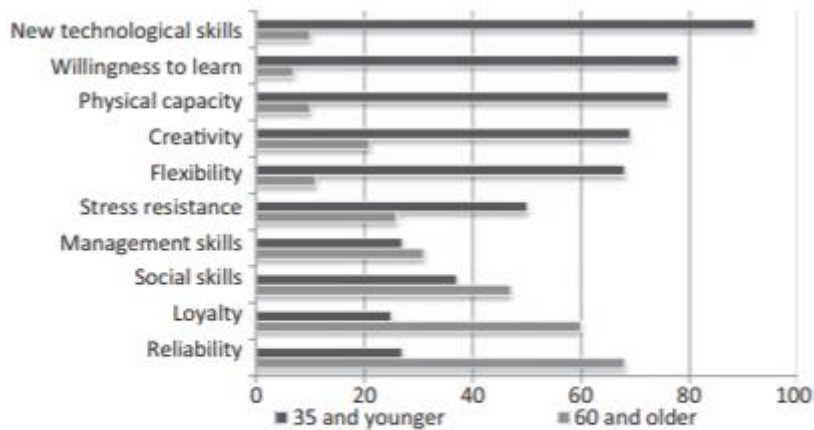
Iversen *et al.* (2009) highlight that there are multiple overlapping dimensions to the concept of ageism which are also apparent in the workplace context. These dimensions are explicit versus implicit ageism, positive versus negative ageism and ageism which occur on micro (individual), meso (community) and macro (society) levels (Iversen *et al.* 2009). Solem (2016) states that positive age discrimination sometimes has an implicit negative effect and uses the Norwegian example where workers above 60 years receive an extra week off for holidays. While extra holiday time is a benefit for older workers, it is based upon the negative stereotype that older workers in general get more tired so need more rest (Solem 2016). The literature labels this positive age discrimination as

‘compassionate ageism’ (Binstock 2010) and ‘pitying positive’ (Tornstam 2006). Micro-level ageism in the workplace refers to how older workers are met because of their age (Hagestad & Uhlenberg, 2005). Meso-level ageism is based on intergroup segregation, i.e. age-segregated neighbourhoods and age-segregated clubs or work sites (Hagestad & Uhlenberg, 2005). Macro-level ageism is also called cultural ageism (often implicit such as in greetings cards and in the media) or structural ageism (e.g. MRA) (Hagestad & Uhlenberg, 2005).

## ***2.9 Employers perception of older workers: shaped by the older worker stereotype?***

Employers are becoming more positive about older workers, but attitudes still are decidedly mixed (Sterns 2010). In order to combat future labour shortages, countries across Europe including Ireland have suggested delaying mandatory retirement (Blossfeld *et al.* 2011). However, Karprinska *et al.* (2013) note that despite the evidence of workers willing to extend their employment and the need for them to remain in employment, there is also evidence to suggest that rather than retaining older workers, employers are in favour of early retirement. The literature nominates the deficit hypothesis as a reason for the widespread perception that older workers are less useful in the later stages of their career (Johnson *et al.* 2017). This hypothesis assumes that older workers experience a general decline of skills, abilities and performance (Johnson *et al.* 2017). However, the literature has questioned the accuracy of this general deficit hypothesis, as although physical skills and abilities (Dave *et al.* 2006) and cognitive abilities (Lindenberger and Ghisletta 2009) may deteriorate to some degree with age, the knowledge and experience of older workers are of advantage to any workplace (Baltes *et al.* 2012) as well as their attitudes, motivation, and performance (Ng and Feldman 2008).

People seeking employment and aged over the age of 45 years can expect to wait at least four times as long to be reemployed in comparison to workers in their 20s (Shea and Haasen 2006). The William Fry Employment Report (2016) showed that 71% of employers identify technology as an inhibiting factor for older workers. Additionally, this survey report found that 42% of employers believe that there is an upper age limit on customer facing roles. Moreover, the survey report presented that 61% of employers believe that older workers are resistant to changes in work practice. The ‘lump of labour fallacy’ promotes the belief that where there are fewer jobs for older workers, there are more jobs for younger workers (Dewhurst 2013). However, the literature highlights that in practice often due to their lack of experience younger workers are not the correct substitute to fill the role once held by an older worker (Dewhurst 2013).



**Figure 2** Stereotypes held by managers about older and younger workers

**Figure 2.1** Bar chart measuring managers stereotypes about older and younger workers out of 100 (Kaprińska *et al.* 2013).

### 2.10 Advantages of older workers

Sterns and Chang (2010) suggests that workers in their 50s and 60s should be considered as being in the middle of their career rather than on the edge of retirement. Furthermore, Sterns and Chang (2010) notes that the idea of working longer should become more normative. The literature presents that older employees who remain in the workforce longer are key actors in the facilitation of economic growth (Feyrer 2007). According to Cortijo *et al.* (2019), managers who are influenced by negative stereotypes about older workers and avoid hiring or retaining older people, run the risk of losing out on the most skilled and productive workers in the workforce. Older workers who continue employment are also needed to both reduce the strain on and to make financial contributions to retirement systems (Posthuma and Campion 2009). Shea and Hassen (2006) note that turnover figures indicate that while younger employees have more years to give, they often do not give them to their first or even second employer and that older workers tend to be more loyal.

### 2.11 Overview of the EU’s rationale for implementing age discrimination legislation

In relation to the issue of age discrimination in employment, such as MRA policies, the rationale for introducing legislation surrounding these issues is indicated in Council Directive 2000/78/EC, also known as the Framework Employment Equality Directive. Section 11 of the Directive states:

*“Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.”*



Article 2 of the Directive has the effect of prohibiting direct and indirect discrimination in employment and occupation on the grounds of age, as well as on the other non-discrimination grounds. Article 6 (1) of the Directive established a framework for distinguishing between circumstances where the use of age to differentiate between individuals can be justified or not. This is also commonly referred to as the ‘objective justification test’ (Dempsey 2016). Article 6(1) provides that differences of treatment on the grounds of age which would otherwise be considered as discrimination may be permitted in domestic law, where the difference in treatment is objectively justified as appropriate and necessary to achieve a legitimate aim. Article 6(1) names legitimate employment policy, labour market and vocational training objectives as indicators of the type of legitimate aim that may be put forward to justify the use of distinctions based on age.

On the topic of the objective justification test, O’Cinneide (2009) notes that the use of age-based distinctions, such as the use of mandatory retirement, may be rooted in rational considerations and serve valuable social and economic objectives which is rarely true of the other non-discrimination grounds. In this way, O’Cinneide (2009) highlights that age-based distinctions are often based upon stereotyping and prejudice.

## **2.12 Irish legislation that prohibits ageism at work**

As this thesis has highlighted so far, it is now apparent that past expectations and assumptions regarding aging, work, and retirement need to be carefully reviewed and revised to fit the reality of the current situation. Legislation against age discrimination has shown a promising ability to fight ageism (Solem 2016).

### *1. The Equality Acts*

Age discrimination at work has been prohibited in Ireland since October 1999, by the Employment Equality Acts 1998 to 2015 (“the EEA”). The EEA includes eight other grounds which are protected from discrimination, both direct and indirect, in relation to: access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading, or classification of posts (agediscrimination.info).

In Ireland, discrimination on the age ground was first introduced by s.6(2)(f) of the Employment Equality Act 1998. However, all employees under 18 years and over 65 years of age were exempted from the application of s.6(2)(f). The Equality Act 2004 (the “2004 Act”) implemented Directive 2000/78 of November 27, 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation. It was s.4(c) of the 2004 Act which removed the upper age limit of 65 years but provided that it would not constitute discrimination to offer “a fixed term contract to a person over the compulsory retirement age”. Section 34(4) of the 2004 Act went on to provide that “it shall not constitute discrimination on the age ground to fix ages for the retirement (whether

voluntarily or compulsorily) of employees or any class or description of employees”. Vahey (2013) highlights that until recently it has generally been accepted that employers were free to fix the compulsory retirement age, by relying on the provisions of s.34(4) of the 2004 Act. Furthermore, provided an employer had a “normal” retirement age specified in writing or established through custom and practice, then employees who had reached “normal retiring age for employees of the same employer” were excluded from relying on the Unfair Dismissals Acts 1977 to 2007, in accordance with s.2(1)(b) (Vahey 2013). Additionally, s.34(4) states that the retirement age must be objectively and reasonably justified by a legitimate aim of the employer and the means of achieving that are both appropriate and necessary. The 2004 Act did not go any further in relation to retirement ages and it has fallen to the courts and tribunals to interpret compulsory retirement ages in line with art.6 of Directive 2000/78. It is clear that Irish legislation needs to align itself with the case law position (Vahey 2013).

## *2. Code of Practice on Longer Working (SI 600/2017)*

The Code of Practice on Longer Working (SI 600/2017) was created in preparation for the significant growth in proportion of older workers who want to continue employment beyond the traditional retirement age of 65 years (irishstatutebook.ie 2020). The purpose of this Code is to provide guidance to employers, employees and their representatives with regard to best principles and practices to follow during the engagement between employers and employees in the run up to retirement including responding to requests to work beyond the retirement age in the employment concerned (irishstatutebook.ie 2020). The Code provides clarity on the issue of ‘objective justification’ by providing the following examples of what could be considered an objective justification; intergenerational fairness (allowing younger workers to progress); motivation and dynamism through the increased prospect of promotion; health and safety (generally in more safety critical occupations); creation of a balanced age structure in the workforce; personal and professional dignity (avoiding capability issues with older employees); or succession planning (irishstatutebook.ie 2020).

### **2.13 Concerns arising from the demographic crisis**

High levels of older worker unemployment have been recognised by the EU as one of the structural weaknesses inherent in the European economy (Dewhurst 2013). It is reported that as the ‘baby boom’ generation begin to retire, there will be more workers retiring than entering the labour market (Eurofound 2020). Further to this, Europeans are living longer and less children are being born which poses economic, budgetary and societal challenges for current policy makers (European Commission 2015). The European Commission (2015) reported that as a result of Europe ‘turning increasingly grey’, the EU’s demographic old-age dependency ratio is estimated to almost double (rising from 27.8% to 50.1%). In other words, the EU’s proportion of workers supporting those in retirement is set to move from four working-age people per retiree to about two working-age persons.

Published in 2012, the European Commission's White Paper on adequate, safe and sustainable pensions presented several initiatives to encourage older workers to continue working if able, in order to curb the challenges facing European pension systems (European Commission 2012). The Citizen's Assembly (2017) in Ireland have also recognised that something needs to be done to reconcile the gap which exists between older workers are being compulsory retire (generally at 65) and the increasing age of entitlement for State pension. Looking specifically at the Irish situation, Gillick (2017) notes that with an increasing number of people choosing to rent rather than buying property, it provokes more concerns of how the ageing population will be able to pay rent. Ryan et al. (2017) have emphasised that the threat of 'pensioner poverty' is real as the State will be unable to sustain the demand on pension system in the coming years if changes are not made.

### **Conclusion**

With regard to the information which this literature review has provided, there appears to be no apparent answer as to what extent must employers go to objectively MRAs. In light of this evident gap in intellectual exploration, the overarching research question, which this thesis aims to answer is:

*'What are the implications on Irish employers of the WRC's recent application of the objective justification test to mandatory retirement ages?'*

## CHAPTER FOUR – FINDINGS

### 4.1 *Analysis of Age Discrimination Case Law*

This section will outline the findings gathered from the sourced Irish and European age discrimination cases regarding MRA. Firstly, this section will analyse six EU age discrimination cases relating to the issue of MRA. These key ECJ decisions informed European employers that MRA must be objectively justified, as well as guiding them on what justifications could satisfy the test. Secondly, this thesis will analyse seven WRC decisions addressing the issue of MRA which illustrates the Irish legal systems position on MRA.

#### **EU Case #1: Case 170/84 *Bilka Kaufhaus v Weber von Hartz* [1986]<sup>1</sup>**

- The landmark decision of *Bilka-Kaufhaus* saw the ECJ lay down a three-tier test for objective justification.
- This test outlined that the court must assess whether the measures chosen by the employer: (i) correspond to a real need on the part of the undertaking, (ii) are appropriate with a view to achieving the objectives pursued, and (iii) are necessary to that end.
- This case law is now encapsulated in Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

#### **EU Case #2: C-411/05 *Palacios de la Villa v Cortefiel Servicios SA* [2007]<sup>2</sup>**

- The decision in *Palacios de la Villa* informed other EU member states that MRA is clearly less favourable treatment on grounds of age, so national laws on MRA must be objectively justified in order to avoid unlawful discrimination, as per the guidance of Article 6(1).
- The ECJ explained that the Directive allows the EU member states to determine retirement ages, but it still regulates termination of employment at a particular retirement age.
- It was submitted that the MRA clause in dispute had the aims of recruiting new workers, increasing stability in employment/sustaining employment.
- In *Palacios de la Villa*, the ECJ found that the aim of the clause, when placed within the national economic context of high unemployment, was a legitimate aim.
- When considering was the measure appropriate and necessary the ECJ highlighted that the member states have a broad margin of discretion in the area of social and employment policy, and consequently the “specific provisions may vary in accordance with the situation in member states” [para 22].

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<sup>1</sup> Hereinafter referred to as *Bilka-Kaufhaus*.

<sup>2</sup> Hereinafter referred to as *Palacios de la Villa*.

- The ECJ held that “[i]t does not appear unreasonable for [...] a member state to take the view that a measure [...] may be appropriate and necessary in order to achieve [...] the promotion of full employment by facilitating access to the labour market” [ para 24].

**EU Case #3: C-388/07 Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform [2009]<sup>3</sup>**

- This case is often referred to as *Heyday* that involved a charity called Age Concern England.
- Age Concern England submitted a total of five questions to the ECJ with regard to the scope of the Directive and further guidance on how the objective justification test was to be applied.
- Age Concern England challenged certain regulations of the UK’s Employment Equality (Age) Regulations 2006 on the basis that these regulations did not properly implement the Directive as they had intended.
- Age Concern England claimed that the list provided in Article 6(1) was intended to guide member states in their implementation of the Directive and impose on them an obligation to set out a specific list of justifiable reasons, by reference to a “legitimate aim”, for differential treatment under national law.
- The ECJ in this case confirmed the decision in *Palacios de la Villa*, where it was ruled that national retirement rules do fall within the scope of the Directive.
- Moreover, the ECJ in the *Age Concern England* case noted that Article 6(1) does not mean that national legislation has to set out a precise list of aims that can justify age discrimination.
- However, the ECJ emphasised that the measure in question (i.e. MRA) must be justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training.

**EU Case #4: C-45/09 Rosenblatt v Oellerking Gebäudereinigungsges mbh [2010]<sup>4</sup>**

- *Rosenblatt* confirmed the position held in *Heyday*, whereby member states were not required to put together a specific list of differences in treatment which may be justified by a legitimate aim.
- This case confirmed that member states, as well as social partners, have broad discretion of what constitutes a justifiable aim in the area of social and employment policy once the “aims are legitimate within the meaning of Article 6(1) thereof and are appropriate and necessary to achieve those aims” [para 45].

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<sup>3</sup> Hereinafter referred to as *Heyday*.

<sup>4</sup> Hereinafter referred to as *Rosenblatt*.

- This case saw the ECJ uphold a German law, which supported a clause in a collective agreement that provided for automatic termination upon entitlement to a retirement pension.
- The aims of the national law in question included; creating an intergenerational workforce; making it easier for younger workers to find work, particularly in a time of chronic unemployment; and avoiding dismissals of older workers on grounds of reduced performance, which may be humiliating.
- The *Rosenbladt* case emphasised that the collective agreement implementing the MRA must itself pursue a legitimate aim in an appropriate and necessary manner.
- The ECJ stated that the clause offered stability of employment and "a certain flexibility" in the management of staff, thus reflecting a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment.
- In *Rosenbladt* the ECJ pointed to the fact, that it is not proven that there was a direct relationship between older workers leaving the labour market and the creation of jobs for young workers.
- While confirming that the Directive did not preclude collective agreements from review, the ECJ noted that “[t]he authorisation of clauses on automatic termination of employment contracts on the ground that an employee has reached retirement age cannot, generally, be regarded as unduly prejudicing the legitimate interests of the workers concerned” [para 56].

#### **EU Case #5: C- 159/10 and C- 160/10 Fuchs and Kohler v Land Hessen [2011]<sup>5</sup>**

- The employer submitted that the MRA policy being disputed was “designed to establish a balance between the generations, in addition to ... three further aims: efficient planning of the departure and recruitment of staff, encouraging the recruitment and promotion of young people, and avoiding disputes relating to employees’ ability to perform their duties beyond the age of 65” [para 47].
- Moreover, the employer argued that the presence of multiple generations within their workplace “helps to ensure that the experience of older staff is passed on to younger colleagues and that younger staff share recently acquired knowledge, thus contributing to the provision of a high-quality public justice service” [para 48].
- The *Fuchs and Kohler* held that the MRA of 65 years for state prosecutors did not breach the employee’s rights as the aim of establishing a balanced age structure to cater for intergenerational fairness did not exceed a legitimate aim.

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<sup>5</sup> Hereinafter referred to as *Fuchs and Kohler*.

- Other legitimate aims which the ECJ held include the aim to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age.
- Furthermore, the ECJ held that “[i]n order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess.” [para 58].
- On behalf of the employee, it was submitted that the employer was attempting to make budgetary savings, as recent studies show that there is no correlation between the compulsory retirement of persons who have reached the age limit and younger persons entering the profession.
- The *Fuchs and Kohler* case highlighted the importance of older workers participating in the labour force when the ECJ noted that “[k]eeping older workers in the labour force promotes diversity in the workforce, which is an aim recognised in recital 25 in Directive 2000/78; moreover, it contributes to the realising of their potential and to the quality of life of the workers concerned, in accordance with the concerns of the European Union legislature set out in recitals 8, 9 and 11 in that directive.” [para 63].

**EU Case #6: Reinhard Prigge and Others v Deutsche Lufthansa AG [2011] C-447/09<sup>6</sup>**

- In this case, the ECJ stated that the limitation of pilots acting as pilots to age 60 pursues the objective of guaranteeing the safety of passengers, persons in areas over which aircraft fly and the safety and health of pilots themselves, which may justify a difference in treatment, and that that limitation may be provided for in a collective agreement.
- However, the ECJ noted that international and German legislation considered that it was not necessary to prohibit pilots from acting as pilots after the age of 60 but that it sufficed merely to restrict those activities.
- This case saw the ECJ reiterate that the list of legitimate aims set out in Article 6(1) is not exhaustive.
- However, the ECJ held that an aim such as air traffic safety does not fall within the aims referred to in the first paragraph of Article 6(1).

**WRC Case #1: Micheal Fox v Tedcastles Aviation Fuels Limited [2019] ADJ-00016441<sup>7</sup>**

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<sup>6</sup> Hereinafter referred to as *Prigge*.

<sup>7</sup> Hereinafter referred to as *Fox*.

- The employer outlined why its retirement age for the employee, a plane refueller, was objectively justified, covering the areas of a) intergenerational fairness, b) succession planning, c) health and safety of aircraft refuellers, and d) dignity in the workplace.
  - a) **Intergenerational fairness:** It was submitted that the established MRA provided opportunities for younger people. Moreover, it was submitted that the majority of progression into relief rolls in the last 10 years were a result of enforcing the MRA.
  - b) **Succession planning:** It was plainly submitted that MRA was justified by creating opportunities for career progression.
  - c) **Health and safety:** The employer argued that the work of a plane refueller carries significant health and safety hazards: heavy physical workloads, shift work and noisy environments, all of which the employer argued have a greater impact on older workers. It was further submitted that health and safety concerns are, and always have been, the primary focus of management in considering the risk to staff and members of the public arising from the work
  - d) **Dignity in the workplace:** The employer also justified the MRA on the grounds of protecting the dignity of older workers: that they would not have to go through performance management with “difficult and stressful HR processes”.

Decision: The AO found that the employee claim of age discrimination was well-founded.

**WRC Case #2: Kathleen Dempsey v The West of Ireland Alzheimer Foundation [2019] ADJ-00014857<sup>8</sup>**

- This case involved the employee, a care assistant and the employer, a body that provides care for people with Alzheimer’s.
- The employer argued that the work was too **physically demanding** for an older person to carry out and therefore, the MRA was justifiable.
- The employer highlighted that the employee works a physically demanding job where she is required to care for vulnerable patients including attending to their personal care such as washing, toileting and other aspects of daily living.
- The employer specifically highlighted significant periods of absence in the preceding years (3 weeks in 2018, 10 weeks in 2017, 13 weeks in 2016 and 1.5 weeks in 2015) and claimed that these absences were an indicator of a trend that those in labour intensive work will suffer with increasing illnesses as they get older.
- The employee outlined that she had an unblemished record throughout her 15 years’ service with the employer and there had been no complaints regarding her ability to carry out her duties nor was there ever a risk assessment conducted if there were concerns about

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<sup>8</sup> Hereinafter referred to as *Kathleen Dempsey*.



ability and her continued employment was not an obstruction to the progression of younger workers.

- Decision: The AO found that the employee had established a prima facie case of discrimination on the grounds of age and the burden of proof was shifted to the employer who were unable to meet the standard.

#### **WRC Case #3: Marine Pilot v Port Company [2019] ADJ-00004560<sup>9</sup>**

- This case involved the employee, a marine pilot and the employer, a port company who was seeking to justify the MRA due to concerns of **physical health and safety**.
- The employer submitted that the role is a physically demanding one and that the physical aspect of the work is reflected in the accident that the complainant had at work some years ago.
- Decision: The retirement age of 65 years is justified in this case and the employee's case was rejected. The AO found that a MRA in an organisation assists workforce planning and prevents disputes on whether or not a person is fit to perform the work. The role of a Marine Pilot is a physically demanding role and can be hazardous. Safety of employees is important, and the retirement age of 65 years is justified to meet this objective. The employee's own experience of an accident in 2011 demonstrates this fact.

#### **WRC Case #4: Judy Bramford v Citizens Information Phone Service Ltd [2019] ADJ-00017442**

- This case involved the employee, and the employer Citizens Information. The employer relied upon two main grounds to objectively justify the mandatory retirement age a) workforce planning and b) intergenerational fairness.
  - a) Workforce planning**

The employer claimed that the purpose of a retirement age is to allow promotional opportunities to other employees within the organisation.
  - b) Intergenerational fairness**

The employer noted that they support the principle of intergenerational fairness to allow for younger workers to gain promotional employment and to ensure that they have a workforce who can fully participate in any succession planning for vacancies that may arise.
- Decision: The complaint was rejected as the AO found the MRA was objectively justifiable.

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<sup>9</sup> Hereinafter referred to as *Marine Pilot*.

**Case #5: Sales Advisor/Mechanic/Department Manager v DIY/Electrical Retailer [2018] ADJ-00013899**

- The employer in this case argues that the MRA of 65 was objectively justified by the legitimate policy aims of a) health and safety, b) workforce planning and c) dignity at work. Setting of a retirement age of 65 is an appropriate and necessary means of achieving the policy aims.

**a) Health and safety**

The employer submitted that the employee's role requires a good reaction from a safety point of view and that the business viewed safety as paramount. Furthermore, it was submitted that hearing capacity is not the same after 65 and other senses become reduced.

**b) Intergenerational fairness**

The employer noted that it would be dangerous to the business not to apply an outer limit to retirement age as others needed to be given a chance on an intergenerational fairness basis.

**c) Dignity at work**

The employer argued that the retirement age of 65 was justified by avoiding the humiliation of dismissing employees for incompetence if no retirement age ensued. Furthermore, the employer wished to avoid a situation where staff may be humiliated if they couldn't muster the workload as it was a known fact that workers more than age 65 slow down.

- Decision: The AO held that the employer's submissions were not enough to rebut the employees claims.

**WRC Case #6: Valerie Cox v RTE [2018] ADJ-00006972<sup>10</sup>**

- This case involved the employee, a broadcaster, and the employer RTE.
- The employer stated the MRA of 65 which was designed to encourage a high retention rate by **creating opportunities for promotion**, thus creating **intergenerational fairness**.
- Moreover, the employer argued that the MRA ensures the **renewal of the employment teams** and it recognises the dignity and respect due to all employees and it **avoids disputes regarding capacity and underperformance**.
- RTE argued that they had a significant interest in ensuring the progression of younger members of staff and for the rotation of staff, in order to reflect the diversity of Irish society.

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<sup>10</sup> Hereinafter referred to as *Cox*.

- Decision: I find that the Complainant has met the burden of proof test and she has established facts from which it is presumed there has been discrimination in relation to her. The burden of proof now passes to the Respondent to prove the contrary.

#### **WRC Case #7: Anne Roper v RTE [2020] <sup>11</sup>**

- The intergenerational fairness was argued by the RTÉ, to justify MRA, as it allowed younger employees to progress into senior positions and attracted new talent into the organisation.
- Further to this, RTE claimed that they had a duty to serve a diverse demographic and the MRA allowed them to broadcast programmes that are of interest and relevance to a younger audience.
- This case saw the WRC highlight that intergenerational fairness is a broad concept and that it would limit its interpretation of the concept to ‘allowing younger workers to progress’, as it says in Code of Practice on Longer Working.
- In this decision, the WRC engaged in a balancing act and examined that the impact the mandatory retirement would have on the employee was greater than the minimal effect that it would have on the organisation as a whole.
- Decision: The AO noted that the enforcement of MRA delivered a brief alleviation of disgruntlement among staff around promotion prospects, but as a means of actually achieving intergenerational fairness its effectivity was dubious. In this way, the measure was disproportionate and could not be objectively justified.

#### **CASES UPDATED 9<sup>TH</sup> September 2020**

#### **Joseph McGrath v Focus Ireland [2020] ADJ-00018823**

- Mr McGrath, a former Civil Servant and member of the Defence Forces, was first hired by the Focus Ireland charity in 2016, on a two-year contract for a new family mediation project.
- During the 2016-2018 period, Focus Ireland raised its retirement age to 66. Mr McGrath turned 66 in April 2018. Before the end of Mr McGrath’s fixed-term contract, he asked for an extension of his employment which was declined.
- Focus Ireland advertised internally for the role he had been working, to which Mr McGrath applied (being the sole applicant), but the employer did not process his application, telling him he had “reached the retirement age at this juncture.”

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<sup>11</sup> Hereinafter referred to as *Roper*.

- Mr McGrath argued that his age should have been seen as a positive, not a negative, and felt “humiliated and hurt” in the way he was treated, noting he did not get to meet with HR face to face.
- Focus Ireland argued the complainant could have had no expectation of working beyond the term of his contract, and that his employment ended because his contract expired, not because of his age.
- Focus Ireland submitted that a **legitimate aim was preventing future disputes regarding an employee’s fitness and to protect the dignity of employees**. It outlined that it maintains a retirement age of 66, which is applied to all staff. The complainant’s employment terminated at the end of the fixed-term contract. His subsequent application was not considered as he was then above the retirement age.
- Additionally, Focus Ireland said that this was justified by the complainant’s entitlement to pension. They also referred to **protecting the dignity of workers**. They submitted that **manpower planning allows the employer to anticipate people retiring**, i.e. to train people in advance of pending retirements. Focus Ireland said that it would take account of future increases in the pension age.

**Decision:**

- The AO held found that Focus Ireland did not use appropriate or necessary means to achieve its aim of fitness and dignity of its employees, when it did not accept Mr Joseph McGrath’s request for an extension of employment.
- The AO said that the aims of Focus Ireland, in not acceding to Mr McGrath’s request for extension of employment, were legitimate, but its means were not appropriate or necessary.
- He found the employer took a narrow approach to the issue using “the blunt indicia of age when fitness could have been readily assessed in other ways.”
- He referred to the services manager giving the complainant a “glowing reference.”
- Focus Ireland “only cited the complainant’s age, rather than the particular circumstances.” Mr McGrath had made out a strong case for his employment to continue for a further fixed period.
- The AO also stated that a “mix of ages was appropriate in addressing the challenges” of the work Focus Ireland was engaged in.
- He awarded Mr McGrath €22,000 for the infringement of his rights, noting he has a pension from his service in the Defence Forces, and the work that Focus Ireland does.

## **Operations Manager v Oil Company [2020] ADJ-00023458**

- The complainant worked at the oil company up to June 2017, when he turned 65 – the mandatory retirement age that was in place.
  - However, he was offered fixed-term contracts after he reached 65, and worked two successive contracts until June 2019, when his employment was terminated.
  - While the retirement age was clearly stated, the complainant contended that the mandatory retirement was not objectively justified.
  - The respondent outlined several reasons to the WRC adjudicator, as to why it used a retirement age, including 1) **health and safety of staff**, 2) **preservation of personal and professional dignity**, 3) **succession planning**, and 4) **to provide promotional opportunities in the organisation**, noting it has a “flat” structure
- 1) Health and safety of staff
    - The respondent noted that the Complainant’s role is not a health and safety critical or physical role, other roles with the Respondent organisation are physically demanding and/or safety critical. However, the Respondent is entitled to elect one mandatory retirement for all staff rather than setting different retirement ages within the business.
    - The respondent relied on the accepted argument in *Paul Doyle -v- ESB International (DEC-E2012-086)* whereby it was argued that there was a real need to have **cohesion in the workplace by having the same retirement age for all employees**.
  - 2) Preservation of personal and professional dignity
    - The Respondent argued that the setting of a retirement age in the Respondent organisation is essential to prevent disputes regarding performance.
    - The Respondent relied on the decision of the Labour Court in the case of *Irish Ferries Limited v Martin McDermott EDA1631* when it was found that setting a retirement age was a legitimate means of preserving the dignity of the older workforce.
  - 3) Succession planning
    - The Respondent argued that the organisation needs to be able to plan when staff are retiring in order to plan for recruitment of a replacement. This is particularly important for roles in the Respondent’s head office and management roles. Of the overall staff headcount of 380, only 20% of the workforce are at manager level with responsibility for Health & Safety, Cash & Stock assets and Staff. Proper planning therefore around succession is critical for the operation of the business.
  - 4) Providing Promotional Opportunities
    - The Respondent submitted that due to unemployment currently standing at 5.2%, retailers are finding it increasingly difficult to retain and recruit staff. The difficulty in recruiting and retaining staff in the company is evident from its high staff turnover figures: Staff

Turnover Figures 2018 - Starters 294; Leavers 222. Turnover Figures 2019 Year to date Starters 167; Leavers 188.

- The Respondent argued that due to the flat structure in the organisation (with a narrow or funnelling affect at the top), promotional opportunities are rare and it is vital therefore that staff are retired in the business to allow promotional opportunities.
- The Respondent also noted that the mandatory retirement age was necessary to ensure intergenerational fairness.

**Decision:**

- On the health and safety argument, the AO found no suggestion that the complainant's health was an impediment to him continuing in employment, noting as well that the company was willing to offer him work on a contractual basis."
- On the intergenerational fairness argument, the AO observed that "no evidence was adduced by the respondent to support such a position."
- On the internal recruitment and promotion opportunities argument, this was not explained why it applied then and not to the two fixed-term contracts the complainant worked after the age of 65.
- Mr Hanly noted that while succession planning is a critical business objective, this reasoning was not clearly advanced by the respondent at the time of the termination of employment and similar to the previous point, why it applied at 65 and not for the two subsequent contracts.
- On the preservation of personal and professional dignity argument, Mr Hanly commented that this "may very well be a legitimate objective of any organisation however I found no evidence that this was raised by the respondent with the complainant at the time of his retirement and there was no inference whatsoever that the complainant was not capable of performing his duties."
- Neither was there any suggestion that the complainant had been capable of performing his duties at the time of the two fixed-term contracts but not at the time when his employment was terminated.
- Interestingly in this case, the AO accepted the Respondent's "aims" were legitimate. However, in demonstrating that the means of achieving those aims is both necessary and appropriate, **an employer must examine the actual circumstances of the employee's position. It is not enough to simply cite only the employee's age.**
- **Employers should consider other potential ways the relevant "aims" might be achieved** in the individual circumstances, taking into account the particular role carried out by the employee.

## CHAPTER FIVE – DISCUSSION

### 5.1 Discussion: Introduction

The primary objective of this research was to develop a clearer understanding of what the WRC are accepting as objective justifications to defend MRAs. This chapter will discuss the importance of the stated findings to this academic exploration by relating them to the information gathered from the literature review. The contents of this discussion seeks to answer the research question:

*‘What are the implications on Irish employers of the WRC’s recent application of the objective justification test to mandatory retirement ages?’*

### 5.2 Analysis of research findings

This section will discuss three main issues that the author has identified with the purpose of developing a clearer understanding of how Irish employers will be able to justify MRA. Firstly, this thesis will look specifically at the WRC’s interpretation of the defence of ‘intergenerational fairness’. Secondly, this thesis will consider the relationship between recurring objective justifications and the negative assumptions linked to older workers. Lastly, this thesis will discuss concerns regarding the strain on national pension systems and the quality of life of older workers after mandatory retirement.

#### 1. Intergenerational fairness

The author suggests that the justification of intergenerational fairness i.e. creating a balance between generations (Dewhurst 2013) which has traditionally been relied on by employers to defend MRA, is losing its wide-reaching power. As seen in *Rosenblatt* and *Fuchs and Kohler*, the ECJ has consistently held that the legitimate aim of achieving intergenerational fairness may be used to justify MRAs. Alongside the contemporary evidence that Europe will have more people retiring than entering the labour market (Eurofound 2020; European Commission 2015), this thesis argues that the viability of intergenerational fairness as a justification has weakened. The author’s argument appears to be illustrated in the decisions of *Cox* and *Roper*, both in which the WRC rejected the use of intergenerational fairness as an objective justification thus, significantly raising the bar for employers. The author proposes that the wording within the Code of Practice on Longer Working (SI 600/2017) also illustrates that the bar has been raised for Irish employers as it confines the scope of the term intergenerational fairness by defining it as ‘allowing younger workers to progress’. Cases such as *Rosenblatt*, have seen the term intergenerational fairness employed to include both the idea of ‘allowing younger workers to progress’ as well as ‘creating a balanced age structure’. However, the Code of Practice on Longer Working (SI 600/2017) has acknowledged that ‘creating a balance age structure’ is a legitimate aim separate to the intergenerational fairness justification.

The author suggest that the WRC's scrutiny and narrow interpretation of the intergenerational fairness justification should prompt employers to be more thoughtful when setting an MRA. Further to this, when doing so the author suggests that employers should carefully consider the potential effects that mandatory retirement could have on the employee versus the effect that the measure will have on the organisation as a whole, similar to what the WRC did in *Roper*. The author suggests that the WRC seem to have limited the wide-reaching of the intergenerational fairness defence to raise the bar for employers, thus forcing them to reconsider the now arguably outdated normal retirement age of 65 (Oude 2019).

## **2. Relationship between recurring objective justifications and older worker stereotypes**

With so many reasons motivating older workers to work beyond normal retirement age (Friedmann and Havighurst 1954), it is unsurprising that in recent years the WRC have reported a large volume of cases challenging MRA (Graphite HRM 2020). The author proposes that often the objective justifications used by employers to defend MRAs, stem from the older worker stereotypes such as those outlined by Peterson and Coberly (1988) and, Shea and Hassen (2006). For example, as observed in the *Kathleen Dempsey* case employers have argued that MRA is necessary for public safety as older workers become less capable of carrying out physically demanding tasks due to increased illness. As Shea and Hassen (2006) have noted, this stereotype often leads to the assumption that older workers have a reduced capacity to perform workplace tasks, suffer from a loss of stamina, and engage in absenteeism. This author proposes that the deficit hypothesis, whereby employers perceive older workers as experiencing a general decline of skills, abilities and performance (Johnson *et al.* 2017) offers a possible explanation as to why employers' objective justifications of MRA are rooted in older worker stereotypes. In the *Marine Pilot* case and *Prigge*, both the ECJ and WRC acknowledged that in certain hazardous professions e.g. pilots MRA may be appropriate and necessary to satisfy public health and safety concerns. Interestingly, in the *Kathleen Dempsey* case where the job was not recognised as dangerous the WRC ruled in favour of the employee, which the author suggests that the distinction between these cases is an indicator that the WRC are challenging employers to confront the underlying ageist reasoning behind implementing certain MRAs. Moreover, the author suggests that the WRC are recognising that many jobs do not require an extensive amount of mental and/or physical capacity (Sterns and Chang 2010) or can be made easier in some way to facilitate the older worker to continue employment rather than enforcing mandatory retirement.

Similarly, the author argues that, as seen in *Fox*, the 'dignity at work' defence appears to be an example of 'compassionate ageism' (Binstock 2010). Further to this, the author proposes that this defence at first glance looks as though its interest lies with the employee, however, it is merely a superficial defence that is deep-rooted in several stereotypes e.g. increased age results in increased workplace accidents (Peterson and Corberly 1988). The author argues that WRC case law indicates



that this defence has become obsolete as the WRC are encouraging employers to think about retirement as a process rather than one-time life event (Bélanger *et al.* 2016). In this way, rather than shying away from measuring the performance of older workers, the author suggests that these are the measures that need to be encouraged in order to allow older workers to continue employment.

The author proposes that the recent WRC decisions are actively challenging the beliefs stemming from older worker stereotypes and making employers reflect on what it means to be an older worker today. Consequently, the author argues that Irish employers will find it difficult to continue to justify the normal retirement age of 65, as the case law is making employers confront their negative perception of older workers. It appears the WRC are unwilling to accept ageist beliefs regarding older workers abilities and needs which may reflect that the WRC are in some way responding to the call for government action to tackle the economic and social challenges facing the ageing Irish population (Ryan *et al.* 2017; Gillick 2017).

### **3. Reducing the strain on pensions and avoiding ‘pension poverty’**

The author proposes that employers need to be cognisant of the economic need for older workers to remain in the workforce and therefore adjust how they think of mandatory retirement and the retirement process altogether. The EU’s economic concerns regarding the strain on national pension systems in context of a demographic crisis has been made clear (Eurofound; European Commission 2015). However, the literature has shown that the state pension is not enough to financially satisfy older workers (William Fry 2016). This is particularly true for approximately 40% of people who do not have a private pension and would have to rely on the state pension as their only form of income (Central Statistics Office 2020). As previously discussed, cases such as *Cox* and *Roper* have shown that the WRC are adopting a strict approach when applying the objective justification test.

The author suggests that by adopting a strict approach, the WRC is seeking to reconcile the State’s increasing economic burden of pension payment, with the evident desire of older workers to continue employment in order to satisfy their own economic burdens i.e. debt, maintaining their lifestyle, leaving money to family (Keogh 2017; Bélanger *et al.* 2016; Jahoda 1982). Figures have shown that Ireland will not be able to maintain the current pension system unless employers are forced to recognise the value of older workers (Ryan *et al.* 2017). Further to this, the author argues that by raising the bar for employers the WRC are making the current legislation fit for purpose. For Irish employers, it is necessary that when they are setting an MRA that they recognise the role they play in relieving the pressure from the Irish pension system. In this way, it is necessary that they understand the negative financial impact that implementing MRA may have on the individual employee’s financial situation and therefore, the effect it will have on the employee’s overall quality of life. Again, the author notes that Irish employers will find it difficult to set the MRA to 65, particularly with the increasing age of entitlement for State pension (Citizens Information 2019).

#### **4. Sustaining older workers quality of life**

In addition to the economic concerns relating to the issue of MRA, the aim of ensuring social cohesion is also an important original objective of implementing age discrimination legislation. This idea was reflected in the *Fuchs and Kohler* case when the ECJ noted the importance of allowing older workers to continue working in order to realize their potential and sustain a good quality of life. With this in mind, the author argues that besides financial dependency, Irish employers need to take into account that older workers are motivated to work for several social type reasons including: to interact socially (Bright 2010), to continue to have daily structure (Atchley 1999) and fulfil their sense of purpose and identity (Sterns 2010). Additionally, the social aspect of work has shown to positively impact the mental and physical well-being of older individuals (Büsch *et al.* 2012; Nilsson *et al.* 2011). This thesis suggests that the *Roper* case indicates that the WRC are coercing employers to consider more closely the overall effect that MRA has on each individual and as proposed by social role theory (Moen 1996), recognise the loss of a job in context of other role losses that typically occur in ones 60s. The author proposes that going forward employers have a difficult time justifying that MRA is an appropriate and necessary measure to achieve any legitimate aim when the literature has made it evident that mental and physical well-being of employees may be at risk as a result of MRA.

#### **5.3 Conclusion**

By combining the insight gathered from the literature review with the findings gathered from the case law analysis, this allowed the author to successfully gather insight for employers who are seeking to set and enforce MRAs. In conclusion, the research has shown that the WRC's strict application of the objective justification test is making the law fit for purpose, in line with the original aims of the Directive, whereby employers are being forced to challenge older worker stereotypes and facilitate older workers to continue employment past the normal retirement age. Moreover, the normal retirement age of 65 appears to be outdated, particularly when compared against the increasing life-expectancy and the evident desire of many older individuals to work past the age of 65.

#### **5.4 Practical Recommendations**

This thesis offers two practical recommendations:

##### **1. Mentorship**

The author proposes that in the genuine interest of achieving intergenerational fairness, employers may create a mentoring role for older workers. Such a role would allow older workers to continue employment but with a reduced level of responsibility and perhaps with a reduced number of hours. Older workers who engage in mentoring would pass on their invaluable knowledge and experience to younger employees who would be taking over the senior roles. This would not only allow older

workers to continue employment but also provide a support system for younger workers and contribute to their overall job satisfaction.

## **2. Start conversations about retirement well in advance**

The author highlights the importance of employers communicating with the employee of what the retirement process will look like to them. Starting up a conversation about retirement well in advance of the normal retirement age will allow employers to assess the various needs of their older workers and therefore, set a more thoughtful MRA and perhaps develop a retirement process i.e. create mentoring opportunities.

### **ADDITIONAL INFORMATION UPDATED 16<sup>TH</sup> DECEMBER 2020**

The points below discuss the increase of entitlement to State Pension in light of the economic effects of the Covid-19 pandemic:

- In May 2020 the IRN/CIPD survey of 250 private sector employers found that “32.5% were planning to align their retirement age with state pension, while 42.4% said their policy was still for staff to retire at 65. Fixed term contracts on retirement were used by 16% and 13% either had open-ended retirement or abolished retirement ages completely.”<sup>12</sup> (Higgins 2020)
- The Society of Actuaries in Ireland (the Society) has called for an increase in the State Pension age since 2003. The Society’s believes that an increase in State Pension age is necessary as it is linked directly to increasing life expectancies. With an ageing population who spend a greater portion of their lives in retirement, the greater the pressure will be on the Social Insurance Fund (SIF) to continue paying the State Pension at its current level. (Gillick 2020).
- There are concerns that the SIF will fall into deficit, similar to what happened in the financial crisis in 2008-2010, as a result of the effects of the Covid-19 pandemic (Gillick 2020).
- Jerry Moriarty, chief executive of the Irish Association of Pension Funds (IAPF) has suggested the introduction of a ‘reduced pension’ may help those who reach the age of 65 and forced to retire but find they must apply for job seekers allowance for two years rather than the state pension (Reeve 2020)

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<sup>12</sup> Industrial Relations News IRN 40.

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