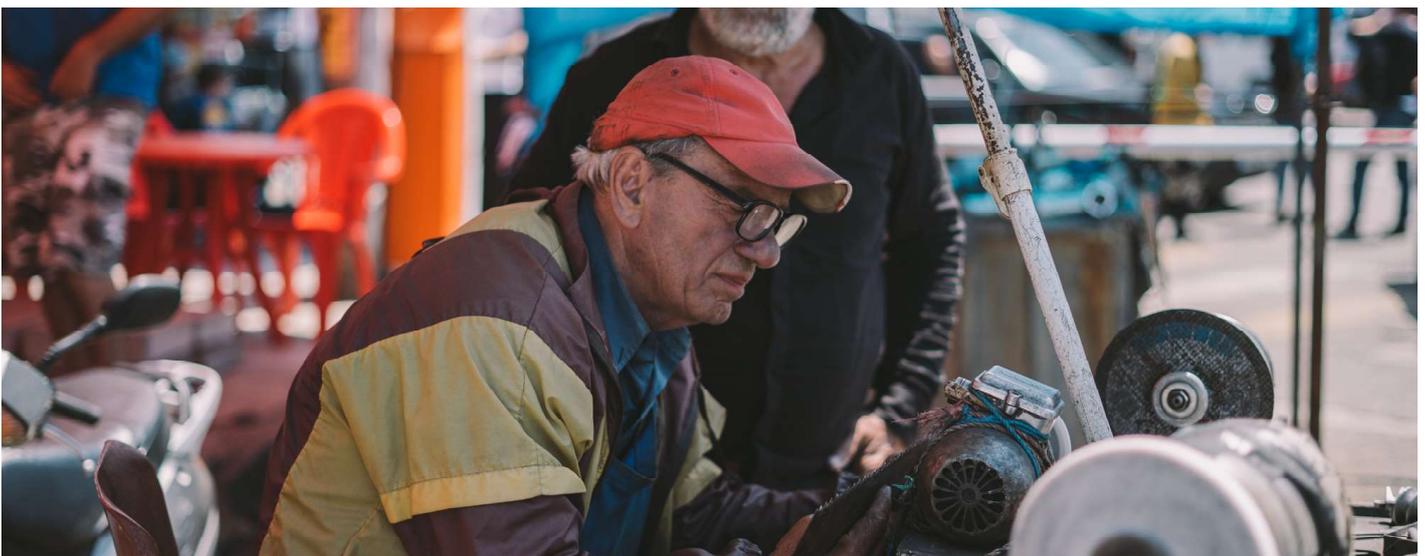




THE RIGHT TO WORK IN OLD AGE

*How the EU Employment
Framework Directive still
leaves older workers behind*

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Twenty years after its adoption, the EU Employment Framework Directive still leaves older workers behind

We are all living longer and healthier lives. Babies born today can expect to live to over 100. Against this positive trend, retiring at age 60 or 65 is neither sustainable, nor necessarily desirable. Active ageing and flexible retirement policies applied across the EU aim to encourage and support longer working lives. But European and national courts seem to still reflect biased and outdated views of the lifecourse and of older people's abilities to work and fall short in equally protecting our human rights when we are older. Overall, there is not enough public consciousness of how to make the right to work a reality in old age and how to tap on older persons' potential for the benefit of society as a whole.

Key messages

- The right to work must be guaranteed equally at all ages.
- The EU Employment Directive covers age as a ground of discrimination, but several lawful exemptions and justifications apply, permitting a wide range of practices that restrict older people's right to access or remain in the labour market.
- National and EU courts still consider age discrimination as less severe compared to other grounds and reflect biases about the ability of older people to work.
- A new UN convention, could catalyse a strong, clearer, more inclusive and accessible interpretation of the universal right to work by EU and national courts.

Key facts

- Only 58% of 55-65 year-olds are in employment, vs 67% of the total population.
- Only one in two older women are in employment.
- In a 2019 survey, 47% of respondents thought that age was perceived as a factor for disadvantaging an equally qualified candidate against another.
- 48 % of all working men and 60 % of women aged 65 years or more in the EU are employed on a part-time basis, compared with 18.3% of the working 18-64 year olds
- One in five older workers (55-64) is caring for a family member in need for care and assistance
- Almost one third of older people who continued to work while receiving a pension did so for non-financial reasons.

Direct & Indirect Discrimination

Older workers are susceptible both to direct and indirect discrimination in the world of work. **Direct discrimination** occurs where a person is subject to less favourable treatment than others explicitly on the basis of a particular characteristic, such as their older age, as for example in the case of mandatory retirement ages, mass dismissals of workers above a certain age or age limits in recruitment processes. **Indirect discrimination** occurs where a supposedly neutral criterion is applied to make decisions or take action but has a disproportionate impact on a group of individuals who share a particular characteristic, as for example collective redundancy policies, which primarily affect older workers; or when employers introduce new technology in the workplace while failing to provide adequate training for older workers who are most likely to lack experience in using these systems.



Age discrimination in EU law

Discrimination on the basis of age is prohibited under EU law (Article 2.1 of EU Charter of Fundamental Rights). In 2000 the EU adopted the Employment Framework Directive, which aims to ensure equal treatment of individuals in employment and occupation regardless of their age, among other grounds. The EU directive also led to the introduction of age discrimination law in many EU Member States for the first time and set minimum standards throughout Europe. The Court of Justice of the European Union (CJEU) helps advance interpretation of the directive by responding to questions posed by national courts (known as ‘preliminary rulings’). Notably, the Court has ruled that ‘the principle of non-discrimination on the grounds of age must be regarded as a general principle of Community law’. (Mangold case, C-144/04, paragraph 75). The Court has also confirmed that different statutory retirement age for women and men is not acceptable (Kleist case, Case C-356/09). It has moreover helped to challenge structural inequalities in the labour market, such as upper age limits in job advertisements.

However, the directive also allows – in its article 6 – the possibility to justify direct age discrimination, as long as there is a legitimate aim. This makes it possible for member states to apply a wide range of exceptions. The Court of Justice of the European Union has largely accepted the use of age as an acceptable category for differential treatment in the field of employment and as a result, a number of age-based practices are now tolerated as ‘objectively justified’, even if they create disadvantages for older workers. Overall, there are diverging levels of protection against age discrimination across the EU.





The protection gaps

Retirement ages

Recital 14 of the Employment Directive states that *“this Directive shall be without prejudice to national provisions laying down retirement ages”*. This provision applies to mandatory retirement ages that may deny older people from the right to continue to work. The Employment Directive clearly gives a large discretion to the member states to deviate from the general prohibition of non-discrimination in this regard.

Article 6 - Justification of differences of treatment on grounds of age

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.

Such differences of treatment may include, among others: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (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.

Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex.

Mandatory retirement

Mandatory retirement ages are either prescribed in law, or in employment or partnership agreements and may apply generally or in specific sectors (ex. public or private) or occupations. The Court of Justice of the EU has accepted the following as legitimate aims for mandatory retirement: intergenerational fairness in terms of access to employment, to avoid the humiliation of older workers if they are asked to leave when they are no longer fit for work, and a reasonable balance between labour market and budgetary concerns. The existence of a right to a pension has also played a significant role in accepting mandatory retirements as legitimate.

Unfavorable working conditions beyond pensionable age

Some employers decide to employ older workers beyond pensionable retirement age, but without offering the same conditions; for example, they only offer temporary contracts. The EU and national





courts tend to consider these practices as legitimate.¹ But if older persons are considered capable to continue working and an asset for the employer who wishes to keep them in their business, why should they be subject to less favorable working conditions? The only justification offered by Courts is that employment continues beyond legal retirement age. Usually, fixed terms contracts after pensionable age are also subject to age limits, albeit beyond pensionable age. This practice has been questioned in some countries, as is the case of Sweden mentioned below, but so far there is no clear guidance by the EU court regarding their legitimacy.

Good practice from Sweden

The CJEU has previously ruled that Swedish employers may lawfully dismiss a person from permanent employment when the person turns 67 (*Hörfeldt vs. Posten meddelande AB*, C-141/11). This practice has been concluded as a legitimate exception from the prohibition against discrimination on the ground of age. In view of this rule, a Swedish private bus company (*Keolis*) had a policy that offered one-year-fixed term employment contracts to workers who had been dismissed at the age of 67. Annual health checks were provided for workers over 65 and the temporary contracts stopped when the employee reached 70. The age limit was justified with safety reasons by the private company. The Swedish Equality Ombudsman brought a case to the Labour Court on behalf of three employees who were dismissed based on this particular policy.

The Labour Court concluded that the safety concerns were not legitimate and should not justify a decision not to renew the contracts. **The permission to dismiss an employee because of age was only lawful when the employee had reached the age of 67.** Above this age, the protection of age discrimination applies and the refusal to prolong temporary employment without individual assessments when the worker reaches the age of 70 constitute age discrimination. This case had significant impact in Sweden by providing fixed term employment possibilities to persons above the age of 70.

The Court stated that the permission to dismiss in scope of the Swedish Discrimination Act only exists at the age of 67. Only at this age, is there an explicit permission in the Employment Protection Act for dismissals without just cause.

Forced career change

In some sectors in Bulgaria, such as the professional army and the police, the law provides an age limit in which both men and women must retire and can no longer remain in service. However, the law does not restrict them from finding employment in other sectors. Similar limitations apply in Poland for judges, public prosecutors, court enforcement officers and notaries.² If older people are 'fit to work', why should they be forced to change professions? Besides, without access to training, guidance and support, it is practically unrealistic to expect workers to change professions after retirement.





Age limits in recruitment

Although the adoption of the Employment Directive has increased general awareness of the unacceptability of age limits in recruitment, maximum age requirements in access to certain forms of employment are still accepted. The European Network of legal experts in gender equality and non-discrimination reports that the Czech Republic has several examples of maximum age limits for certain professions. Court assessments tend to vary depending on the profession and the sector in which the age limit exists (for example for firefighters and pilots age limits are considered by the CJEU appropriate). Worryingly ageist assumptions sometimes come into play in these decisions, as in the case of Petersen, described below.

The Petersen case

In *Petersen*, the CJEU found that a Member State may legitimately consider it necessary to set an age limit for the practice of a medical profession (dentist) on the basis that it protects the health of patients. The case concerned a maximum age limit of 68 for dentists to be accredited to work in the German health service. The law served two objectives: (1) the protection of the health of patients in view of the fact that the performance of dentists declines after a certain age, and (2) the financial balance of the German health system. Regarding the health of patients, the Court stated that the German law would not be necessary and proportionate as it only would apply in the public health care system and not the private sectors (since the case concerned the German health service). On the other hand, if the aim was to preserve the financial balance of the German health system, the age limit may be necessary as it limits the number of dentists employed within the national health system and thus save money. The CJEU also accepted the argument that the age limit would open opportunities for younger dentists, which was one of the justifications that was presented in the scope of Article 6(1) of the Employment Directive. In *Petersen*, **the Court also accepted the argument that the skills of dentists declined with age**. This argument was based on reference to 'general experience', rather than reference to scientific studies indicating this fact, nor an individual assessment of the person concerned.

Redundancy

Age discrimination legislation in Estonia, France, Greece, Latvia, Luxembourg, Slovakia and Slovenia gives preference in redundancies to older workers.³ Older workers may also be pressured to sign 'voluntary' early retirement/resignation agreements, but harassment on the basis of age is barely known or recognized by Courts.





Courts legitimise and perpetuate ageism

These are just some examples that show that court decisions have not only failed to address structural ageism, but they also sometimes contribute to its perpetuation. Ageism, the stereotyping, prejudice and discrimination against individuals or groups on the basis of their age⁴ often operates at an unconscious level⁵. Ageism is pervasive at all levels of society including in courts and legal professionals.⁶ By normalising and tolerating practices that would be considered unacceptable for other groups, the justifications used by courts problematise ageism as ‘less severe’ form of discrimination.⁷ Recognizing a causal link between age and the ability to perform professional duties, courts ignore scientific evidence and amplify the misconception that old age itself equals frailty and makes us unfit to work. Decisions that accept ageism in the labour market, leave open the use of age proxies as a basis for policy or decision-making in other aspects of life, even if this harms individuals and entails unfair treatment. For example, because ill health is seen as a symptom of older age instead of as a medical condition that merits treatment, older people are excluded from preventive screening, from surgical treatment and organ transplantation⁸. Ageism also leads to the wide use of restrictive, neglectful and abusive practices in care settings, but also their under-reporting⁹. And because older people internalise these ageist stereotypes, they are also less likely to seek protection and redress in case of discrimination.

More concretely, the justifications used by courts are problematic because:

They consider work, not as a right, but merely as a source of income

Every individual has the right to be able to work.¹⁰ This right involves the freedom to choose and accept work and the right not to be deprived of work unfairly.¹¹ Access to work is important in itself, because it enables a person to have a good standard of living and can improve their quality of life, health and wellbeing. Work also allows individuals to make choices, to live independently and to participate in society. It has been shown that work gives a sense of meaning and structure, it helps maintain social connectedness and a sense of belonging, it provides opportunities for learning and for new experiences. Work therefore is not just about income; it is essential for the realisation of other fundamental human rights and an inseparable and inherent part of human dignity.¹² Work enables everyone to have a fulfilling life. The right to work is to be guaranteed without age distinction.¹³





They reflect an outdated idea of the lifecourse

The archetypical paradigm of the lifecourse, comprises of three distinct phases: early years are associated with learning; adulthood with work and old age with retirement. One of the key problems with the prevalence of the tripartite lifecourse paradigm, is that it drives prejudice and exclusion. Retirement is seen as natural

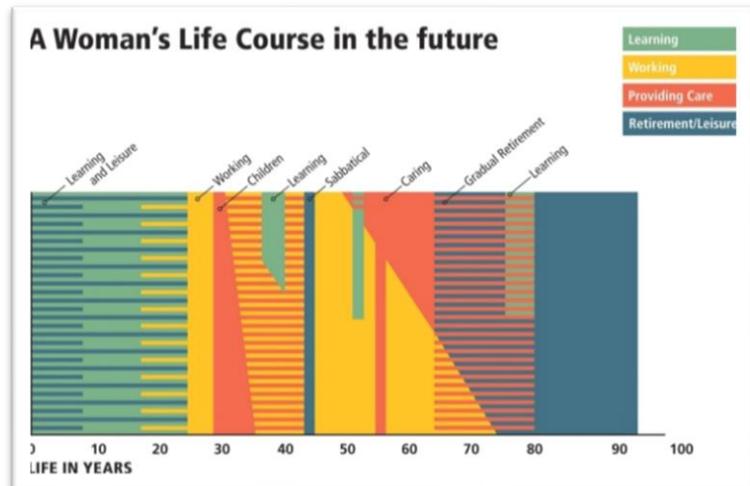


Figure 1 Multistage Lifecourse - Alex Kalache

or inevitable regardless of older people's abilities or wish to continue working. This happens without looking into alternatives (such as partial retirement or flexible working) and even if it deprives older people of their social role and leads them to marginalisation and poverty¹⁴. The risk of exclusion is higher for those with low skill and education levels. If this pattern is retained, with today's life expectancies and retirement ages, an individual may spend more than three decades in retirement. But in reality, an adult is likely to interrupt their career several times for learning, undertaking caring responsibilities or leisure (ex. Sabbatical leave); to be at the same time employed and engaged in unpaid work, training or volunteering; but also to work and remain active beyond the typical retirement age. Some older workers gradually transition to retirement, others complement pension income with part-time jobs and others 'unretire' in search for more meaning and wellbeing in later life. The lifecourse is no longer linear and the spheres of learning, working and leisure are no longer exclusive to specific age groups. Courts need to catch up with the reality of the multi-stage lifecourse. They need to be embedded with an understanding of how the right to work needs to be expanded in the context of longevity.

They are based on the false generalisation that advanced age equals loss of ability to perform a job

Old age does not equal illness and disability. Even though the likelihood to have a disability increases with age not all older persons have disabilities. Despite persistent stereotypes, there is no sufficient evidence that productivity declines with age.¹⁵ On the contrary, it is believed that the accumulation of professional expertise and knowledge compensates for functional losses.¹⁶ Older workers often have important skills, such as critical thinking, resilience and flexibility, which are on high demand by employers.¹⁷ They can train younger workers and rely on wider professional networks. Older workers





also tend to be more loyal and can therefore provide more stability and security to the organisation.¹⁸ Mixed age teams have also been associated with better performance and creativity.¹⁹

They reflect a biased notion of ‘intergenerational fairness’

Forcing older workers to retire is considered reasonable in order to support youth unemployment, even though there is not sufficient evidence that mandatory or early retirement creates new opportunities for younger workers.²⁰ In fact, older and younger workers rarely compete for the same jobs. A better match between skills, education and training and labour market needs is needed at all ages. Supporting older workers is not about privileging a specific generation of workers; it’s about equalizing opportunities for everyone to access work when they are older. Allowing older workers to work for longer has benefits for all generations. Solutions must support all population groups, and not shift problems from one group to another.²¹

They build on the assumption that pension levels are adequate

The assumption that by the legal retirement age individuals should have accumulated enough income security, ignores the fact that pension levels do not always correspond to the needs of pensioners, especially in the case of low-paid workers and those with interrupted careers. Caregiving duties and the gender pay gap lead to a stark (40%) difference in pension income. Persons with disabilities have on average fewer opportunities for education and work and they are therefore more likely to have lower income in old age²². They also tend to have to make more out of pocket payments for their care and support needs. Other groups, including migrants, Roma people and ethnic minorities who face lifelong inequalities are also more likely to have lower pensions. Decisions that are based on generalisations, without any individual assessments could lead to economic hardship and unfair treatment.

The Rosenblatt case

In *Rosenblatt*, the CJEU was faced to determine whether German legislation allowing mandatory retirement at 65, as provided in a collective agreement was justified age discrimination. The CJEU concluded that the aims of the legislation, namely to share employment between generations and to avoid humiliating capability dismissals for older workers, were legitimate. The Court went on to state that the means of achieving these means ensured that **pension benefits became available**. This conclusion was made despite the submission of the applicant that the statutory old-age pension would not be sufficient in view of his previous employment contract and would further put him in a difficult financial situation.

They drive inequalities and discrepancies between EU countries

Member States have interpreted the Employment Directive in diverse ways. This means that protection from discrimination in old age varies drastically from country to country. In some EU





countries, employment (i.e. labour law) protection ends with mandatory retirement.²³ This means that older workers who have reached legal retirement age are not equally protected against dismissal, discrimination and redundancy. Procedural requirements also sometimes make it difficult for workers to access justice. The extent of legal protection also varies depending on whether national law allows also groups or only individuals to make a claim of unfair treatment on the basis of age. Where groups are explicitly allowed to make claims, class actions (collective redress) are pursued more easily.²⁴

Conclusions

Decisions adopted using the above justifications violate the right to equality. They are based on ageist assumptions that are neither grounded in empirical evidence, nor reflect modern understandings of the right to work. They also run against current policies that aim to extend working lives. In order to challenge this prevailing ageist thinking that can be found at all levels of society, including court decisions, we need a strong legal framework that reflects a fundamental rethink of our right to work in old age. **A binding international instrument, such as a UN convention, could catalyse a strong and inclusive interpretation of the universal right to work by courts**, just like the Convention on the Rights of Persons with Disabilities has done in the case of persons with disabilities. It would make it increasingly difficult to tolerate practices that are based on stereotypes and attribute less value to older workers or contributions made in old age. It would incorporate specific barriers faced by older workers and spell out richer, clearer and more accessible interpretations of the right to work, including the following elements that have been brought into light in this paper.²⁵

The difference individualised assessments can make

A man in the Netherlands (above 65 years of age) who already was entitled to a pension and worked as a fireguard at a shipyard with the help of an employment agency was notified by e-mail that the agency would end his temporary placement. He has worked at the shipyard for 2 years, but the agency stated in the email that “they did not want to keep employees older than the state pension age”. The man then turned to the national equality body (i.e. Netherlands Institute for Human Rights).

According to the Netherlands Institute for Human Rights, the e-mail led to the assumption that the shipyard ended his temporary placement because he was older than the state pension age. The company had to present an objective justification. The shipyard argued that a fireguard must walk well and be able to carry out checks on the ships and move quickly in case of fire, and a fireguard older than the state pension age becomes less suitable for the job. These arguments were not objective justifications and a case of age discrimination was therefore concluded by the equality body. The shipyard established a general link between suitability for the function and age, which preserves biases about people of a certain age. The company should assess the physical suitability of fireguards instead of using assumptions based on age.





- Any assessment of an individual's capacity to perform a job should be based on an individual assessment rather than on stereotypical or age-based assumptions.
- Mandatory retirement ages interfere with the right to work ; they subject older workers to adverse treatment based merely on their age and they must be considered discriminatory.
- Legislation that prohibits discrimination on the basis of employment and occupation should apply fully to access to and termination of employment at all ages; it must include direct and indirect discrimination, cumulative intersectional and multiple discrimination; harassment, instructions to discriminate and victimisation.
- The mere existence of the possibility to receive state pension should not be used as a justification for the proportionality of mandatory retirement and dismissals.
- Laws and court decisions need to allow for extending working lives, for gradual transition to retirement or a combination of pension and work.
- Older workers must be fully covered by non-discrimination and labour law legislation
- They should have access to information about their rights and how to claim them.
- Legal procedures should make it easy for claimants to raise issues of age discrimination. For example, once an apparent case of differential treatment on the basis of age or a disproportionate impact of an employment practice on older persons has been established, the burden of proof should shift to the employer or other persons to clearly demonstrate that the action was not based on age or, if it was, that it was based on an objective and reasonable justification which is not based expressly or implicitly on ageist assumptions
- Judiciary and legal professionals must be trained and sensitised on issues of older age, ageism and the multidimensional barriers that older people face in the labour market.
- Financial and expert support must be available to older persons who wish to bring claims of age discrimination, the availability of quick and inexpensive resolution of such complaints through administrative or judicial proceedings. Extrajudicial mechanisms for redress and reparation, such as in trade unions and employers organisations, equality bodies and labour offices should also be available.





For more information:

Nena Georgantzi

Policy Coordinator, Human Rights & Non-Discrimination

AGE Platform Europe

Nena.georgantzi@age-platform.eu

Endnotes

¹ See Georgiev, para 54

² European network of legal experts in gender equality and non-discrimination, 2018, p. 41.

³ ibid

⁴ <https://www.who.int/westernpacific/news/q-a-detail/ageing-ageism>

⁵ Mikołajczyk, B. (2015) 'International law and ageism', *Polish Yearbook of International Law*, (35), pp. 83-108. Liat Ayalon and Clemens Tesch-Römer, *Contemporary perspectives on ageism* (Springer International Publishing, 2018).

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⁹ Amanda Phelan, "Elder abuse, ageism, human rights and citizenship: implications for nursing discourse," *Nursing Inquiry* 15, no. 4 (2008).

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¹¹ Committee on Economic Social and Cultural Rights (CESCR), "General Comment No.6: The economic, social and cultural rights of older persons," (United Nations, 1995). <http://www.refworld.org/docid/4538838f11.html>.

¹² Committee on Economic, Social and Cultural Rights, General Comment No. 18 (2005) on the right to work.

¹³ Committee on Economic Social and Cultural Rights (CESCR), "General Comment No.6: The economic, social and cultural rights of older persons."

¹⁴ Alan Walker, "Towards a political economy of old age," *Ageing and Society* 1, no. 1 (1981).

¹⁵ WHO report on ageing 2015; Disney, R. 1996. Can we afford to grow older? A perspective on the economics of aging (Cambridge, MA, MIT Press). There are some authors who believe that increased wages for seniority do not correspond to increased productivity, see for instance Skirbekk V. (2003), "Age and Individual Productivity: A Literature Survey", MPIDR Working Paper WP 2003-028, August Cedefop/ Skills supply and demand in Europe, Cedefop Luxembourg 2010

¹⁶ WHO report on ageing 2015

¹⁷ <https://www.weforum.org/reports/the-future-of-jobs-report-2020/digest>

¹⁸ <https://www.bls.gov/news.release/tenure.nr0.htm> and business case for older workers





¹⁹ https://www.aarpinternational.org/File%20Library/LLEL/AARP-Insights-from-Global-Executive-Roundtables_FINAL.pdf

²⁰ <https://social.un.org/ageing-working-group/documents/eleventh/Discussion%20paper%20on%20work%20January%202020.pdf> ; Doron et al., "Ageism and anti-ageism in the legal system: A review of key themes."

²¹ ILO older workers' recommendation

²² Gerry Zarb and Mike Oliver, *Ageing with a disability: what do they expect after all these years?* (University of Greenwich London, 1993).

²³ Naj Ghosheh, Age discrimination and older workers: Theory and legislation in comparative context

²⁴ Naj Ghosheh, Age discrimination and older workers: Theory and legislation in comparative context

²⁵ For other elements see in particular: <https://social.un.org/ageing-working-group/documents/eleventh/Discussion%20paper%20on%20work%20January%202020.pdf> ; <https://social.un.org/ageing-working-group/documents/eleventh/Inputs%20NGOs/Age%20Platform%20Europe%20-%20Right%20to%20Work.pdf>

