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Working in the UK without a Default Retirement Age: Health, Safety, and the Oldest Workers

BRENDA BARRETT* AND MALCOLM SARGEANT**

ABSTRACT

This article is prompted by the abolition in the UK of the default retirement age; in particular, it will consider the impact on individuals seeking, or in continuing work, and on organisations needing to manage older workers. Underpinning the article is the hypothesis that as the removal of a compulsory retirement age allows an increasing number of people to work beyond their 65th birthday, organisations will need to develop policies to cope with increasing numbers of workers in their late 60s, 70s and beyond. Here, we focus on the need for employers to plan for an ageing workforce in respect of the health and safety issues which will result from employing increasing numbers of older workers. Firstly, the article considers what evidence exists as to whether there will be an increase in the number of older workers. Secondly, it examines decisions of the European Court of Justice and the Supreme Court in relation to retirement age and the possibility of an employer justified retirement age. Finally, it focuses on the occupational health and safety issues faced by older workers and those for whom they work.

1. INTRODUCTION

This article is concerned with the consequences of the abolition in 2011 of the default retirement age.¹ It assumes that more people will wish to continue to work beyond the hitherto default retirement age of 65 and that some may wish to work at least to the age of 80. In acknowledgement that statistics show that a considerable proportion of older people classify themselves as self-employed, the title was phrased so as to acknowledge that the article will need to look beyond, but certainly not ignore, the traditional employment relationship.²

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¹The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 (SI 2011/1069).

²The data shows the number of workers who are self-employed in their main job rose 367,000 between 2008, the start of the economic downturn, and 2012. Some 60% of the increase in self-employed workers occurred between 2011 and 2012; 84% of the increase in self-employed workers since 2008 was for those aged 50 and above. Office for National Statistics, London, February 2013. http://www.ons.gov.uk/ons/dcp171776_298533.pdf (date last accessed 7 January 2015).

A press release in May 2014 about research undertaken by the Resolution Foundation headlined that '450,000 newly self-employed would rather be employees'. To support its own commissioned research, drawing heavily on statistics published by the Office for National Statistics, it found that of the 4.5 million self-employed people in the UK today, nearly 1.7 million became self-employed after 2009, and that, of that newer group, approximately 450,000 people would prefer to be an employee and only became self-employed because there was no alternative. The survey revealed that 44% of the new self-employed in lower-skilled occupations would rather be an employee, more than double the proportion (21%) of more highly skilled people. These statistics have some relevance to this article even though the research was not dealing exclusively with older workers.³

In the longer term, the intention to increase the pensionable age may mean that workers will expect to work beyond 65.⁴ Thus, employers need to prepare for older workers. The article focuses on occupational health and safety issues but clearly there are other areas of management and human resource issues that require research and policy formulation and these are touched upon. The importance of health and safety issues is exemplified by the European Commission's Strategic Framework for the period 2014–20 in which the need to focus on the EU's ageing workforce is identified as one of its three main challenges.⁵ The Framework states that:

Successfully prolonging working careers depends strongly on appropriate adaptation of workplaces and work organisation, including working time, workplace accessibility and workplace interventions targeted at older workers. Life time employability should also be developed to cope with workers' changing capabilities because of ageing.⁶

³Resolution Foundation Press Release, London, May 2014. <http://www.ipsos-mori.com/researchpublications/researcharchive/3370/Survey-on-selfemployment-for-the-Resolution-Foundation.aspx> (date last accessed 8 January 2015).

⁴In its comprehensive spending review in October 2010, the coalition government announced that the pensionable age would be raised to 66 in 2020 and to 67 in 2028, impacting on those now in their 50s. However, the policy will be reviewed at regular intervals with the objective of ensuring people receive only a given proportion of their lives on a pension. Department for Work and Pensions, *Reviewing the State Pension Age*, London, April 2013, updated December 2013. <https://www.gov.uk/government/policies/reviewing-the-state-pension-age> (date last accessed 7 January 2015).

⁵The other two are to improve implementation of existing health and safety rules and to improve the prevention of work-related diseases. European Commission, *Communication from the Commission on an EU Strategic Framework on Health and Safety at Work 2014–2020* COM (2014) 332.

⁶*Ibid.* p7.

In one recent EU wide survey on working conditions,⁷ however, only 31% of respondents stated that there had been measures to adapt the workplace for older people (although this survey appears to categorise older workers as 55 years plus). The survey found chances of such an adaptation having taken place increased with the size of employer, so the figure for those employers employing 2–10 workers was 26% compared to 36% for employers with 250 plus workers. Interestingly, the UK analysis showed that the percentage of respondents who stated that such adaptations had taken place was 52%, which is considerably more than the EU average. There is no further information in the report about the nature of these adaptations.

2. WORKING AFTER THE AGE OF 65 YEARS

The nature of the ‘oldest’⁸ workforce will be influenced by the age at which people stop working and the process by which that happens. There is evidence that a phased process of working part-time prior to stopping work is the preferred means.⁹ The UK government has been of the view that ‘in practice, most older workers are only interested in working an extra year or two longer and most would prefer to phase their retirement rather than stop suddenly.’¹⁰ Other evidence (see below) does not necessarily support this view.

The figures for increased life expectancy are quite clear and well known. By 2030, there will be 51% more people aged 65 and over than in 2011. By 2030, men aged 65 in the UK will expect to live until they are over 88.4 years and women to the age of 91. The House of Lords Committee report which included these figures stated that ‘older people must be enabled to stay in employment longer. Expectations of early retirement must change. Employers and the government should remove disincentives for older people to work longer...’¹¹

It is of course too soon to decide whether the removal of the default retirement age has, or will lead, over time, to people working longer and any conclusions are likely to be speculative. The age of 65 years might be

⁷European Commission, *Working Conditions*, Flash Eurobarometer Survey 398, April 2014.

⁸‘Oldest’ is used hereafter to describe the work group with which this article is concerned.

⁹See *Older Workers in the Labour Market 2012* (London: Office for National Statistics, 2012). http://www.ons.gov.uk/ons/dcp171776_267809.pdf (date last accessed 7 January 2015).

¹⁰*Employing Older Workers: An Employer’s Guide to Today’s Multi-Generational Workforce* (London: Department for Work and Pensions, 2013). <https://www.gov.uk/government/publications/employing-older-workers-an-employer-s-guide-to-today-s-multi-generational-workforce> (date last accessed 7 January 2015).

¹¹House of Lords Select Committee on Public Service and Demographic Change *Ready for Ageing?* HL Paper 140 2013.

the wrong yardstick to use in judging whether people are likely to retire later in the future. An important factor influencing the length of working life in the UK, apart from the abolition of the default retirement age, is the government's proposal to adjust the pensionable retirement age to ensure that people do not draw a pension until they enter what may be expected to be the final third of their lives. These changes are likely to affect the length of working lives which, indeed, is what they are intended to do. An EU wide survey,¹² for example, found that almost two thirds of Europeans in Member States believed that they should be allowed to continue working beyond the official retirement age. The same survey also found that in about one third of such Europeans currently in work would like to continue working beyond that age. It is perhaps this indication of future intentions that may provide the evidence that workplaces need to adapt to an older workforce.

This intention in the UK to work longer than the traditional pensionable retirement age is also reflected in a survey carried out by the Chartered Institute for Personnel and Development (CIPD) after the UK government announced the abolition of the default retirement age but before it had come into effect.¹³ It found that some 42% of workers planned to work beyond the state retirement age with little difference between men and women. Only some 29% replied that they had no intention of continuing to work.¹⁴ Perhaps not surprisingly, the older workers became the more likely they were to say that they planned to continue working. Some 60% of respondents aged 55 and over said that they planned to do so. The most common reason given was financial (72%), followed by a wish to continue using skills and experience (47%), social interaction (41%) and self-esteem (34%). Of those who stated that they planned to continue to work beyond state retirement age some 11% (all women) planned to retire between the ages of 61 and 65, and 45% anticipated retiring between the ages of 66 and 70 years of age. In all, some 14% of employees plan to retire between the ages of 71 and 75. Interestingly, some 11% of those surveyed who planned to continue working beyond the state retirement age did not expect ever to retire formally. If these intentions turn into reality, then the government

¹²European Commission Directorate-General for Employment, Social Affairs and Inclusion *Special Eurobarometer 378 Active Ageing 2012*; see also D. Sinclair, J. Watson and B. Beach, *Working Longer: An EU Perspective* (London: International Longevity Centre, 2013). http://www.ilcuk.org.uk/index.php/publications/publication_details/working_longer_an_eu_perspective (date last accessed 7 January 2015).

¹³CIPD Employee Outlook Report Summer 2010; *Focus on the Ageing Workforce* (London, 2010). <http://www.cipd.co.uk/hr-resources/survey-reports/employee-outlook-ageing-workforce-focus.aspx> (date last accessed January 7 2015).

¹⁴The rest were 'don't knows'.

assumption mentioned above that workers will continue working for just a year or two after the pensionable age will no longer be true. According to these figures, some 25% of survey participants had expressed an intention to work into their 70s. It is this potential change that both governments and employers need to take into account in future planning.¹⁵

The type of employment in which an individual is occupied influences retirement decisions, particularly for those involved in manual work. This does not seem as yet to have been an issue for the government in raising the state pension age. It may be much more difficult for those in manual work to continue working when compared to those in more sedentary occupations. The EU survey mentioned above¹⁶ gives the following result in answer to the question ‘Would you like to keep working after the age when you are entitled to a pension?’ (Table 1).

Apart from the greater enthusiasm of UK workers to continue working compared to the EU average, which may be a result of the pension provision available in the UK, there is a significant drop in ‘yes’ responses for manual workers.

These figures represent a significant increase on the current statistics concerning older workers who continue to work. One government report¹⁷ looked at ages in nine major industrial sectors and found that the proportion of all

Table 1. Would You Like to Keep Working After the Age When You Are Entitled to a Pension?

	EU27	UK
Self-employed	46	72
Managers	37	59
Other white collar	29	64
Manual	28	45

All figures are percentages of the workforce in the relevant category.

¹⁵A. Farrow and F. Reynolds, Brunel University, London, *Post-Retirement Age Workers and Health and Safety* a report submitted to the Institute of Occupational Safety and Health Research Committee 2014 Leicester. <http://www.iosh.co.uk/~media/Documents/Books%20and%20resources/Published%20research/Post-retirement%20age%20workers%20and%20health%20and%20safety%20full%20report%20v3.ashx> (date last accessed 7 January 2015). 40 workers were interviewed for the report, including one aged over 90, and found that the reasons for continuing at work were similar to those given here.

¹⁶European Commission, *Special Eurobarometer 378 Active Ageing 2012* (n.12).

¹⁷Department for Work and Pensions, *Extending Working Life: Sector Initiative Analysis* (London, 2013). <https://www.gov.uk/government/statistics/extending-working-life-sector-initiative-analysis> (date last accessed 7 January 2015).

workers (employed and self-employed) aged between 65 and 69 was 2%. These ranged from 1% in finance and public administration; 2% in construction, manufacturing, health and social care, hospitality, retail and education; and 3% in transport and 'other sectors'. The sectors with the biggest proportion of the 65–69 workforces were education, health and social care, and retail. Although the proportions actually working are low, there is much evidence that older workers are employed in part-time jobs; the report showed that some 50% of 65-year-old men and some 76% of women of the same age who were working, worked part-time. These figures increased to 77% for men and 92% for women remaining in employment at the age of 70 years. The report concluded that 'for all the nine sectors, the prevalence of part time working increases with age'.

Further evidence of a likely increase in working by the oldest workers can be sought in other jurisdictions where mandatory retirement has long been abolished, such as the USA.¹⁸ Here, the Age Discrimination in Employment Act 1967 (ADEA)¹⁹ has been amended on a number of occasions including the ADEA Amendments of 1978 which increased the upper age limit (from 65 years imposed when the Act was originally adopted) to 70 years for non-federal employees and removed it altogether for federal employees. It also stopped mandatory retirement prior to the age of 70 years. In 1986, this was further amended so that the upper age limit of 70 years for protection was effectively removed for all workers.

There appears to be a trend to longer working in the USA, even though a bigger proportion of the oldest workers are already in work compared to the UK. In 1990, some 12.1% of the population 65 years and older was in the labour force, compared with 75.6% of 16 to 64-year olds. By 2010, the labour force participation rate for those aged 65 plus had increased to 16.1%. Within the 65 plus population, the participation rate for 65- to 69-year olds increased from 21.8% in 1990 to 30.8% in 2010, a nine percentage point increase, compared with a five percentage point increase for 70- to 74-year olds and a one percentage point increase for people aged 75 years and older.²⁰ A similar trend is shown when workers are asked about their

¹⁸Comparing countries in this way can be difficult and there is an issue of course about whether the causes of people working longer are necessarily the same in each country.

¹⁹The ADEA is only concerned with older workers in contrast to the UK Regulations which cover all ages. It applies to workers who are least 40 years of age. The Act also only applies to those employers who have at least 20 employees for 20 or more calendar weeks in preceding year.

²⁰B. Kramer and D. Howard, *Labor Force Participation and Work Status of People 65 Years and Older*; American Community Survey Briefs 2013; U.S. Department of Commerce, U.S. Census Bureau. <http://www.census.gov/prod/2013pubs/acsbr11-09.pdf> (date last accessed 7 January 2015).

expected age of retirement. In 2003, some 29% of those aged 55 and over said that their expected age of retirement would be 66 plus years. In 2013, this figure had grown to 44%.

In the USA, the actual labour force participation rate and its expected growth is shown in [Table 2](#).²¹

Thus, the projections are that, in the USA, over 38% of 65 to 69-year olds and 24% of 70 to 74-year olds will be participating in the labour force, along with almost 15% of 75 to 79-year olds. In terms of future projections, it is interesting to compare these projected figures with the outcomes of the CIPD survey considered above. In that survey, some 11% stated that they had no intention of ever retiring and some 14% envisaged an age of between 71 and 75 as their retirement date.

The Occupational Safety and Health Administration and National Institute of Occupational Health and Safety (NIOSH) are the Federal authorities monitoring the health and safety of workers in the USA. NIOSH has noted that demography means there will be more older workers in society in future and their Director has remarked:

Having a healthy, productive workforce will help sustain economic growth in the decades ahead. We must take steps now to help all workers stay safe and healthy at work as they age. We must also take steps to address the special needs of older workers who, more and more, will be staying on the job past traditional retirement age.

That said much of the data so far available relates to workers between the age of 50 and 65. However, the Bureau of Labor Statistics reports on

Table 2. Labour Force Participation Rate by Age

Age	Participation Rate			
	1992	2002	2012	2022
65–69	20.6	26.1	32.1	38.3
70–74	11.1	14.0	19.5	24.0
75–79	6.3	7.4	11.4	14.9

²¹M. Toosi, Labor force projections to 2022: the labour force participation rate continues to fall *Monthly Labor Review*, December 2013, US Bureau of Labor Statistics, Washington, USA. <http://www.bls.gov/opub/mlr/2013/article/labor-force-projections-to-2022-the-labor-force-participation-rate-continues-to-fall.htm> (date last accessed 7 January 2015). See also Employee Benefits Research Institute, *2013 Retirement Confidence Survey*, Washington, USA. <http://www.ebri.org/surveys/rcs/2013/> (date last accessed 7 January 2015).

workers aged 55 and older and notes that rates of work-related injuries and fatalities rise sharply over the age of 65.²²

3. COMPULSORY RETIREMENT

The problem for many employers in the UK is that the abolition of the default retirement age in 2011 did not necessarily mean the end of an opportunity to have a compulsory retirement age. It had originally been introduced as an exception to the Employment Equality (Age) Regulations 2006 which sought to make age discrimination in employment unlawful.²³ At the time it appeared to be somewhat strange to introduce a measure to allow for compulsory retirement at the same time as introducing measures to restrict age discrimination. For many a compulsory retirement policy amounted to a severe form of age discrimination but it was a policy supported by employers though opposed by trade unions.²⁴ Schedule 6 of the Regulations contained provisions for employees to request the right to continue to work after retirement age and, provided the employer followed the procedure, it was able to accept or reject the employee's request without fear of an age discrimination complaint.

Since the 2011 Regulations abolishing this exception, for many employers a mandatory retirement age is no longer accepted practice.²⁵ There still exists, however, the possibility for an employer to have an employer justified retirement age, based upon the justifications allowed for in various decisions of the European Court of Justice and the UK Supreme Court.

²² Aging Workers at Higher Risk of Death, Severe Injury, Conference Report Suggests Ways to Keep Workers Healthy and Productive. 30 November 2009. See Advancing Workplace Health Protection and Promotion for an Aging Workforce; R. Loeppke et al. (2013) 55 *Journal of Occupational & Environmental Medicine* 500–6. http://journals.lww.com/joem/Fulltext/2013/05000/Advancing_Workplace_Health_Protection_and.6.aspx (date last accessed 7 January 2015).

²³ SI 2006/1031 Regulation 30 provided an exception for retirement at the age of 65 or more; subsequently, until its abolition, this exception was included in the Equality Act 2010.

²⁴ See M. Sargeant, 'The Employment Equality (Age) Regulations 2006: A Legitimation of Age Discrimination in Employment' (2006) 35 *Industrial Law Journal* 209–28.

²⁵ See, for example, *Abolishing the Default Retirement Age: The Impact on Business* (London: Freshfield Bruckhaus Deringer, 2011) in which 70% of employers surveyed were not going to continue with having a compulsory retirement age <http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Abolishing%20the%20default%20retirement%20age%20The%20impact%20on%20business.pdf> (date last accessed 7 January 2015). See also the CBI/Harvey Nash employment trends survey *Staying the Course* 2011 where employers surveyed were concerned about the possibilities of litigation if they continued with a retirement age.

Age discrimination is the only protected characteristic²⁶ contained in the Equality Act 2010 for which there can be justification for direct discrimination as well as indirect discrimination.²⁷ Section 13(2) of the Act states that

If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Thus, there is a need to show that the treatment is a proportionate means of achieving a legitimate aim.²⁸ In the case of compulsory retirement, it would mean showing that a policy of having a mandatory retirement age for an individual or group was a proportionate means of achieving a legitimate aim.

The issue of what constituted a legitimate aim was considered by the Supreme Court in the case of *Seldon v Clarkson Wright and Jakes*.²⁹ The case concerned Mr Seldon who was a senior partner in a law firm where the partnership deed contained a mandatory retirement clause. There was a requirement to retire from the partnership at the end of the year when the age of 65 was reached. When the time for retirement approached, Mr Seldon put forward a number of proposals to the partners that would enable him to continue working for another three years. The partners rejected this and offered him an ex gratia payment in recognition of his services. He began proceedings in March 2007 alleging direct age discrimination.

The employer had put forward a number of 'legitimate aims' at the Employment Tribunal which included staff retention, workforce planning and allowing an older partner to leave 'without the need to justify the departure and damage dignity'. The Court carried out a review of cases at the European Court of Justice and concluded that the various legitimate aims that had been identified could be put under two headings. These were inter-generational fairness and dignity.³⁰ The first of these, which was stated

²⁶The nine protected characteristics contained in the Equality Act 2010 are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

²⁷This derives from Art 6(1) of Directive 2000/78/EC which provides that differences in treatment on the grounds of age will not constitute age discrimination if they are 'reasonably and objectively 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'.

²⁸Section 19(2)(d) applies the same formula for indirect discrimination for all protected characteristics apart from that concerned with pregnancy and maternity.

²⁹[2012] UKSC 16.

³⁰For a fuller analysis of the relevant case law of the Court of Justice, see M. Sargeant, 'Distinguishing Between Justifiable Treatment and Prohibited Discrimination in Respect of Age' (2013) 4 *Journal of Business Law* 398–416.

as being ‘comparatively uncontroversial’, could include facilitating access to employment for young people, but it could also mean enabling older people to remain in the workforce. It can also mean sharing limited opportunities to work in a particular profession fairly between the generations.³¹ The second aim of dignity was an argument put forward by employers wanting the default retirement age established by the 2006 Age Regulations. It concerns avoiding the need to go through lengthy disciplinary and competence procedures when some older workers decline in performance and capacity. Retirement is seen as a way for older workers to exit the workforce with dignity rather than being dismissed for other reasons.

Although the Supreme Court accepted these aims as legitimate in general, there still needed to be justification in relation to the particular employment and the particular individual. Lady Hale stated that:³²

Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.

She also stated that there is a need to establish³³ ‘whether the measure has to be justified not only in general but also in its application to the individual’. In May 2014, the Employment Appeal Tribunal held that in this case 65 was an appropriate age.³⁴

The reaction of employers to the judgment of the Supreme Court judgment was shown when the CBI Director for Employment and Skills Policy was quoted as saying that:³⁵

³¹It is interesting how a number of the references on retirement to the Court of Justice have concerned the professions (case C-341/08 *Petersen* concerning dentists; cases C-250/09 and C-268/09 *Gergiev* concerning university professors and cases C-159/10 and 160/10 *Fuchs* concerning public prosecutors) where, arguably, it might be possible to show that there are a finite number of jobs and progression demands that older members of the profession retire to make way for younger ones.

³²Para 61.

³³Para 63.

³⁴UKEAT/0434/1305.

³⁵<http://www.cbi.org.uk/media-centre/press-releases/2012/04/cbi-comments-on-retirement-age-ruling-in-seldon-case/> (date last accessed 13 February 2015).

This ruling confirms that, at least in principle, companies are able to set their own retirement age. However, this does nothing to fill the vacuum left by the Government's scrapping of the Default Retirement Age...If employers want to set a retirement age that is suitable for their workforce, and know for sure whether it is legitimate, they will still have to go through a costly and lengthy legal process.

Nevertheless, as already stated it appears that this uncertainty has led many employers to abandon a mandatory retirement policy, although there are some notable exceptions such as Cambridge University and Oxford University which have, at the time of writing, a compulsory retirement age of 67 years for their academic employees.³⁶

4. OCCUPATIONAL HEALTH AND SAFETY OF OLDER WORKERS

The Health and Safety Executive (HSE) is the agency, which in Britain³⁷ has responsibility for matters related to the health and safety of the workforce. It is responsible for monitoring the effectiveness of the framework legislation, which is the Health and Safety at Work Act 1974 and other relevant statutory provisions; its responsibilities extend to ensuring relevant European directives are adopted into UK law. Employers are required to report to HSE relevant accidents and diseases caused by their activities,³⁸ and from these reports, it publishes statistics and it also commissions research. It has to ensure that the statutory provisions are observed by employers and other duty holders; to do this, it can inspect workplaces and prosecute those who are breaking the law. It issues guidance on what is required to comply with the law and will provide advice. At a time when funding of HSE by Central Government is restricted, it relies increasingly on publication on its website.³⁹

³⁶At Oxford there is provision for staff to apply to work beyond this age but, according to the University procedures 'applications will be approved only where the panel is satisfied that an extension of employment creates sufficient clear advantage to the University so as to justify an exception to the general rule': <http://www.admin.ox.ac.uk/personnel/end/retirement/acrel-retire/ejraproc/> (date last accessed 7 January 2015). Generally see <http://www.admin.cam.ac.uk/offices/hr/policy/retirement/statement.html> and [https://www.admin.ox.ac.uk/media/global/wwwadminoxacuk/localsites/personnel/documents/circulars/2013/PERS\(13\)04_Retirement_and_Pensions_Update_Circular.pdf](https://www.admin.ox.ac.uk/media/global/wwwadminoxacuk/localsites/personnel/documents/circulars/2013/PERS(13)04_Retirement_and_Pensions_Update_Circular.pdf) (date last accessed 7 January 2015).

³⁷A similar system has been enacted for Northern Ireland, by Order in Council but this is not within the remit of HSE.

³⁸Reporting of Injuries, Diseases and Dangerous Occurrences Regulations, 1995 SI 1995/3163 as amended.

³⁹The Reporting of Injuries, Diseases and Dangerous Occurrences (Amendment) Regulations 2012 SI. 2012/199. <http://www.hse.gov.uk/>.

The 1974 Act section 2(1) places on employers the general duty ‘...to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees’ and section 3(1) places a similar duty on employers in respect of those who are not its own employees.⁴⁰ The Management of Health and Safety at Work Regulations 1999,⁴¹ introduced to implement the EC Framework directive on health and safety⁴² make explicit in Regulation 3 what is implied in the general duty, namely the employer has to carry out a risk assessment of each and every aspect of its operation and respond to the findings of this assessment by introducing safe systems of work and monitoring their effectiveness. Similar responsibilities to those of the employer are imposed on the self-employed under both the Act and the regulations.

When HSE prosecutes for breach of a legislative duty the trial is generally in a magistrates’ court and the outcome will not be published in the law reports. However, convictions are frequently published on its website as press releases and these show a tendency to prosecute for breach of sections 2 and 3 even where there are specific regulations, as, for example, the Manual Handling Operations Regulations 1992.⁴³ Incidentally, in practice HSE rarely prosecutes unless the breach of law has caused personal injury or disease. These press releases very often give the age of the victim and they do suggest that there are relatively few victims over the age of 65 and when older workers are injured there is little in the report to suggest that the injury was directly due to the victim’s age, though in the two examples cited here it may be possible to infer that a younger person might have avoided injury. Of course, there will be no prosecution when someone is injured unless the injury was caused by a breach in the law.

Thus, the following report is about a serious accident suffered by a 73-year-old man who worked at a wood yard three days a week. The accident occurred when he was sitting on the bar of a log splitter talking to a visitor. His overalls caught on the lever that operated the machine and he was crushed against the splitter. His injuries were so severe he spent six months in hospital and remained bedridden. The employers were convicted because the machine was not guarded in the way regulations required.⁴⁴ It may be

⁴⁰The ECJ has allowed that these duties are not absolute, but like many of the UK statutory provisions on health and safety are qualified by the expression ‘reasonably practicable’ because the UK legislation is enforced in the criminal courts. See *European Commission v UK* (Case C-127/05, Judgment of 14 June 2007).

⁴¹1999 SI 1999/3242. The original regulations were dated 1992 and the 1999 edition has introduced relatively minor modifications.

⁴²Directive 89/391/EEC.

⁴³SI 1992/2793. These regulations were made in response to Directive 90/269/EEC.

⁴⁴Adapted from Press Release. <http://www.hse.gov.uk/press/2013/rnn-e-00613.htm> (date last accessed 8 January 2015).

questioned whether a younger worker would have felt the need to take a rest while talking, but this was not an issue in the report of the prosecution.

In the second case,⁴⁵ a 60-year-old worker broke his hip in three places and needed two steel pins inserted to help repair the damage after falling over the edge of a trailer on which he was attempting to cover and secure a load of pallets. HSE served an enforcement notice requiring the employer to put in place measures to prevent workers falling in similar circumstances and the firm pleaded guilty to breaching the Work at Height Regulations 2005.⁴⁶

The failure to place more emphasis, in reports of prosecutions, on the age of the victim even if age may have contributed to the likelihood of the accident occurring, and the significance of this in an aging population, may be due to HSE's awareness that under the Equality Act 2010 age is a protected characteristic. The HSE website now stresses the importance of the equality laws, stating:

Health and safety legislation applies to all regardless of age. It is unlawful to discriminate against young workers as well as against older workers, and stereotypes are damaging to the way we perceive age. Health and safety can sometimes be used as a false excuse for not employing someone.⁴⁷

Notably this statement refers to employing 'workers'. It therefore creates some ambiguity about contracting with self-employed as (has already been noted) by statutory definition those in business on their own account are not workers. The duties of the self-employed in respect of their own safety and the safety of others remain because contrary to expectations they were not addressed by the Enterprise and Regulatory Reform Act 2013. HSE expected that this Act would following the recommendations of the Löfstedt review⁴⁸ that people who work for themselves be taken out of health and safety law if their work posed no risk to others and had gone so far as to launch a consultative document on how best this recommendation could be achieved.⁴⁹ However, the actual enforcement of the law against the self-employed is not necessarily going to be actively pursued in future not least because work-related

⁴⁵<http://press.hse.gov.uk/2014/logistics-firm-in-court-after-worker-breaks-leg-in-lorry-fall/> (date last accessed 8 January 2015).

⁴⁶SI 2005/735.

⁴⁷<http://www.hse.gov.uk/vulnerable-workers/older-workers.htm> (date last accessed 8 January 2015).

⁴⁸Department for Work and Pensions, *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation* Cm8219 2011. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/66790/lofstedt-report.pdf (date last accessed 8 January 2015).

⁴⁹<http://www.hse.gov.uk/press/2012/hse-selfemployedconsultation.htm> (date last accessed 8 January 2015).

injuries suffered by the self-employed who are not themselves employers or contracted to provide services to an employer may not comply with the regulations requiring accidents to be reported to HSE. Moreover, HSE has not customarily prosecuted either employees or the self-employed where no one other than the wrong doer has been injured or put at risk of injury. Nevertheless, as the proposal of the Löfstedt review was in the event omitted from the 2013 Act, on the grounds that it was not sufficiently clearly worded HSE has now returned to the matter and carried out a consultation on draft regulations providing definitions of activities where self-employed persons will continue to have duties under section 3(2) of the Health and Safety at Work etc Act 1974, all others being exempt from the duty.⁵⁰

These reservations are important because as has already been noted a high proportion of older workers are self-employed. The significance of this has been further emphasised by a report by the Resolution Foundation which argues that the continued growth in self-employment is explained ‘both by structural changes in the labour force and the cyclical effect of the long downturn. More people are entering self-employment and fewer are exiting’, so that one in seven of the workforce are now self-employed.⁵¹

A. Vulnerability of Older Workers

The received view about the vulnerability of older workers is stated by the European Agency for Safety and Health at Work:

Studies indicate that although older workers have fewer accidents, their injuries are often more severe and take longer to heal. Slips, trips and falls are the largest cause of accidents across all sectors, from heavy manufacturing to office work. While younger workers tend to get more eye or hand injuries, older workers report more back injuries.

Older workers may find it harder to see or adjust focus in certain distance ranges, have reduced peripheral vision, see things less clearly, find it harder to perceive depth or be more sensitive to glare. They are also more likely to have other conditions that impair vision such as cataracts and retinal disorders. These changes

⁵⁰Health and Safety Executive *CD273 – Consultation on proposals to exempt self-employed persons from section 3(2) of the Health and Safety at Work etc. Act 1974, except those undertaking activities on a prescribed list*. Published in July 2014. The intention is to introduce The Health and Safety at Work etc Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations in 2015.

⁵¹C. D’Arcy and L. Gardiner, *Just the Job or a Working Compromise? The Changing Nature of Self-Employment* (Leicester: Resolution Foundation, 2014).

in visual capacity may increase the risk of accidents. Falls may be caused by poor balance, slower reaction times, visual problems and lack of concentration.⁵²

In the following sections, literature will be investigated to establish whether the opinion stated by the European Agency is accurate.

B. UK Research

This section deliberately refers to ‘older’ rather than ‘oldest’ workers because so little consideration has been given to the position of the ‘oldest’. Indeed, research concerning older workers commonly takes 50 years of age as the starting point, though this is not always explicitly stated.

HSE has for some time paid considerable attention to whether older workers are more prone to work-related accidents and illnesses, however much of what they have published relates to workers under the age of 65, which is not surprising given the regulations abolishing the default retirement age did not come into effect until October 2011.⁵³ Nevertheless, the work done on those approaching 65 is still relevant because ageing is an on-going process beginning well before that age. HSE will in future need to evaluate whether workers aged more than 65 demonstrate acceleration of common problems already identified before the age of 65 or develop new age-related problems not identified in those younger cohorts. In going forward HSE will be well advised to remember the American experience, noted above, that rates of work-related injuries and fatalities in that jurisdiction rise sharply over the age of 65. It must be borne in mind though that data relating to other jurisdictions may differ from that gathered in the UK because there may be higher percentages of workers engaged in heavy or dangerous manual work such as construction or logging.

As long ago as 2005 a research report published by HSE dispelled myths about the reliability of older workers.⁵⁴ Having reviewed the literature, it concluded:

⁵²https://osha.europa.eu/en/priority_groups/ageingworkers (date last accessed 8 January 2015).

⁵³The much more extensive literature review carried out at Brunel for the Institute of Occupational Health and Safety found the same problem, namely that the literature in the main dealt with workers between the ages of 55 and 65. It is true the start of the Brunel exercise pre-dated the removal of the statutory default retirement age, but it remains too early for data concerning older workers.

⁵⁴K. Benjamin and S. Wilson (2005) *Facts and Misconceptions About Age, Health Status and Employability*. Health and Safety Executive Report Number HSL/2005/20. http://www.hse.gov.uk/research/hsl_pdf/2005/hsl0520.pdf (date last accessed 8 January 2015). Updated in 2011 Yeomans, *Facts and Misconceptions About Age, Health Status and Employability*. Health and Safety Laboratory, Harpur Hill, Buxton, Derbyshire SK17 9JN (2011) RR832.

...older adults are vastly different from each other. This is a result of both external and internal factors interacting with the process of ageing. Therefore, no stereotype of older workers is likely to be true for all, or even most, older workers. From the evidence presented, some 'myths' have been dispelled more than others. For example, the myths on chronological age being the most important determinant of health or older workers taking more time off work or having more accidents are not true. Other myths, whilst partly having some truth to them, for example, that cognitive capacities or sensory abilities generally decline with age, can still be considered inaccurate as they do not recognise these changes do not occur for most individuals or can be compensated for by a number of means. They also fail to recognise that these changes are unlikely to impact on the work performance of older workers. In this way, these stereotypes/myths cannot be used to justify the exclusion of older workers from the workforce.

Having noted that some of the studies needed to be taken with caution because of methodological problems it continued:

Productivity is likely to be of greatest interest to organisations in their decision to retain and recruit older workers. However, the evidence suggests older workers cannot simply be described as less productive than younger workers. Productivity is likely to be affected by absenteeism and accident rates, both of which are not found to be worse in older workers. Declines in health or cognitive, physical or sensory functioning can be minimised, prevented or overcome by simple adjustments or personal actions; therefore, age cannot be used as a health and safety 'excuse' to exclude older workers from the workforce. Older workers are also quite capable of adapting to change and learning new information, but organisations may need to convince more experienced workers of the value of any changes and/or training.

A further study, the following year reported that older workers were, even before the economic recession reduced possibilities for older workers to be employed by an organisation, more likely to be self-employed.⁵⁵ The conclusions of these two pieces of research are reflected in the general advice given by HSE to employers about employing older workers. It suggests, however, that there are actions that can be helpful when considering individual circumstances. These include carrying out risk assessments routinely, not just when an employee reaches a certain age; considering the modification of tasks to help people stay in work longer and making sure that appropriate retraining is provided; allowing staff to change work hours and job content;

⁵⁵Z. Wysall and P. Ellwood, *HSE Horizon Scanning Intelligence Group Demographic Study*, HSE 2006. <http://www.hse.gov.uk/horizons/assets/documents/demographics.pdf> (date last accessed 8 January 2015).

encouraging or providing regular health checks for all staff, regardless of age; and importantly for employers to consider their legislative duties, such as those under the Equality Act 2010 or flexible working legislation. These could require businesses to make adjustments to help an employee with a health issue or consider a request to work flexibly.⁵⁶ This advice from HSE marries well with Lady Hale's suggestion in the *Seldon* case that 'sophisticated performance management measures' applied throughout an employer's workforce may facilitate employment of older workers without introducing discriminatory supervision of their work. Similarly, general improvement of the work environment for the benefit of all may be of particular value to the more vulnerable.

It is worthy of emphasis that a risk assessment directed to individual older workers is likely to be discriminatory and changing the way the job is undertaken or by whom it is undertaken will only be within the regulatory requirement for risk assessment set out in Regulation 3 of the Management of Health and Safety at Work Regulations 1999 if the job itself is not being undertaken in compliance with the law. A recent HSE press release⁵⁷ has some bearing on this. The 65-year-old victim suffered 'horrendous' head injuries when, with a colleague, he was investigating a fault on a hot wire cutting machine. As a result he had to retire although he had intended to continue working. HSE's investigation revealed the machine had not been isolated from its power source and a fixed safety guard had been removed. The inspector found the employer had failed to carry out a suitable risk assessment and develop safe procedures for the maintenance activity. The employers were convicted of breach of their general duty in section 2(1) of the 1974 Act.

C. Vulnerability in Particular Work Situations

In addition to its publications on general issues relating to the employment of older workers HSE, and other sources, provide information about the special vulnerability of older workers to particular work-related accidents or diseases and their special vulnerability in specific types of work.

Reported statistics show that in the construction and agriculture sectors there are persistent problems with an increasing vulnerability of older workers. HSE reported in 2013 that although there have been significant

⁵⁶<http://www.hse.gov.uk/vulnerable-workers/older-workers.htm> (date last accessed 8 January 2015).

⁵⁷<http://press.hse.gov.uk/2014/firm-fined-after-worker-suffers-horrific-head-injuries/> (date last accessed 8 January 2015).

reductions in the number and rate of injury over the last 20 years or more construction remains a high risk industry. While it accounts for only about 5% of the employees in Britain, it accounts for 27% of fatal injuries to employees and 10% of reported major injuries.^{58,59} Studies conclude that the increase in falls in older workers may be related to loss of control of postural stability, reduced strength and decline in balance as workers age.⁶⁰

While reports on the construction industry show that injury statistics are unacceptably high, the record in agriculture is worse. A report of 2006 states particular concern as to the impact of an ageing workforce on the agriculture and allied industries by virtue of their hazard profiles and structure. Workers in agriculture tend to remain economically active and do not retire until much later in life, if they retire at all. While there are inconsistencies between data sources, they all indicate that agriculture is characterised by an ageing ownership/tenant base and workforce. Older workers whether employed or self-employed are routinely engaged in physically demanding and potentially hazardous activities ranging from driving heavy plant (on the public highway and/or private land⁶¹) and operating machinery, through plant and property maintenance, to manual and livestock handling and exposure to chemicals. Annual fatal accident statistics show approximately 20% of fatal accidents in agriculture occur to people above the age of 65 and accidents result in more serious injury or death than might be expected.⁶²

The choice of musculoskeletal diseases for a specific report was no doubt prompted by musculo-skeletal disorder (MSD) being the most significant

⁵⁸<http://www.hse.gov.uk/STATISTICS/industry/construction/index.htm> (date last accessed 8 January 2015).

⁵⁹S. Wright, *Health and Safety in Construction in Great Britain, 2013 Work-Related Injuries and Ill Health*. <http://www.hse.gov.uk/STATISTICS/industry/construction/construction.pdf>.

⁶⁰H. Beers and C. Butler, *Age Related Changes and Safety Critical Work, Identification of Tools and a Review of the Literature* RR946 (2012). <http://www.hse.gov.uk/research/rpdf/tr946.pdf>.

⁶¹Generally, jobs in the transportation sector have been found to require a range of skills and abilities, and the relationship between age and driving behaviour has been described as complex. Although age, in itself, has not been found to predict driving performance, a significant relationship has been found between perceptual and cognitive abilities and driving performance. H. Beers and C. Butler, *Age Related Changes and Safety Critical Work, Identification of Tools and a Review of the Literature* RR946 (2012). <http://www.hse.gov.uk/research/rpdf/tr946.pdf> (date last accessed 8 January 2015).

⁶²Health and Safety Commission and Executive Agriculture Industry Advisory Committee - AIAC 080701. <http://www.hse.gov.uk/aboutus/meetings/iacs/aiac/080708/aiac080701.pdf> (date last accessed 8 January 2015). For example, over a 10 year period (from 1997/98 to 2006/07) in agriculture 45% of accidents involving animals occurred to workers aged 65+ (compared with an averaged working population over a four-year period of 7% within the same age group). Similarly, 28% of all transport-related fatalities involve the over 65s.

cause of work-related injury. MSD is caused either by an accident when lifting a heavy article⁶³ or by repetitive action in moving articles as, for example, by supermarket checkout workers.⁶⁴ Unfortunately, the scoping exercise originally intended to enable HSE to formulate future policy or guidance and provide advice was dropped. The more limited objectives were to identify current scientific thinking about the subject and evaluate if individuals are more susceptible to MSD in the workplace as they age. The research therefore amounted to a review of the literature produced between 2003 and 2009. After a careful review of numerous published studies this report concluded that in respect of MSD;

Age is not an independent risk factor for work related MSDs. Older workers are more susceptible to work-related MSDs than younger workers because of decreased functional capacity. The propensity for injury is related more to the difference between the demands of work and the worker's physical work capacity (or work ability) than to age.

In order to assist it in identifying where its attention should be directed HSE commissioned a special report to investigate age-related changes in safety critical work⁶⁵ because it was concerned workers may continue to perform tasks with deteriorating performance particularly in safety critical and major hazard industries, leading to an increase in the risk of major incidents or injury. Duty holders may find it difficult to judge whether workers have the functional capacity to work to the required level of safe performance. The researchers found there are very few papers that cover age, changes in performance and also explicitly mention work as being safety critical. They focussed on occupations within HSE's remit on jobs making high physical, cognitive and emotional demands and considered whether there might be risks to other than the worker.⁶⁶ High demand jobs include fire fighters and ambulance workers. Literature also suggested there was an association between age, performance and shift work. There is evidence from the offshore industry that prolonged exposure to shift work is believed to increase the risk of gradual reduction in physical performance capacity, but mandatory health checks have resulted in healthy worker selection. While no studies have directly examined the combined effects of shift work and age on safety, older workers

⁶³For this reason the Manual Handling Regulations advise that manual lifting should be confined to situations where mechanical means of lifting articles is not possible.

⁶⁴Checkouts and musculoskeletal disorders INDG269 05/98 C500.

⁶⁵Beers and Butler supra n.60.

⁶⁶Much of the literature was on pilots who are not within HSE's remit.

have been suggested to be at greater risk of injuries and accidents on night shifts. The authors of the report concluded on the evidence that even in safety critical work age-related declines 'do not necessarily have a negative impact on performance at work.' However they reached this conclusion cautiously because 'The findings from studies of age and performance may not be a true reflection of reality in terms of changes in performance.'

Considering the tools available for duty holders to use to assess decrements in human function they found no single tool which could be used by the duty holder in a variety of circumstances in matters such as cognitive demand, working memory, processing speed, physical fitness/ability. They reported:

There is a large variation in the tools/tests that have been identified. The tools/tests vary in terms of the reasons for their development, their feasibility of use for the duty-holder, the constructs/capacities they measure, the extent of intervention they require by a health professional, the context in which they are used, and the extent of their use.

The reporters believed that this was an area in which more research was required.

D. Reports on Work Undertaken in Other Jurisdictions

Comparing the UK's occupational health and safety system with that of other jurisdictions is not easy because the British⁶⁷ system is very unusual; no other agency has quite the same range of responsibilities. The system in the USA is nearest to that in the UK though sanctions are not criminal. In some systems, much more emphasis is placed on compensation than on penalties. This is true of the EU⁶⁸ and Australia. Nevertheless, there is much value to be gained by exploring research undertaken in some other jurisdictions.

(i) Australia

In Australia, for example, statistics about work place accidents and disease are compiled and published by Safe Work Australia the body responsible

⁶⁷The HSE has no jurisdiction in Northern Ireland though the essence of the 1974 Act has been transported to that country by Order in Council.

⁶⁸The failure to understand the UK system led to the UK being challenged unsuccessfully in the European Court of Justice on whether it had properly implemented the Framework Directive 89/391/EEC, *European Commission v UK* C-127/05.

for the operation of the workmen's compensation scheme. Safe Work also notes that younger workers are more susceptible to accidents than older ones.⁶⁹ Further a very large scale investigation into stress in the workplace makes no special reference to older workers but suggests that the highest risk of stress is in the 25–34 age group 'as they show the poorest psychological health, likely due to factors such as competing work and family demands as well as entering the workforce following study, working hard and using long hours to advance in their careers, as well as experiencing low levels of skill discretion.'⁷⁰

The Australian workers' compensation scheme is geared for provision only for workers up to the default retirement age of 65 but nevertheless some reference is made to the position of workers over the age of 65. In particular, a consultation document was published in 2010 to consider the proposition that there should be more workers over the age of 65 in the workforce and it states without evidence of the increased vulnerability which it posited:

The increasing number of older workers remaining in the workforce beyond recognised retirement age will result in an increasing occurrence and recurrence of body stressing injuries. This will be increasingly evident within the many small businesses that do not have the financial resource and/or incentive to modify their work processes to meet the requirements of older workers.

Information and financial incentive must be made available to smaller employers to ensure assessment and (where appropriate) modify their workplaces to meet the physical and cognitive abilities of older workers. Many of whom will (by financial necessity) be forced to remain in / seek employment within workplaces that will not be configured to meet their capacities.⁷¹

(ii) European Union

Since all members states of the EU are bound by the same equal opportunities directive as the UK, it might be instructive to look at each one to find out whether any of them had any findings on the occupational health and safety of workers over the age of 65, but that would be an exercise beyond

⁶⁹<http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-injuries/pages/work-related-injuries> (date last accessed 8 January 2015).

⁷⁰<http://www.safeworkaustralia.gov.au/sites/swa/about/Publications/Documents/748/The-Australian-Workplace-Barometer-report.pdf> (date last accessed 8 January 2015).

⁷¹http://www.safeworkaustralia.gov.au/sites/SWA/about/consultation/Documents/Public%20Submissions%20R/AWS030-Russell_Richard.DOC (date last accessed 8 January 2015).

the scope of this research and unlikely to be helpful given the recent date of the directives, and as Table 1 has shown the percentage of older workers is lower than in the UK. However, it is worthwhile looking at the European Agency for Safety and Health at Work's account of a report produced in the Netherlands:⁷²

Results show a gap between opinions and facts regarding the health and employability of older workers: such employees are viewed as less healthy, for example. People believe that all older employees have declining physical health due to chronic disease, such as heart problems and other complaints from physically demanding work. On the contrary, the facts show that a large majority of older employees enjoy good physical and mental health and work very well until the age of 65–70 years. It is a myth that the health and employability of workers decline when they grow old; in fact, only a small percentage of older employees decline physically and/or mentally.

It would be interesting to know on what evidential basis this report was produced given the relatively low percentage of older workers in the EU.

(iii) Profile of Older Workers' Health

Some older people suffer deterioration in hearing and sight, have less muscle power, do not sleep as well, and are more likely to have chronic disease, such as heart and back trouble.⁷³ However, the decline in cognitive abilities appears to be small.

Although older people have more difficulty in solving new and complex problems,⁷⁴ more established and automatic cognitive abilities actually increase, as knowledge and experience grows.⁷⁵ For most people, intelligence remains stable until the age of 80.⁷⁶

⁷²<http://www.eurofound.europa.eu/ewco/2005/04/NL0504NU02.htm> (date last accessed 8 January 2015).

⁷³The report references F. Craik and T. Salthouse, *The Handbook of Ageing and Cognition* (2nd edition) (Hillsdale, NJ: Lawrence Erlbaum Associates, 2000).

⁷⁴The report references P. Merryman, B. Brown, E. Schludermann and S. Schludermann, 'Halstead's Studies in the Neuropsychology of Ageing' (1983) 2 *Archives of Gerontology and Geriatrics* 49–177.

⁷⁵The report references R. Cremer, 'De dynamiek van cognitieve vermogens tijdens de actieve levensloop [The Dynamics of Cognitive Abilities during the Active Course of Life]' (1983) 24 *Tijdschrift voor Gerontologie en Geriatrie* 12–7.

⁷⁶The report references J. Snel and R. Cremer, *Work and Ageing: A European Perspective* (London: Francis and Taylor, 1994).

Despite physical and cognitive decline, there are five reasons why this has little consequence for the employability of most older workers:

- 1.Older employees use many tactics to compensate for decline (for example, reading glasses; well-developed working strategies);
- 2.Many people are healthy until old age;
- 3.Health depends on many more factors other than age, such as lifestyle, job tenure and physical demands;
- 4.In most jobs, declining health has no impact on job performance;
- 5.Many jobs and work environments can be adjusted for emerging disabilities.

Nevertheless, absenteeism among older workers is higher than among younger employees. However, a secondary analysis on data ... in 2000 shows that, among a sample of almost 22,000 employees, the (self-reported) duration of absenteeism is more strongly related to job tenure than to age.

This valuable report is one of the few which provide valuable information about the 'oldest' workers.

5. WHAT IS THE CHALLENGE FOR EMPLOYERS?

The EU Occupational Health and Safety Agency comments that 'as the number of young people entering employment falls in the coming years, there will be a significant increase in the proportion of older people in the workforce. Employers will have to rely increasingly on ageing workers, and this could be to their advantage.'⁷⁷

It may be commented that this assertion by the EU Agency assumes that the problems of the low birth rate and of the high percentage of unemployed young people which exists in member states is not resolved. In the UK, the birth rate is relatively high and changes in education and restrictions on benefits are intended to address the problem or unemployment, but for present purposes the EU Agency's assertion will be accepted.

Underlying employer concerns appear to be a worry that older workers will suffer from such physical and cognitive decline that they will not be able to perform their work adequately, with the outcome that the employer will need to remove the employee risking unfair dismissal and/or age discrimination litigation. This article has shown there is little evidence that this decline happens and affects work performance for older workers. Indeed,

⁷⁷https://osha.europa.eu/en/priority_groups/ageingworkers (date last accessed 8 January 2015).

many employers should from experience be aware of this for they have for many years been happy to rely on retired workers providing their services on a voluntary basis, often in reception areas in museums and charity shops, frequently at the cash desk, or escorting visitors on guided tours of stately homes, sometimes providing support in care homes and also as manual workers on wildlife reserves. Such volunteers are usually treated as if they were employees and normally accepted as such by companies providing employers' liability insurance. There can be little doubt that this unpaid work would not be accepted by either employers or insurers if volunteers were unreliable due to health problems or a bad accident record.

Notably in HSE's study of the literature on age and employment published in 2011⁷⁸ older worker was defined as 50 years plus. The conclusions to the study found that 'there is little evidence that chronological age is a strong determinant of health, cognitive or physical abilities, sickness absence, work-related injuries or productivity'. It further stated that 'older workers do not need to be treated any differently to younger workers as long as employers are aware that there may be a reduction in some physical and mental capabilities with age and that these can be identified on an individual basis and suitable accommodations put in place'. It is interesting to speculate whether the same conclusions would have been drawn if the focus had been only on the oldest workers.

Some warnings are included about the oldest group. Some cognitive abilities such as working memory, reasoning, attention and processing speed do decline with age, but, according to the study, 'cognitive performance does not generally show any marked decrease until after the age of 70..', although the report also quotes research which 'suggests that intelligence does not show declines with age but remains stable on average until 80 years of age'.⁷⁹ Similarly, with respect to age and physical strength and endurance, the report states that the decline of muscle strength is 'unlikely to be noticeable until after the age of 65'. The report states that, although general health and life expectancy and disability free life expectancy are improving, there is evidence that ageing does generally bring an increase in the rate of musculoskeletal disorders and cardiovascular disease, but that this does 'not necessarily hinder the employee at work and may have only minimal effects on

⁷⁸L. Yeomans, *An Update of the Literature on Age and Employment* (Health and Safety Executive Books, London, 2011). <http://www.hse.gov.uk/research/rrpdf/rr832.pdf> (date last accessed 8 January 2015).

⁷⁹M. Peeters and H. Emmerik, 'An Introduction to the Work and Well-Being of Older Workers' (2008) 23 *Journal of Managerial Psychology* 353–63.

productivity'. The real crux of the problem, if there is one for employers, is that it may be difficult to generalise. The report states that

High levels of individual variability in physical, mental and social conditions have been observed in older age groups. This variability is likely to make it more difficult to generalise,⁸⁰ For example, in studies with fire fighters, wide individual variations in task performance were found with more than sixfold difference in performance both between and within age groups.⁸¹

This then might be the issue for employers when employing the oldest age group. It is not that there is evidence of a general decline which will affect work performance, but that there is a great variation among individuals and, given the higher rates of various limiting ailments and disabilities, it is likely that employers will have older individuals who might have work limiting health problems. The message to employers must therefore be to act on HSE's reminder of their statutory duty to make suitable and sufficient assessments of the risks to the health and safety of their workers, taking into account not only the general system of work but the possible vulnerability of the oldest workers.

The employers' assessments need not, indeed possibly should not, be risk assessments to comply with Regulation 3 of the Management of Health and Safety at Work Regulations. Virtually all employers today carry out annual staff appraisals of every employee. These are performance management reviews, in the form of interviews of every employee by his/her line manager, and in some cases, notably the teaching profession, it is a statutory requirement that this is done. Such reviews consider the employee's performance against targets set the previous year and set targets for the year ahead. These reviews are the arena in which the health and safety record of the employee should be considered. Where there is doubt of the employee's capability or when the employee is undertaking safety critical work or work, such as shift work, where the risk to the worker is known, the employer can require the employee have a medical examination. The outcome of such scrutiny can set the framework for setting targets for the coming year, which may, for example, involve a change of task or a reduction of hours. In this way, the organisation's human resources department should be able to assist the employee to accept the need for age-related changes in the employment

⁸⁰G. Costa and S. Sartori, 'Ageing, Working Hours and Work Ability' (2007) 50 *Ergonomics* 1914–30; cited in Yeomans (2011) n. 78.

⁸¹J. Sluiter, 'High-Demand Jobs: Age-Related Diversity in Work Ability' (2006) 37 *Applied Ergonomics* 429–40; cited in Yeomans (2011) n. 78.

relationship. Employees for their part may since 30 June 2014 invoke the amended section 80 of the Employment Rights Act 1996 which extends the right to request flexible working hours to all employees. It may be attractive to older workers to, for example, travel to work after the rush hour or spread their hours of work over more days. The employer is not required to concede to such a request but must deal with it in 'a reasonable manner'.⁸²

6. CONCLUSIONS

This article has attempted to predict the future of the employment of the oldest workers focussing on the employability of workers over the hitherto conventional retirement age of 65. Forecasting the future can only ever been done in the context of assuming most aspects of the environment will remain the same. Predicting the occupational health and safety risks to older workers is particularly difficult because up till now research has focussed on workers under the age of 65.

This investigation has assumed that there will be no dramatic changes such as a pandemic or a major war causing major changes in the assumed demography of the UK. Nor does it take into account the recent suggestion that in future the demand for workers will be reduced because many of the tasks now carried out by workers will be done by robots. Similarly, it cannot be predicted whether medical science may materially improve the process of ageing.

If no such dramatic changes occur the investigation indicates there will be an ageing population in which a higher proportion of men and women over the age of 65 will want to continue in paid employment for a variety of reasons. Our conclusion is that employers should be able to meet the needs of this oldest workforce with adequate planning. Certainly a need for a focus on health and safety issues should not be seen as a reason not to prepare for the management of such workers.

⁸²See ACAS June 2014 Code of Practice 5, *Handling in a Reasonable Manner Requests to Work Flexibly*. <http://www.acas.org.uk/media/pdf/f/e/Code-of-Practice-on-handling-in-a-reasonable-manner-requests-to-work-flexibly.pdf> (date last accessed 8 January 2015).