Tackling Age Discrimination against Older Workers: A Comparative Analysis of Laws in the United Kingdom and Finland

Alysia Blackham*

Abstract
The European Union is experiencing a period of dramatic demographic change. As individuals live longer, and the proportion of ‘prime age’ workers decreases, governments are increasingly seeking to extend working life, particularly by encouraging older workers to remain in employment for longer. This has encouraged a greater focus on reducing age discrimination in employment to enable older workers who wish to continue to work to do so, including through the introduction of age discrimination legislation at the EU and domestic level. However, despite the presence of a general framework for equal treatment in employment and occupation at the EU level, there are still significant differences across national provisions. This paper considers how age discrimination laws affecting employment differ between EU Member States, focusing particularly on the United Kingdom and Finland.

Keywords
Age Discrimination, Comparative Law, Equality Law, United Kingdom, Finland, European Union Law, Labour Law

The European Union (EU) is experiencing a period of dramatic demographic change. As individuals live longer, and the proportion of ‘prime age’ workers decreases, governments are increasingly seeking to extend working life, particularly by encouraging older workers to remain in employment for longer.¹ This has prompted a greater focus on reducing age discrimination in employment to enable older workers who wish to continue to

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¹ Turpin-Lipstein Fellow and College Lecturer in Law, Clare College; Affiliated Lecturer, Faculty of Law, University of Cambridge (UK). This article was presented as a paper at the Third Young Scholars’ Workshop in Labour Relations in Modena, Italy. The author would like to thank Professor Catherine Barnard for her helpful comments on an earlier version of this article.

work to do so, including through the introduction of age discrimination legislation at the EU and domestic levels.\(^2\) However, despite the presence of a general framework for equal treatment in employment and occupation at the EU level, in the form of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Directive),\(^3\) there are still significant differences across national provisions, particularly as they relate to the treatment of older workers.

In this context, this paper considers how age discrimination laws affecting the employment of older workers differ between EU Member States, focusing particularly on the United Kingdom (UK) and Finland. Finland has the longest history of legal intervention in age discrimination in the EU,\(^4\) and is notable for the relative success of its labour market interventions relating to older workers.\(^5\) As a result, it is an interesting and worthwhile comparator for other EU countries. In this paper, I identify four key differences between age discrimination laws in the UK and Finland, relating to: the development and structure of the legislation; the duties placed on public authorities; the use of retirement ages; and enforcement mechanisms. I argue that these differences may be attributed to contrasting national attitudes to age and age equality, conceptions of ‘equality’ more broadly, and the degree of individualism or collectivism evident in the laws and their means of enforcement.

Thus, despite EU legislative intervention in the area of age equality, there are still substantial differences between the laws adopted in different Member States. On the face of it, age discrimination laws that adopt collectivist measures, like those in Finland, have the potential to improve outcomes for older workers by facilitating enforcement at the macro or societal level. There are therefore worthwhile lessons for the UK from the Finnish legislative model, and these are explored in the paper.

1 EU Regulation

1.1 Age discrimination

Instruments to prevent age discrimination were first introduced at the EU level in 2000. In 1997, the Treaty Establishing the European Community was amended by the Treaty

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of Amsterdam to include a new article 6a\(^6\) that empowered the Council of the European Union to take action to combat discrimination on a number of grounds, including age. Empowered by the now article 19 of the Treaty on the Functioning of the European Union (TFEU), in 2000 the Council of the European Union adopted the Directive which established a general framework for equal treatment in employment and occupation, including on the grounds of age.\(^7\) Further, the Court of Justice of the European Union (CJEU) has held (controversially) that non-discrimination on the grounds of age is a general principle of EU law,\(^8\) which is given specific expression by the Directive.\(^9\)

The Directive prohibits direct and indirect discrimination based on age in employment and occupation, and applies to conditions for access to employment, access to training, employment and working conditions and involvement in work organisations. Direct age discrimination is defined as treating a person less favourably than another in a comparable situation on the grounds of age.\(^10\) Indirect age discrimination is defined as a situation where:

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\text{an apparently neutral provision, criterion or practice would put persons (…) [of] a particular age (…) at a particular disadvantage compared with other persons unless (…) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.}\(^11\)
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A number of specific exceptions to the principle of equal treatment are provided for in the Directive. First, the provisions in relation to age discrimination do not apply to the armed forces. Second, Member States may provide that a difference of treatment does not constitute discrimination where 'such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'.\(^12\) Third, and perhaps most significantly, article 6(1) of the Directive provides that Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

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\(^{7}\) Case C-144/04 Mangold v Helm [2005] ECR I-9981, para 75; Case C-555/07 Kücükdevici v Swedex GmbH [2010] ECR I-365, paras 21, 50.


\(^{10}\) Directive, art 2(2)(a).

\(^{11}\) Ibid art 2(2)(b).

\(^{12}\) Ibid art 4(1).
The Directive provides examples of differences of treatment that might fall within the provision, including

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for (...) older workers (...) to promote their vocational integration or ensure their protection (...) (c) 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.

Fourth, article 7(1) of the Directive makes provision for Member States to take positive action to achieve equality, by noting that 'the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [age] (...) with a view to ensuring full equality in practice'. While this raises the possibility of equality of outcomes, it does little to encourage Member States to address disadvantages: rather, such measures are merely not ‘prevented’ by the Directive and need to be positively adopted by Member States. It is therefore unsurprising that there has been limited use of positive action measures in European countries.13

Within the Directive there is a fundamental tension between the principle of equal treatment (and human rights objectives) and the justification of exceptions to the principle (driven by economic objectives). The Preamble to the Directive explicitly acknowledges this tension:

The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.14

The Directive attempts to strike an appropriate balance between these competing objectives through the use of the objective justification test: exceptions are acceptable where they are ‘objectively and reasonably justified by a legitimate aim (...) and if the means of achieving that aim are appropriate and necessary’.15 As a consequence, it is the responsibility of courts to determine the ‘ultimate boundaries’ of what is justified.16

This approach has two key limitations. First, the test is unclear and provides insufficient certainty for when an exception will be acceptable. In particular, determining what will constitute a ‘legitimate aim’ and be ‘appropriate and necessary’ provides

15 ibid art 6(1).
significant scope for judicial discretion and different interpretations. By leaving these issues to be resolved by the courts, the Directive makes frequent legal challenges nearly inevitable, necessitating significant time and cost to achieve a level of clarity.

Second, the test provides significant scope for Member States to undermine the principle of equal treatment on the grounds of age. It may therefore limit significantly the protection available to older workers by effectively legitimising discrimination on the grounds of age. Indeed, article 6 has been described as being so broad that it allows governments 'to tolerate most forms of age discrimination indefinitely'. As a result, the test is not an adequate means of striking an appropriate balance between competing objectives.

1.2 Mandatory retirement

EU legislative instruments provide little protection for workers who do not wish to retire: indeed, the Directive is explicitly made without prejudice to national provisions laying down retirement ages. EU case law has explicitly endorsed the use of compulsory retirement ages if the provisions are objectively and reasonably justified by a legitimate aim (such as legitimate employment policy, labour market and vocational training objectives) and the means of achieving that aim are appropriate and necessary, in accordance with article 6(1).

To be 'legitimate', the aims underlying retirement provisions must have a public interest nature beyond purely individual reasons particular to an employer's situation. However, in pursuing legitimate aims, a national rule may allow a degree of flexibility for employers. These aims do not need to be explicitly specified in legislation so long as the general context of the provision allows for the aims to be identified. Further, the

19 Schiek (n 1) 790.
20 See Directive, Preamble, recital 14. However, this has not acted to exclude retirement ages from review under the Directive.
22 Age Concern (n 21) para 46.
23 ibid.
aims underlying a provision may change over time without affecting the validity of the law itself.25

In the context of retirement provisions, the CJEU has held that legitimate aims might include:

- the creation of a ‘favourable age structure’ to establish a balance between generations;26
- distributing work and professional opportunities between generations;27
- planning for staff departures and recruitment;28
- encouraging recruitment and promotion of young people29 and other categories of workers;30
- avoiding legal disputes with older employees over their ability to perform their duties31 or the need to dismiss older employees on performance grounds, particularly in ‘situations which are humiliating for elderly workers’;33 and
- standardising the age-limit for compulsory retirement in a specific sector.34

However, ensuring air traffic safety is not a legitimate aim in this context, being beyond the scope of legitimate employment policy, labour market and vocational training objectives.35 Budget savings are also not considered a legitimate aim,36 though Member States may take budgetary constraints into account when justifying a retirement age if they are considered alongside other factors (such as social, political or demographic issues).37

The idea that the distribution of work and professional opportunities between generations could be a legitimate aim to justify age discrimination reflects the ‘fair innings’ argument, and the idea that mandatory retirement will open up jobs for (younger) workers.38 This is concerning, as there is increasing evidence and recognition that the ‘fair innings’ argument is based on flawed assumptions and reasoning.39

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25 Fuchs (n 21) paras 41–42.
26 Fuchs (n 21) paras 47, 49; Georgiev (n 21) para 46; Commission v Hungary (n 24) para 62.
27 Palacios (n 21) para 53; Georgiev (n 21) para 42; Case C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] ECR I-47, para 65; Rosenbladt (n 21) para 43.
28 Georgiev (n 21) para 45; Fuchs (n 21) paras 47, 49; Hörnfeldt (n 24) para 29.
29 Palacios (n 21) para 65; Rosenbladt (n 21) paras 43, 60–62.
30 Fuchs (n 21) paras 47, 50.
31 Fuchs (n 21) para 43.
32 Rosenbladt (n 21) para 34.
33 Commission v Hungary (n 24) para 61.
35 Fuchs (n 21) para 74.
36 ibid para 73.
38 See, for example, Performance and Innovation Unit, ‘Winning the Generation Game: Improving Opportunities for People Aged 50–65 in Work and Community Activity’ (April 2000) 39–40 <http://www.impactdata.org.uk/Incomes/GenGame>a
Alysia Blackham

legitimate aims identified by the CJEU reflect and endorse a number of collective assumptions around age and the ageing process, particularly the institutionalisation of the life course and decline theory of ageing. Thus, there are strong grounds to question the 'legitimate aims' identified in CJEU case law.40

Once a legitimate aim has been identified, the Court must determine whether the differences in treatment are appropriate and necessary to achieve that aim. Member States have a broad discretion in defining measures to achieve a legitimate aim.41 However, in exercising this discretion, Member States must not frustrate the prohibition of age discrimination in the Directive.42 Member States are required to balance the desirability of older workers remaining in employment with other (possibly divergent) interests, such as an individual’s desire to retire and the need to promote young people’s entry into the labour market.43 For a measure to be appropriate and necessary it must not appear unreasonable in the light of the aim pursued and must be supported by evidence.44

In applying the proportionality test, the Court will often consider whether workers are entitled to a ‘not unreasonable’ pension following retirement.45 If a sufficient pension is available, the Court generally accepts that retirement rules will not ‘unduly prejudice[e] the legitimate claims of workers’.46 However, even if retirement income is deemed to be inadequate, this will not prevent termination at a standard retirement age if an employee is able to continue working, either with their current employer or with a different company47 or with a different type of employment arrangement, such as a fixed-term contract.48 This reflects the desire to ensure adequacy of income for the elderly—if not through a pension, then through the later possibility of paid employment. Some older workers have been found to experience substantial difficulties in recruitment, and may fail to return to the labour market once they have lost their job.49 As a result, it is unrealistic to assume that retired workers will have the chance to return to work to secure an adequate income. Further, this argument implicitly acknowledges that older workers have no right or entitlement to remain in employment, meaning that a retirement rule cannot ‘unduly prejudice[e]’ their ‘legitimate claims’, as they have no legitimate claim to participate in the labour market. Thus, the CJEU has implicitly endorsed potentially

41 Palacios (n 21) para 68.
42 Age Concern (n 21) para 51.
43 Palacios (n 21) paras 69, 71.
44 ibid para 72; Fuchs (n 21) para 83.
45 Palacios (n 21) para 73; Rosenbladt (n 21) paras 43, 48; Georgiev (n 21) para 54; Fuchs (n 21) paras 66–67; Hörnfeldt (n 24) para 42.
46 Palacios (n 21) para 73; Georgiev (n 21) para 54; Fuchs (n 21) para 66.
47 Rosenbladt (n 21) paras 73–76; Fuchs (n 21) para 66.
48 Hörnfeldt (n 24) paras 40–41.
49 See, for example, Malcolm Sargeant, ‘United Kingdom’ in Malcolm Sargeant (ed), The Law on Age Discrimination in the EU (Kluwer Law International 2008) 224.
ageist views regarding the allocation of work and professional opportunities on the grounds of age.

If a retirement rule has been collectively bargained and/or is tailored to the circumstances of the case, it is also more likely to be regarded as proportionate.\(^\text{50}\) This reflects the argument that retirement ages:

should not be regarded as blanket age discrimination, but rather as part of a mutually agreed company personnel policy, or collective agreement, generally negotiated by individuals with reasonable bargaining power. [They] should only be banned if there are explicit reasons for governments to override such private contractual arrangements.\(^\text{31}\)

As a result, it appears that age equality can be ‘trumped’ by freedom of contract, majority rule or bargaining,\(^\text{52}\) so long as the retirement rule is appropriately negotiated between the parties.

That said, the quality of individual consent to a retirement provision is often limited. Many employees have no choice but to accept the terms on which employment is offered, and will have little or no opportunity to bargain or amend a retirement age specified in an employment contract.\(^\text{53}\) Further, union members are likely to have only a ‘diluted influence’ over the terms of a collective agreement, limiting the meaningfulness of their consent.\(^\text{54}\) Finally, a retirement age is unlikely to be a primary concern or consideration of many (particularly younger) employees at the time a contract is signed. As a result, consent to a retirement age is ‘largely illusory’ in many cases,\(^\text{55}\) undermining the argument that retirement ages should be seen as a negotiated private contractual arrangement.

Retirement rules are also more likely to be proportionate if they apply to professions with a limited number of posts where individuals cannot be promoted without a vacancy.\(^\text{56}\) This reflects a generally unsubstantiated belief that retirement rules help to facilitate the distribution of work and professional opportunities between generations.

Overall, the application of the proportionality test does not subject retirement provisions to rigorous scrutiny or require substantial proof or evidence of necessity from Member States. As a result, it appears likely that a retirement provision that reflects any of the above considerations will be deemed valid by the CJEU, providing little protection for workers who do not wish to retire. That said, Commission v Hungary may mark a shift towards more rigorous scrutiny of the proportionality of mandatory retirement ages. In that case, which involved the lowering of compulsory retirement ages for judges, prosecutors and notaries in Hungary from 70 to 62 years of age, the CJEU ruled that Hungary had ‘failed to provide any evidence’ that more lenient provisions could not have achieved

\(^{50}\) Palacios (n 21) para 74; Rosenbladt (n 21) paras 49–50, 67–69; Hörfeldt (n 24) para 32.

\(^{51}\) Morley Gunderson, Banning Mandatory Retirement: Throwing out the Baby with the Bathwater (Backgrounder No 79, CD Howe Institute 2004) 6.

\(^{52}\) Michael Connolly, ‘The Coalition Government and Age Discrimination’ (2012) 2 JBL 144, 158.

\(^{53}\) ibid.

\(^{54}\) ibid.

\(^{55}\) ibid.

\(^{56}\) See Georgiev (n 21) para 52.
the same aims, 57 particularly given other changes to increase public service retirement
ages were being introduced via a ‘gradual staggering’. 58 Therefore, the provisions were
not necessary to achieve the standardisation of retirement ages across the public service.
Further, the provisions were not appropriate to achieve a more balanced age structure
among judges, prosecutors and notaries: 59 the sudden retirement of those aged between
62 and 70 would create a ‘very significant acceleration’ of turnover in positions in 2012,
and a ‘radical slowing down’ thereafter, particularly as the retirement age would then be
progressively increased (with the rest of the public service) to 65. 60 Therefore, the change
would not create a balanced age structure in the medium and long term. 61

Commission v Hungary demonstrates that the CJEU will carefully examine the
proportionality of retirement ages in some circumstances. However, that case is
exceptional for three reasons. First, it was not a preliminary ruling, meaning the CJEU
was not limited to providing guidance to national courts. 62 Second, the case involved the
abrupt lowering of compulsory retirement ages, rather than the maintenance of established
retirement provisions. Unlike in other cases, the change therefore failed ‘to protect the
legitimate expectations of the persons concerned’. 63 Third, the broader impact of the case
may be limited by its particular political circumstances: prior to the CJEU’s decision, the
Venice Commission had condemned Hungary’s changing of judicial retirement rules as
potentially ‘open[ing] the way for undue influence on the composition of the judiciary’ 64
and raised concerns that the rules could be used ‘as a means to put an end to the term
of office of persons elected or appointed under the previous Constitution’. 65 The new
retirement rules potentially undermined the independence of the judiciary and the rule
of law. It is therefore unsurprising that the CJEU adopted a more rigorous approach
in this case, as age discrimination law was being used to secure broader political ends.
However, this more rigorous approach is unlikely to be extended to subsequent cases,
particularly where a retirement age has already been in place for some time.

57 Commission v Hungary (n 24) para 71.
58 ibid paras 73–74.
59 ibid para 79.
60 ibid para 78.
61 ibid para 77.
62 See further Elaine Dewhurst, ‘Intergenerational Balance, Mandatory Retirement and Age Discrimination in
Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?’
63 Commission v Hungary (n 24) para 68.
65 ibid para 140.
2 UK Regulation

The EU Directive was adopted in the UK by the Employment Equality (Age) Regulations 2006 (the Regulations). The Regulations were expressed as being designed to encourage the labour market participation of groups previously subject to age discrimination, while still being mindful of the need to allow employers to manage their businesses effectively. In 2010, the various UK anti-discrimination provisions, including the Regulations, were consolidated into the Equality Act 2010 (the Act) to simplify the law, remove inconsistencies and strengthen equality protection. The Act specifies nine protected characteristics, including age, which cannot be used as a basis for unfair treatment. The Act defines age as a protected characteristic as ‘a reference to a person of a particular age group’, being ‘a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

2.1 Age discrimination

The Act prohibits direct and indirect discrimination, harassment and victimisation on the grounds of age in the workplace, during recruitment, in setting the terms of employment, deciding to award promotions and provide training, and in dismissal. Direct discrimination is defined as a person treating another person less favourably than they would treat others because of a protected characteristic. However, in relation to age, less favourable treatment is not discrimination if the treatment is shown to be ‘a proportionate means of achieving a legitimate aim’. This limitation does not apply to any other protected characteristic.

Indirect discrimination is defined as applying a provision, criterion or practice that is discriminatory in relation to a relevant protected characteristic. Applying a provision, criterion or practice will be discriminatory if:

- it is, or would be, applied to people who do not share a protected characteristic;
- it puts, or would put, persons sharing a protected characteristic at a particular disadvantage when compared with persons who do not share a characteristic;
- it puts, or would put, a particular individual at that disadvantage; and

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69 Equality Act 2010 s 5.
70 ibid s 39.
71 ibid s 13(1).
72 ibid s 13(2).
73 ibid s 19(1).
the provision, criterion or practice is not shown to be a proportionate means of achieving a legitimate aim.\(^{74}\)

In addition to exempting age discrimination that is ‘a proportionate means of achieving a legitimate aim,’ the Act makes a number of specific exceptions to the prohibition of age discrimination in employment, including for:

- occupational requirements which are a proportionate means of achieving a legitimate aim;\(^{75}\)
- benefits based on length of service that:
  - relate to a period of service of up to five years duration; or
  - relate to a period of service exceeding five years duration and which the employer reasonably believes fulfil a business need;\(^{76}\) and
- enhanced redundancy payments.\(^{77}\)

The Act also established a public sector equality duty, requiring public authorities or people exercising public functions, in the exercise of their functions, to have ‘due regard’ to the need to:

- eliminate discrimination, harassment, victimisation and conduct prohibited by the Act;
- advance equality of opportunity between persons who share and do not share a protected characteristic, including by:
  - removing or minimising disadvantages suffered by persons who share a protected characteristic that are connected to that characteristic;
  - taking steps to meet the particular needs of persons who share a protected characteristic; and
  - encouraging persons who share a protected characteristic to participate in public life or activities in which their participation is disproportionately low; and
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it, including by tackling prejudice, and promoting understanding.\(^{78}\)

A review of the public sector equality duty was conducted in 2013 ‘to establish whether the Duty is operating as intended.’\(^{79}\) The Steering Group concluded that it was too early to make a final judgement about the impact of the duty, as it was only introduced in April 2011, and the available evidence was as yet inconclusive, particularly in relation to

\(^{74}\) ibid s 19(2).
\(^{75}\) ibid sch 9, s 1(1).
\(^{76}\) ibid sch 9, s 10.
\(^{77}\) ibid sch 9, s 13.
\(^{78}\) ibid s 149.
the associated costs and benefits of implementing the duty. The Group recommended that the government consider conducting a formal evaluation of the duty in 2016.

Finally, the Act allows positive action that is a proportionate means of achieving the aim of:

- enabling or encouraging persons who share a protected characteristic to overcome or minimise disadvantage connected to that characteristic;
- meeting the needs of persons who share a protected characteristic which are different from the needs of persons who do not share the characteristic; or
- enabling or encouraging persons who share a protected characteristic to participate in an activity in which their participation is disproportionately low.

Similarly, positive action may be taken in recruitment and promotion to address a disadvantage or disproportionately low participation. However, a person may only be treated more favourably than another in recruitment and promotion because of a protected characteristic if: they are as qualified as the other person (the so-called tie-break); the employer or company does not have a policy of treating persons who share the protected characteristic more favourably in recruitment or promotion; and the action is a proportionate means of overcoming or minimising the disadvantage, or promoting participation in the activity.

While positive action is allowed under the Act, most employers are unlikely to take advantage of the provisions: positive action is seen as too risky and resource-intensive to be beneficial, and may lead to a ‘potential minefield’ of legal action if employers ‘get it wrong’. Rather than being helpful to employers, the sections are a ‘trap for the well intentioned’. The drafting of the sections makes them ‘too dangerous [for employers] to use safely’, limiting any possibility of positive action in the UK.
Age discrimination claims under the Act in relation to employment are heard by employment tribunals that can make declarations, award compensation and recommend action. The Act contains a provision shifting the burden of proof in discrimination cases: if there are facts from which the court could decide, in the absence of any other explanation, that a person has contravened the Act, the court must hold that the contravention occurred, unless it can be shown that the person did not contravene the Act. The Act may also be enforced by the Equality and Human Rights Commission, which is empowered by the Equality Act 2006 to take enforcement action spanning investigations, unlawful act notices, action plans, agreements, applications to restrain, conciliation, and legal proceedings.

2.2 Mandatory retirement

Prior to the introduction of the Regulations, employers choosing to implement a normal retirement age (NRA) for their workforce were protected by legislation, with employees dismissed on the ground of retirement after reaching the NRA or age 65 being unable to claim unfair dismissal or redundancy payments. In drafting the Regulations, the government conducted extensive consultation on whether the UK should introduce a national default retirement age (DRA) and, if so, what age it should be. It was decided to include a DRA of 65 in the Regulations, while still allowing employers to retain a lower NRA if it could be objectively justified. Kilpatrick describes this decision as a ‘pragmatic concession to employer lobbying’ in which the government ‘buckled before employer pressure’ to introduce a DRA. The introduction of a DRA was criticised extensively for placing age equality secondary to business performance.

Under the Regulations, employers were required to consider an employee’s request to work beyond the retirement age and could only retire an employee in accordance

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88 Equality Act 2010 s 120.
89 ibid s 124.
90 ibid s 136.
91 See also Linda Dickens, 'The Road is Long: Thirty Years of Equality Legislation in Britain' (2007) 45 Br J Ind Relat 463, 474.
with complicated procedural provisions.\textsuperscript{96} Employers’ failure to comply with these provisions resulted in a number of legal challenges to dismissals.\textsuperscript{97} An employer could also refuse to offer employment to an applicant who was over the employer’s NRA or, if the employer did not have a NRA, over the age of 65, or an applicant who would turn that age within six months.\textsuperscript{98} Thus, the Regulations (and, later, the Act) effectively endorsed age discrimination in employment, in the form of mandatory retirement ages.

From 1 October 2011, with the passage of the Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011,\textsuperscript{99} it has no longer been possible to retire an employee in the UK using the national DRA. Under the Regulations, employers may still implement an Employer-Justified Retirement Age (EJRA) if the requirement can be objectively justified as a proportionate means of achieving a legitimate aim. Maximum recruitment ages will also need to be objectively justified.

The case of \textit{Seldon v Clarkson Wright & Jakes (A partnership)}\textsuperscript{100} provides some clarification of what will be sufficient to justify an EJRA. In that case, the UK Supreme Court considered an appeal in which a lawyer claimed he was subjected to direct age discrimination when he was compulsorily retired from the partnership at age 65 in accordance with the partnership deed. In considering the CJEU case law, the UK Supreme Court categorised legitimate aims as falling within two broad classes: first, \textit{inter-generational fairness}; and, second, \textit{dignity}.\textsuperscript{101} In relation to the actual aims identified by the Employment Tribunal (ET) as justifying the retirement provision in this case—ensuring associates were given the opportunity of partnership after a reasonable period; facilitating workforce planning; and limiting the need to use performance management to remove partners, thereby contributing to the firm’s ‘congenial and supportive culture’—the Court noted that each of these aims had been recognised by Luxembourg as legitimate social policy aims. The aims could also be related to the circumstances of the firm, making them legitimate in this particular case.\textsuperscript{102} In his additional comments, Lord Hope noted that while the aims were directed to the firm’s own best interests, this did not prevent them being legitimate social policy aims. This implies that employers will be able to fairly readily identify legitimate aims to support a retirement policy.

The \textit{Seldon} case was referred back to the ET to consider whether a retirement age of 65 was proportionate, as opposed to a retirement age more broadly: ‘there is a difference between justifying a retirement age and justifying this retirement age’.\textsuperscript{103} In May 2013, the ET held that the retirement age of 65 was appropriate and reasonably necessary for

\begin{itemize}
\item \textsuperscript{96} Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 47, sch 6. For further description and critique of these provisions, see Kilpatrick (n 94).
\item \textsuperscript{97} See, for example, \textit{Compass Group Plc v Ayodele} [2011] IRLR 802; \textit{Howard v Campbell’s Caravans Ltd} [2011] UKEAT 0609_10_1205; \textit{Bailey v R & R Plant (Peterborough) Ltd} [2011] UKEAT 0370_10_1805.
\item \textsuperscript{98} Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 7(4).
\item \textsuperscript{99} Employment Equality (Age) Regulations 2006, SI 2006/1031, reg 7(4).
\item \textsuperscript{100} \textit{ibid} paras 56–57.
\item \textsuperscript{101} \textit{ibid} para 67.
\item \textsuperscript{102} \textit{ibid} para 68.
\end{itemize}
achieving the aims of staff retention and planning for the future of the firm.\textsuperscript{104} It was important that associates ‘should see that upon the retirement of partners opportunities were created for succession to partnership, and that there was a ‘realistic long-term expectation as to when and where vacancies will arise’.\textsuperscript{105} In deciding whether the age of 65 was proportionate, the Tribunal considered the importance of consent, the existence of the DRA, the state pension age, and the fact that the CJEU had considered 65 to be a proportionate age in the past. However, the ET also noted that the position ‘might have been different’ if Mr Seldon had been retired after abolition of the DRA and planned changes to the state pension age.\textsuperscript{106} The ET’s decision on proportionality was upheld by the Employment Appeal Tribunal (EAT) in May 2014.\textsuperscript{107}

As it stands, \textit{Seldon} indicates that employers will be able to justify an EJRA with relative ease. It appears that employers will be easily able to identify legitimate aims to justify a retirement age, so long as these aims are relevant to the employer’s particular circumstances. This will be particularly straightforward where the organisation has a hierarchy with limited senior positions, as is the case in a law firm or university. However, it may be more challenging to prove that the actual retirement age adopted is a proportionate means of achieving these aims, particularly given the government has deemed a DRA of 65 to no longer be appropriate for the general workforce. The ET and EAT’s further consideration of the \textit{Seldon} case has provided very limited guidance on this issue, as the DRA was still in place at the time of Mr Seldon’s retirement.

2.3 Summary

In sum, the UK Act provides less protection for age discrimination in employment than other forms of discrimination, as both direct and indirect age discrimination may be justified as a ‘proportionate means of achieving a legitimate aim’.\textsuperscript{108} This provides significant scope for employers to undermine the principle of equal treatment on the grounds of age. Given these limitations, it is informative to consider comparative perspectives on how legislation to combat age discrimination may be structured. In this context, the legal framework in Finland, which is regarded as a successful example of legislative intervention to support older workers,\textsuperscript{109} is a useful point of comparison.
3 Finnish Regulation

3.1 Age discrimination

Non-discrimination on the basis of age is a core idea in many pieces of Finnish legislation. The Finnish Constitution provides: ‘[n]o one shall, without an acceptable reason, be treated differently from other persons on the ground of (...) age.’ Further, under the Constitution: ‘Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice.’ By defining discrimination as differential treatment without an acceptable reason, the Constitution raises the possibility that direct discrimination may be justified.

These rights are further developed in the Employment Contracts Act (55/2001) (Finland) (Employment Contracts Act), which prohibits ‘any unjustified discrimination [by employers] against employees on the basis of age.’ Employers must also generally ‘treat employees equally unless there is an acceptable cause for derogation deriving from the duties and position of the employees.’

The Non-Discrimination Act (21/2004) (Finland) (the Non-Discrimination Act) was introduced to ‘foster and safeguard equality and enhance the protection provided by law to those who have been discriminated against’ and to implement the Directive in Finnish law. The Non-Discrimination Act prohibits discrimination on the basis of age in relation to:

- conditions for access to self-employment or means of livelihood;
- recruitment conditions, employment and working conditions, personnel training and promotion;
- access to training and vocational guidance; and
- membership and involvement in work-related organisations.

Further, authorities are required to seek to

purposefully and methodically (...) foster equality and consolidate administrative and operational practices that will ensure the fostering of equality in preparatory work and decision-making [and] alter any circumstances that prevent the realization of equality.

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110 Constitution of Finland ch 2, s 6.
111 ibid ch 2, s 18.
113 Employment Contracts Act (55/2001) (Finland) ch 2, s 2.
114 ibid.
115 Non-Discrimination Act (21/2004) (Finland) s 1.
116 ibid ss 2, 6.
117 ibid s 4.
'Authorities' are defined broadly to include: central and local government authorities; independent bodies governed by public law; and societies governed by public law, individual actors and non-incorporated state enterprises when discharging public administrative functions.\(^\text{118}\)

Different treatment on the grounds of age is exempt under the Non-Discrimination Act where 'it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable justified objective' or where it relates to qualification for retirement or invalidity benefits.\(^\text{119}\) The Non-Discrimination Act also exempts 'justified different treatment, in due proportion, that is founded on a genuine and decisive requirement relating to a specific type of occupational activity and the performance of said activity'.\(^\text{120}\) The Non-Discrimination Act explicitly states that it does not prevent positive discrimination 'aimed at the achievement of genuine equality' so long as it is appropriate to its objective.\(^\text{121}\) Further, the Non-Discrimination Act exempts 'a procedure based on an equality plan, and intended to implement the intention of this Act in practice'.\(^\text{122}\)

Unlike the Directive, section 7 of the Non-Discrimination Act does not explicitly require actions to be 'appropriate and necessary' to be exempt from the scope of the Act. However, proportionality is regarded as a general principle of the Finnish legal system, meaning proportionality should be automatically taken into account when applying the Non-Discrimination Act, making the Act consistent with the Directive in practice.\(^\text{123}\) That said, Hiltunen argues that the law would be clearer if the Non-Discrimination Act had incorporated an express requirement that exemptions be 'appropriate and necessary'.\(^\text{124}\)

Occupational safety and health authorities are responsible for supervising the prohibition of discrimination in employment.\(^\text{125}\) Authorities may receive communications from employees, carry out inspections, and report cases of probable discrimination to a public prosecutor.\(^\text{126}\)

Under the Non-Discrimination Act, a court may award compensation for suffering as a result of discrimination (up to €16 430, or more 'where special cause exists'),\(^\text{127}\) amend discriminatory contractual terms or declare a contract or any part of it to be void.\(^\text{128}\) Further, the Discrimination Board may prohibit specific discriminatory conduct

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\(^{118}\) ibid.

\(^{119}\) ibid s 7(3).

\(^{120}\) ibid s 7(2).

\(^{121}\) ibid s 7.

\(^{122}\) ibid s 7(1).

\(^{123}\) Hiltunen (n 112) 28.

\(^{124}\) ibid 72–73.

\(^{125}\) Non-Discrimination Act (21/2004) (Finland) s 11.

\(^{126}\) See Act on Occupational Safety and Health Enforcement and Cooperation on Safety and Health at Workplaces (44/2006) (Finland).

\(^{127}\) This may be inconsistent with EU law: see Case C-271/91 Marshall v Southampton and South-West Hampshire Area Health Authority (II) [1993] ECR I-4367.

\(^{128}\) Non-Discrimination Act (21/2004) (Finland) ss 9, 10.
and impose a conditional fine. Individuals may also seek damages if they incur loss due to an employer ‘intentionally or through negligence [committing] a breach against obligations arising from the employment relationship’ or the Act, including the obligation to treat employees equally. Discrimination in employment is also subject to criminal sanctions, with employers liable to a fine or imprisonment for up to six months for discriminating in recruitment or in employment ‘without an important and justifiable reason’.

Given discrimination legislation was in place in Finland prior to the Directive coming into effect, it is unsurprising that the Finnish provisions occasionally deviate from the terms of the Directive. Hiltunen argues that the legislation now reflects ‘a certain dualism’, with older acts prohibiting discrimination in ‘rather general terms’ and more recent legislation following the framework of the Directive. However, preparatory works that guide the interpretation of the legislation have indicated that the law should be interpreted in accordance with the wording of the Directive and the case law of the CJEU. This has arguably alleviated the significance of any discrepancy between the provisions.

3.2 Mandatory retirement

Finland has a default retirement age of 68 for the general workforce. Under the Employment Contracts Act, chapter 6, section 1a, employment relationships for employees other than civil servants are terminated without notice at the end of the month in which the employee turns 68, unless the employer and employee agree to continue the relationship, including on the basis of a fixed-term extension. Similar arrangements are in place for civil servants and municipal workers. Employers and employees may also agree to a different retirement age, either in an employment contract or through collective agreement. Negotiated retirement ages must comply with the Non-Discrimination Act—that is, they must have ‘a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market or vocational training or some other comparable justified objective’. Contractual provisions may be ‘adjusted or ignored’ if they are ‘contrary to good practice or otherwise unreasonable’. According to Hiltunen, many employers have

129 ibid s 13.
130 Employment Contracts Act (55/2001) (Finland) ch 12, s 1.
131 Criminal Code of Finland (39/1889) (Finland) ch 47, s 3.
132 Hiltunen (n 112) 5.
133 ibid 9.
134 ibid.
135 See further ibid 12.
136 See further ibid 77.
137 Non-Discrimination Act (21/2004) (Finland) s 7(3).
138 Employment Contracts Act (55/2001) (Finland) ch 10, s 2.
adopted internal rules relating to retirement ages, and employers and employees often agree to include these rules in employment contracts.  

4 Comparison and critique

While both the UK and Finland operate within the EU legal framework, the countries’ approaches to age discrimination laws vary markedly. This is consistent with Bell’s analysis of the extent to which EU Directives have encouraged the convergence of anti-discrimination law: while the Directives may have encouraged Member States to take action in the equality field,

deeper scrutiny suggests that national models have not withered away under the influence of EU law. Europeanisation may have modified national practices, but there is still ample evidence of local diversity.  

The sections that follow consider four aspects of local diversity evident in UK and Finnish age discrimination laws, relating to: the development and structure of the legislation; the duties placed on public authorities; the use of retirement ages; and available enforcement mechanisms.

4.1 Development and structure of legislation

First, the Finnish legislation reflects ‘a certain dualism’, with older acts prohibiting discrimination in ‘rather general terms’ and more recent legislation following the framework of the Directive. In contrast, all UK legislation closely follows the terms of the Directive. As noted above, preparatory works that guide the interpretation of the Finnish legislation have rightly indicated that the law should be interpreted in accordance with the wording of the Directive and the case law of the CJEU. This has arguably alleviated the significance of any discrepancy in the Finnish provisions and, indeed, any discrepancies between the law in Finland and the law in the UK.

However, while discrepancies between the provisions are likely to have limited practical impact, the different way the national provisions have developed is likely to have more significant ramifications. The ‘certain dualism’ in Finnish legislation reflects the fact that Finland has a longer history of promoting age equality than most other EU Member States: age discrimination was prohibited in Finland well before the

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139 Hiltunen (n 112) 78.
141 Hiltunen (n 112) 5.
142 ibid 9.
143 ibid.
implementation of the Directive, meaning the terms of older acts sometimes do not accord with the Directive. However, as a consequence of this long history, measures to prevent age discrimination are now well established in Finland.

In contrast, the UK has no real tradition of age equality measures: age discrimination legislation was only adopted in response to the passing of the Directive. Prior to this, the UK government had launched a non-statutory code of practice to encourage employers to adopt non-discriminatory policies. However, there was a significant reluctance to adopt legislative age equality measures. As Sargeant notes, ‘it is (…) impossible to know whether the UK Government would have progressed to [legislative intervention] without the need to transpose the Directive.’ Despite impetus for change from the EU level, Dickens rightly recognises that the UK’s ‘receptiveness to European influence is not always wholehearted’, particularly in the area of age equality. That said, the Coalition’s support for the abolition of the DRA in 2011 might reflect a shift in governmental attitudes towards age equality in the UK.

Difficulties in implementation can be experienced where the main stimulus and motivation for change originates from outside sources, particularly where there is an incongruence between law, politics and society. As a result, despite adopting age discrimination legislation, it is unsurprising that some UK decision makers continue to view age and age discrimination with a degree of ambivalence or uncertainty. While age discrimination is generally viewed as undesirable in the UK, it is seen as less undesirable than other forms of discrimination and, indeed, potentially beneficial in an array of circumstances. Discriminating on the basis of age is often viewed as reasonable.


ibid.


Dickens (n 91) 468.

It is arguable, though, that this change was prompted by the decisions in Case C-388/07 R (Age Concern England) v Secretary of State for Business Enterprise and Regulatory Reform [2009] ECR I-1569 and R (Age UK) v Secretary of State for Business, Innovation & Skills [2009] IRLR 1017.

See, for example, Karoliina Ahtela, ‘Promoting Equality in the Workplace: Legislative Intent and Reality’ in Eva-Maria Svensson and others (eds), Nordic Equality at a Crossroads: Feminist Legal Studies Coping with Difference (Ashgate 2004) 75.


and, at the very least, easily justifiable in the interests of society more broadly. As a consequence, age is afforded the least protection of any ground of discrimination, with broad ranging exceptions to the principle of age equality.

In summary, then, the UK and Finland demonstrate dissimilar attitudes to age and age equality, which are reflected and embodied in their different legislative instruments and legislative history.

4.2 Duties on public authorities

Second, the Finnish legislation places a broad duty on authorities to ‘foster equality’. In contrast, the duty in the UK is far more limited, requiring authorities to merely have ‘due regard’ to the need to advance equality. It is questionable to what extent the ‘due regard’ standard in the UK will be effective in advancing equality in practice. Indeed, Fredman argues that the duty may be ‘too flimsy’ to encourage organisations to develop their own solutions to equality issues. The duty is arguably insufficiently prescriptive and too open-ended in its pursuit of ‘equality’ to allow a determination of when it has been complied with or breached in practice, impairing its efficacy. The duty may therefore encourage ‘mere procedural compliance’ and ‘box ticking’ by public sector organisations, rather than promoting real change. Thus, the UK duty may have significant limitations in promoting equality in practice. A more robust duty on public authorities with a stronger standard of review, such as that in Finland, may overcome some of these limitations. However, a Finnish-style duty may still be inefficient in practice, relying on judicial review to monitor and enforce compliance, and generally forcing public bodies to seek judicial determinations of whether they have complied with the duty. Thus, even a stronger standard of review would not resolve all the issues associated with imposing positive duties on UK public authorities.

The differences in the duties placed on public authorities in Finland and the UK may reflect a more fundamental distinction between the conceptions and importance

153 Helen Meenan, ‘Age Discrimination in the EU and the Framework’ in Malcolm Sargeant (ed), The Law on Age Discrimination in the EU (Kluwer Law International 2008) 18; Sargeant, ‘Age Discrimination’ (n 17) 3, 5; Sargeant, ‘The European Court of Justice and Age Discrimination’ (n 17) 146.


155 Equality Act 2010 s 149.


158 Fredman, ‘The Public Sector Equality Duty’ (n 156) 420; Fredman, ‘Breaking the Mold’ (n 157) 276.

159 Despite these limitations, the duty may have had positive impacts on the behaviour of public bodies in practice: see the examples presented to the government review of the PSED, as described in Mary-Ann Stephenson, ‘Misrepresentation and Omission—An Analysis of the Review of the Public Sector Equality Duty’ (2014) 85 Pol Q 75, 77.

160 Fredman, ‘Breaking the Mold’ (n 157) 281.
of ‘equality’ in Finnish and UK laws. There is limited agreement as to what ‘equality’ entails at both the domestic and EU level: 161 ‘equality’ is not a unitary concept, and what it entails in practice is not straightforward. 162 While the choice between different conceptions of equality is ultimately a matter for policy and value judgments, not logic, 163 governments do not always make a choice between competing interpretations. Indeed, Hepple identifies seven meanings of ‘equality’ evident in the Equality Act 2006 (UK) and government equality reviews, including:

- respect for equal worth, dignity and identity as fundamental human rights;
- eliminating status discrimination and disadvantage;
- consistent treatment/formal equality;
- substantive equality of opportunity;
- equality of capabilities;
- equality of outcomes; and
- fairness. 164

Alternatively, equality could be defined as encompassing:

- consistency (eg like individuals being treated alike, ‘formal equality’);
- individual merit (eg treating individuals according to merit, free from stereotypical assumptions);
- treating individuals differently according to their needs;
- achieving a fair distribution of social resources (eg preventing certain groups from bearing particular burdens on the grounds of group membership);
- equality of opportunities (eg giving individuals an equal set of alternatives from which to choose to pursue their idea of the ‘good life’);
- treating individuals with equal dignity and concern; and/or
- full participation and inclusion in social institutions. 165

These varied interpretations of equality continue to be evident in both UK and Finnish government policies. Equality is a fundamental principle within Finnish law, and has a long history of legislative expression and protection. 166 Indeed, Larja and others describe

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165 See Fredman, ‘The Age of Equality’ (n 162) 37–46. See also Fredman, Discrimination Law (n 163) 8–19.
equality as the ‘cornerstone of the Finnish legal system’. While Finnish legislation has increasingly come to reflect an individualised, Anglo-Saxon ‘rights-based model’ of equality, equality in Finland is still often focused on achieving social cohesion and the even distribution of resources, rather than an individual right not to be discriminated against, reflecting the Nordic communitarian legal tradition. This is evident in the Finnish Constitution, which provides that ‘[n]o one shall, without an acceptable reason, be treated differently from other persons,’ but does not establish an individual right not to be discriminated against.

Since ratifying the European Convention on Human Rights and joining the EU, Finnish legislation has increasingly come to reflect an individualised ‘rights-based model’ of equality, as embodied in the Non-Discrimination Act. A key challenge for contemporary Finnish discrimination law is reconciling a traditional emphasis on collective labour institutions (such as a trade-union regulated labour market) with the new push to achieve individual equality of opportunities. Perhaps as a result of this challenge, Pylkkanen criticises the ‘meek and half-hearted implementation of equality legislation’ in Finland, calling into question the practical efficacy of the prevailing equality rhetoric. According to Pylkkanen, in Finland:

The efficient legal framework of anti-discrimination, surprisingly, is not regarded in general as being a vital component of an equal society. This can perhaps be best explained with the thin historical layer of rights discourse as well as with the prevailing myth of an already achieved equality.

However, while Finland does not have a strong rights discourse, the need to achieve ‘equality’ through social cohesion and the even distribution of resources is an enduring focus of government and government intervention. Therefore, imposing a broad duty on authorities to ‘foster equality’ is entirely consistent with the Finnish conception of equality and the importance of equality in Finland.

In contrast, the UK has a more limited tradition of equality, with inequality forming

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170 Ch 2, s 6 (emphasis added).
171 Svensson and others (n 169) 3; Pylkkanen (n 168) 340–41.
172 Svensson and others (n 169) 3.
173 Pylkkanen (n 168) 341.
174 ibid.
175 ibid 340.
Tackling Age Discrimination against Older Workers

a fundamental historical feature of UK society. According to Thane, age discrimination is ‘embedded in British culture and is only recently and slowly beginning to shift.’ However, UK government documents now recognise equality as a key characteristic of a democratic society—‘[a]t our best, we are defined by our tolerance, freedom and fairness.’ Similarly, the Discrimination Law Review stated:

Our vision is of a society where there is opportunity for all and responsibility from all, regardless of age, disability, gender, race, religion or belief or sexual orientation; as well as background. Everyone should have an equal chance to make the most of natural ability; equitable access to public provision; equal status as a citizen; and equal responsibility back to society.

This reflects a highly individualised notion of equality of opportunities, which contrasts markedly with the collective notion of equality evident in Finland. Further, UK law is grounded in a notion of equality driven by financial and efficiency considerations, and which is designed to ensure employers get ‘the best performance out of their business’; ‘[equality] is fundamental to building a strong economy.’ As a consequence, the notion of ‘equality of opportunities’ pursued by UK laws is firmly bounded and driven by organisational efficiency. Therefore, laws to promote equality are also focussed on ensuring that ‘the labour market is both strong and efficient’ and that regulation does not impair organisational efficiency or progress. As a consequence, equality policies seek to reduce and limit government intervention in business, and seek to adopt:

a light touch implementation that strikes the right balance between tackling age discrimination effectively by giving important new rights for individuals, whilst allowing business to continue to operate productively but fairly.


177 Thane (n 176) 1.


179 Otlowski (n 176) 8.

180 Department of Trade and Industry, Equality and Diversity Coming of Age (n 93) 6.


183 See, for example, ibid.

184 Explanatory Memorandum to the Employment Equality (Age) Regulations 2006, para 2.
This limited conception of equality is reflected in the duties placed on authorities in the UK: by merely requiring public authorities or people exercising public functions to have 'due regard' to the need to 'advance equality of opportunity', the legislation has created a limited role for government in achieving equality, leaving scope for organisations and business to operate with limited government intervention, and has reemphasised the prevailing individualised idea of equality.

4.3 Retirement ages

Third, while Finnish legislation establishes a default retirement age of 68 for the Finnish workforce, the UK abolished its national DRA in 2011, though employers may still justify mandatory retirement in limited circumstances. The retention of a national default retirement age of 68 in Finland arguably reflects a more collectivist focus to equality laws. By retaining a national retirement age, and automatically terminating contracts at that age unless alternative provision is made, the Finnish provisions reflect a reification of retirement as a social institution and an orderly means of shifting older workers out of employment. While the Finnish provisions make some allowance for individual desires and needs, by allowing employers and employees to contract out of the provisions, the default rule reflects a collective understanding of wellbeing and social good, rather than an acknowledgement of individual diversity.

Conversely, the UK’s more individualistic focus is reflected in the reasons for abolishing the national default retirement age in 2011. In abolishing the DRA, the UK government declared that:

We believe strongly in the freedom of people to work on for as long as they want and are able to. (…) These changes do not mean that individuals can no longer retire at 65—simply that the timing of that retirement becomes a matter of choice rather than compulsion.

Removing a national retirement age was therefore seen as an exercise in promoting individual choice and freedom, and reducing government intervention in the activities of employers and employees. This is entirely consistent with an Anglo-Saxon model of individual rights and freedoms: while employees may still retire, this is ultimately an individual or employer decision, which must be negotiated or arranged at an individual (not governmental) level. However, employers may still adopt an EJRA where that is a proportionate means of achieving a legitimate aim, indicating that an individualistic focus will not always take priority over business needs.

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185 Equality Act 2010 s 149.
186 See further Seldon v Clarkson Wright & Jakes (A partnership) [2012] UKSC 16.
4.4 Differences in enforcement mechanisms

Finally, age discrimination legislation in Finland may be enforced by occupational safety and health authorities, individual claimants and the police, with age discrimination being regarded as both a civil and criminal wrong. In the UK, while the Equality and Human Rights Commission may take enforcement action in age discrimination matters, the majority of enforcement occurs via individual complaints and enforcement in courts and tribunals.\(^{189}\) This may reflect fundamental differences in the degree of individualism or collectivism evident in the laws and their means of enforcement.

Finnish law is grounded in a Nordic communitarian legal tradition, with a strong focus on pursuing substantive equality between social groups and a belief that individual rights are subservient to societal goals and norms.\(^{190}\) As the Finnish welfare state has become increasingly orientated towards a liberal rights framework and market forces,\(^{191}\) an individualistic focus may destabilise this communitarian tradition.\(^{192}\) However, Finland still regards itself as having a prevailing ‘sense of common responsibility’ which is ‘[one] of the cornerstones of [its] success’.\(^{193}\)

This collectivist orientation is reflected in how equality legislation is enforced in Finland and, in particular, the primary enforcement of age discrimination laws by collective measures. First, the criminalisation of discrimination in employment implies that discrimination is viewed as a social wrong, rather than an individual concern. As a result, discrimination is more frequently investigated and punished by central authorities, rather than relying on individual enforcement mechanisms. Second, the use of occupational health and safety authorities as complaints and enforcement bodies for discrimination matters implies that discrimination is perceived as having health and wellbeing implications\(^{194}\) and reflects the broader Finnish policy emphasis on collective wellbeing at work.\(^{195}\)

Given the enduring collectivist focus to the enforcement of discrimination legislation, it is unsurprising that few individual age discrimination cases have been brought under the Non-Discrimination Act (Finland).\(^{196}\) However, it is also revealing to consider the limited utilisation of more collective forms of enforcement: across all regional divisions in Finland in 2010, only 13 requests for information were sent to employers in cases of

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\(^{189}\) Dickens (n 91) 475.

\(^{190}\) Pylkkanen (n 168) 336.

\(^{191}\) Ibid.


\(^{193}\) Martti Ahtisaari, ‘Finland’s Leap Forward’ (1999) 8 Presidents and Prime Ministers 7, 7.


\(^{196}\) See, for example, Lassi Koto and Petteri Viljakainen, ‘Finland’ in Nicky ten Bokum and Paul Bartelings (eds), Age Discrimination Law in Europe (Kluwer Law International 2009) 112.
alleged age discrimination. Further, the District Courts and Courts of Appeal heard no cases of age discrimination reported to police between 2005 and 2010. This implies that collectivist enforcement mechanisms are being utilised to a very limited extent to address age discrimination. It is possible that discrimination is instead being addressed via negotiations between unions and employers at the local level. However, there is no firm evidence of this occurring. Further, equality measures are mostly contained within and advanced by legislation, rather than being negotiated via collective bargaining.

The limited use of criminal penalties in Finland as a means of addressing age discrimination is consistent with other studies on the use of penal sanctions. Previous research has found that criminal sanctions are ‘remarkably underuse[d]’ in the field of discrimination. Writing in 2006, Waaldijk and Bonini-Baraldinote that there had been no reported case law on the use of penal sanctions in discrimination cases since 1985 in France, 1992 in the Netherlands, 1995 in Finland and Spain, and 1997 in Luxembourg. This may be attributable to the higher burden of proof in criminal matters (and the inappropriateness of shifting the burden of proof, unlike in civil cases), the higher psychological cost of criminal proceedings, the greater separation of criminal proceedings from individual citizens, and the greater potential for political control of prosecutions. As a result, many Member States view the criminal law as being ‘of limited use’ in discrimination matters.

However, even if rarely utilised, criminal measures may be necessary to ensure that available remedies are ‘effective, dissuasive and proportionate’ and to ‘send out a clear signal of the state’s abhorrence of acute and the most severe discrimination’. Moon therefore concludes that:

197 Larja and others (n 167) 102.
198 ibid 109.
202 ibid.
204 Waaldijk and Bonini-Baraldi (n 201) 134.
206 Moon (n 203) 3.
In order to be truly effective, both as a norm for societal behaviour, and as a readily accessible and enforceable remedy, both civil and criminal procedures, should co-exist and complement one another.\textsuperscript{207} Therefore, while collective mechanisms are rarely utilised in Finland, they perform an important function in communicating and setting standards of behaviour for the community generally. In this way, Malmberg argues that collective enforcement mechanisms may facilitate macro-level enforcement of discrimination laws.\textsuperscript{208}

In contrast to the situation in Finland, the UK’s individualistic focus has meant that equality legislation is primarily dependent on individual litigation in ETs for enforcement. The UK is often regarded as one of the most individualistic countries in the world. In ranking countries based on an ‘individualism index’, Hofstede listed the UK as the third most individualistic nation (behind the United States of America and Australia).\textsuperscript{209} In contrast, Finland was listed seventeenth (behind Norway, Sweden, and Denmark).\textsuperscript{210}

Reflecting the UK’s individualistic focus, while the Equality and Human Rights Commission may take enforcement action in age discrimination matters, the ‘weight of enforcement’ has fallen on individual complaints and enforcement in the courts.\textsuperscript{211} This has a number of substantial limitations, including the inherent reliance upon individuals’ awareness of their rights and their willingness or capacity to enforce them.\textsuperscript{212} Dickens notes:

The role of collective enforcement is very weak in Britain. Trade unions have no standing to bring cases on behalf of a group of members; the equality commissions generally cannot initiate cases in their own name that a respondent is engaging in a discriminatory practice.\textsuperscript{213}

This has the potential to severely impair the enforcement of age discrimination legislation in the UK.\textsuperscript{214}

5 Conclusion

In the quest to extend working lives in the EU, the prohibition of age discrimination has

\textsuperscript{207} ibid.
\textsuperscript{210} ibid 215.
\textsuperscript{211} Dickens (n 91) 475.
\textsuperscript{212} Fredman, Discrimination Law (n 163) 165; Dickens (n 91) 479.
\textsuperscript{213} Dickens (n 91) 481.
been a key focus of many legislative initiatives. However, despite the existence of a broad legislative framework at the EU level, Member States have adopted divergent approaches to the task of achieving age equality. The laws in place in Finland and the UK demonstrate differences in the development and structure of age discrimination legislation, the duties placed on public authorities, the use of retirement ages and available enforcement mechanisms. These disparities reflect more fundamental national differences in attitudes toward ageing and age equality measures, conceptions of ‘equality’ and prevailing levels of individualism and collectivism.

These legal differences are an intended and desirable consequence of adopting such a broad framework at the EU level, which allows Member States to adapt and implement EU edicts in a way that is consistent with national traditions and differences. Further, it demonstrates the potential for ‘mutual learning’ and communication between EU Member States in the areas of non-discrimination and labour law, and the possibility of useful comparisons on the relative effectiveness and accessibility of different national approaches.

However, in order to facilitate effective and appropriate mutual learning between Member States that optimises outcomes for older workers, it is necessary to analyse the practical impact of these laws in more detail, to assess the relative merits of the different approaches. On the face of it, a more collectivist approach to age discrimination laws, like that evident in Finland, has the potential to improve outcomes for older workers by facilitating enforcement at the macro or societal level. As Malmberg notes, relying on individual claims alone is unlikely to facilitate effective macro-level enforcement. However, an individualist approach may facilitate better outcomes for older workers at a micro or personal level. For example, the abolition of the national DRA in the UK (which arguably reflects a more individualistic approach to age equality) may be advantageous for older workers who wish to remain in employment beyond the default retirement age.

While legal doctrinal and comparative analysis, like that undertaken in this paper, can lay the foundation for exploring the impact of collectivist and individualist approaches, it can only investigate the impact of these differences to a limited extent. This paper highlights the need for additional, complementary research deploying other, non-doctrinal methods, to further analyse how these legal differences are playing out in practice, and whether legal differences are actually creating different employment outcomes for older workers.

217 Malmberg (n 208) 223.