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## Legal Barriers to Age Discrimination in Hiring Complaints

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*Studies have shown that senior workers endure longer spells of unemployment than their younger counterparts. Age discrimination has been identified as one of the main obstacles to reemployment. This article critically examines how Canadian anti-age discrimination law has responded to the contemporary challenges experienced by senior job seekers. It articulates several difficulties in our existing age discrimination legal framework by analyzing and contrasting social science literature on the present labour market experience of senior job applicants with human rights tribunal and court decisions in hiring complaints. It concludes by sketching a preliminary set of workable proposals for change that derives from the recognition that age discrimination in hiring takes a systemic form and should be addressed as such.*

*Des études ont montré que les travailleurs âgés traversent des périodes de chômage plus longues que les travailleurs plus jeunes. Il a été déterminé que la discrimination fondée sur l'âge est l'un des principaux obstacles à la réembauche. L'auteure fait un examen critique de la réaction du droit canadien en matière de discrimination fondée sur l'âge aux défis que doivent relever les demandeurs d'emploi âgés aujourd'hui. Elle souligne plusieurs difficultés dans le cadre juridique actuel en matière de discrimination fondée sur l'âge. À cette fin, elle analyse la documentation en sciences sociales sur ce que vivent actuellement les demandeurs d'emploi âgés et la compare aux décisions du tribunal des droits de l'homme et des autres tribunaux dans les plaintes concernant l'embauche. Elle conclut en esquissant une première série de propositions réalistes de changement qui découlent de la reconnaissance du fait que la discrimination fondée sur l'âge à l'embauche devient systémique et doit être traitée comme telle.*

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*Introduction*

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*Introduction*

The search for a job has become an increasingly difficult ordeal for workers at advanced ages.<sup>1</sup> Studies have shown that senior workers endure longer spells of unemployment than their younger counterparts, despite dedicating comparable time and effort to re-enter the labour market.<sup>2</sup>

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1. There is no universal consensus around the definition of old age. The literature often divides people of advanced age to categories including “old-old” (above retirement age), “old” (retirement age), and “old-young” (below retirement age). See e.g. Marcie Pitt-Catsoupes & Michael A Smyer, “How Old Are Today’s Older Workers?” The Aging & Work Issue Brief 04 (February 2006), online: <[www.agingsociety.org/agingsociety/links/howold.pdf](http://www.agingsociety.org/agingsociety/links/howold.pdf)>.

In this article, I intend to avoid popular terms such as “old” and “elderly” due to their negative connotation. Although I prefer the term “workers at advanced age,” for the sake of convenience, I will use the shorter term “senior workers,” without implying any workplace hierarchy. For the purpose of this article, this term refers to workers aged 55 and above as the studies referred to in this article suggest that long term unemployment and barriers to labour market re-entry are mostly associated with this age group. But note that there is some evidence that age discrimination in hiring may start earlier. See e.g. *Policy on discrimination against older persons because of age* (Toronto: Ontario Human Rights Commission, 2002) at 6, online: <[www.ohrc.on.ca](http://www.ohrc.on.ca)>; Rocio Albert López-Ibor, Lorenzo Escot & José Andrés Fernández Cornejo, “A Field Experiment to Study Sex and Age Discrimination in Selection Processes for Staff Recruitment in the Spanish Labor Market” (2008) *Papeles de Trabajo Working Paper No 20/08*, online: <[www.ssrn.com](http://www.ssrn.com)>.

2. See André Bernard, “The Job Search of the Older Unemployed” (2012) 24:3 *Statistics Canada Perspective on Labour and Income* 4, online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>; Carl E Van Horn, *Working Scared (Or Not Working At All): The Lost Decade, Great Recession, and Restoring the Shattered American Dream* (Rowman & Littlefield Publishers, 2013) at c 4.

They search for jobs through various methods<sup>3</sup> and are willing to move outside their community to obtain new skills and to work for less money,<sup>4</sup> but these efforts prove to be of little or no avail. According to Statistics Canada, the average length of unemployment in 2015 for those aged 15 to 24 was 11.5 weeks, for those aged 25 to 54—21.9 weeks, for those aged 55 to 64—29.3 weeks and for those aged 65 and more—26.6 weeks.<sup>5</sup>

Furthermore, while some senior workers do eventually find work, it is often non-standard employment and for lower pay.<sup>6</sup> Others face the stigma of long-term unemployment and abandon the job search exiting the labour market involuntarily, although they are not yet eligible for social security benefits, such as Old Age Security, and are significantly below the pensionable age.<sup>7</sup> Even those who are eligible for some (reduced) benefits would often rather work longer if possible,<sup>8</sup> as the current public and private pension systems fail to provide adequate retirement income,<sup>9</sup> and life expectancy continues to increase.<sup>10</sup> Thus, many senior workers

3. Note that while Van Horn (*ibid*) found that senior workers search online for jobs, Bernard (*ibid*) found that senior workers tend to use different search methods from those used by younger workers.

4. See e.g. Ellie D Berger, “‘Aging’ Identities: Degradation and Negotiation in the Search for Employment” (2006) 20:4 *J Aging Studies* 303; Ellie D Berger, “Managing Age Discrimination: An Examination of the Techniques Used When Seeking Employment” (2009) 49:3 *Gerontologist* 317 (their negative experience in job searches leads senior candidates to conceal their age by changing their physical appearance (e.g. hair dye), revising their resumes, using “young” language, and taking courses to avoid being classified as out-of-date).

5. Statistics Canada, *Table 282-0048—Labour force survey estimates (LFS), duration of unemployment by sex and age group, annual (persons unless otherwise noted)*, CANSIM (database).

6. See e.g. a recent report on the barriers to reemployment and the shift from stable to precarious forms of employment experienced by racialized senior workers following a plant closure in Winnie Ng et al, “An Immigrant All Over Again? Recession, Plant Closures, and Older Racialized Workers: A Case Study of the Workers of Progressive Moulded Products” (2013), online: <[www.ryerson.ca](http://www.ryerson.ca)>.

7. Former Prime Minister Stephen Harper proposed an increase in the age for receipt of old age security benefits from 65 to 67 to be phased in over six years starting in 2023. This has since been reversed by the current Liberal Prime Minister Justin Trudeau.

8. See e.g. Katherine Marshall & Vincent Farrao, “Participation of Older Workers” (2007) 8:8 *Perspectives on Labour and Income* 5, online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>; “Rethink Retirement: 2008 Survey of Canadians’ Preparedness for Life After Work,” Desjardins Financial Security, online: <[www.desjardinslifeinsurance.com](http://www.desjardinslifeinsurance.com)>. For similar studies in the US see e.g. Sudipto Banerjee, “Retirement Age Expectations of Older Americans Between 2006 and 2010” (2011) 32:12 *EBRI Notes* 2, online: <[www.ssrn.com](http://www.ssrn.com)>; “Staying Ahead of the Curve 2013: The AARP Multicultural Work and Career Study: Older Workers in an Uneasy Job Market” (2014) AARP, online: <[www.aarp.org](http://www.aarp.org)>.

9. According to OECD, they only replace about 45 percent of the average pre-retirement gross income which is far below the recommended two-thirds. See “Pension at a Glance 2013: Canada” (2013) OECD, online: <[www.oecd.org](http://www.oecd.org)>.

10. Life expectancy at birth for Canadians has increased from 57.1 years in 1921 to 81.7 years in 2011. See Yves Decady & Lawson Greenberg, “Ninety Years of Change in Life Expectancy,” Statistics Canada—Health at a Glance (2014), online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>.

cannot afford to retire and are forced to make extreme efforts to remain in the labour market for a longer period of time.<sup>11</sup>

There is extensive quantitative and qualitative research on the experience of senior unemployed workers in the United States.<sup>12</sup> In Canada, several studies and policy papers have confirmed that senior workers face myriad challenges to reemployment, including a lack of reemployment opportunities, outdated and industry- or job-specific skills,

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11. See also Aneta Bonikowska & Grant Schellenberg, "Employment Transitions Among Older Workers Leaving Long-term Jobs: Evidence from Administrative Data," Statistics Canada (2014), online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>. This study examines patterns of employment of workers who left a long term job (of 12 years and above) between the late 1990s and early 2000s. Among other findings, this study reveals that 60% of workers above 55 find a new job within 10 years, that the chances of re-employment decreases as they age, and that those without a registered pension plan tend to work longer.

12. See e.g. Sewin Chan & Ann Huff Stevens, "Job Loss and Employment Patterns of Older Workers" (2001) 19:2 *Journal of Labor Economics* 484; Geri Adler & Don Hilber, "Industry Hiring Patterns of Older Workers" (2009) 31:1 *Research on Aging* 69 at 82-83; Kenneth A Couch, Nicholas A Jolly & Dana W Placzek, "Earnings Losses of Older Displaced Workers: A Detailed Analysis with Administrative Data" (2009) 31:1 *Research on Aging* 17; Maria Heidkamp, Nicole Corre & Carl E Van Horn, "The 'New Unemployables': Older Job Seekers Struggle to Find Work During the Great Recession" (2010) *The Sloan Centre on Aging & Work at Boston College*, Issue Brief 25, online: <[www.bc.edu](http://www.bc.edu)>; Richard W Johnson & Corina Mommaerts, "Age Differences in Job Displacement, Job Search, and Reemployment" (2010) *Boston College Center for Retirement Research Working Paper No. 2011-3*, online: <[www.ssrn.com](http://www.ssrn.com)>; Susan Bisom-Rapp, Andrew D Frazer & Malcolm Sargeant, "Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States" (2011) 15 *Employee Rts & Employment Pol'y J* 43 at 48-50; Richard W Johnson & Janice S Park, "Can Unemployed Older Workers Find Work?" (2011) *Urban Institute*, online: <[www.urban.org](http://www.urban.org)>; Claire McKenna, "Economy in Focus: Long Road Ahead for Older Unemployed Workers" (2012) *National Employment Law Project*, Issue Brief, online: <[www.nelp.org](http://www.nelp.org)>; U.S. Bureau of Labor Statistics, "Worker Displacement: 2009-2011" (2012) *Economic News Release No. USDL-12-1719*, online: <[www.bls.gov](http://www.bls.gov)>; Matthew S Rutledge, Natalia Orlova & Anthony Webb, "How Will Older Workers Who Lose Their Jobs During the Great Recession Fare in the Long-Run?" (2013) *Centre for Retirement Research at Boston College*, online: <[www.crr.bc.edu](http://www.crr.bc.edu)>.

health issues, barriers to training and education, and age discrimination.<sup>13</sup> Their early withdrawal from the labour market is predicted to negatively affect economic and labour force growth, aggravating fiscal pressures on public and private pension plans.<sup>14</sup>

Several policy proposals have been made recently by various government and non-governmental organizations on how to improve labour market prospects for senior workers.<sup>15</sup> One of the major achievements was the development of the Targeted Initiative for Older Workers (TIOW) in 2008. The TIOW is a federal-provincial cost-shared program which aims to provide employment assistance services and employability improvement activities to unemployed workers aged 55 to 64.<sup>16</sup> But given the data provided above, certainly more should be done.

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13. See e.g. Ontario Human Rights Commission, *Discrimination and Age: Human Rights Issues Facing Older Persons in Ontario* (Toronto: Ontario Human Rights Commission, 2000), online: <[www.ohrc.on.ca](http://www.ohrc.on.ca)>; Maurice J Mazerolle & Gangaram Singh, "Economic and Social Correlates of Re-Employment Following Job Displacement" (2004) 63:3 *American J Economics & Sociology* 717; Organization for Economic Cooperation and Development, *Ageing and Employment Policies: Live Longer, Work Longer* (Paris: OECD, 2006) at 34-39, online: <[www.oecd-ilibrary.org](http://www.oecd-ilibrary.org)>; Marshall & Ferrao, *supra* note 8 at 8-9; René Morissette, Xuelin Zhang & Marc Frenett, "Earnings Losses of Displaced Workers: Canadian Evidence from a Large Administrative Database on Firm Closures and Mass Layoffs" (2007) Analytical Studies Branch Research Paper Series, No 291, Catalogue No 11F0019MIE, online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>; *Supporting and Engaging Older Workers in the New Economy—Report by the Expert Panel on Older Workers* (Ottawa: Human Resources and Social Development Canada, 2008), online: <[www.publications.gc.ca](http://www.publications.gc.ca)>; Jean Pignal, Stephen Arrowsmith & Andrea Ness, *First Results from the Survey of Older Workers, 2008* (Ottawa: Statistics Canada, 2010), online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>; Ross Finnie & David Gray, "Labour-Force Participation of Older Displaced Workers in Canada: Should I Stay or Should I Go?" (2011) 15 *Institute for Research on Public Policy Study 1* at 19-20, online: <[www.irpp.org](http://www.irpp.org)>; Ping Ching Winnie Chan, René Morissette & Marc Frenette, "Workers Laid-off During the Last Three Recessions: Who Were They, and How Did They Fare?" (2011) Statistics Canada, Analytical Studies Branch Research Paper Series, online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>.

14. See Finnie & Gray, *ibid*; *Supporting and Engaging*, *ibid*.

15. See e.g. Finnie & Gray, *supra* note 13 (who argue that a wage insurance program which would subsidize a proportion of the senior unemployed worker's wage losses for a fixed period, accompanied by intensive job search assistance, can be effective in tackling senior workers' challenges to re-employment). See also Public Policy Forum, *Canada's Aging Workforce: A National Conference on Maximizing Employment Opportunities for Mature Workers* (Ottawa: Public Policy Forum, 2011), online: <[www.pppforum.com](http://www.pppforum.com)>; The National Seniors Council, "Report on the Labour Force Participation of Seniors and Near Seniors, and Intergenerational Relations" (Gatineau: National Seniors Council 2011), online: <[www.seniorscouncil.gc.ca](http://www.seniorscouncil.gc.ca)>.

16. See OECD, *Thematic Follow-Up Review of Policies to Improve Labour Market Prospects for Older Workers: Canada* (Paris: OECD, 2012), online: <[www.oecd.org](http://www.oecd.org)>; Government of Canada, Strategic Policy and Research Branch, *Formative Evaluation of the Targeted Initiative for Older Workers, Final Report* (Ottawa: Strategic Research and Policy Branch, 2010), online: <[www.rhdcc-hrsdc.gc.ca](http://www.rhdcc-hrsdc.gc.ca)>.

Although age discrimination has been identified in the literature as one of the major barriers to labour market re-entry<sup>17</sup> and is often strongly tied to other reemployment challenges such as health issues and barriers to training and education,<sup>18</sup> there has been almost no comprehensive research on the role that Canadian anti-age discrimination law has played in addressing and removing obstacles to job market re-entry. This article therefore critically examines how Canadian anti-age discrimination law has responded to the contemporary challenges experienced by senior job seekers. As human rights legislation in Canada falls under provincial jurisdiction, except for federally-regulated entities, this article focuses on the law of one province, Ontario, but refers to the law of other provinces and engages in a broader legal analysis which is pertinent across Canada wherever applicable.

At the outset, it should be noted that this article does not aim to assess whether anti-age discrimination law *deters* employers from discriminating against senior job applicants in the first place. There is extensive literature on this issue in the U.S., where most studies found that states with stronger anti-discrimination laws are associated with increased employment among senior workers.<sup>19</sup> Some studies have also found that stronger laws improved employment prospects of senior workers, albeit with some conflicting results during difficult economic times,<sup>20</sup> while other studies have found that anti-age discrimination laws which make it difficult to dismiss senior workers deterred their hiring in the first place.<sup>21</sup> While no comparable

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17. See e.g. Bernard, *supra* note 2; Heidkamp, Corre & Van Horn, *supra* note 12 at 17; Berger (2006), *supra* note 4; Joanna N Lahey, "Do Older Workers Face Discrimination?" An Issue in Brief No 33, Center for Retirement Research at Boston College (2005), online: <[www.crr.bc.edu](http://www.crr.bc.edu)>.

18. See text accompanying *infra* notes 151-154.

19. See David Neumark & Wendy A Stock "Age Discrimination Laws and Labor Market Efficiency" (1999) 107 *Journal of Political Economy* 1081; Scott J Adams, "Age Discrimination Legislation and the Employment of Older Workers" (2004) 11 *Labour Economics* 219.

20. See David Neumark & Patrick Button, "Did Age Discrimination Protections Help Older Workers Weather the Great Recession?" (2014) 33:4 *J Policy Analysis and Management* 566. The authors did not find evidence that stronger anti-age discrimination laws helped senior workers during the 2007-2009 recession and sometimes were associated with more adverse effects (i.e. senior workers in American States with stronger laws against age discrimination faced longer periods of unemployment after the recession compared with younger workers). But the authors also found evidence that stronger laws helped senior workers (especially with unemployment durations and hiring rates) before the recession, and that this evidence is consistent with some empirical studies conducted before the recession. See also David Neumark, Joanne Song & Patrick Button, "Does Protecting Older Workers from Discrimination Make it Harder to Get Hired? Revised with Additional Analysis of Sipp Data and Appendix of Disability Laws" (February 2015), online: <[www.ssrn.com](http://www.ssrn.com)> (little or no evidence was found to support the assertion that stronger disability discrimination laws lower the hiring of non-disabled or disabled senior workers).

21. See Joanna Lahey, "State Age Protection Laws and the Age Discrimination in Employment Act" (2008) 51 *Journal of Law and Economics* 433.

literature exists in Canada, this article does not intend to explore this issue. Rather, it examines how anti-age discrimination law responds when age discrimination is alleged to have occurred during the hiring process. After analyzing and contrasting social science literature on the present labour market experience of senior job applicants with human rights tribunal and court decisions on age discrimination in hiring complaints, several difficulties in our existing legal framework for age discrimination are addressed.

This article proceeds as follows: Part I offers a short introduction to anti-age discrimination law in Canada. Part II provides a review of Ontario Human Rights Tribunal decisions on age discrimination in hiring complaints between the years 2004 and 2015, which reveals that only a very small number of complaints were upheld. Part III identifies several difficulties in the way that anti-age discrimination law responds to contemporary practices of age discrimination in hiring. Among other difficulties, this part discusses how prevailing practices of age discrimination have been increasingly subtle and systemic, while anti-age discrimination jurisprudence focuses on individual cases of overt and explicit bias. To this end, this part reviews decisions made by tribunals and courts and contrasts them with the ways in which age discrimination in hiring is manifested. For example, it shows that adjudicators often view age discrimination cases as though they must be of direct form, requiring complainants to show clear evidence of explicit bias, but the cases are often of adverse effect and implicit bias in nature. Finally, Part IV sketches a preliminary set of workable proposals for change, which derive from the recognition that age discrimination in hiring takes a systemic form and should be addressed as such.

### I. *Anti-age discrimination law in Canada*

Human rights legislation all across Canada prohibits age discrimination in employment.<sup>22</sup> Both direct and adverse effect forms of discrimination are banned. For example, it is wrong to have a hiring policy according to which only workers below the age of 40 can be considered for a position. It may be equally wrong to have a hiring policy according to which only workers who pass a fitness test can be considered for a position, when this neutral-

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22. See in Ontario: *Human Rights Code*, RSO 1990, c H. 19, ss 5, 11; in British Columbia: *Human Rights Code*, RSBC 1996, c 210, s 14; in Alberta: *Human Rights Act*, RSA 2000, c A-25.5, s 7; in Nova Scotia: *Human Rights Act*, RSNS 1989, c 214, ss 5(1)(d), 8(1); in Quebec: *Charter of Human Rights and Freedoms*, RSQ, c C-12, ss 10, 16.



on-its-face policy has a disproportionate impact on senior applicants.<sup>23</sup> Among others, the legislation protects workers against discrimination in the recruitment, selection and hiring process. Advertisements must not contain qualifications that directly or indirectly discourage people from applying for a job on the basis of age.<sup>24</sup> In addition, application forms must not ask questions that directly or indirectly classify candidates on the basis of age.<sup>25</sup> Finally, questions asked during the interview about age are permitted only when special exceptions apply, for example, where age is a *bona fide* occupational requirement (BFOR).<sup>26</sup>

To establish a case of *prima facie* age discrimination in hiring, the complainant has to submit evidence that age was relied upon by the employer as one of the reasons for the hiring decision (such as a comment made by the interviewer about the complainant's age). Alternatively, the complainant may show that (1) the complainant was qualified for the particular position; (2) the complainant applied for and was denied the position; and (3) a considerably younger candidate who was no better qualified was hired for that position (the "three-stage test"). Once the complainant establishes a *prima facie* case of discrimination, the evidential burden shifts to the respondent to provide a credible and rational explanation demonstrating that the decision was not discriminatory (e.g. the complainant was not qualified or the successful job applicant was more qualified). The adjudicator has to determine whether the inference of discrimination is more probable from the evidence than the explanation provided by the employer.<sup>27</sup>

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23. Despite the prohibition on age discrimination, mandatory retirement had been widely exercised in Canada. Even now when most Canadian jurisdictions have introduced changes to their legislation, mandatory retirement is still allowed through various exceptions and exemptions. See Pnina Alon-Shenker, "Ending Mandatory Retirement: Reassessment" (2014) 35 Windsor Rev Legal and Soc Issues 22 at 28-32.

24. See in Ontario: *Human Rights Code*, *supra* note 22, s 23(1); in British Columbia: *Human Rights Code*, *supra* note 22, s 11; in Alberta: *Human Rights Act*, *supra* note 22, s 8; in Nova Scotia: *Human Rights Act*, *supra* note 22, s 8(2); in Quebec: *Charter of Human Rights and Freedoms*, *supra* note 22, s 18.1.

25. See in Ontario: *Human Rights Code*, *supra* note 22, s 23(2); in Alberta: *Human Rights Act*, *supra* note 22, s 8; in Nova Scotia: *Human Rights Act*, *supra* note 22, s 8(2); in Quebec: *Charter of Human Rights and Freedoms*, *supra* note 22, s 18.1.

26. See in Ontario: *Human Rights Code*, *supra* note 22, s 23(3); in Nova Scotia: *Human Rights Act*, *supra* note 22, s 8(2); in Quebec: *Charter of Rights and Freedoms*, *supra* note 22, s 20.

27. See e.g. *Girdharrie v Cardinal Fasteners, a division of Talbot Sales Inc*, 2013 HRTO 514 at paras 71-74; *Blakely v Queen's University*, 2012 HRTO 1177 at para 48; *Clennon v Toronto East General Hospital*, 2009 HRTO 1242, at paras 75-78; *Shakes v Rex Pak Ltd (1981)*, 3 CHRR D/1001 at para 8919.

## II. *Examination of complaints filed with the Ontario Human Rights Tribunal*

Although Canadian anti-age discrimination law is comprehensive and has been promoted and enforced for several decades, age discrimination in hiring is widespread. Recent studies provide more than anecdotal evidence of the prevalence and persistence of age discrimination in the workplace, specifically at the recruitment stage. For example, some studies found that senior workers perceive ageism as a significant barrier to reemployment.<sup>28</sup> Other studies found that many employers hold ageist views, for example that senior workers are not as motivated, flexible or productive as their younger counterparts, may face greater difficulties adjusting to new technology and other changes, have issues with reporting to younger managers, and experience a decline in physical abilities.<sup>29</sup> These views are often based on inaccurate generalizations. Indeed, age is a poor proxy for job performance, and the process of aging is highly individualized.<sup>30</sup> However, studies have shown that these inaccurate beliefs and stereotyped assumptions, embedded in the determination process, have a potent impact on employers' decisions regarding hiring, training and promotion.<sup>31</sup>

Despite this grim reality, proving age discrimination in hiring is often very difficult. This is also the case regarding the various prohibited grounds including gender, race and disability. First, a large portion of

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28. See references in *supra* note 17.

29. See e.g. *Time for Action: Advancing Human Rights for Older Ontarians* (Toronto: Ontario Human Rights Commission, 2001), online: <[www.ohrc.on.ca](http://www.ohrc.on.ca)>; *Policy on discrimination*, *supra* note 1. In the U.S. see e.g. Jessica Collison, *Older Workers Survey* (Society for Human Resource Management, June 2003), online: <[www.shrm.org](http://www.shrm.org)> (five percent of hiring managers were "extremely hesitant" to hire senior workers, 14% were "hesitant," 42% were "a little hesitant" and only 38% were "not at all hesitant." The reasons for this hesitancy include various stereotypes such as that senior workers do not keep up with technology and require more training).

30. See e.g. Glenn M McEvoy & Wayne F Cascio, "Cumulative Evidence of the Relationship Between Employee Age and Job Performance" (1989) 74 *J Applied Psychology* 11; *Policy on Discrimination*, *supra* note 1 at 8, 10-11; Geoffrey Wood, Adrian Wilkinson & Mark Harcourt, "Age Discrimination and Working Life: Perspectives and Contestations—A Review of the Contemporary Literature" (2008) 10:4 *Intl J Management Reviews* 425; Rasa Zabarauskaitė, "Older Workers Show Highest Levels of Company Loyalty," European Working Conditions Observatory, Institute of Labour and Social Research (2008), online: <[www.eurofound.europa.eu](http://www.eurofound.europa.eu)>; Thomas WH Ng & Daniel C Feldman, "The Relationship of Age to Ten Dimensions of Job Performance" (2008) 93 *J Applied Psychology* 392.

31. See e.g. Kevin J Gibson, Wilfrid J Zerbe & Robert E Franken, "Employers' Perceptions of the Re-employment Barriers faced by Older Job Hunters" (1997) 48 *Rel Ind* 321; Kène Henkens, "Stereotyping Older Workers and Retirement: The Managers' Point of View" (2005) 24: 4 *Canadian J on Aging* 353; Eyal Gringart, Edward Helmes, & Carig Paul Speelman, "Exploring Attitudes toward Older Workers among Australian Employers: An Empirical Study" (2005) 17:3 *J Aging & Social Policy* 85; Berger (2006), *supra* note 4; Berger (2009), *supra* note 4; Ellie Berger, *Ageism at Work: Negotiating Age, Gender, and Identity in the Discriminating Workplace* (University of Toronto Press, forthcoming).

age discrimination complaints are filed by those who were dismissed after long-term service, while only a small portion are filed by those who were not hired.<sup>32</sup> Long term employees may have more insight into the reasons for their dismissal than job candidates have when they are not called for an interview or are not hired following an interview. Long-term employees may also have a stronger incentive to sue for damages which are potentially higher than those of job candidates. Second, even when an age discrimination complaint in hiring is filed, it seems that it will be rarely upheld. In the U.S.,<sup>33</sup> for example, most age discrimination complaints (including related to hiring) are settled or dismissed, slightly more than the overall average of all complaints.<sup>34</sup> In Canada, there are no official litigation statistics of age discrimination complaints. In Ontario, there is some data on the *overall* complaints filed with the Human Rights Tribunal.<sup>35</sup> But this data does not distinguish between complaints on the

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32. There is no official data available in Canada about how many age discrimination complaints revolve around hiring. In the US, around one-tenth of age discrimination complaints deal with hiring. See Samuel Issacharoff & Erica Worth Harris, "Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution" (1997) 72 NYU L Rev 780 at 793; Jennifer Nycz-Conner, "Age Bias in Hiring is Hard to Prove," *Washington Business Journal* (23 March 2009), online: <www.bizjournals.com>.

33. Under the *Age Discrimination in Employment Act*, 29 USC § 626, to file a lawsuit in court, the plaintiff first has to file a charge with the Equal Employment Opportunity Commission. Upon a decision to pursue a charge, the Equal Employment Opportunity Commission (EEOC) first attempts to settle the complaint. If this fails, the EEOC may file a lawsuit against the employer or authorize the plaintiff to file a lawsuit. In 2013, the EEOC received 21,296 age discrimination complaints but filed only seven lawsuits with ADEA claims. A plaintiff may file a claim with the Federal Court but this is even more hopeless as the federal court system is generally hostile toward employment discrimination claims. See Nancy Levit, "Changing Workforce Demographics and the Future of the Protected Class Approach" (2012) 16 Lewis & Clark L Rev 463 at 492; Kevin M Clermont & Stewart J Schwab, "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?" (2009) 3 Harvard L & Policy Rev 103; Patricia G Barnes, *Betrayed: The Legalization of Age Discrimination in the Workplace* (2014).

34. In 2014, 7.8% of the age discrimination charges filed with the EEOC were settled with benefits (compared to 8.5% of all charges under all statutes enforced by EEOC); 6.2% were withdrawn with benefits (compared to 5.9%); 18% were closed for administrative reasons (compared to 16.9%); for 65.3% of the charges the EEOC determined that there was no reasonable cause (the charging party may still bring a private court action) (compared to 65.6%); for only 2.7% of the charges the EEOC determined that there was reasonable cause (compared to 3.1%). See "Equal Employment Opportunity Commission, Enforcement & Litigation Statistics—Age Discrimination in Employment Act, FY 1997–FY 2014," online: <www.eeoc.gov> and "All Statutes, FY 1997–FY2014," online: <www.eeoc.gov>.

35. According to the Pinto Report, from 1 April 2009 to 31 March 2012, the Ontario Human Rights Tribunal delivered 274 final decisions finding discrimination in 110 cases. In addition, 1649 were dismissed on a preliminary basis (which includes cases dismissed under a summary hearing procedure based on a finding that the complaint has no reasonable prospect of success). See Appendix E to Andrew Pinto, *Report of the Ontario Human Rights Review 2012* (Ontario Ministry of the Attorney General, November 2012), online: <www.attorneygeneral.jus.gov.on.ca> ["Pinto Report"].

basis of grounds (e.g. sex, race, age, etc.) or types of claims (e.g. hiring, harassment, dismissal, etc.).

This article provides a preliminary examination of human rights tribunal decisions on age discrimination in hiring complaints.<sup>36</sup> As part of this examination, a search was conducted for all of the decisions, reported on Quicklaw, by the Ontario Human Rights Tribunal from 1 January 2004 to 1 January 2016 in which a claim of age discrimination in hiring was made (usually among other claims).<sup>37</sup> From the results of this initial search for keywords, irrelevant decisions (which in fact did not include any claim of age discrimination in hiring) and decisions which did not consider the claim of age discrimination in hiring on its merits<sup>38</sup> were excluded and a total of 69 relevant decisions were identified.<sup>39</sup> That is, between 2004 and 2015 only 69 complaints of age discrimination in hiring were litigated (including under summary hearing procedures).<sup>40</sup> In fact, no age discrimination in hiring decisions were adjudicated between 2004 and 2007.<sup>41</sup> Given the large number of complaints filed every year with the

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36. For a very recent attempt, see Peter S Spiro, "Improving the Effectiveness of Human Rights Law Against Age Discrimination in Hiring" (6 November 2014), online at SSRN: <www.ssrn.com>. (The author searched for age discrimination in hiring cases on CanLII and read through the top 20 out of 80 reported hearings. The complainants in all 20 cases were unsuccessful. Upon reviewing several cases the author concluded that the Human Rights Tribunal has not been "an effective means for applicants to deal with age discrimination complaints.")

37. This examination started with a broad search for the key words "age," "employment" and "hiring" in Ontario by the Human Rights Tribunal within the sample period which resulted in over 400 decisions. A decision was made to focus on the Tribunal, despite the fact that s 46.1 of the Code creates jurisdiction for civil courts to award monetary compensation and/or restitution for a breach of the Code, when the plaintiff has a recognized civil cause of action *in addition* to claiming a Code breach (for example when an employee seeks wrongful dismissal damages and age discrimination in dismissal). But this would rarely be relevant in a hiring case. A few civil actions were filed on the basis of s 46.1 and in none of them the human rights complaint was successful. See Pinto Report, *supra* note 35 at 174.

38. This includes interim decisions where the age claim has not yet been considered or decisions to dismiss the complaints on a preliminary basis (i.e. not on merits) such as delay or jurisdiction issues.

39. Decisions dealing with re-hiring and promotion were included when they involved a selection process.

40. Upon review of a complaint, the Tribunal may direct on its own initiative, that a summary hearing be held to hear submissions from the parties regarding whether the complaint should be dismissed, in whole or in part, on the basis that there was no reasonable prospect that it would succeed. The Tribunal may also grant a respondent's request for a summary hearing.

41. There was one decision in 2008, one in 2009, 13 in 2010, 17 in 2011, 16 in 2012, 10 in 2013, 7 in 2014 and 4 in 2015. This is because prior to June 2008, people who experienced discrimination had to file a complaint with the Ontario Human Rights Commission. The Commission then investigated, attempted to reach a settlement, and had the authority to make a decision whether to pursue a claim with the Ontario Human Rights Tribunal. As noted in the Pinto Report (*supra* note 35 at 9), "[o]nly a small percentage of cases made it to the Tribunal stage....in the five years prior to 2008, on average, about 9.4% of complaints completed by the Commission were referred to the Tribunal." On 30 June 2008 the system changed (see the *Human Rights Code Amendment Act*, 2006, SO 2006, c 30) allowing people who experienced discrimination to file their complaints directly with the Tribunal.

Ontario Human Rights Tribunal,<sup>42</sup> this may suggest a high percentage of settlement rates.<sup>43</sup>

More importantly, a review of the 69 decisions reveals that the complainant's claim of age discrimination in hiring was upheld in only 6 cases.<sup>44</sup> Interestingly, in 4 of the 6 cases, the complaint was only *partially* upheld with a very limited victory (and remedy) to the complainant.<sup>45</sup> Furthermore, 5 of the 6 cases were upheld because they involved clear-cut overt cases of age discrimination, such as asking for the job applicant's age or date of birth.<sup>46</sup> Finally, the vast majority of complainants (50 of the 69 cases) were self-represented (similar to the general data available on Ontario Human Rights Tribunal complaints).<sup>47</sup>

While the small number of age discrimination in hiring cases—and specifically the small number of upheld complaints—may suggest that age discrimination is not widespread and significant, the literature and research show otherwise.<sup>48</sup> It seems as though complainants experience various challenges, perhaps evidentiary, in proving their cases.<sup>49</sup> This again is not unique to age discrimination complaints. When a clear discriminatory policy, rule, or practice is not established, any complainant (e.g. women, disabled or racialized people) will struggle to establish a *prima facie* case of discrimination

42. In 2013–2014, 3,242 complaints were received by the Ontario Human Rights Tribunal. About 421 complaints (13%) were on the basis of age (not necessarily in employment or related to hiring). See Ontario, Human Rights Tribunal, “Fiscal Year 2013–2014” (Toronto: HRTO, 2015), online: <www.hrto.ca>.

43. Indeed, from 30 June 2008 to 31 March 2012, 60 to 70% of the complaints filed with the Ontario Human Rights Tribunal where mediation was conducted were settled (see Pinto Report, *supra* note 35, Appendix E).

44. The cases were: *Shaw v Ottawa (City)*, 2012 HRTO 593 [*Shaw*]; *Reiss v CCH Canadian Limited*, 2013 HRTO 764 [*Reiss*]; *Deane v Ontario (Community Safety and Correctional Services)*, 2011 HRTO 1863 [*Deane*]; *Kosovic v Niagara Caregivers and Personnel Ltd*, 2013 HRTO 433 [*Kosovic*]; *Tearne v Windsor (City)*, 2011 HRTO 2294 [*Tearne*]; and *Rocha v 1339835 Ontario Ltd*, [2012] OHRTD No 2207 [*Rocha*].

45. These cases were *Shaw*, *Reiss*, *Deane* and *Kosovic* (*ibid*).

46. These cases were *Reiss* (indicating that the employer was looking for a more junior candidate in experience and salary expectations); *Deane* (encouraging the complainant to consider retirement); *Shaw* (asking for job applicant's birth certificate and driver's license); *Kosovic* (asking for date of birth of applicant); and *Rocha* (withdrawal of interview after inquiring about the age of the applicant) (*supra* note 44).

47. For example, in the fiscal year 2013–2014, 76% of all complainants were self-represented. See Ontario Human Rights Tribunal, “Fiscal Year 2013–2014,” *supra* note 42.

48. See *supra* notes 29 and 31.

49. Certainly there is a need for more data to determine whether this is statistically significant. Future research could, for example, compare the success rates of age discrimination in hiring cases to cases on the basis of other grounds of discrimination, or to cases from other provinces, or to age discrimination cases in other stages of the employment relationship (e.g. dismissal).

as these cases often depend on inferences from context and on how much adjudicators are prepared to draw inferences in the complainant's favour. But since age discrimination is often considered "different" from other grounds of discrimination,<sup>50</sup> has been litigated less and for a shorter period of time,<sup>51</sup> and has been researched and studied less compared to other forms of discrimination,<sup>52</sup> it could be that the signs of its various forms and practices have been less recognized by adjudicators. It is therefore imperative to demonstrate how these evidentiary and other challenges manifest themselves in the specific context of age and to flesh out their common and more unique facets.

### III. *Age discrimination in hiring—theory and practice*

#### 1. *Introduction*

This part attempts to provide an explanation for the low number of age discrimination complaints in hiring cases upheld by the Ontario Human Rights Tribunal between 2004 and 2015. It discusses various difficulties within our existing discrimination law and jurisprudence, such as those

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50. I discussed the differences between age and other grounds of discrimination in great detail in Pnina Alon-Shenker, "'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting" (2013) 17 CLELJ 31 at 35-36, 38-41. In short, unlike other personal characteristics such as race, age is constantly changing; all of us were once young, and most of us will become seniors at some point. Furthermore, unlike most prohibited grounds of discrimination, there is no clear distinction between the discriminators and those who are discriminated against on the basis of their age. In fact, senior workers are frequently discriminated against by managers of their own age. Finally, when assessing whether age-based distinctions amount to unlawful discrimination, the discussion often centres on a comparison between senior and younger workers, rather than on the actual harm to those workers. Even when an age-based distinction is identified, it is often permitted if the younger worker is expected to bear the same burdens once he or she grows old.

51. See *supra* note 41.

52. There is an extensive research on workplace discrimination on the basis of race, disability and gender including their implicit and systemic forms. See, for example, Colleen Sheppard, "Systemic Inequality and Workplace Culture: Challenging the Institutionalization of Sexual Harassment" (1995) 3 CLELJ 249; Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: *A Review of British Columbia (Public Service Employee Relations Commission) v BCGSEU*" (2001) 46 McGill LJ 533; Thomas Kleven, "Systemic Classism: Systemic Racism: Are Social and Racial Justice Achievable in the United States" (2008–2009) 8 Conn Pub Int LJ 37; Dale Larson, "'Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act'" (2009) 56 UCLA L Rev 451; Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4:1 McGill JL & Health 17; Justin D Levinson & Danielle Young, "Implicit Gender Bias in the Legal Profession: An Empirical Study" (2010–2011) 18 Duke J Gender L & Pol'y 1; Christopher Cerullo, "Everyone's A Little Bit Racist? Reconciling Implicit Bias and Title VII" (2013–2014) 82 Fordham L Rev 127; Andrea Doneff, "Social Framework Studies Such as Women Don't Ask and It Does Hurt to Ask Show Us the Next Step toward Achieving Gender Equality—Eliminating the Long-Term Effects of Implicit Bias—But Are Not Likely to Get Cases Past Summary Judgment" (2013–2014) 20 Wm & Mary J Women & L 573; Leland Ware, "Color Struck: Intragroup and Cross-Racial Color Discrimination" (2013–2014) 13 Conn Pub Int LJ 75; Tanya Kateri Hernandez, "One Path for Post-Racial Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence" (2014) 32 Law & Ineq 309.

related to unconscious bias and systemic discrimination, which have long been identified in the literature. The discussion in this part contributes to the literature by underlining the particular and sometimes unique manifestation of these challenges in the context of age discrimination in hiring.

## 2. Use of “rational” language

Studies have shown that employers are often reluctant to hire senior workers for various reasons other than age *per se*, such as high labour cost or proximity to retirement.<sup>53</sup> For example, some employers will be less inclined to hire senior workers who are perceived as more expensive than younger workers—having higher wages, more costly pension and health benefits, and there being less time to recoup the firm’s investment in their recruitment and training.<sup>54</sup> The difficulty is that while many employers genuinely appreciate the experience and expertise of senior workers, they may still choose not to hire them for these other reasons, which are often couched in rational language.<sup>55</sup> One might argue that this is simply a rationalization of discriminatory age-based reasons. However, the case law on age discrimination suggests that such a decision-making process would usually not amount to wrongful age discrimination.

Recall that senior job candidates are required to provide either direct or circumstantial evidence that *age* was a factor in the decision-making.<sup>56</sup> Accordingly, decisions which are based on other factors, such

53. See e.g. *Policy on discrimination, supra* note 1 at 14-16; Vincent Roscigno et al, “Age Discrimination, Social Closure and Employment” (2007) 86:1 *Social Forces* 313 at 325-329.

54. See e.g. Alicia H Munnell, Steven A Sass & Mauricio Soto, *Employer Attitudes Toward Older Workers: Survey Results* (Chestnut Hill, MA: Center for Retirement Research at Boston College, 2006), online: <[www.crr.bc.edu](http://www.crr.bc.edu)>; Richard W Johnson, “Managerial Attitudes Toward Older Workers: A Review of the Evidence” (2007) The Retirement Project, Discussion Paper 07-05, The Urban Institute, online: <[www.urban.org](http://www.urban.org)>; Adler & Hilber, *supra* note 12 at 72; OECD, “Helping Older Workers Find and Retain Jobs,” in *Pensions at a Glance 2011: Retirement-income Systems in OECD and G20 Countries* (OECD Publishing, 2011) at 69-70, online: <[www.oecd.org](http://www.oecd.org)>; David Foot & Rosemary Venne, “The Long Goodbye: Age, Demographics, and Flexibility in Retirement” (2011) 38 *Canadian Studies in Population* 59 at 66, online: <[www.footwork.com](http://www.footwork.com)>; James Woolever, “Human Resource Departments and Older Adults in the Workplace” in Patricia Brownell & James J Kelly, eds, *Ageism and Mistreatment of Older Workers: Current Reality, Future Solutions* (Dordrecht: Springer, 2013) 111.

55. See e.g. Investors Group, *A Little Bit Older, A Little Bit Wiser* (Winnipeg, MB: 2012), online: <[www.investorsgroup.com](http://www.investorsgroup.com)>; SHRM-AARP, *Strategic Workplace Planning* (2012), online: <[www.shrm.org](http://www.shrm.org)>.

56. This was confirmed by the Supreme Court of Canada, though in an education (rather than employment) setting. See *Moore v British Columbia (Education)*, 2012 SCC 61, 3 SCR 360 at para 33: “...to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the [area]; and that the protected characteristic was a factor in the adverse impact.”

as seniority or cost, generally do not amount to age discrimination.<sup>57</sup> In *Law v. Thames Valley District School Board*,<sup>58</sup> for example, the Human Rights Tribunal upheld a policy (requiring retired teachers who wanted to work to have an additional certification) because the distinction was based on pension status and not age, despite the high correlation between pension and age.<sup>59</sup> Similarly, comments such as “You’re overqualified” or “Your salary expectations are too high” might be tainted by ageism, but are often insufficient to draw an inference of age discrimination. Take for example the case of *Williams v. Ceridian Canada*, where the complainant was required to prove that the presumption of over-qualification was connected to age. The Tribunal was willing to assume that the employer told the complainant that he was overqualified, but did not see how this presumption was connected to the complainant’s age.<sup>60</sup> By contrast, the Federal Court of Appeal correctly identified “career potential” (which factored in proximity to retirement) as an age-based discriminatory factor in denying a promotion to a Canadian Armed Forces member.<sup>61</sup>

It is important to note that consideration of such “rational” factors often involves a reliance on inaccurate generalizations about senior workers.<sup>62</sup> For example, while wages do tend to increase with age (or work experience) specifically in large workplaces with pay scales, the perception that senior workers are generally more costly than younger workers often relies on inaccurate generalizations or is motivated by ageist stereotypes. Studies have shown that formerly unemployed seniors earn much less in their new jobs than they earned before,<sup>63</sup> and that they are more likely (compared to younger workers) to accept jobs which pay less than their previous jobs.<sup>64</sup> Furthermore, although many senior workers earn more than younger workers, they are usually not paid more than their

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57. See e.g. *Bursey v Clifford & Romano Plumbing/Heating*, 2010 HRTO 688 where the Tribunal stressed that laying off workers “out of seniority” or distinguishing among workers on the basis of financial considerations does not constitute discrimination in the absence of any facts connecting the layoff to age.

58. 2011 HRTO 953.

59. This decision was discussed in Alon-Shenker, *supra* note 50.

60. *Williams v Ceridian Canada*, 2011 HRTO 433 (“Although age and job qualifications may coincide...generally speaking, one’s level of qualification for a given position is independent from one’s age,” *ibid* at para 18).

61. See *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2005 FCA 154.

62. See Pnina Alon-Shenker, “Nonhiring and Dismissal of Senior Workers: Is it all about the Money?” (2014) 35:2 Comp Lab L & Pol’y J 159.

63. See references in *supra* note 13.

64. See Bernard, *supra* note 2.



actual productivity.<sup>65</sup> Also, since senior workers have higher retention rates and lower job turnover rates compared to younger workers, firms may have a reasonable opportunity to recover their investment in hiring and training.<sup>66</sup> Nevertheless, these inaccurate generalizations are embedded in explicit and implicit forms of bias which manifest in the ease with which rationalizations can be offered and make it difficult to establish a *prima facie* case of age discrimination. Furthermore, a policy of not hiring over-qualified candidates may seem neutral-on-its-face but might ultimately result in adverse effects on senior workers, who tend to have more work experience than younger workers.<sup>67</sup> Similarly, even when a decision to not hire senior workers is based on an accurate assessment of their high labour cost, or a neutral-on-its-face factor such as pension receipt, such a decision might have a disproportionate impact on senior workers.<sup>68</sup>

Age discrimination cases are unique in that it is very common to justify discrimination through business-related reasons.<sup>69</sup> A similar claim against the high labour cost of people with disabilities or pregnant women is generally not acceptable as a rational or reasonable reason for discrimination. Even if hiring people with disabilities or pregnant women is costly or requires accommodation, employers are expected to bear this cost as long as it does not amount to undue hardship. But when it comes to senior workers, a cost-based claim is often acceptable.<sup>70</sup> Part of the underlying reasons these claims are more acceptable in age cases is that age discrimination is considered different from other forms of

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65. See e.g. Ana Rute Cardoso, Paulo Guimaraes & José Varejão, "Are Older Workers Worthy of Their Pay? An Empirical Investigation of Age-Productivity and Age-Wage Nexuses," IZA Discussion Paper No 5121 (2010), online: <www.ssrn.com>; Foot & Venne, *supra* note 54 at 65; David E Bloom & Alfonso Sousa-Poza, "Ageing and Productivity: Introduction" (2013) 22 Labour Economics 1; Bernhard Mahlberg, Inga Freund, Jesús Crespo Cuaresma & Alexia Prskawetz, "Ageing, Productivity and Wages in Austria" (2013) 22 Labour Economics 5; Gary Burtless, "The Impact of Population Aging and Delayed Retirement in Workforce Productivity," (2013) Center for Retirement Research at Boston College Working Paper, online: <www.crr.bc.edu>.

66. See e.g. Zabarauskaitė, *supra* note 30; Adler & Hilber, *supra* note 12, at 82; Bureau of Labor Statistics, Employee Tenure in 2010, News Release USDL-121887 (2010), online: <www.bls.gov>; Foot & Venne, *supra* note 54, at 65; Jungwee Park, "Job-Related Training of Older Workers" (2012) 24 Perspective on Labour and Income 4, online: <www.statcan.gc.ca>.

67. See *Policy on discrimination*, *supra* note 1 at 15; Jeff Morneau, "Too Good, Too Bad: 'Overqualified' Older Workers" (2000) 22 W New Eng L Rev 45.

68. See Alon-Shenker, *supra* note 62.

69. On the apparent tendency to use economic and cost-based reasons to justify age discrimination as opposed to other forms of discrimination, see Rhonda M Reaves, "One of These Things is Not Like the Other: Analogizing Ageism to Racism in Employment Discrimination Cases" (2004) 38:4 U Rich L Rev 839 at 843-44; Issacharoff & Harris, *supra* note 32 at 799; CT (Terry) Gillin & Thomas R Klassen, "The Shifting Judicial Foundation of Legalized Age Discrimination" in CT (Terry) Gillin, David MacGregor & Thomas R Klassen, eds, *Time's up!: Mandatory Retirement in Canada* (Toronto: James Lorimer, 2005) 45.

70. See Alon-Shenker, *supra* note 62.

discrimination.<sup>71</sup> Furthermore, there is a common perception of a tension between protecting the rights of senior workers and the needs of younger workers. As youth unemployment becomes a major concern, there is a growing perception that increasing the employment of senior workers reduces job opportunities for younger workers. However, extensive empirical research has refuted this perception.<sup>72</sup>

### 3. *The subtle nature of age discrimination in hiring*

A second and related difficulty is that while the prevailing practices of age discrimination have been increasingly subtle and implicit, anti-age discrimination jurisprudence mainly focuses on overt and explicit bias. This difficulty is certainly not exclusive to age discrimination cases. The most insidious form of discrimination involves implicit bias (such as unconscious racism, sexism as well as ageism). Yet, the impact and effects of implicit bias have been much less studied and adjudicated in the context of age discrimination.

Most employers no longer deliberately exclude senior workers or engage in overt animus. And if they do, the law responds effectively to blatant forms of discrimination.<sup>73</sup> The problem arises when age discrimination stems from implicit bias. Indeed, studies have shown that employers succumb to ageism implicitly. While their decisions are not motivated by a dislike of senior workers, they are influenced inadvertently by, for example, death or age anxiety.<sup>74</sup> Although employers are often senior themselves, they are not less likely to discriminate against those in their own age group. Senior workers are frequently discriminated

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71. See *supra* note 50.

72. See e.g. Adriaan S Kalwij, Arie Kapteyn & Klaas De Vos, "Early Retirement and Employment of the Young" RAND Labour and Population Working Paper Series (March 2009); Alicia H Munnell & April Yanyuan Wu, "Will Delayed Retirement by the Baby Boomers Lead to Higher Unemployment among Younger Workers?" (October 2012) Center for Retirement Research at Boston College, online: <[www.crr.bc.edu](http://www.crr.bc.edu)>; Alicia H Munnell & April Yanyuan Wu, "Are Aging Baby Boomers Squeezing Young Workers out of Jobs" (October 2012) Center for Retirement Research at Boston College, online: <[www.crr.bc.edu](http://www.crr.bc.edu)>.

73. See e.g. the recent case of *Kosovic*, *supra* note 44 (Ontario Human Rights Tribunal held that a recruitment agency's job application form asking for the applicant's date of birth violated the Ontario *Human Rights Code*, even though the applicant's answer to that question was not the reason for not hiring him) as well as *Rocha*, *supra* note 44 (an oral inquiry about the age of the applicant as well as withdrawal of an interview offer after learning about the applicant's age contravenes the *Human Rights Code*).

74. See e.g. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 147; Charles W Perdue & Michael B Gurtman, "Evidence for the Automaticity of Ageism" (1990) 26:3 *J Experimental Social Psych* 199 at 199-201; Becca R Levy & Mahzarin R Banaji, "Implicit Ageism" in Todd D Nelson, ed, *Ageism: Stereotyping and Prejudice Against Older Persons* (Cambridge, MA: MIT Press, 2002) 49; Becca R Levy, "Unconscious Ageism" in Erdman B Palmore, Laurence Branch & Diana K Harris, eds, *Encyclopedia of Ageism* (New York: Haworth Pastoral Press, 2005) at 335-339.

against by managers of their own age, who might not perceive themselves as old or might fear aging and wish to distance themselves from what will inevitably occur.<sup>75</sup> Consequently, age discrimination in hiring is often covert. Employers screen out senior job candidates because “our firm is energetic and dynamic,” “there wasn’t a good fit,” or “the candidate was overqualified.”<sup>76</sup> But absent objective criteria for determining unsuitability or over-qualification, these comments are euphemisms or code words for being too old for the job. Interestingly, a recent empirical study found that when decision-makers were primed to think about their objectivity or bias close to making a hiring decision, age discrimination in hiring increased and when they were reminded of the statutory prohibitions, age discrimination in hiring was not affected.<sup>77</sup>

The literature on implicit bias and anti-discrimination law is voluminous.<sup>78</sup> Extensive sociological and psychological studies, using

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75. See e.g. Cliff Oswick & Patrice Rosenthal, “Towards a Relevant Theory of Age Discrimination in Employment” in Mike Noon & Emmanuel Ogbonna, eds, *Equality, Diversity and Disadvantage in Employment* (Houndmills: Palgrave, 2001) 156; Erdman B Palmore, “Age Denial” in Palmore, Branch & Harris, *supra* note 74 at 9; Anna Kleinspehn-Ammerlahn, Dana Kotter-Grühn & Jacqui Smith, “Self-Perceptions of Aging: Do Subjective Age and Satisfaction with Aging Change During Old Age?” (2008) 63:3 *J Gerontology: Psychological Science* 377.

76. See Richard Cohen, “‘Language Workaround’—Avoiding Ageist Comments,” *Employment Discrimination Report*, 31 March 2014, online: <[www.employmentdiscrimination.foxrothschild.com](http://www.employmentdiscrimination.foxrothschild.com)>.

77. It could be that when one thinks about him or herself as objective they are more willing to act on their opinions and thoughts which are nonetheless biased. See Nicole M Lindner, Alexander Graser & Brian A Nosek, “Age-Based Hiring Discrimination as a Function of Equity Norms and Self-Perceived Objectivity” (2014) 9:1 *PLOS ONE* 1.

78. See e.g. Linda Hamilton Krieger, “The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity” (1995) 47 *Stan L Rev* 1161; Catherine E Smith, “Looking to Torts: Exploring the Risks of Workplace Discrimination” (2004) 75 *Ohio St LJ* 1207; Marianne Bertrand, Dolly Chugh & Sendhil Mullainathan, “Implicit Discrimination” (2005) 95(2) *American Economic Review* 94; Audrey J Lee, “Unconscious Bias Theory in Employment Discrimination Litigation” (2005) 40 *Harv CR-CLL Rev* 481; Melissa Hart, “Subjective Decision Making and Unconscious Discrimination” (2005) 56 *Ala L Rev* 741; Linda Hamilton Krieger & Susan T Fiske, “Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment” (2006) 94 *Cal L Rev* 997; Anthony Greenwalk & Linda Hamilton Krieger, “Implicit Bias: Scientific Foundations” (2006) 94 *Cal L Rev* 945; Christine Jolls & Cass R Sunstein, “The Law of Implicit Bias” (2006) 94 *Cal L Rev* 969; Samuel R Bagenstos, “Implicit Bias, ‘Science,’ and Antidiscrimination Law” (2007) 1 *Harv L & Pol’y Rev* 477; David Faigman, Nilanjana Dasgupta & Cecilia Ridgeway, “A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias” (2007–2008) 59 *Hastings LJ* 1389; Katharine Bartlett, “Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination” (2009) 95(8) *Virginia L Rev* 1893; Dominique Allen, “Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach” (2010) 29 *U Tas L Rev* 83; Katie R Eyer, “That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law” (2012) 96 *Minn L Rev* 1275; Elizabeth L Sarine, “Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias” (2012) 100 *Cal L Rev* 1359. See also references in *supra* note 52.

tools such as the Implicit Association Test (IAT),<sup>79</sup> have shown that unconscious bias on the basis of various grounds including age<sup>80</sup> is pervasive and significantly influences the decision-making process. Since it is unconscious, even well-intentioned people are influenced by cognitive bias and are prone to discriminate against others. In response, legal scholars have suggested a variety of policy reforms and doctrinal amendments to anti-discrimination law. Among other suggestions, scholars advocated for affirmative action programs in employment and for a more structural approach to anti-discrimination law. This approach may include, for example, a proposal to allow complainants to rely on statistical evidence to provide a “social framework,” to fill in the gaps and establish their case. It may also entail a proposal to draw from tort law principles when regulating implicit bias, or to allow for broader remedies beyond the remedies for the particular complainant.<sup>81</sup>

These views have also elicited criticism. Some scholars contested the validity of psychological research on implicit bias.<sup>82</sup> Others expressed concerns about holding people responsible for their implicit yet perhaps subconscious bias.<sup>83</sup> As well, the use of statistical evidence without establishing causation between that evidence and the particular case has been criticized.<sup>84</sup> There is substantial evidence, however, on the detrimental impact of implicit bias on the process of decision-making which results in actual disadvantage. It is therefore imperative to examine how anti-discrimination law addresses this consequential disadvantage. Otherwise, anti-discrimination law would be limited to direct instances of discrimination, where the decision-maker intentionally excludes members

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79. This test measures how fast a person would associate a group characteristic (such as black or white) with a given description (such as good or bad). See Samuel R Bagenstos, “The Structural Turn and the Limits of Antidiscrimination Law” (2006) 94 Cal L Rev 1 at 6.

80. See evidence cited in Nilanjana Dasgupta, “Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations” (2004) 17 Soc Just Res 143 at 147-148.

81. See references cited in *supra* notes 52 and 78. Note that remedies for future compliance (i.e. public interest remedies) are generally available to complainants. See e.g. *Ontario Human Rights Code*, *supra* note 22, s 45.2(1)3. While these remedies are routinely awarded by the Ontario Human Rights Tribunal, there are still many cases where discrimination is found and no reasons are given for not awarding public interest remedies. See Pinto Report, *supra* note 35 at 76-77. Note also that the decision in *Moore*, *supra* note 56, might raise difficulties in applying a broader remedial approach.

82. See e.g. Gregory Mitchell & Philip E Tetlock, “Antidiscrimination Law and the Perils of Mindreading” (2006) 67 Ohio St LJ 1023.

83. *Ibid.* See also Jennifer Saul, “Unconscious Influences and Women in Philosophy” in Fiona Jenkins & Katrina Hutchison, eds, *Women in Philosophy: What Needs to Change?* (NY: Oxford University Press, 2013) 39; Daniel Kelly & Erica Roedder, “Racial Cognition and the Ethics of Implicit Bias” (2008) 3(3) *Philosophy Compass* 522.

84. See e.g. Lee, *supra* note 78 at 494.

of a prohibited ground.<sup>85</sup> Furthermore, there is some evidence that people are aware that there might be inconsistencies between what they should do and what they actually do while influenced by implicit bias.<sup>86</sup> In particular, employers exercise a wide range of controls over processes and actions tainted by implicit bias and have the ability to put in place some mechanisms to mitigate its destructive influence.<sup>87</sup>

Hence, there is a relatively wide consensus that anti-discrimination law should provide a response to implicit bias. The main challenge is evidentiary. How does one prove implicit bias? Note that implicit bias can result in direct and adverse effect forms of discrimination. Yet it will usually not involve an explicit expression which reveals the discriminator's intention. Rather, it will involve, for example, an interviewer not feeling the appropriate "chemistry" with the interviewee. It will also usually not involve a particular rule or policy in the workplace which is neutral on-its-face yet results in a disproportionate impact on members of a protected ground.<sup>88</sup> Rather, it will involve, for example, an unwritten practice of not hiring over-qualified candidates. "Smoking-gun" evidence will rarely be available.

True, this evidentiary challenge is not exclusive to age discrimination. However, the literature on implicit ageism as well as the experience of adjudicators with such cases is rather limited. Despite the rhetoric of focusing on "the discriminating effects of the alleged actions rather than on the intentions of the discriminator,"<sup>89</sup> the case law seems to treat age discrimination cases as though they must be direct discrimination cases, requiring complainants to show evidence of explicit bias even though they are often adverse effect and implicit bias cases. Proving age discrimination is therefore very difficult where it is statistical, institutional and indirect.<sup>90</sup> As we have seen, age discrimination in hiring complaints filed in Ontario between 2004 and 2015 were primarily upheld when the complainants were able to prove that the decision not to hire them involved some overt ageist expressions.<sup>91</sup>

The obvious difficulty is that job candidates are seldom privy to the decision-making process, and employers rarely indicate the reason for not

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85. See Bagenstos, *supra* note 79.

86. Jules Holroyd, "Responsibility for Implicit Bias" (2012) 43(3) *J Social Philosophy* 274 at 299.

87. *Ibid* at 302.

88. See Lee, *supra* note 78 at 491.

89. See *Peel Law Association v Pieters*, 2013 ONCA 396, [2013] OJ No 2695 (QL).

90. See John Macnicol, *Age Discrimination: An Historical and Contemporary Analysis* (Cambridge, UK: Cambridge University Press, 2006) at 18-22 (Summarizing recent surveys in the US and Britain).

91. See Section B above.

inviting them to an interview or for not hiring them following an interview.<sup>92</sup> Direct evidence showing that age was a factor in the decision is rarely available.<sup>93</sup> Some may have more information in unique circumstances, such as when they are current employees applying for a different position with the same employer or when the decision not to hire them is based on a pre-employment test. Indeed, two of the few upheld age discrimination in hiring complaints in recent years involved such cases. In the first case, the position of a contract employee (age 67) was eliminated by the employer who decided not to re-hire her for a similar position at a lower level.<sup>94</sup> The second case involved a job candidate who received a conditional offer of employment for the job of arena attendant but was asked to complete a pre-employment test which required maintaining a heart rate below a specific level.<sup>95</sup>

Others who may have more information about why a certain job candidate was not hired include the union in a unionized workplace and incumbent workers. However, incumbent workers may have little interest in filing a complaint challenging a hiring practice or policy which does not affect them directly and their complaint might even be dismissed for lack of standing.<sup>96</sup> Furthermore, although unions are generally more resourceful and knowledgeable than job candidates, they are not obliged to investigate or assist a job candidate, who believes he or she was discriminated against, unless the union's failure to act was based on discriminatory factors.<sup>97</sup>

True, in the absence of direct evidence job candidates may still establish age discrimination using circumstantial evidence. However, it is not easy to meet the three-stage test. Similar to other forms of discrimination, the

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92. See *Discrimination and Age*, *supra* note 13. Note that once a notice of hearing is issued, both parties are required to disclose documents. However, these documents are usually not available to the complainant at the initial stage of job search and non-hiring.

93. Among these few cases, see *Winsor v Provincial Demolition and Salvage Ltd* [2000] NHRBID No 1 (Nfld Bd Inq), where the applicant was told that his age was a factor in not being hired.

94. See *Cowling v Alberta (Employment and Immigration)*, 2012 AHRC 12.

95. See *Tearne*, *supra* note 44. The Human Rights Tribunal held that the employer had not demonstrated that the standard used in this pre-employment test was reasonably necessary to accomplish the goal of being able to perform the job safely and that it had not shown that accommodation short of undue hardship was infeasible.

96. See e.g. *Ontario Public Service Employees Union v Ontario (Ministry of Economic Development, Trade and Tourism)*, 2000 CanLII 20531, where the complainant was demoted on what he perceived to be based on age and a workplace policy which favoured younger workers. He was supported in his grievance by the union, which included testimony and articles from human resources statements and policies that seemed to support a desire to promote a younger workforce. However, the Grievance Settlement Board determined that even though human resources seemed to encourage the recruitment of younger workers, this did not constitute discrimination against current employees.

97. See e.g. *Arias v Centre for Spanish Peoples*, 2009 HRTO 1025 at paras 16-17; *Traversy v Mississauga Professional Firefighters Association, Local 1212*, 2009 HRTO 996 at para 17.

onus of proof at the *prima facie* stage rests on the complainant, and as the adjudicator has not yet heard the employer's response and explanation, it is almost impossible to determine the identity of the successful candidate and whether this candidate was or was not better qualified than the complainant.<sup>98</sup> Some adjudicators have *de facto* abandoned the three-stage test and instead examined whether "the evidence is sufficient to satisfy [the adjudicator] that the applicant's allegation of discrimination on the basis of...age is more probable than the explanations provided by the respondent, bearing in mind that the onus of proving discrimination always rests with the applicant and that discrimination need only be one factor in the respondent's decision."<sup>99</sup> Even when the complainant is successful in proving the three-stage test, adjudicators often require the complainant to provide "something more," i.e., to establish a link between their age and not being hired, referring back to direct evidence which is often absent.<sup>100</sup>

Take for example the case of *White v. Abbotsford Community Services*.<sup>101</sup> The Human Rights Tribunal of British Columbia recognized that "age discrimination in the hiring process can be subtle and that in the absence of explicit comments or conduct by the potential employer, the information that might disclose the basis for such an allegation is primarily, if not totally, within the possession and control of the potential employer."<sup>102</sup> It was therefore ready to assume that the complainant's approximate age range "could reasonably be inferred from his extensive work history and date of education"<sup>103</sup> and that candidates who were interviewed were younger than the complainant.<sup>104</sup> However, it held that "there must be some information set out in the complaint to link Mr. White's age to the failure to hire."<sup>105</sup> Such information, as the Tribunal explained, could be comments made by the employer that inappropriately referred to the complainant's age.<sup>106</sup> But this is exactly the type of direct evidence that is rarely available to complainants. And so, even when adjudicators shift the evidential burden to the employer, they often accept the explanations

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98. See text accompanying *supra* note 27.

99. See *Gazankas v Red Lake (Municipality)*, 2013 HRTO 198 at para 18. See also *Blakely v Queen's University*, 2012 HRTO 1177 at para 48.

100. That is, the onus of proof remains with the complainant, who has to present a case which "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." *Ontario (Human Rights Commission) v Simpsons-Sears*, [1985] 2 SCR 536, 52 OR (2d) 799 at para 28.

101. 2009 BCHRT 269.

102. *Ibid* at para 27.

103. *Ibid* at para 26.

104. *Ibid* at para 28.

105. *Ibid* at para 26.

106. *Ibid* at para 27.

provided by the employer as long as there is no direct evidence of age as a factor in the decision. Furthermore, even when there is some evidence on the use of subjective measures in the selection process, some adjudicators fail to see them as a form of adverse effect discrimination.

Another example is in *Gurofsky v. Toronto District School Board*.<sup>107</sup> In that case the complainant was unsuccessful in her attempts to get hired as a permanent contract teacher in five of the respondent's schools. Although she established a *prima facie* case (she was qualified for the positions; she was significantly older than the successful candidates and more experienced),<sup>108</sup> the Tribunal found that age was not a factor in the decision not to hire her for any of these positions. The Tribunal accepted the respondent's explanation that the successful candidates were better than her. This was despite the fact that "each of the competitions fundamentally relied on interviews to assess the suitability of candidates," which could be very subjective and that "none of the job competitions had a formal system for scoring interviews and none of the competitions had a formal system for evaluating or weighing a candidate's interview performance."<sup>109</sup>

The Tribunal agreed that "there was increased likelihood for subjective evaluations in the respondent's hiring processes" and that "subjective evaluations can be arbitrary and tainted by discriminatory considerations," but held that the processes "did attempt to objectively compare performances."<sup>110</sup> This was despite the fact that some of the respondent's witnesses stated that they liked a certain candidate because he or she was "energetic" or was "a good fit for their school."<sup>111</sup> The Tribunal held that they provided "reasoned credible explanations."<sup>112</sup> One principal, for example, testified that he assessed her on a number of occasions and was concerned about her ability to relate to students and staff. However, the Tribunal accepted that his impression was "derived from limited information, and that he did not have as fulsome a picture of the applicant as he might have."<sup>113</sup>

Note that the search for direct evidence and for a link between age and the non-hiring decision has led to many dismissed complaints at the summary hearing stage. Following a motion by the employer or a Tribunal order, a summary hearing is ordered to determine whether the complaint

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107. [2011] OHRTD No 2246, 2011 HRTO 2274.

108. *Ibid* at para 63.

109. *Ibid* at para 69.

110. *Ibid* at paras 71-72.

111. *Ibid* at para 73.

112. *Ibid*.

113. *Ibid* at para 79.



should be dismissed because it has no reasonable prospect of success. Instead of the three-stage test, adjudicators examine whether there is a reasonable prospect that the complainant can prove on a balance of probabilities that there is a link between his or her age and the decision not to hire them.<sup>114</sup> This more general test raises the evidentiary bar and ultimately causes many complaints to fail. That is, many complaints are dismissed at this stage although they successfully fulfilled the three-stage test.<sup>115</sup>

#### 4. *Age discrimination is systemic, institutionalized and structural*

The third difficulty is that, as in the context of other prohibited grounds, anti-age discrimination law relies on a complaint-driven system, whereas the modern face of age discrimination in hiring has become increasingly systemic, institutionalized and structural.<sup>116</sup> True, the law broadly defines discrimination as including both direct and adverse effect forms, yet it puts more emphasis on individual, isolated instances of discrimination and does not provide effective means to uncover and address systemic discrimination.

First, because anti-age discrimination law is enforced through a complaint-driven system, discrimination is not redressed until and unless a human rights complaint is filed and upheld. Litigation may take a long time, result in high legal expenses and be very stressful for complainants. Alternatively, a human rights complaint can be filed by a person, two or more persons, and a person or an organization on behalf of others.<sup>117</sup> It can also be filed, at least in some provinces, by a human rights commission. In Ontario, the Human Rights Commission may file a complaint if it is in the public interest or intervene as a party to a complaint with consent.<sup>118</sup>

114. See e.g. *Dabic v Windsor Police Service*, 2010 HRTO 1994, at paras 8-10.

115. In *Zhao v Toronto Community Housing Corporation*, 2012 HRTO 2187, the Tribunal noted that the three-stage test “is not a rigid approach that defines a *prima facie* case in every hiring case,” and “is largely unhelpful in the context of summary hearings” (*ibid* at para 9).

116. On systemic, institutionalized and structural forms of discrimination more generally see Colleen Sheppard, “Equality Rights and Institutional Change: Insights from Canada and the United States” (1998) 15 *Arizona J Intl & Comparative L* 143; Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 *Canadian Bar Review* 893; Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Canada: McGill-Queen’s University Press, 2010); Jason R Bent, “The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory” (2010–2011) 44 *U Mich JL Reform* 797; Christine Tsang, “Uncovering Systemic Discrimination: Allowing Individual Challenges to a Pattern or Practice” (2013–2014) 32 *Yale L & Pol’y Rev* 319; Richard Thompson Ford, “Bias in the Air: Rethinking Employment Discrimination Law” (2014) 66 *Stan L Rev* 1381; Bagenstos, *supra* note 79.

117. *Ontario Human Rights Code*, *supra* note 22, ss 34-35.

118. *Ontario Human Rights Code*, *supra* note 22, s 37.

This allows for systemic complaints to be filed. However, the Pinto Report found that while the Commission has actively engaged in public initiatives to address systemic discrimination such as policy development and training, it has rarely initiated public interest complaints or intervened in private sector complaints due to limited resources and it has operated in a manner disconnected from the general public, the private employment sector and other human rights agencies.<sup>119</sup>

Second, even when complaints are filed, the evidentiary burden on complainants is incompatible with the manner in which hiring decisions are made and age discrimination is manifested. Discrimination, and specifically systemic discrimination, does not occur at an isolated moment of a workplace decision. There is usually a more complex narrative or process preceding and underpinning the ultimate decision.<sup>120</sup> Indeed, systemic discrimination is “the product of cumulative acts that are not traceable to a single actor or event”; it usually “arises from small acts of disrespect or distrust that leads [*sic*] to disparate opportunities or results, and is often informed by stereotypes throughout the process.”<sup>121</sup> However, it seems that some adjudicators focus on the decision-maker and the decision itself, rather than on the general processes, past practices and surrounding circumstances.

Take for example the case of *Bradley v. Canada (AG)*.<sup>122</sup> Although the age of the job candidate (43) was noted in the margin notes used for assessment, the Federal Court of Appeal dismissed the complaint due to insufficient evidence of discrimination. But, as the Human Rights Commission of Ontario noted: “Had the complaint been that of a racial minority, whose race had been noted in the margin of interview notes, one wonders if the result would have been the same.”<sup>123</sup>

Another example is the case of *Deane v. Ontario (Community Safety and Correctional Services)*, where the complainant tried to obtain a permanent position with the employer but was unsuccessful.<sup>124</sup> There was

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119. Pinto Report, *supra* note 35 at 123-29. It therefore recommended that the Commission develop a litigation strategy at the Tribunal and focus on cases where complainants have difficulty advancing and proving systemic discrimination and initiate public interest complaints consistent with this strategy (*ibid* at 131). The Report also recommended that litigation initiatives focus on addressing systemic discrimination in employment practices, specifically in the private sector, and specifically hiring and promotion practices (*ibid* at 140).

120. See Krieger, “The Content of Our Categories,” *supra* note 78 at 1211.

121. See Michael Selmi, “The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions” GWU Law School Public Law Research Paper No 2014-8, online: <[www.ssrn.com](http://www.ssrn.com)>, who focuses this critique on the American 1964 Civil Rights Act.

122. [1999] FCJ No 370 (FCA).

123. See *Discrimination and Age*, *supra* note 13.

124. *Supra* note 44.

no dispute that the complainant was qualified for the position (in fact she scored the highest of all 300 applications reviewed and the fourth of all interviewees) and that the successful candidates were younger.<sup>125</sup> But the complainant also had to show that they were no better qualified than her (the three candidates who scored higher than her in the interview process were hired), and as the Tribunal noted, in the absence of evidence of direct discrimination, this was very difficult to prove.<sup>126</sup> Although the hiring decision was based on the interview performance which is a highly subjective method and despite the fact that the Tribunal accepted the evidence that the complainant was encouraged to retire on various occasions by the same person who held the interview, and found that the complainant was in fact treated differently in employment,<sup>127</sup> the Tribunal did not take note of those incidents when it engaged in the analysis of whether the interview process itself was discriminatory.

A similar example is found in *Nelson v. Lakehead University*,<sup>128</sup> where the complainant applied for a full-time tenure track assistant professor position. He was advised by two professors (one of whom had been on the hiring committee) that his age was a factor in the decision not to hire him, and he therefore filed a human rights complaint with the Human Rights Commission. The Tribunal found that “there was no consideration given to Dr. Nelson’s age in the Committee’s deliberations” and that the successful candidate was chosen because the committee believed she was stronger in her research and teaching.<sup>129</sup> The Tribunal also held that the Dean inquired about the age of Nelson, but since this was *before* the interviews were conducted, his age was not considered “in the critical part of the selection process.”<sup>130</sup> This was despite the fact that the Dean “was present during the interviews and the Committee’s deliberations.”<sup>131</sup> This could suggest a power dynamic which tainted the outcome of the job selection process, but the Tribunal rejected this “speculative” suggestion.<sup>132</sup> The Tribunal also accepted that “the selection process employed was highly subjective,”<sup>133</sup> but concluded that the evidence “does not reflect that age was a factor in that process.”<sup>134</sup>

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125. *Ibid* at paras 112-113.

126. *Ibid* at para 114.

127. *Ibid* at paras 97, 103-104.

128. *Nelson v Lakehead University* [2008] OHRTD No 39, 2008 HRTO 41.

129. *Ibid* at para 59.

130. *Ibid* at para 74.

131. *Ibid*.

132. *Ibid* at para 75.

133. *Ibid* at para 80.

134. *Ibid* at para 82.

A final example is the recent case of *Reiss v. CCH Canadian Limited*.<sup>135</sup> Reiss, a 60 year old lawyer, who worked in the legal departments of two banks, was laid off as a result of downsizing and subsequently he established a sole practice which was not a financial success.<sup>136</sup> He therefore applied for a legal writing position with CCH, a legal publishing company. He intentionally omitted some information from his curriculum vitae that would have revealed his age and also submitted a salary expectation that was lower than the budgeted amount and the amount offered to the successful candidates.<sup>137</sup> Reiss was requested to submit the missing information and, upon inquiring about the status of his application, got an email from CCH's human resources consultant stating that "it is looking like they are moving toward candidates who are more junior in their experience and salary expectation."<sup>138</sup>

Reiss filed an age discrimination complaint, but was only partially successful. The Human Rights Tribunal of Ontario held that the abovementioned email was "tainted by age discrimination,"<sup>139</sup> "suggestive of a stereotyped assumption that an older person would necessarily want a higher salary and would therefore not be a good candidate,"<sup>140</sup> and had an adverse effect on Reiss, who assumed he had been rejected, which was not the case, and did not follow up with CCH.<sup>141</sup> But the ruling was limited to "depriving the applicant of an opportunity to follow up."<sup>142</sup> The major part of the complaint, dealing with the primary decision maker who decided not to interview Reiss, was dismissed.

Although it seemed that Reiss was able to prove the three-stage test, the Tribunal accepted the explanation provided by the employer. The employer claimed that they had already identified two promising candidates before Reiss submitted his application, and had had some concerns about Reiss' over-qualification.<sup>143</sup> But the employer's explanation was rather weak. First, as the Tribunal noted, the "evidence about the difficulty in recruiting

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135. *Supra* note 44.

136. *Ibid* at paras 10-11.

137. *Ibid* at paras 18-22. Yet this is exactly what one would expect a senior job candidate to do when facing ageism in the workplace. See Berger 2006, *supra* note 4.

138. *Ibid* at para 38. This case provides anecdotal evidence on the extent to which stereotyped presumptions on salary expectations of senior workers are ingrained in the recruitment process. Despite the fact that Reiss had asked for less than the other job candidates, he was denied an interview for reasons related to his presumably higher salary expectations.

139. *Ibid* at para 108.

140. *Ibid* at para 85.

141. *Ibid* at para 86.

142. *Ibid* at para 109.

143. *Ibid* at paras 61-63.

and retaining suitable candidates” raised some doubts.<sup>144</sup> Apparently, one of the two promising candidates resigned shortly after her hiring and the second candidate declined the job offer. Yet, Reiss was not even considered nor called for an interview. Ms. Mason, the Director of Editorial for Legal and Business Markets, who was responsible for the hiring decisions, testified that the “position was eventually filled by one of the writers who held the job before leaving to make it vacant. She ran into this person on the subway and persuaded her to return to the job.”<sup>145</sup> Second, the Tribunal agreed that “over-qualification can provide a discriminatory pretext.”<sup>146</sup> Nonetheless the Tribunal accepted this explanation, although the employer failed to elucidate in objective terms why over-qualification could be an issue.<sup>147</sup> Reiss was *de facto* held responsible for not explaining in his job application why he would want to work as a legal writer after he had worked for many years in a senior corporate law position.<sup>148</sup>

The Tribunal concluded that although Reiss was able to establish “some evidence to support his contention that Ms. Mason’s decision making was influenced by age discrimination...the applicant has to do more than this. He must establish that it is more probable than not that his age was a factor in Ms. Mason’s decision making.”<sup>149</sup> The result was that Reiss was awarded modest damages of \$5,000 because he was not entitled to monetary compensation for loss of earnings but only for injury to dignity as a result of the discrimination related to the email he received.<sup>150</sup>

##### 5. *A narrow duty to accommodate senior workers*

A final difficulty is that while training and accommodation are essential to the quest for improved reemployment prospects of senior workers, the duty to accommodate senior workers has been limited to an affirmative defence, which arises only as a response to individual requests of accommodation.

Senior workers might lack, or be perceived as lacking, the necessary skills to get rehired.<sup>151</sup> Following long-term employment, especially in declining industries, their skills might be considered too job- or industry-specific, obsolete or otherwise irrelevant when transitioning to other industries. As Therese MacDermott argues, precisely because employers are reluctant to hire senior workers due to perceived or actual incapacity

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144. *Ibid* at paras 105-106.

145. *Ibid* at para 42.

146. *Ibid* at para 99.

147. *Ibid* at paras 100, 102-103.

148. *Ibid* at para 100.

149. *Ibid* at para 102.

150. *Ibid* at paras 111-114.

151. See e.g. Johnson & Mommaerts, *supra* note 12 at 20.

and lack of adaptability to new processes, a duty to accommodate senior workers' age-related needs is essential.<sup>152</sup>

However, studies have shown that senior workers are provided with fewer training opportunities,<sup>153</sup> and less accommodation for disability-related needs compared to their younger counterparts. That is, the proportion of workers who receive no accommodation consistently increases with age, both according to U.S. and Canadian evidence.<sup>154</sup> Furthermore, despite its considerable importance, the law fails to effectively support employability of senior workers. The duty to accommodate senior workers does not amount to an affirmative duty, but rather takes the part of an affirmative defence (*bona fide* occupational requirement). It therefore arises only as a response to an individual ad hoc request of accommodation. This means that not until an employee files a complaint and establishes a *prima facie* case of age discrimination, must an employer prove that age was a *bona fide* occupational requirement and that, among other things, the employer has attempted to accommodate that employee up to a point of undue hardship.

While the Supreme Court of Canada held in *Meiorin* that employers, from the outset, regardless of an individual request, "must build conceptions of equality into workplace standards" and that "standards governing the performance of work should be designed to reflect all members of

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152. See Therese MacDermott, "Older Workers and Extended Workforce Participation: Moving beyond the 'Barriers to Work' Approach" 14:2 (2014) *Intl J Discrimination & L* 83. More generally, this paper argues that pension reforms and tax incentives are insufficient to increase labour force participation among senior workers. It advocates promoting the inclusion of senior workers through various mechanisms which would encourage employers to address reemployment challenges faced by senior workers. These mechanisms include facilitating flexible work practices and accommodating the needs of senior workers

153. See e.g. Park, *supra* note 66; Jesus Canduela et al, "Ageing, Skills and Participation in Work-Related Training in Britain: Assessing the Position of Older Workers" (2012) 26:1 *Work, Employment and Society* 42.

154. See Michael Williams, Dory Sabata & Jesse Zolna, "Accommodating Aging Workers who have a Disability" in Alex Mihailidis et al, eds, *Technology and Aging: Selected Papers from the 2007 International Conference on Technology and Aging* (Amsterdam: IOS Press, 2008) 51; Julie Ann McMullin & Kim M Shuey, "Ageing, Disability and Workplace Accommodations" (2006) 26 *Ageing & Society* 831. The Canadian 2001 PALS finds that senior workers who attributed their functional limitation to ageing (rather than to disability) were less likely to recognize the need for a workplace accommodation, and that among those who acknowledged a need for an accommodation, senior workers who ascribed their limitation to ageing were less likely to have their needs met. See Cara Williams, "Disability in the Workplace" in Statistics Canada, *Perspectives on Labour and Income* 7:2 (Ottawa: Statistics Canada, February 2006), online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>. More recently see Kevin Banks, Richard P Chaykowski & George A Slotsve, "Disability Accommodation Gap in Canadian Workplaces: What Does It Mean for Law, Policy, and an Aging Population?" (2013) 17:2 *CLEJLJ* 295.

society,”<sup>155</sup> subsequent case law has yet to adopt this potential broad vision of an affirmative duty of accommodation. True, the most common way to enforce anti-discrimination law is to bring an individual complaint.<sup>156</sup> Yet, the holding in *Meiorin* suggests that employers do not need to wait for individual requests in order to act and promote inclusion, which should ease the burden of proof upon complainants who are not accommodated.

Unfortunately, the duty to accommodate senior workers has been deemed relevant mostly in cases of direct discrimination (usually mandatory retirement) and disability-related needs (as opposed to age-related needs). When a workplace rule or policy is neutral-on-its-face but results in adverse effects on senior workers, or where the needs of a senior worker are age-related, the duty of accommodation is often not enforced.

In the case of *Preddie v. Saint Elizabeth Health Care*,<sup>157</sup> for example, the complainant alleged that the employer discriminated against her on the basis of age because the employer “knew or ought to have known that as an older person the applicant would not have been computer literate and that they needed to do more to accommodate the applicant when she had difficulty in completing her on-line computer assignments.”<sup>158</sup> The Human Rights Tribunal dismissed the complaint holding that there was no persuasive evidence that requiring a senior worker to use a computer was adverse effect discrimination, and that since the duty to accommodate is not a free standing obligation, there was no need to consider whether the employer failed to accommodate the complainant.<sup>159</sup> Indeed, the complainant did not provide sufficient evidence of adverse effect. Also, it is clear that employers may require their workers of all ages to use computers. But arguably such a neutral-on-its-face requirement may in fact have an adverse effect on senior workers, thus constituting a *prima facie* discrimination on the basis of age. The employer may claim that the use of computers is a *bona fide* occupational requirement, but should be required to accommodate senior workers up to the point of undue hardship. This duty should include, for example, longer and more detailed training.

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155. *British Columbia (Public Service Employment Relations Commission) v British Columbia Government and Service Employees' Union* [1999] 3 SCR 3 at para 68, 174 DLR (4th) 1 at para 68 [*Meiorin*].

156. Systemic complaints are possible but rare (see *supra* notes 117-119). See also *CN v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 [*Action Travail*], which is an example of how even successful systemic discrimination complaints can face insurmountable enforcement problems.

157. 2011 HRTO 2098.

158. *Ibid* at para 12.

159. *Ibid* at para 26.

In another example, *Bastide v. Canada Post Corp.*,<sup>160</sup> the Federal Court upheld a policy that asked temporary workers to pass a neutral-on-its-face manual dexterity test in order to obtain a permanent position, although there was a statistically significant relationship between age and failure rates on the test, and the employer did not explore any ways to accommodate those who failed the test.<sup>161</sup> The Court ruled that the manual dexterity test itself constitutes a form of accommodation and that without the test the failure rate during training would constitute undue hardship to the employer.<sup>162</sup>

#### IV. *Preliminary set of proposals for change*

To summarize, age discrimination in hiring complainants face various challenges which sometimes overlap and are often interrelated and associated with issues such as implicit bias and institutionalized discrimination. That is, subtle and systemic instances of age discrimination in hiring tend to slip under the anti-age discrimination law radar. As a result, enforcement and deterrence become less effective and meaningful. Employers' perceptions of the legitimacy of various ageist practices are reinforced, whereas more and more job candidates realize that filing a complaint of age discrimination in hiring does not warrant the effort. Consequently, not only does the law fail to address and redress the wrongs of age discrimination, it also aggravates their marginalization, social exclusion and disadvantage in the labour market. As the law fails to support employability of senior workers and provides no hope for future job applicants, it might perpetuate ageist stereotyping and reinforce discriminatory behavior.

It could be that the law, or at least litigation under anti-age discrimination law, has become less relevant. Proposals for change should therefore focus on education and labour market policy. For example, efforts should be made to increase awareness among employers of the benefits associated with the recruitment and hiring of senior workers and to build effective centres and programs for job placements and retraining. Another suggestion is to promote and encourage extra-legal mechanisms such as corporate self-regulation which embraces a firm's responsibility for the well-being of senior workers. Furthermore, to address genuine cost concerns, the State could provide financial and tax incentives including

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160. 2005 FC 1410, [2006] 2 FCR 637 [*Bastide*]. The decision was affirmed by *Bastide v. Canada Post Corp.*, 2006 FCA 318, 365 NR 136, leave to appeal to SCC refused, 31732 (8 March 2007).

161. This decision is discussed in Pnina Alon-Shenker, "The Duty to Accommodate Senior Workers: Its Nature, Scope and Limitations" (2012) 38:1 Queen's LJ 165.

162. *Supra* note 160 at para 50.



grants and subsidies to encourage employers to hire and train senior workers and some financial assistance to the senior unemployed as a bridge between dismissal and pensionable age.<sup>163</sup> The State could also expand its employment services offered to senior workers seeking jobs and its assistance to those who wish to start their own business.<sup>164</sup> Finally, the State could foster lifelong learning, and promote and provide training in versatile and transferrable skills, especially for those who worked in physically demanding, low-skilled jobs and need a career change.

But legal mechanisms are still relevant and important. One proposal might be to extend the statutory termination notice for senior workers (to compensate for longer periods of unemployment) and to adjust the common law reasonable notice (to reflect the abolishment of mandatory retirement on the one hand, and the challenges to reemployment, on the other hand).<sup>165</sup> It has been argued that recent decisions, awarding longer periods of reasonable notice to senior workers,<sup>166</sup> might deter employers from hiring senior workers.<sup>167</sup> Indeed, the age of a dismissed employee has been factored into the determination of reasonable notice under

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163. Ontario has recently announced the creation of the Community Loans Fund (as part of Ontario's Accessibility Action Plan) which will provide discounted rates on financial products such as loans to businesses that commit to hiring people facing employment barriers such as people with disabilities, long-term unemployed, and older unemployed. See "Ontario Improving Employment Opportunities for People Facing Barriers" (Ministry of Economic Development, Employment and Infrastructure, 3 December 2015), <[www.news.ontario.ca](http://www.news.ontario.ca)>.

164. For example, the TIOW (*supra* note 16), which is currently limited to those aged 55-64, should be expanded to young-old workers starting from 40 or 45, and to those aged 65 and above.

165. A good example of this adjustment is the recent case of *Filiatrault v Tri-County Welding Supplies Ltd.*, 2013 ONSC 3091, where Paul and Shirley Filiatrault sold their company to Liquid Air Canada and were fired a few days later. They sued for wrongful dismissal damages. The Filiatraults were in their early 80s when their employment was terminated. The Ontario Superior Court of Justice held that the sales agreement did not require them to resign or retire and that the employees had tried to mitigate their damage by attempting to find employment but were not successful due to their advanced age. Based on their length of service (42 years), their age, and their executive positions with the company, they were awarded 18 months' pay. The ruling could have been higher, but the Filiatraults agreed to limit their claim to 18 months.

166. See e.g. *Hussain v Suzuki Canada Ltd.*, [2011] OJ No 6355, 100 CCEL (3d) 295 (a junior supervisor, who worked for 36 years and was terminated at the age of 65, received 25.5 months' pay after proving he has 1% chance of finding a job); *Szczypiorowski v Coast Capital Saving Credit Union*, 2011 BCSC 1376, [2011] BCJ No 1923 (a 62-year old credit union manager with 18.5 years of service was entitled to 18 months' pay in lieu of notice given his age and low chances of securing employment close to retirement age); *Kotecha v Affinia Canada ULC*, 2013 ONSC 4817, [2013] OJ No 3360 (a machine operator, who worked for 20 years and was terminated at the age of 70, received 22 months' pay in addition to the working notice provided which was 11 weeks). The last case was appealed (*Kotecha v Affinia Canada ULC*, 2014 ONCA 411). The Court of Appeal held that this was excessive given that it presented no exceptional circumstances and determined a notice period of 18 months from which the 11 weeks' working notice would be deducted.

167. See e.g. Howard Levitt, "Canada: Why older workers are getting an upper hand over their employers," *Financial Post* (16 May 2014), online: <[www.business.financialpost.com](http://www.business.financialpost.com)>.

common law for many years.<sup>168</sup> However, the vast majority of these recent cases involved workers with very long tenure. It is rarely the case that a worker at advanced age, who works somewhere for a short period of time, will be awarded a lengthy notice period.<sup>169</sup> Indeed, the isolated impact of age is relatively modest—an additional 3 months' pay for those above 50 years old.<sup>170</sup> It is not possible to estimate the deterrent effect of a longer termination notice. Furthermore, the deterrence effect of having to pay more for senior workers could be easily neutralized if the contract of employment explicitly provides reasonable notice which meets the minimum statutory requirements.<sup>171</sup>

Anti-age discrimination law still has an important, supplementary role in eradicating and redressing discriminatory patterns and driving social change.<sup>172</sup> This role could become more effective if it stems from the recognition that age discrimination in hiring takes a subtle and systemic form and should be addressed as such. A more structural approach to anti-age discrimination law should be developed, similar to proposals made regarding other prohibited grounds such as sex and race.<sup>173</sup> This may mean, for instance, that even well-intentioned people would be required to assess themselves and their actions and act against their natural preferences. This may also mean that employers, regardless of any motive, could be held accountable for facilitating or enabling discrimination in their hiring

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168. When an employee is dismissed without cause, the length of reasonable notice is determined on the basis of four factors set out in *Bardal v Globe & Mail Ltd* [1960] OJ No 149, [1960] OWN 253: (1) the character of employment; (2) length of service; (3) age of employee; and (4) availability of comparable employment in light of the employee's experience, training and qualifications. Usually courts do not award more than 24 months' notice.

169. For an exceptional case see *Ellerbeck v KVI Reconnect Ventures Inc*, 2013 BCSC 1253, [2013] BCJ No 1534, where the Supreme Court of British Columbia awarded a 59-year old corporate controller with only 3.5 years of service—10 months' pay in lieu of notice, taking into account her senior position and age: "Ellerbeck held a senior level management position. She reported directly to the president and CEO. She was the senior financial officer of the defendants' organizations.... The organizational chart and her responsibilities and activities evidence her senior level responsibilities.... Ellerbeck was a candidate for president.... [D]ue to her age, she faces greater barriers in obtaining a mid to senior level position. Ms. Ellerbeck does not intend to retire presently" (*ibid* at paras 46-47).

170. See Kenneth William Thornicroft, "The Assessment of Reasonable Notice by Canadian Appellant Courts from 2000-2011" (2013) 17:1 CLEJ 1.

171. See *Machtiger v HOJ Industries Ltd*, [1992] 1 SCR 986.

172. For a similar position in the U.S. see Olatunde C Johnson, "Leveraging Discrimination" in Samuel Bagenstos & Ellen Katz, eds, *A Nation of Widening Opportunities? The Civil Rights Act at Fifty* (Ann Arbor: University of Michigan Press, 2014), online: <www.ssrn.com> (while anti-discrimination law has been less effective in addressing contemporary problems such as providing access into entry-level employment, this article argues that the *Civil Rights Act* continues to provide an important regulatory framework for addressing problems of exclusion of various protected groups in a variety of social spheres while using some effective public and private enforcement strategies).

173. See references cited in *supra* notes 52 and 78.

practices by, for example, failing to establish a fair process or employing objective measurements.<sup>174</sup>

There are various ways to promote such a structural approach. The most feasible way is through the case law. As the literature and research on age discrimination grows and emerges, adjudicators may become more familiar with dealing with its most insidious and systemic forms and be willing to draw inferences in favour of the complainant where the employer used a subjective selection process. Recall that when a job applicant establishes the three-stage test (i.e. the applicant was qualified for the particular position; the applicant applied for and was denied the position; and a considerably younger candidate who was no better qualified was hired for that position), the evidential burden shifts to the respondent to provide a credible and rational explanation demonstrating that the decision was not discriminatory. Here, adjudicators may require employers to do more than just explain that “there wasn’t a good fit” or that “the candidate was over-qualified.” A consistent record of job-related, objective criteria and hiring practices would serve as a good basis for a credible and rational explanation. This includes for example the use of a standard set of interview questions, several interview teams or a scoring system. By contrast, adjudicators may draw inferences in favour of the complainant if the decision making process mainly contains subjective elements, i.e. if the employer failed to put in place some preventive measures for implicit bias. Accordingly, the requirement that the complainant provide “something more” (i.e. show that age was a factor in the decision making) should be relaxed. It should be sufficient, for example, to point to some other questionable hiring or employment practices in that organization, even by other personnel, or to other circumstantial evidence, such as statistical disparity in that organization. Furthermore, adjudicators should be willing to relax the burden imposed upon complainants at the summary hearing stage as often complainants do not have much control over most of the evidence. Indeed, a few recent interim decisions may signal a new trend.<sup>175</sup>

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174. See e.g. Tristin K Green, “A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong” (2007) 60 Vand L Rev 849; Krieger & Fiske, *supra* note 78.

175. In these cases, the Tribunal recognized that “it is often difficult to establish direct evidence of discrimination and that the Tribunal must draw reasonable inferences from circumstantial evidence to decide whether discrimination has been proven on balance of probabilities.” It therefore allowed the complaints to proceed further in the hearing process despite the fact that the complainants were unable to establish the third element of the three-stage test, to which usually the respondent is privy at this stage of the process. See *Wilkinson v 1481544 Ontario Limited o/a Merry Maids of Barrie*, 2016 HRTP 290 at paras 29-33; *Hardy v Lambton Kent District School Board*, 2015 HRTO 1177 at paras 20-25. Although the Tribunal noted that it “has long accepted” this proposition, this has mainly been observed in racial discrimination cases (see e.g. *Phipps v Toronto Police Services Board*, 2009 HRTO 1604); *Pitter v Toronto Transit Commission*, 2012 HRTO 1412 (CanLII)).

In the same spirit, adjudicators should interpret the duty of accommodation more broadly so that employers are required to consider special needs and differences among employees from the outset, design workplace rules and policies in a way that is more inclusive, and revisit decision-making processes which include subjective criteria. A conceptual shift from individual accommodation, which focuses on the individual job applicant and his or her ad hoc accommodation request or need, to systemic accommodation, which imposes comprehensive and preemptive obligations upon employers, has been proposed in the context of disability discrimination, but has not been fully adopted by tribunals, courts and other adjudicators.<sup>176</sup>

Efforts should also be made to increase the level of support to self-represented complainants. As we have seen in Part II, in 50 of the 69 cases the complainants were self-represented. The issue of self-representation and the asymmetry between complainants and respondents was also flagged by the Pinto Report.<sup>177</sup> Self-represented complainants may be unfamiliar with the process and struggle to support their claims with evidence. In the 2008 reform in Ontario, a new agency was established—the Human Rights Legal Support Centre—which advises and assists complainants and can provide legal representation as well. While the services provided are of high quality, the Centre cannot meet the demand for its services.<sup>178</sup> Arguably legal representation may increase the chances of winning a case. As the Pinto Report concludes, self-represented complainants can do fairly well, but may do relatively better with legal representation.<sup>179</sup>

Even if the above-mentioned proposals are adopted, it is doubtful that a complaint-driven model can create robust systemic change. Unions should therefore be encouraged to file a general grievance or to assist job candidates (who are prospective union or bargaining unit members) in filing a human rights complaint when there is evidence of systemic age discrimination in hiring. Finally, class actions and public interest complaints initiated by human rights commissions or non-government organizations should be encouraged through simplified procedures to

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176. See Pothier, *supra* note 52 at paras 30-31.

177. In the cases examined by the Pinto Report, self-representation ranged from 53% to 70%, while respondents were almost always represented—82% to 90% of the time. See Pinto Report, *supra* note 35 at 45-46.

178. See Ontario *Human Rights Code*, *supra* note 22, ss 45.11-45.18 and its website: <[www.hrlsc.on.ca](http://www.hrlsc.on.ca)>.

179. Pinto Report, *supra* note 35 at 108.

achieve deterrence and better protection against discrimination in future cases.<sup>180</sup>

A more significant way to promote a structural approach anti-age discrimination law could be accomplished if the legislature actually mandates or prohibits particular selection processes. But this suggestion does not seem politically viable. A more feasible suggestion might be to amend the legislation so that the onus of proof shifts to the respondent once the complainant meets the three-stage test, without a further requirement that the complainant establishes a link between their age and not being hired. Employers would then have to show that their decision was based on clear, premediated objective measures rather than impulsive and subjective ones. Since implicit bias is very common and hard to resist even by well-intentioned people, this legislative amendment which would require employers to act and implement objective selection processes may make a difference.<sup>181</sup>

A final suggestion, which is more comprehensive, would be to introduce legislation, similar to some extent to the *Accessibility for Ontarians with Disabilities Act*,<sup>182</sup> which would aim at promoting age equality in the workplace. This legislation would include a requirement to implement written hiring policies to promote age diversity and mitigate the effects of implicit bias in the workplace. It would also impose reporting duties upon employers regarding their selection processes and practices and what they do to avoid the influence of implicit bias. Finally, this legislation would effectively broaden the scope and nature of the duty of accommodation. A broader duty of accommodation should reflect a commitment to assisting in the employability of all workers. This would include a requirement to improve health and safety in the workplace and other working conditions such as workplace ergonomics and to invest in the lifelong learning and training of all workers. It would also include a requirement to accommodate not only disability-related but also various age-related needs allowing senior workers to work productively such as

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180. Similarly the Pinto Report, *supra* note 35, recommends: The Commission should have a process based on established criteria whereby community organizations can request the Commission to initiate a public interest complaint (Recommendation 21).

181. Similar solutions are already used in other Canadian employment and labour law contexts where evidentiary challenges have been identified. This includes for example just cause cases (see e.g. *McKinley v BC Tel*, [2001] 2 SCR 161, 2001 SCC 38 at para 36) and unfair labour practice cases (see *Plourde v Wal-Mart Canada Corp.*, [2009] 3 SCR 465, 2009 SCC 54 at para 91). It is also used in other legal systems in the specific context of discrimination. See e.g. the *Fair Work Act 2009* (Cth) s 361 in Australia.

182. SO 2005, c 11.

flexible work arrangements, part time opportunities, bridge positions, and training and retraining opportunities.

*Conclusion*

This article has critically examined how anti-age discrimination law in Canada (with a focus on Ontario) has responded to job market re-entry barriers faced by senior workers. It has discussed how the practices of age discrimination in hiring have evolved and how this has affected the well-being of senior workers. After reviewing age discrimination in hiring complaints filed and litigated in the last twelve years in Ontario, it found that only a few were upheld. Most importantly, this article has identified four major difficulties in the way that anti-age discrimination law has responded to the modern face of age discrimination in hiring. Finally, it provides several preliminary proposals which may promote effective enforcement, meaningful deterrence and improved employment prospects for senior workers.

