INTERSECTING AGE AND GENDER IN WORKPLACE DISCRIMINATION COMPLAINTS

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I. INTRODUCTION

Older female workers experience significant barriers in the labor market. Despite the growing proportion of women in the labor force, gender wage gaps and gendered occupational segregation are still major problems.[1] Non-standard employment and precarious work are more common among women than men.[2] Women also bear significant unpaid caregiving responsibilities and experience interrupted paid working lives.[3] As female workers age, these challenges often lead to increased vulnerability and can severely impact their socioeconomic status, health, and well-being.[4] While

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1. In Canada, *see* Aneta Bonikowska, Marie Drolet & Nicole M. Fortin, *Earnings Inequality and the Gender Pay Gap in Canada: The Role of Women's Under-representation Among Top Earners*, 088 ECONOMIC INSIGHTS 1 (2019), https://www150.statcan.gc.ca/n1/pub/11-626-x/11-626-x2019002-eng.pdf (last accessed Dec. 25, 2019); Elizabeth Richards, *Who are the Working Women in Canada's Top 1%?* 088 STATISTICS CANADA 1 (2019), https://www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2019002-eng.pdf?st=LmFWLnr0 (last accessed Dec. 25, 2019). In Australia, *see* AUSTRALIAN BUREAU OF STATISTICS, LABOUR FORCE, AUSTRALIA, NOV 2019 (2019), https://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0 (last accessed Dec. 25, 2019); AUSTRALIAN BUREAU OF STATISTICS, AVERAGE WEEKLY EARNINGS, AUSTRALIA, MAY 2019 (2019), https://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0 (last accessed Dec. 25, 2019); WORKPLACE GENDER EQUALITY AGENCY, GENDER WORKPLACE STATISTICS AT A GLANCE 2018-19 (2019), https://www.wgea.gov.au/data/fact-sheets/gender-workplace-statistics-at-a-glance-2017-18 (last accessed Dec. 25, 2019).

2. *See, e.g.*, Judy Fudge & Leah F. Vosko, *Gender Paradoxes and the Rise of Contingent Work: Towards a Transformative Political Economy of the Labour Market, in* 8 CHANGING CANADA: POLITICAL ECONOMY AS TRANSFORMATION 183 (Wallace Clement & Leah F. Vosko eds., 2003); Cynthia J. Cranford, Leah F. Vosko & Nancy Zukewich, *The Gender of Precariousness in the Canadian Labour Force*, 58 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 454 (2003).

3. *See, e.g.*, Gillian K. Hadfield, *A Coordination Model of the Sexual Division of Labor*, 40 J. ECON. BEHAV. & ORG. 125 (1999); Diane Elson, *Labor Markets as Gendered Institutions: Equality, Efficiency and Empowerment Issues*, 27 WORLD DEV. 611 (1999).

4. *See, e.g.*, Lynn McDonald, *Gendered Retirement: The Welfare of Women and the "New" Retirement*, *in* 10 NEW FRONTIERS OF RESEARCH ON RETIREMENT 137 (Leroy O. Stone ed., 2006); Julie A. McMullin & Ellie D. Berger, *Gendered Ageism/Aged Sexism: The Case of Unemployed Older Workers*, *in* AGE MATTERS: RE-ALIGNING FEMINIST THINKING 201 (Toni M. Calasanti & Kathleen F. Slevin eds., 2006); Susan Bisom-Rapp & Malcolm Sargeant, *It's Complicated: Age, Gender, and Lifetime Discrimination against Working Women – The United States and the U.K. as Examples,* 22 ELDER L.J. 1

demographic trends have notably affected the composition of the workforce with increasing participation rates among older workers,[5] it is harder for older women than older men to find jobs,[6] which often leads to long term unemployment, financial insecurity and work displacement.

Studies show that older women are more prone to stereotypical assumptions and prejudice. For example, when accounting for workers who reported age discrimination in the workplace, the Australian Human Rights Commission found that, women were more likely than men to report being "perceived as having outdated skills, being too slow to learn new things or as someone who would deliver an unsatisfactory job".[7] Furthermore, the stigma, which is often associated with aging bodies – especially women's – further perpetuates discrimination against older female workers.[8] For older male workers, grey hair and wrinkles are often associated with power and authority, whereas the same traits could be detrimental to women, who are often judged by their physical appearance, and whose sexual attractiveness is closely tied to youth.[9] As Thornton and Luker observe, "[W]hile embodiment and sexualisation have always been features of work for women, the assumed correlation of youth with commercial success is having a particularly

(2014); Alexander Monge-Naranjo & Faisal Sohail, *Age and Gender Differences in Long-Term Unemployment: Before and After the Great Recession*, 26 ECONOMIC SYNOPSES 1 (2015), https://files.stlouisfed.org/files/htdocs/publications/economic-synopses/2015-11-10/age-and-gender-differences-in-long-term-unemployment-before-and-after-the-great-recession.pdf (last accessed Dec. 26, 2019); David Neumark, Ian Burn & Patrick Button, *Is It Harder for Older Workers to Find Jobs? New and Improved Evidence from a Field Experiment*, 127 J. POL. ECON. 922 (2019), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/701029 (last accessed Dec. 26, 2019).

5. In Canada, *see* Andrew Fields, Sharanjit Uppal & Sébastien LaRochelle-Côté, *The Impact of Aging on Labour Market Participation Rates*, STATISTICS CANADA (2017), https://www150.statcan.gc.ca/n1/pub/75-006-x/2017001/article/14826-eng.htm (last accessed Dec. 26, 2019). In Australia, *see* AUSTRALIAN INST. OF HEALTH AND WELFARE, AUSTRALIAN GOV'T, *Older Australia at a Glance* (2018) [hereinafter AUSTRALIAN INST. OF HEALTH AND WELFARE], https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/summary (last accessed Dec. 26, 2019).

6. In Canada, *see* STATISTICS CANADA, *Census in Brief: Working seniors in Canada* (2017), https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016027/98-200-x2016027-eng.cfm (last accessed Dec. 26, 2019); Government of Canada, *Promoting the Labour Force Participation of Older Canadians: Promising Initiatives* (Employment and Social Development Canada, 2018), https://www.canada.ca/en/employment-social-development/corporate/seniors/forum/labour-force-participation.html (last accessed Dec. 26, 2019). In Australia, *see* AUSTRALIAN INST. OF HEALTH AND WELFARE, *supra* note 5.

7. *See, e.g.*, AUSTRALIAN HUM. RTS. COMM'N, NATIONAL PREVALENCE SURVEY OF AGE DISCRIMINATION IN THE WORKPLACE 2015 1, 51 (2015), https://www.humanrights.gov.au/our-work/age-discrimination/publications/national-prevalence-survey-age-discrimination-workplace (last accessed Dec. 26, 2019).

8. *See* MARTHA C. NUSSBAUM & SAUL LEVMORE, AGING THOUGHTFULLY: CONVERSATIONS ABOUT RETIREMENT, ROMANCE, WRINKLES, AND REGRET (Oxford U. Press, 2017); Martha C. Nussbaum, *Ageing, Stigma, and Disgust*, *in* 8 THE EMPIRE OF DISGUST: PREJUDICE, DISCRIMINATION AND POLICY IN INDIA AND THE U.S. (Zoya Hasan, Aziz Z. Huq, Martha C. Nusbbaum & Vidhu Verma eds., 2018).

9. *See, e.g.*, Julia Twigg, *The Body, Gender, and Age: Feminist Insights in Social Gerontology,* 18 J. AGING STUDIES 59, 62 (2004); Sian Moore, '*No Matter What I Did I Would Still End Up in the Same Position': Age as a Factor Defining Older Women's Experience of Labour Market Participation*, 23 WORK, EMP. & SOC'Y 655, 668 (2009); Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 96 (2003).

deleterious impact on older women workers".[10] Moreover, Thornton and Luker identify the unique phenomenon of women being seen as aging more quickly than men.[11] In addition, given the non-standard way in which many women experience paid work, with interrupted careers due to caregiving responsibilities, lower wages and shorter service, many older women need to fully engage with paid work in the later years of their working lives to build retirement savings.[12] But it is at this point that the effects of age discrimination are most impactful on older women.

Despite the growing evidence of intersectionality-related challenges for older women in Canadian and Australian labor markets, there is limited case law indicating that claims of an intersectional nature are pursued. Research has been undertaken separately in each of these jurisdictions on why very few workplace age discrimination cases have been successfully pursued,[13] and this article seeks to build on that foundation to explore the potential for intersectionality claims. The legislative framework in both jurisdictions does allow for such claims to be made, and courts have in a limited number of cases been asked to determine such claims. Focusing on workplace age discrimination complaints in Canada (Ontario) and Australia, this article aims to shed light on how the case law portrays the interaction between age and gender in shaping the experiences of older female workers in these two labor markets. It explores how the theoretical and empirical work on intersectionality is translated into legal action, and how it informs the legal analysis and the selection of remedies. Specifically, this article examines whether complainants and adjudicators conceptualize ageism as potentially gendered, and whether adjudicators account for the distinct impact of ageism and sexism in their legal analysis and in awarding remedies, or whether each ground is analyzed in isolation. Finally, this article aims to assess whether it would be more strategically effective to frame age discrimination complaints in intersection with gender, and how the current grounds-based approach to anti-discrimination law restricts the ability of complaints to succeed. Some

10. Margaret Thornton & Trish Luker, *Age Discrimination in Turbulent Times*, 19 GRIFFITH L. REV. 141, 143 (2010).

11. *Id.* at 166. For a further discussion of how older female workers are negatively affected by the combination of stereotyping on the basis of age and gender, see SUSAN BISOM-RAPP & MALCOLM SARGEANT, LIFETIME DISADVANTAGE, DISCRIMINATION AND THE GENDERED WORKFORCE 33–41 (Cambridge U. Press 2016) [hereinafter LIFETIME DISADVANTAGE].

12. Colin Duncan & Wendy Loretto, *Never the Right Age? Gender and Age-based Discrimination in Employment*, 11 GENDER, WORK & ORG. 95, 101 (2004).

13. *See* Pnina Alon-Shenker, *Legal Barriers to Age Discrimination in Hiring Complaints*, 39 DALHOUSIE L.J. 289 (2016) [hereinafter *Legal Barriers to Age Discrimination in Hiring Complaints*]; Pnina Alon-Shenker, *'Age is Different': Revisiting the Contemporary Understanding of Age Discrimination in the Employment Setting*, 17 CANADIAN LAB. & EMP. L.J. 31 (2013) [hereinafter *Age is Different*]; Therese MacDermott, *Giving a Voice to Age Discrimination Complainants in Federal Proceedings*, 19 FLINDERS L. J. 233 (2017) [hereinafter *Giving a Voice to Age Discrimination Complainants in Federal Proceedings]*; Therese MacDermott, *Resolving Federal Age Discrimination Complaints: Where Have all the Complainants Gone?* 24 AUSTRALASIAN DISP. RESOL. J. 102 (2013) [hereinafter *Resolving Federal Age Discrimination Complaints*].

feminist scholarship suggests that there are limitations in an intersectional analysis, due to its potential contribution to conceptual fragmentation, and that it "cannot unpick or unravel the many ways in which inequality is produced and sustained".[14] This article acknowledges that a doctrinal analysis focused on intersectionality, which examines the way cases are pleaded and how claims are categorized in a legal setting, is constrained by the fact that it must rely on the way the law represents the experience of older women in these circumstances. However, such an analysis can serve to highlight what is absent from such accounts of women's working lives, and can explore ways to reduce the impact of siloed categories in workplace discrimination claims, so as to better speak to the lived experience of older women.

II. INTERSECTING ATTRIBUTES

The experience of older women in the labor market is shaped by multiple personal characteristics, namely age and gender, but can also involve disability, carers responsibilities and other attributes, which produce unique forms of disadvantage. The term "multiple discrimination" has been used to describe a phenomenon in which multiple personal characteristics come into play in three different ways: (1) *ordinary multiple discrimination* —when a person is discriminated against on the basis of various characteristics but each is used on a different occasion (for example, an older woman was not promoted because her supervisor thought men were more suitable for senior positions and later she was also denied training due to her proximity to a typical retirement age); (2) *additive multiple discrimination* —when a person is discriminated against on the basis of various characteristics on the same occasion, but each operates separately (for example, an older women did not get a job interview because the prospective employer believed only young men (not old men, not young women) would be fit for this physically demanding job; (3) *intersectional multiple discrimination*—when a person is discriminated against on the basis of various characteristics on the same occasion and the characteristics are inextricably linked and operating in combination (an older woman was not promoted because her supervisor thought she should retire and take care of her spouse, but would consider promoting younger women, and younger or older men).[15] The term intersectionality was coined by the American law

14. Joanne Conaghan, *Intersectionality and the Feminist Project in Law, in* 1 INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 21–22 (Emily Grabham, Davina Cooper, Jane Krishnadas, & Didi Herman eds., 2009).

15. Maria Hudson, *The Experience of Discrimination on Multiple Grounds* (Acas Research Paper, 2011), https://www.bl.uk/britishlibrary/~/media/bl/global/business-and-management/pdfs/non-secure/e/x/p/experience-of-discrimination-on-multiple-grounds.pdf (last accessed Dec. 27, 2019). Hudson's typology is based on TAMARA LEWIS, MULTIPLE DISCRIMINATION: A GUIDE TO LAW AND

professor, Kimberlé Crenshaw to demonstrate how gender and race operate interactively to shape the unique and complex experiences of Black women, and how despite this interaction, legal systems tend to treat such characteristics as mutually exclusive and fail to capture the diversity and interlinkage of these characteristics.[16] As Crenshaw explained, "dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis", yet "this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group".[17]

While the literature often focuses on race and gender,[18] the distinct impact of intersectional age and gender discrimination is only recently being explored. In Australia, McGann et al. found that women were "more likely than men to cite ageism as a barrier to finding work" and "that the nature of ageism experienced by older women is qualitatively different from men."[19] Specifically, women in clerical, administrative, and customer service work are more likely to experience ageism, since such careers generally relate to the physical appearance and attractiveness of the job-holder. Unlike stereotypes related to declines in functional capabilities, stereotypes related to physical appearance and attractiveness are less likely to be addressed by awareness campaigns with respect to the inaccuracies of such stereotypes and the valuable contribution of older workers to society.[20] In the U.S., Harnois found that women are significantly more likely to face either gender-based or age-based discrimination than men.[21] A comparative study of the U.S. and

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EVIDENCE 4 (Central London L. Ctr. 2010). On the question of terminology for forms of multiple discrimination see Ben Smith, *Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective*, 16 EQUAL RTS. REV. 73, 80 (2016).

16. Kimberlé Crenshaw, *Demarginalizing the Intersection between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139, 139 (1989).

17. *Id.* at 140.

18. *See, e.g.*, Sumi Cho, Kimberlé W. Crenshaw & Leslie McCall, *Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis*, 38 SIGNS: J. WOMEN IN CULTURE & SOC'Y 785 (2013); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,* 43 STAN. L. REV. 1241 (1991); Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 CAN. J. WOMEN & L. 25 (1993); Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN'S L. J. 179 (1993); Dianne Pothier, *Connecting Grounds of Discrimination to Real People's Real Experiences*, 13 CAN. J. WOMEN & L. 37 (2001).

19. Michael McGann et al., *A Gendered Analysis of Age Discrimination among Older Jobseekers in Australia* (Bankwest Curtin Econ. Ctr., Working Paper Series No. 16/01, 2016), https://ftprepec.drivehq.com/ozl/bcecwp/downloads/WP1601.pdf (last accessed Dec. 28, 2019). *See also* Michael McGann et al., *Gendered Ageism in Australia: Changing Perceptions of Age Discrimination among Older Men and Women*, 35 ECON. PAPERS 375, 375 (2016) [hereinafter *Gendered Ageism in Australia*].

20. Michael McGann et al., *supra* note 19.

21. Catherine E. Harnois, *Age and Gender Discrimination: Intersecting Inequalities across the Lifecourse*, *in* 20 AT THE CENTER: FEMINISM, SOCIAL SCIENCE AND KNOWLEDGE 87, 103 (Vasilikie Demos & Marcia T. Segal eds., 2015).

the U.K. by Bisom-Rapp and Sargeant found that women workers suffer from multiple disadvantages during their working lives, which result in significantly poorer outcomes in old age when compared to men. Gender-based factors (including gender stereotyping), women's traditionally greater roles in family caring activities, and other less overt factors that are still gender-related, produce disadvantage that increases incrementally over time.[22] Discrimination experienced by older women, as Roseberry argues, is "constructed by social processes that ensure that youth and maleness maintain their positions in the social hierarchy. . . . Neither age nor gender can be removed from the analysis without losing an essential aspect of the discriminatory practice."[23]

Intersectionality is particularly important in the context of older workers. Although age discrimination undermines human dignity, it is often considered less harmful and reprehensible than other forms of discrimination. In fact, age is widely used as a legitimate way to distribute resources in society, including in the labor market.[24] Furthermore, discrimination laws generally grant weaker protection to age discrimination complainants either through broader statutory exceptions or lower levels of judicial scrutiny.[25] Consequently, it is more difficult to prove age discrimination than other forms of discrimination.[26] Accordingly, it may be strategically beneficial for complainants who solely allege age discrimination to consider whether other grounds are relevant. Furthermore, framing an age discrimination complaint as one which intersects with other grounds might be particularly useful in exposing the wrongfulness and distinct impact of such discrimination.

The case of *Ontario Nurses' Association v Municipality of Chatham-Kent and the Attorney General of Ontario* highlights the importance of including other relevant grounds in an age-based discrimination allegation.[27] In this case, the Ontario Nurses Association challenged a statutory provision which allowed employers to provide less or no health and life insurance benefits to workers who reach the age of 65. Arbitrator Etherington ruled that

22. Bisom-Rapp & Sargeant, *supra* note 4, at 6. *See also* LIFETIME DISADVANTAGE, *supra* note 11, at 208.

23. Lynn Roseberry, *Multiple Discrimination, in* AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE 16, 37 (Malcolm Sargeant ed., 2011).

24. *See* Frank Hendrickx, *Age and European Employment Discrimination Law*, *in* 31 ACTIVE AGEING AND LABOUR LAW: CONTRIBUTIONS IN HONOUR OF PROFESSOR ROGER BLANPAIN 3, 7 (Frank Hendrickx ed., 2012); Ann Numhauser-Henning, *The Elder Law Individual Versus Societal Dichotomy–A European Perspective*, *in* ELDER LAW: EVOLVING EUROPEAN PERSPECTIVES 86 (Ann Numauser-Henning ed., 2017).

25. *See, e.g.*, Colm P. O'Cinneide, *Constitutional and Fundamental Rights Aspects of Age Discrimination*, *in* 47 AGE DISCRIMINATION AND LABOUR LAW: COMPARATIVE AND CONCEPTUAL PERSPECTIVES IN THE EU AND BEYOND 51, 54 (Ann Numhauser-Henning & Mia Rönnmar eds., 2015).

26. *See, e.g.*, Therese MacDermott, *Challenging Age Discrimination in Australian Workplaces: From Anti-Discrimination Legislation to Industrial Regulation*, 34 U.N.S.W. L. J. 182, 204 (2011); MacDermott, *supra* note 13; Pnina Alon-Shenker, *Legal Barriers to Age Discrimination in Hiring Complaints*, *supra* note 13; Pnina Alon-Shenker, *Age is Different*, *supra* note 13.

27. 202 LAC (4th) 1, 88 CCPB 95.

the impugned statutory provision was discriminatory on the basis of age and violated Section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). However, he further held that such a violation was reasonable and justifiable under Section 1 of the *Charter*. In reaching this conclusion, considerable weight was placed on the fact that "age is different" from other prohibited grounds of discrimination.[28] As a lesson from this case, Bisnar and McIntyre argue that "[t]o make the systemic effects of age discrimination clearer to adjudicators, litigators ought to frame claims of age discrimination in intersection with other grounds. This would help bring to light the flaws in the prevailing rhetoric that age is different from other prohibited grounds and that infringements of equality rights on the basis of age are easier to justify . . . . This strategy would also help to keep adjudicators from placing any weight, consciously or unconsciously, on the competing interests of younger and older workers in a collective bargaining context".[29] Similarly, Fudge and Zbyszewska argue that intersectionality analysis should be considered where it may expose adverse effects on specific groups, such as older female workers. For example, it can demonstrate how mandatory retirement arrangements and age-based pension policies, designed on the basis of stereotypical life-cycle norms, may result in a disproportionate impact on older women, who do not conform to the standard employment arrangement and duration.[30]

III. THE POTENTIAL FOR AN INTERSECTIONALITY CLAIM UNDER CANADIAN AND AUSTRALIAN LAW

A. Introduction

The concept of intersectionality has gained significant recognition in the academic literature, however, it has not been fully acknowledged nor developed in the adjudication of workplace discrimination complaints, and is often limited by the grounds-based approach to anti-discrimination law. Three major challenges to intersectional discrimination complaints have been identified in the literature. First, complainants generally find it difficult to conceptualize their experience as one of intersectional discrimination. In the context of gender, this difficulty may be attributed to the composition of the workgroup and occupational segregation, as women who work alongside women are less able to see their experience in terms of a comparison to other

28. *Id.* at para 137.

29. Danielle Bisnar & Elizabeth McIntyre, *Lessons for Litigators from ONA v. Chatham-Kent: A Union Perspective*, 17 CANADIAN LAB. & EMP. L.J. 225, 245–46 (2013) (Can.).

30. Judy Fudge & Ania Zbyszewska, *An Intersectional Approach to Age Discrimination in the European Union: Bridging Dignity and Distribution?, in* 47 AGE DISCRIMINATION AND LABOUR LAW, COMPARATIVE AND CONCEPTUAL PERSPECTIVES IN THE EU AND BEYOND 141, 162 (Ann Numhauser-Henning & Mia Rönnmar eds., 2015).

groups.[31] Second, intersectionality is usually not explicitly recognized under anti-discrimination legislation, which imposes a heavier evidentiary burden on complainants. This challenge is intensified in the context of age, which is often addressed under separate legislation,[32] or is associated with broader statutory exceptions and exemptions.[33] Finally, the case law is inconsistent and generally shows a lack of awareness of intersectional discrimination and a tendency to engage in an additive analysis of multiple discrimination.[34] In the U.S. it seems that these obstacles have been significant in limiting the success rates of litigation strategies.[35] We acknowledge that legal systems, and specifically workplace discrimination litigation, are limited in their ability to bring about broader societal changes. But we maintain that litigation remains an important tool, alongside other policy interventions, to affect a change in the lives of older women. Furthermore, the success of litigation strategies varies between different jurisdictions. Finally, we focus on the lived experiences of older women where their cases were litigated to examine whether, in circumstances where the law is invoked, it captures the actual experiences of older women in the labor market.

B. Canada

In Canada, while intersectionality is not explicitly recognized by legislation, anti-discrimination laws seem to provide more favorable conditions to an intersectionality claim compared to other jurisdictions. Human rights legislation in each Canadian jurisdiction (provincial and federal) has prohibited discrimination in employment on the basis of various grounds since the 1950s. The grounds of sex and age were added to the list of prohibited grounds in the late 1960s. Discrimination on the basis of age

31. *See, e.g.*, Sian Moore, *Age as a Factor Defining Older Women's Experience of Labour Market Participation in the UK*, 36 INDUS. L. J. 383, 384–85 (2007).

32. In the U.S., older women's ability to pursue an intersectional discrimination claim is limited under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act (*see* Joanne S. McLaughlin, *Limited Legal Recourse for Older Women's Intersectional Discrimination Under the Age Discrimination in Employment Act*, 26 ELDER L.J. 287 (2019)).

33. Analyzing EU case law, Fudge & Zbyszewska found that it is difficult to implement an intersectional approach to age-related discrimination in EU law because laws on age are different from laws on other grounds and the law does not use the language of intersectionality (Fudge & Zbyszewska, *supra* note 30).

34. *See* Bisom-Rapp & Sargeant, *supra* note 4; LIFETIME DISADVANTAGE, *supra* note 11, at 53–57. *See also* Smith, *supra* note 15; Paul Chaney, *Mainstreaming Intersectional Equality for Older People? Exploring the Impact of Quasi-federalism in the UK*, 28 PUB. POL'Y & ADMIN. 21 (2013); Jenny J. Votinius, *Intersectionality as a Tool for Analysing Age and Gender in Labour Law*, *in* CHALLENGES OF ACTIVE AGEING: EQUALITY LAW AND FOR THE WORKPLACE 95, 105 (Simonetta Manfredi & Lucy Vickers eds., 2016).

35. Rachel K. Best, Lauren B. Edelman, Linda H. Krieger, & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 995 (2011). This study examined U.S. federal courts decisions between 1965 and 1999 and found that intersectional claims dramatically reduced the chances of winning a case (by about 50% compared to cases claimed on a single ground).

and sex is also prohibited under Section 15 of the *Charter*. While anti-discrimination laws seem to promote a single-axis approach by providing a list of discrete prohibited grounds, Canadian case law has taken a contextualized approach to discrimination, by considering the social context of historically disadvantaged groups when analyzing complaints, and recognizing the diverse and complex forms that discrimination may take.[36]

In 1993, the Supreme Court of Canada dismissed the claim in *Canada (A.G.) v Mossop*,[37] and did not consider the intersectionality of sexual orientation and family status in that case. Madam Justice L'Heureux-Dubé writing for the minority stated that: "Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect".[38] In 1999, the Supreme Court in *Law v Canada*, held unanimously that "it is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds. Such an approach to the grounds of discrimination accords with the essential purposive and contextual nature of equality analysis under s. 15(1) of the *Charter*",[39] and that "[t]here is no reason in principle, therefore, why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1)".[40] In the same year, the Supreme Court recognized in *Corbiére v Canada*,[41] a new analogous ground of discrimination against Aboriginal band members living off reserve – different personal characteristics which overlap and intersect.

Intersectionality has also been recognized by other judicial bodies. For example, in the case of *Kearney v Bramalea Ltd*,[42] the Ontario Board of Inquiry held that the use of a rent/income ratio or an income criterion to determine eligibility for residential tenancy had a disparate impact on individuals based on the intersection and overlap of various ground including the receipt of public assistance, sex, marital status, family status, race, citizenship, and place of origin. In *Frank v A.J.R. Enterprises Ltd*,[43] where Aboriginal women were evicted from their hotel rooms or were denied

36. *See* Ontario Human Rights Commission, *An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims* 1 (Toronto: Ontario Human Rights Commission, 2001), https://www.ohrc.on.ca/sites/default/files/attachments/An_intersectional_approach_to_discrimination%3A_Addressing_multiple_grounds_in_human_rights_claims.pdf (last accessed Dec. 29, 2019).

37. [1993] 1 S.C.R. 554 (Can.).

38. *Id.* at 646. *See also* Madam Justice L'Heureux-Dubé's dissenting opinion in *Egan v Canada*, [1995] 2 S.C.R. 513, 563 (Can.).

39. [1999] 1 S.C.R. 497, 554 (Can.).

40. *Id.* at 555.

41. [1999] 2 S.C.R. 203 (Can.).

42. (No. 2) (1998), 34 C.H.R.R. D/1 (Can. Ont. Bd. Inq.), https://archive.org/details/boi98_021 (last accessed Jan. 15, 2020).

43. (1993), 23 C.H.R.R. D/228 (BCCHR) (Can.).

services, the British Columbia Human Rights Tribunal held that "the intersection of sex and race discrimination . . . is the essence of this complaint", and that there is "a pattern of malignant and contemptuous sexism intertwined with callous racism and disregard for the basic dignity, humanity and feelings of aboriginal women".[44]

Indeed, the intersectionality of sex and race has been the most recognized in the case law. In *Baylis-Flannery v DeWilde*,[45] it was held that "the law must acknowledge that [the complainant] is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman. The danger in adopting a single ground approach to the analysis of this case is that it could be characterized as a sexual harassment matter that involved a Black complainant, thus negating the importance of the racial discrimination that she suffered as a Black woman. In terms of the impact on her psyche, the whole is more than the sum of the parts: the impact of these highly discriminatory acts on her personhood is serious. The Respondent has wilfully and recklessly injured her dignity and worth. The resulting stress has caused damage to her physical and emotional well-being."[46] In another case, *S.H. v M [. . .] Painting*,[47] the Ontario Human Rights Tribunal held that "the harassment of the complainant was based on the unique intersection of the grounds with which the complainant self-identifies"[48] (aboriginal and single mother) and awarded $40,000 in damages for injury to dignity, feelings, and self-respect, explaining that: "The intersectional nature of a complainant's experience does not simply translate into a greater award of damages as compared to someone who identifies with only one prohibited ground. It is . . . a way for the Tribunal to understand the complexity of the complainant's experience . . . It can similarly be useful as a framework for assessing the impact of the discrimination [on] the complainant's dignity, feelings and self-respect."[49]

The unique interaction of age and sex has been recently recognized in the case of *Talos v Grand Erie District School Board*.[50] In this case, the Ontario Human Rights Tribunal held that the impugned legislation, which allows for differential treatment in the provision of benefits above the age of 65, adversely affects older workers and was therefore unconstitutional. While Talos was a unionized, male teacher, the Tribunal accepted the expert witness' research on age and intersectionality in considering the impact of the legislation, which it categorized as operating "as a blunt tool" on low wage workers and those with limited attachment to the workplace, including

44. *Id.* at para 35.
45. 2003 HRTO 28 (Can.), https://CanLII.ca/t/1r5w0 (last accessed Jan. 15, 2020).
46. *Id.* at para 145.
47. 2009 HRTO 595 (Can.), https://CanLII.ca/t/23j2f (last accessed Jan. 15, 2020).
48. *Id.* at para 65.
49. *Id.* at para 83.
50. 2018 HRTO 680 (Can.), https://canlii.ca/t/hs4l0 (last accessed Jan. 15, 2020).

immigrants and those with "family responsibilities" who cannot afford to retire at age 65.[51]

But courts and tribunals have not been consistent. As Hodes argues, anti-discrimination laws still rely on a list of discrete grounds, which view identity as a set of immutable physical characteristics, rather than as an experience "mediated by agency, social relationships, and power relations."[52] The result is that the complainant or the adjudicator tends to either prioritize one ground that is seen as supported by stronger evidence or apply an additive approach to discrimination.[53] Indeed, the Ontario Human Rights Commission found that while tribunals and adjudicators increasingly acknowledge a need for an intersectional approach, the most common approach to discrimination claims is one that tends to analyze each ground in isolation.[54]

C. Australia

The form and structure of Australian anti-discrimination law has an impact on intersectional claims. Australian laws lack the constitutional protections for equality and non-discrimination that exist in other jurisdictions. Further, there is not a single equality act in the federal area covering a range of attributes. Consequently, claims must be made under different acts dealing with a distinct ground, for example, the *Sex Discrimination Act 1984* (Cth), or the *Age Discrimination Act (2004)* (Cth). Academic commentators see "the need to attribute a complaint to *an* attribute" as flowing from the structure of the legislation involving multiple parallel federal statutes with each attribute giving rise to a separate complaint.[55] Hence, the pursuit of workplace discrimination claims in Australia is dominated by the "single axis" model of distinct grounds giving rise to separate claims. Claims that are framed in this way have been criticized as "not allowing the complexity of identity, and its impact on the experience of discrimination, to be revealed".[56] There is further fragmentation due to the existence of distinct anti-discrimination and employment law statutory schemes, and separate state and territory anti-

51. *Id.* at paras 242–43.

52. Caroline Hodes, *Intersectionality in the Canadian Courts: In Search of a Decolonial Politics of Possibility,* 38 ATLANTIS 71, 73 (2017), https://journals.msvu.ca/index.php/atlantis/article/view/4765/71-81%20PDF (last accessed Dec. 30, 2019).

53. *Id.* at 74.

54. Ontario Human Rights Commission, *supra* note 36, at 22.

55. NEIL REES, SIMON RICE & DOMINIQUE ALLEN, AUSTRALIAN ANTI-DISCRIMINATION & EQUAL OPPORTUNITY LAW 127 (Federation Press, 3rd ed. 2018).

56. Hilary Astor, *A Question of Identity: The Intersection of Race and Other Grounds of Discrimination, in* RACE DISCRIMINATION COMMISSIONER, RACIAL DISCRIMINATION ACT 1975: A REVIEW 269 (1995). *See also* Andrew Thackrah, *From Neutral to Drive: Australian Anti-Discrimination Law and Identity,* 33 ALTERNATIVE L.J. 31, 32–33 (2008).

discrimination legislation.[57] Claims of multiple discrimination can in theory be brought under this structure by relying on different grounds under the separate federal statutes or pleading a number of grounds under one act, for example where a state anti-discrimination act covers a range of attributes. However, in practice complaints of this kind are very uncommon. Although there is a lack of direct evidence on why such claims are uncommon, it can be explained in part on the basis that it makes the pleadings more complex and compounds problems with proving each distinct form of discrimination and who the relevant comparator is in each context.

Overall, Australian anti-discrimination laws are silent on intersectionality. The exception is the federal *Age Discrimination Act,* which specifically prohibits an intersectional claim regarding age and disability. It provides that "a reference to discrimination against a person on the ground of the person's age is taken not to include a reference to discrimination against a person on the ground of a disability of the person."[58] Calls for the reform of the lack of capacity for Australian anti-discrimination legislation to address intersectionality have been longstanding. The Australian Law Reform Commission's *Equality Before the Law* inquiry in 1994 recommended that a new provision be added to apply where it appears that the facts of a complaint supports the conclusion that the complainant has, or may have, suffered discrimination on additional grounds.[59] Then, the claim would be considered and determined and orders would be made as if the complaint had been pursued under each piece of legislation and joined together.[60] When a unified federal anti-discrimination act was being considered in the period 2012 to 2013, the draft legislation proposed a new provision defining direct discrimination as unfavorable treatment "because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes."[61] However, none of these proposals have been enacted.

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57. Coverage of age was introduced into anti-discrimination legislation in South Australia (1990), Queensland (1992), Western Australia (1993), New South Wales (1994), Northern Territory (1994), Australian Capital Territory (1996), Victoria (1996) Tasmania (1999), and to the federal system (2004). *See also Fair Work Act 2009* (Cth) s 351 (Austl.), https://www.legislation.gov.au/Details/C2018C00512 (last accessed Jan. 3, 2020).

58. *Age Discrimination Act 2004* (Cth) s 6 (Austl.), https://www.legislation.gov.au/Details/C2017C00341 (last accessed Jan. 3, 2020).

59. AUSTRALIAN LAW REFORM COMMISSION, EQUALITY BEFORE THE LAW: JUSTICE FOR WOMEN 69 (1994), https://www.alrc.gov.au/inquiry/equality-before-the-law/ (last accessed Jan. 3, 2020).

60. *Id. See also* PARLIAMENT OF AUSTRALIA, EFFECTIVENESS OF THE SEX DISCRIMINATION ACT 1984 IN ELIMINATING DISCRIMINATION AND PROMOTING GENDER EQUALITY 4.50-56 (2008), https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/report/index (last accessed Jan. 3, 2020).

61. *Human Rights and Anti-Discrimination Bill 2012* (Cth) (Austl.) Cl 19, https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Human%20Rights%20and%20Anti-Discrimination%20Bill%202012%20-%20Explanatory%20Not.pdf (last accessed Jan. 3, 2020).

The case of *Fares v Box Hill College of TAFE* is one of the few examples under Australian anti-discrimination law that takes a genuinely intersectional approach.[62] Fares was employed as a technical teacher in the clothing studies department of the college. She alleged that she was discriminated against in the treatment she received at work, including in workload allocations, support and consultation within the department, and in the selection process for appointment to a more senior position. She alleged that the discrimination was due to her sex and her ethnicity, on the basis that she and other non-English speaking background ("NESB") women were treated less favorably than the staff of English-speaking background. The Victorian Equal Opportunity Board found that there was an underlying atmosphere of discrimination against NESB women, and that such atmosphere manifested itself in the treatment of the complainant by others in the department. In establishing the causal link with the attributes of sex and ethnicity, the Board relied on characteristics that were imputed to non-English speaking women. These were identified as being "a belief that NESB women are generally more emotional, highly strung, demanding and overly conscientious in their work, long-winded and unable to be concise, holding undue regard for academic qualifications as opposed to practical experience and thus ambitious for themselves".[63] The Board concluded that the less favorable treatment of the complainant was a result of a reaction against and views held about her based on the imputed characteristics of her sex and ethnicity, those being characteristics imputed to NESB women generally in the department. The Board looked holistically at the experience of the complainant as a NESB woman, and noted it was different to the treatment of English speaking male and female members of staff and to the one male NESB member of staff.

Another example is the case of *Djokic v Sinclair & Central Meat Export Co Pty Ltd.*[64] The complainant was employed in the second respondent's business packing meat for export.[65] She alleged that she was subject to various forms of sex and race discrimination, including sexual harassment, that eventually lead to the termination of her employment.[66] Her claims were lodged under both the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act.*[67] The complainant experienced disharmony in her work relations as her fellow workers considered her to be overly conscientious and at times referred to her as a "stupid wog bitch".[68] The workplace was highly gender-segregated with only certain roles available to women. Further

62. (1992) EOC 92-391 (Austl.).
63. *Id.* at para 78,782.
64. [1994] HREOCA 16 (Austl.).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

animosity arose in the workplace because the complainant applied to be trained in a position that was designated as a job only performed by men, an informal arrangement that the union was also a party to. The complainant was placed on a roster that required her to work permanently with the first respondent (Mr. Sinclair) with whom she had experienced significant problems. She claimed this was done with a view to force her to resign. She alleged the first respondent referred to her regularly as a "wog bitch" and touched her in a sexual manner. In its reasons for the decision, the Human Rights and Equal Opportunity Commission characterized her treatment as discrimination in the workplace on the ground of both her sex and her race, and that she was a victim of sexist and racists attitudes. It also found that the failure to allow her to train for a traditionally male role in the workplace was based purely on the ground of her sex. The case was not determined based on separate breaches of each act. Instead, it was found that the reasons for finding the complaints substantiated applied under both the *Racial Discrimination Act* and the *Sex Discrimination Act*. In terms of a remedy, damages were apportioned equally between the two acts.

IV. CASE ANALYSIS OF AGE DISCRIMINATION IN EMPLOYMENT CASES IN CANADA AND AUSTRALIA

A. Canadian (Ontario) Cases

Many human rights complaints filed every year do not proceed to a hearing before a tribunal. A significant number of complaints are referred to a mediation process, where most are successfully settled.[69] Others are dismissed for a variety of procedural reasons through a preliminary process. Only about 100 cases a year are decided on the basis of merit.[70] While many of the complainants are self-represented, most respondents are represented by either a lawyer or a paralegal.[71] The proportion of human rights complaints on the basis of age filed with human rights tribunals has increased in the last several years. In 2017 to 2018, about 13% of the complaints filed with the Ontario Human Rights Tribunal were on the basis of age (alone or together with other grounds).[72] While the average success rate for human rights complaints generally stands at 40%,[73] there is evidence that age

69. In 2017-2018, 1,355 mediations were held, 59% were settled at mediation. TRIBUNALS ONTARIO, SOC. JUST. DIV., SOC. JUST. TRIBUNALS ONTARIO ANN. REP. 2017–2018 (2018), https://www.sjto.gov.on.ca/documents/sjto/2017-18%20Annual%20Report.html.

70. *Id.* (showing that 97 cases were decided "on the merits" in 2017-18).

71. *Id.* (discussing that in the last few years, up to 40% of the complainants were self-represented at a hearing before the Ontario Human Rights Tribunal, whereas almost 90% of respondents were represented by either a lawyer or a paralegal).

72. *Id.*

73. *Id*. (In 2017-2018, 41% of the cases with a final decision on the merits were found successful in the Ontario Human Rights Tribunal, 34% in 2016–2017, and 35% in 2015–2016).

discrimination complaints that proceed to a hearing are more difficult to prove.[74]

Given the large number of age discrimination cases in Canada, we limited our search to Ontario Human Rights Tribunal decisions involving age discrimination in employment complaints over the last ten years. We counted 313 age discrimination in employment complaints filed by either male, female, or both complainants (including those with only interim decisions).[75] Most of the complainants were self-represented (168 complainants, or 54%).[76] Age discrimination complaints were mainly filed by men (196 complaints were filed by men, 112 were filed by women, and 5 were filed by both). Many female complainants filed their complaints on the basis of age in addition to other grounds (63 out of 117 cases, or 54%). However, gender was (one of) the alleged grounds in only 19 cases. When examining the cases in which women have filed a complaint on the basis of age (alone, or in addition to other grounds), but not on the basis of gender, we assessed whether gender could have been relevant and useful to their complaints, and whether it intersected with age. In some of the 117 cases, gender was not relevant and in many others, there were not enough facts available to determine its relevance. In 12 cases, we thought gender was relevant and could have made a difference. For most of these cases, we have provided an analysis below. We have also examined all 19 cases in which both age and gender were argued by the complainant to assess whether they intersect and what impact this intersectionality had on the legal analysis and remedies.

1. Analysis of age discrimination cases in which gender discrimination was not claimed but could have been relevant

Below are several examples of Ontario Human Rights Tribunal decisions in which age discrimination was claimed alone or in addition to other grounds, but gender was not claimed, despite its potential relevance based on the facts of the case and how the complainants portrayed their experience. However, there are not many cases that fit these criteria, and a lot of complaints never reached the stage of a full analysis of the evidence as they were directed to a summary hearing and dismissed for having no reasonable prospect of success.

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74. *See generally, supra* note 26.

75. If several decisions were made in relation to one complaint, this would count as one complaint. In cases where there was no final decision regarding a complaint, but only interim decisions, this was still counted as one complaint. In cases where the decision was not substantive (i.e. was not made on the merit of the case) but was to dismiss the complaint for a variety of reasons (e.g. delay or jurisdictional issue), this was still counted as a complaint. The rationale was to examine patterns in filing complaints in terms of the gender of the complainant, the number of grounds alleged, legal representation, etc., rather than to examine success rates.

76. In 63 cases, the complainants were legally represented (by a paralegal or a legal counsel). In 23 cases, they were represented by another individual, and in 59 cases the representation was unknown.

In *Girdharrie v Cardinal Fasteners, a Division of Talbot Sales Inc.*,[77] Girdharrie filed a human rights complaint alleging discrimination on the basis of age alone after she was laid off from her job as a machine operator at the age of fifty-nine after seven and a half years with the company. She argued that the following week the company decided to hire a temporary younger woman over her for a permanent job of operating a new machine. Her complaint was dismissed for lack of evidence. Interestingly, the facts of the case reveal that the complainant's experience was affected by the intersection of age and gender. When asked during cross-examination why he did not ask the complainant to work on the vertical bagger, the CEO replied: "I would never let a lady lift a 60 pound box."[78] He testified that the job required the lifting of heavy boxes, that the complainant was not capable of doing so, and that she did not have the speed that the younger worker had.[79] The complainant submitted that these statements or assumptions were based on her status as an *older woman*.[80] Having operated similar machines for seven and a half years without any negative comments on her performance, the complainant argued that she did not get the job because of an assumption about her abilities, based on the stereotype that older women are weak and not capable of manual labor.[81] The respondent submitted that age was never mentioned or used for any hiring decisions.[82] Ironically, the respondent used sexism as a defense, noting that the complainant's focus on the CEO's comments about not having a lady lift heavy boxes "was an allegation of sexism, not age discrimination."[83]

The Tribunal started its decision by noting that the complainant had made some reference in her submissions to discrimination on the basis of gender. However, since she did not allege discrimination on the basis of gender in her formal claim form, it did not consider this ground of discrimination.[84] Moving on to deliberate on the allegations of age discrimination, the comment made by the CEO was simply not considered. Dismissing her age discrimination complaint, the Tribunal held that there was no direct evidence that age was relied upon by the respondent as one of the reasons for the hiring decision,[85] even though it was the CEO who made the hiring decision. Reviewing the circumstantial evidence, the Tribunal held that even if it were to accept that the complainant was qualified for the vertical bagger position and even if the other employee was not better

77. [2013] O.H.R.T.D. No. 523, 2013 HRTO 514 (Can.) [hereinafter *Girdharrie*].
78. *Id.* at para 26.
79. *Id.* at para 30.
80. *Id.* at para 42.
81. *Id.* at paras 45, 47.
82. *Id.* at para 54.
83. *Id.* at para 56.
84. *Id.* at para 69.
85. *Id.* at para 71.

qualified, the respondent provided a non-discriminatory explanation for its hiring decision that was credible.[86] The Tribunal accepted the CEO's testimony that based on his observations of those operating the machine, the younger employee was more qualified than the complainant based on speed and accuracy in the work and in her ability to anticipate the workings of the machine,[87] as "a reasonable and objective evaluation of pre-existing performance."[88] Indeed, the complainant was legally represented and should have requested an amendment to her human rights application at an earlier stage to allow the gender based discriminatory aspects of her claim to be considered. However, it could also be that the nature of the intersectionality only became apparent at the cross-examination stage, when it was perhaps too late to amend the application. In any event, had an intersectionality claim been pursued in this case, the result could have been different. The decision not to hire the complainant seems tainted by ageist stereotypes, but as the case relies on circumstantial evidence the Tribunal readily accepted the explanation of the respondent as credible. This is a common occurrence in age discrimination cases. Framing the claim as aged-sexism or gendered-ageism could have helped substantiate the claim that the CEO ruled her out without seriously considering her experience and capabilities and could have helped demonstrate that an inference of discrimination was more probable based on the available evidence, rather than the actual explanation offered by the respondent.

Another case where age discrimination was alleged alone but gender could have been relevant is *Arias v Centre for Spanish Speaking Peoples*.[89] Arias, who was in her mid 50s, worked as an administrative assistant for a non-for-profit organization. In her complaint, Arias described many incidents where she was treated unfairly on the basis of her age. Among such incidents, Arias claimed that two female supervisors conveyed to the respondent's board of directors and others that she was "too old" and "too slow" in an effort to have her replaced with an employee in their age group.[90] Arias also submitted that the president of the respondent's board asked her whether she planned to dye her hair.[91] The president denied the allegations by testifying that she did not recall making that comment.[92] Dealing with each incident separately, often at length, the Tribunal dismissed the complaint due to a lack of sufficient evidence. Interestingly, the incident with the president was addressed in a very short paragraph. The Tribunal accepted Arias' evidence that the president made that comment to her, but provided its own explanation

86. *Id.* at para 80.
87. *Id.* at para 78.
88. *Id.* at para 80.
89. [2010] O.H.R.T.D. No. 1816, 2010 HRTO 1818 (Can.) [hereinafter *Arias*].
90. *Id.* at paras 4, 32.
91. *Id.* at para 29.
92. *Id.* at para 30.

for that comment. The Tribunal noted that since Arias testified that she had previously dyed her hair and then let her hair grow out, it did not find the comment in that context discriminatory.[93] No further analysis of this issue was provided. When examining the other allegations, the Tribunal generally preferred the evidence of the respondent over that of the complainant, or held that the evidence provided by the complainant was insufficient to prove the allegations. It seems that at least the incident with the president could have been framed as a case of intersectional discrimination against an *older woman*. Given how the physical appearance of older women often negatively affects their experience in the workplace, especially in jobs such as hers, one might wonder if a man would have received similar comments. While Arias was self-represented and may not have considered this, placing the facts in an intersectionality context could have been helpful in order to be able to draw an inference from the surrounding circumstances and to substantiate the claim that it was more likely than not that discrimination occurred against an old woman. It could have negated the tendency to dismiss the possibility that age was a factor in her treatment.

Another case where gender was silent is *Ying v Canadian Commercial Workers Industry Pension Plan*.[94] Ying alleged discrimination in the operation of a pension plan on the basis of age alone. She worked in a grocery store for 23 years until she was terminated at the age of 48. Because she was under 50 years of age, she was not eligible for a reduced early retirement pension under the terms of her pension plan. Instead, she was entitled to a transfer of the commuted value of the pension or a deferred pension payable upon reaching the age of 65. The Tribunal dismissed the complaint holding that the law, through the combined operation of statutory exemptions in the *Human Rights Code*, the *Employment Standards Act*, its regulations (O. Reg. 286/01), and the *Pension Benefits Act*, allowed "differential treatment based on age in the operation of a pension plan based on the establishment of a normal retirement date that is no more than the date the plan member turns 66 and an early retirement date that is no less than ten years before the early retirement date is permissible and exempt from the operation of the *Code*."[95] However, this and other differential treatments in the provision of benefits, pension and retirement allowances that were based on the age of the employee could be challenged by a claim of intersectional discrimination on the basis of age and gender. As they often refer to a "normal retirement age" and "normal and early retirement dates", they are based on stereotypical assumptions about the typical course of employment and are designed with a

93. *Id.* at para 31.
94. 2012 HRTO 1274 (Can.), https://canlii.ca/t/frwgj (last accessed Jan. 14, 2010).
95. *Id.* at para 27.

male worker and a long-term continuous career in mind.[96] Applying lower and upper age limits to the provisions of benefits, pension and retirement allowances can have a disproportionate impact on older women, who once laid off may be forced out of the labor market at a relatively young age due to their poor prospects of obtaining other employment, but may find themselves not eligible to the benefit, pension or allowance due to an age based requirement. Similarly, such schemes can have a disproportionate impact on older women, who wish to work beyond standard retirement and benefit age limits where they have not accumulated sufficient retirement savings due to significant caregiving responsibilities and interrupted careers. An intersectional discrimination argument can be particularly significant here as these age cut-offs are often allowed through legislation. The common understanding is that age-based distinctions are a legitimate way to distribute resources between generations, but this ignores their impact on specific groups such as women. But the case of *Ying* is silent with regards to gender. It does not consider Ying's prospects of obtaining another job after working for 23 years in a grocery store. It views the matter of continuous employment as a matter of choice.

One of the rare cases in which an age discrimination complainant was successful is *Deane v Ontario (Community Safety and Correctional Services)*,[97] but here again, it could be that an intersectionality analysis would have been helpful. Deane, who was around 60 years old, was unsuccessful in obtaining a permanent position with the respondent and filed a human rights complaint alleging discrimination on the basis of age alone. The Tribunal accepted the evidence that Deane was encouraged to retire on various occasions and held that she was treated differently in her employment because she was an older person, but it dismissed her other allegations, specifically regarding the failure to obtain a permanent position due to her age. There was no dispute that she was qualified for the position (in fact, she scored the highest of all 300 applications reviewed and the fourth highest of all interviewees) and that the successful candidates were younger than her. But she 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). The Tribunal noted that in the absence of evidence of direct discrimination, this was very difficult to prove. It did not help that the hiring decision was based on the ranking of her interview performance, which was rather subjective according to Deane. First, the manager, who encouraged Deane to retire on various occasions, was the same person who interviewed her (Mr. Mosquera). Further, the interview was conducted by only two individuals,

96. *See e.g.*, Fudge & Zbyszewska, *supra* note 30; and Elizabeth Shilton, *Gender Risk and Employment Pension Plans in Canada*, 17 CANADIAN LAB. & EMP. L.J. 101 (2013).

97. 2011 HRTO 1863 (Can.), https://canlii.ca/t/fngnz (last accessed on Jan. 14, 2020).

Mr. Mosquera and his colleague and friend Mr. Raghubir. Lastly, Deane argued that the interviewers' notes were incomplete, suggested she was underscored, and that Mr. Mosquera indicated later that she seemed nervous during the interview when she was not. Since the Tribunal did not find the interview process itself to be discriminatory, the result was that her complaint was only partially successful and the remedy was limited to $7,000 for injury to dignity.[98] It seems that an intersectional discrimination claim on the basis of age and gender could have been relevant here, given the alleged subjectivity of the interview process and the manager's assumption that Deane should have retired when she reached the age of 60 (the age of eligibility for pension benefits based on her plan). Indeed, Deane testified that she was contemplating retirement, but she told the manager that she did not feel she could retire because she had some debts.[99] In fact, the Tribunal held that while the manager was quite aware that she had not definitely decided when she was going to retire, he did on occasion say things to her that were intended to make sure she understood the benefits of taking retirement as soon as she was eligible to do so, and that she reasonably believed he was encouraging her to retire.[100] This potentially involves sex-based assumptions about her readiness to retire once she reached the age of eligibility, including whether she had accumulated sufficient retirement benefits and whether she could afford to retire. Had the Tribunal taken a more contextual approach to the facts of this case, specifically the comments about retirement, the result could have been different, which may have resulted in a higher monetary award.

Similarly, *Clennon v Toronto East General Hospital* involves comments about retirement plans.[101] In this case, Clennon filed a human rights complainant alleging age discrimination in the termination of her employment as a nurse at the age of 59. Conversely, the respondent hospital claimed she was dismissed due to poor performance. The Tribunal found that no performance issues were raised with her and that her director inquired about her plans for retirement on three occasions. It held that the respondent's failure to take steps to address performance issues was tainted by age discrimination and that this, in turn, tainted the respondent's decision to terminate her employment. Here again, gender discrimination could have been argued, specifically in relation to the director's comment on whether the complainant should have considered retiring given that her husband had retired and that "it would be good to be retired with him," to which the complainant responded that she did not have enough money to retire.[102]

98. *Id.* at para 135.
99. *Id.* at para 42.
100. *Id.* at paras 95–97.
101. 2009 HRTO 1242 (Can.), https://canlii.ca/t/28h8g (last accessed Jan. 14, 2020).
102. *Id.* at para 58.

Despite the complainant winning the case, claiming gender discrimination as an intersecting ground may have resulted in a higher award of damages.[103]

In other cases, age discrimination was pursued in addition to other prohibited grounds, but not gender. For example, in *Byers v Fiddick's Nursing Home*,[104] Byers filed a human rights complaint alleging discrimination on the basis of age and disability. Byers, who was 61 years old at the hearing, held a long-term senior nursing management position in a nursing home until she was forced to resign due to the employer's failure to accommodate her disability. She was also discriminated against on the basis of age with respect to long term disability benefits, not being permitted to attend a conference because she was considered too old, and being scheduled to work more evening and additional shifts than other employees. The Tribunal held that "[t]he intersectional nature of an applicant's experience does not simply translate into a greater award of damages as compared to someone who identifies with only one prohibited ground," but that "it is a way to understand the complexity of the applicant's experience," and that "[i]t can be useful as a framework for assessing the impact of the discrimination to the complainant's dignity, feelings and self-respect."[105] Given the intersectional nature of the complaint, the Tribunal awarded $25,000 for injury to her dignity, feelings and self-respect, which is somewhat higher than the usual range.[106] While gender discrimination was not claimed and was absent from the analysis, it could be viewed as relevant. For example, Byers testified that because she was older and did not have younger children, she was scheduled more evening shifts and additional shifts than the other nurse managers. Indeed, "the respondents did not provide any information to suggest that the other nurse managers' availability, except [for one specific case], was restricted."[107] The Tribunal concluded that the complainant "was scheduled more evening shifts and additional hours because she did not have younger children, which in the context of this case, amounts to discrimination on the basis of age."[108] Yet, the assumption regarding availability was based on age and gender combined. The respondents based their assumption regarding availability on a comparison between younger and older *women*. While availability may be limited by a variety of factors, it seems to have been reduced by the respondents to one

103. The complainant was awarded compensation for injury to dignity, feelings and self-respect in the total amount of $20,000 and around $21,000 as compensation for loss of the payment under the proposed severance package. *See* 2010 HRTO 506 (Can.) at para 44, https://canlii.ca/t/28gnv (last accessed Jan. 14, 2020).

104. 2012 HRTO 952 (Can.), https://canlii.ca/t/frbp1 (last accessed Jan. 14, 2010).

105. *Id.* at para 279.

106. In the context of discrimination on the basis of disability in termination, damages usually range from $10,000 to $20,000. *See Knox-Heldmann v. 1818224 Ontario Ltd.*, 2015 HRTO 1376 (Can.) at para 48.

107. *Supra* note 104, at para 113.

108. *Id.* at para 117.

factor – childcare obligations. Younger female workers were assumed to be less available than older *women* because they are more likely to have small children and tend to have primary responsible for childcare obligations, without actually assessing each person's availability and restrictions. Such an assumption might not have been made in a less gender-dominated occupation. However, such a claim was not pursued by the complainant and was not considered by the Tribunal.

Another interesting observation is that in *Byers* the allegations of discrimination on the basis of age and disability were analyzed separately by the Tribunal and were only integrated in the discussion of remedies. Was her age intersecting with her disability a factor in the employer's failure to accommodate her? Was her disability intersecting with her age a factor in the unfair treatment regarding the conference attendance and the night scheduling? Or was this an ordinary multiple discrimination claim, where each ground of discrimination played a separate role on different occasions? If so, why does the Tribunal stress the intersectionality dimension when considering remedies? Arguably, if age and disability worked in combination to the complainant's disadvantage, they should have been considered in conjunction throughout the analysis.

In other cases, complaints were dismissed following a summary hearing and while it seems as if gender could have been pleaded, a full analysis of the evidence is not available. In *Stewart v Ontario (Government Services)*,[109] for example, Stewart filed a human rights complaint alleging discrimination in employment on the basis of disability, family status, marital status, age, and association with a person identified by a protected ground. Following a summary hearing, the Tribunal held that some aspects of the complaint had no reasonable prospect of success. These include the allegations with respect to age, the allegation that the respondent failed to accommodate the complainant's disabilities, and the allegation that the complainant's employment was terminated in part because she has a learning processing disorder and ADHD. The Tribunal ordered that the claim proceed to a hearing with regards to only two issues: whether the complainant was harassed in employment and ultimately terminated because of her spouse's disability, her own disability, and/or her children's disabilities; and whether the respondent's decision concerning vacation timing adversely affected the complainant due to her spouse's disability. While the Tribunal analyzed each ground separately and dismissed some parts, including the allegations of age discrimination, the complainant's experience could have been analyzed as intersectional discrimination against an older female worker, who had caregiving responsibilities for her husband and children, who have disabilities. Indeed, the complainant, who was hired when she was around

109. 2013 HRTO 1635 (Can.), https://canlii.ca/t/g0r59 (last accessed on Jan. 14, 2020).

the age of 50, argued that her manager held "stereotypical beliefs towards people who have 'increased caregiving responsibilities for family members with disabilities.'"[110] But dismissing the allegation of age discrimination at the initial stage of a summary hearing prevented any further consideration of how age intersected with gender in shaping her workplace experience.

2. Analysis of age discrimination cases which also explicitly involved sex discrimination

Below are several examples of Ontario Human Rights Tribunal decisions in which both age and gender discrimination were claimed. We examined how these allegations were conceptualized and analyzed by the complainant and the Tribunal.

In *Ellis v Petro-Canada Inc*,[111] 18 complainants, who worked for Petro-Canada at the Oakville Refinery, were laid off when the plant closed in 2005. They applied for jobs in other locations but were not successful. They filed a human rights complaint alleging that their age and/or disability was a factor in the decision not to hire them. Two of the complainants were female and only one of them, Cassady, claimed age discrimination. In her case, the successful applicant was a 25-year-old woman, who had been hired on a temporary basis. Cassady felt that it was unfair for the respondent to prefer a recently-hired temporary worker over a long-term employee. She alleged age, gender and disability discrimination.[112] Interestingly, the Tribunal dismissed the claim of gender discrimination, holding that both "Cassady and the successful worker were female, so gender discrimination is not a factor."[113] The Tribunal further held that while Cassady was older than the successful applicant and had a permanent medical restriction (which would not have been relevant to the position of Customer Service Representative), the evidence established that the two candidates were not equally qualified. The successful applicant was fully bilingual whereas Cassady was not, she also had stronger computer skills and significant sales experience.[114] It is interesting to note that the Tribunal considered this case as additive multiple discrimination, where gender and age were analyzed in silos. Since the successful applicant was female, the Tribunal found this to be sufficient evidence to dismiss the claim of sex discrimination. But the experience of the complainant should have been considered at the intersection of her age, sex, and disability, specifically given the nature of the job (Customer Service Representative) where physical appearance may influence, even if

110. *Id.* at para 23. The parties were referred to mediation and may have settled as we could not find a final decision in this case.

111. 2014 HRTO 163 (Can.) [hereinafter *Ellis*], https://canlii.ca/t/g303v (last accessed on Jan. 14, 2020).

112. *Id.* at para 113.

113. *Id.* at para 114.

114. *Id.* at para 116.

subconsciously, the hiring decision-making process. The fact that another woman was hired should not automatically refute a claim of gender discrimination when put in the context of the intersection of gender and age, as explained under the typology of multiple discrimination.

In *Knox-Heldmann v 1818224 Ontario Ltd*,[115] following a hearing in which the respondent was not in attendance, the Tribunal held that the complainant experienced discrimination in employment on the basis of age, family status, marital status, and disability. In particular, it found that the complainant, who was married and 59 years-old when she was dismissed from her employment of five-year duration with Coffee Time, was discriminated against on the basis of perceived disability. While her age might have also been a factor in her dismissal, the Tribunal made no specific finding in that regard. But the Tribunal did hold that the complainant "experienced a poisoned work environment on the basis of her sex, age, marital status and family status during the course of her employment in the form of comments made about her age, her marital and family status."[116] The comments, such as that she should quit or retire and move on with her life, that she was as old as the general manager's mother, and that she is "a dried up old prune" who could be ignored, were never addressed by the respondent.[117]

In this case, the disability issue was the most obvious as the complainant's termination letter made specific references to the need for accommodation in her hours of work as a factor in the decision.[118] The Tribunal also held that asking her to delay taking her wages on at least four occasions and telling her she had a husband to take care of her amounted to discrimination on the basis of family and marital status as well as sex.[119] The Tribunal accepted the complainant's evidence that "this job and her income were her 'independence' after a life as a homemaker whose first husband had died not long before she began working for the respondents."[120] The complainant sought and received an award of $15,000 compensation for the negative effect of the discrimination on her dignity, feelings, and self-respect.[121] She also sought and received an award of monetary compensation for loss of income for a period of seven months while she searched for other employment without success. While the complainant, who was legally represented, was successful and received the remedy she had sought, it is interesting to note that the complainant as well as the Tribunal conceptualized

115. 2015 HRTO 1376 (Can.) [hereinafter *Knox-Heldmann*], https://canlii.ca/t/glqxr (last accessed on Jan. 14, 2020).

116. *Id.* at para 3.

117. *Id.* at para 40.

118. *Id.* at para 37.

119. *Id.* at para 41.

120. *Id.*

121. *Id.* at paras 44, 50.

and analyzed the case as an additive or cumulative, rather than intersectional, discrimination case. An intersectionality claim seems plausible, given that the comments pertained to a combination of identities – being older and a married woman who is expected to retire and take care of her retired husband. Although the complainant won the case, an intersectional analysis could have strengthened her claim, stressing the distinct impact of intersectionality not only on her experience at Coffee Time, but also on her unsuccessful job search following her termination. Accordingly, this could have given rise to a larger award of damages.

Finally, a unique example of a complainant, who conceptualized her experience as intersectional discrimination, can be found in *Terra v Dufferin-Peel Catholic District School Board*.[122] Terra filed a human rights complaint alleging discrimination in employment on the basis of age and sex. She worked for more than twenty-seven years with the respondent school board as a teacher and as a school vice principal. Her claim alleged that the board discriminated against her with respect to a job selection process for one of five positions as a school principal. Two of the successful candidates were male, and the other three were female. The three unsuccessful candidates were all women over the age of 50, including the applicant who was fifty-six years old. As the Tribunal described it, although the complainant was self-represented, she "encouraged the Tribunal to take an intersectional approach to assessing her complaint. That is, her complaint was not solely based on age discrimination or gender discrimination but rather a combination of those two factors."[123] In making this intersectional claim, Terra relied on the fact that the same three unsuccessful candidates for the 2013 and 2014 job selections were all women over the age of fifty.[124] However, dealing with the gender issue first, the Tribunal held that Terra had no evidence to suggest that men over the age of fifty succeeded in obtaining jobs as principals, while their female peers failed.[125] Although she provided evidence that the ratio of male to female principals at the school board was 70 to 30, the Tribunal noted that the current ratio could not lead to the conclusion that the complainant experienced discrimination in the more specific circumstances of the job selection process in 2014, where 3 of the 5 successful candidates were women.[126] Dealing with the age issue second and separately, the Tribunal did not see a significant difference in the age range. As this was a summary hearing, the Tribunal did not have access to all of the evidence, but held that it could be reasonably inferred from the evidence available that the successful

122. 2015 HRTO 1657 (Can.) [hereinafter *Terra*], https://canlii.ca/t/gmjrf (last accessed Jan. 14, 2020).
123. *Id.* at para 15.
124. *Id.* at para 16.
125. *Id.* at para 17.
126. *Id.* at para 19.

candidates were in their mid to late 40s at the time, while the complainant was 56 years old, and that such a range was not a substantial difference in age in the context of this case.[127] Accordingly, the complaint was dismissed on the basis that it had no reasonable prospect of success. Since the Tribunal recognized that there were some problems with the hiring process, a full hearing of the evidence would have been helpful. In particular, given that the Tribunal considered age and gender separately, an intersectionality analysis of the evidence could have helped to substantiate the argument that in the context of the intersection of age and gender, there is a substantial difference between the workplace experience of women in their late 40s and that of women in their late 50s, given that women are perceived to age earlier than men. But since the case was dismissed at this early stage, the potential for an intersectionality claim was not further explored nor considered.

B. Australian Cases

Despite the acknowledged prevalence of workplace age discrimination, such claims are rarely pursued in the Australian legal context. In 2015, the Australian Human Rights Commission conducted a national prevalence survey and reported that over one quarter (27%) of Australians aged 50 years and over had experienced some form of age discrimination in the workplace.[128] Of those who reported experiencing age discrimination, 43% did not take any action; of those who did take action, only 5% discussed the issue with an external organization.[129] While reports of this kind acknowledge the barriers constraining older persons from pursuing justice as a group,[130] there is also a recognition that it is rare for older women to pursue complaints.[131] Furthermore, a successful outcome for a workplace age discrimination claim is an uncommon phenomenon. Previous reviews of the case law show that there have been no successful workplace discrimination claims brought under the federal *Age Discrimination Act 2004* (Cth).[132]

127. *Id.* at para 20.

128. AUSTRALIAN HUM. RTS. COMM'N, *supra* note 7, at 19.

129. *Id.* at 67. *See also* AUSTRALIAN HUMAN RIGHTS COMMISSION, WILLING TO WORK: NATIONAL INQUIRY INTO EMPLOYMENT DISCRIMINATION AGAINST OLDER AUSTRALIANS AND AUSTRALIANS WITH DISABILITY (2016), https://apo.org.au/node/66558 (last accessed Jan. 15, 2020).

130. *See also* LAW COUNCIL OF AUSTRALIA, THE JUSTICE PROJECT FINAL REPORT: INTRODUCTION AND OVERVIEW 35–36 (2018), https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf (last accessed Jan. 15, 2020).

131. Thornton & Luker, *supra* note 10, at 148. This is supported by the complaints statistics published by the Australian Human Rights Commission that show annually more complaints are lodged by men than women: https://www.humanrights.gov.au/complaint-information, (last accessed Jan. 15, 2020).

132. *Giving a Voice to Age Discrimination Complainants in Federal Proceedings*, *supra* note 13. Reasons for the lack of successful outcomes include complex legislative definitions of discrimination, restrictive court interpretations, difficulties with proving an age discrimination complaint, the absence of positive equality obligations, and the lack of agency enforcement.

However, there are a few examples under state anti-discrimination legislation, and with respect to unfair dismissal and general protections claims under the federal labor legislation, the *Fair Work Act 2009* (Cth).[133] The Australian literature supports the conclusion reached in other jurisdictions that the experience of older women in terms of age discrimination is qualitatively different from that of older men, and is experienced from a younger age.[134] The stigmatizing of older women in employment is not the same as the experience of older men or that of younger women. As Australian discrimination law scholars Thornton and Luker note, "[N]ot only is age rendered invisible by virtue of the intersection with the feminine, but discrimination against older women is normalised so that they rarely think it is worthwhile to pursue a complaint."[135] They also point to the fact that "age discrimination is more difficult to challenge because of the social devaluing of the older woman."[136]

An overall assessment of Australian anti-discrimination case law in the employment context is indicative of some general trends. First, age discrimination cases are predominantly brought by men and are silent on gender, such as the landmark case of *Qantas Airways Ltd v Christie*.[137] Similarly, some of the landmark sex discrimination cases heard by the High Court of Australia, where the age of the women complainants may have been relevant, are silent on this point.[138] There is a very small sample of Australian age discrimination cases where gender discrimination may have been relevant, but was not claimed, and such cases are discussed below. Further, there are also a small number of workplace discrimination claims where both age and gender are considered by Australian courts and tribunals, again discussed below, but they largely take the form of additive discrimination claims. Given that only a very small number of cases were available, our search of Australian databases was not limited by years or jurisdictions.

1. Analysis of Australian age discrimination cases in which gender discrimination was not claimed but could have been relevant

133. *Giving a Voice to Age Discrimination Complainants in Federal Proceedings*, *supra* note 13; *Resolving Federal Age Discrimination Complaints*, *supra* note 13.

134. *Gendered Ageism in Australia*, *supra* note 19, at 386.

135. Thornton & Luker, *supra* note 10, at 161.

136. *Id.*

137. (1998) 152 ALR 365 (Brennan CJ, Gaudron, McHugh, Gummow and Kriby JJ). *See also* Therese MacDermott, *Age Discrimination and Employment Law: The Sky's the Limit,* 11 AUSTRALIAN J. LAB. L. 144 (1998). This case involved the question of whether a male pilot could continue in his employment beyond a fixed age cut off. The case presented an unusual factual situation where the age barrier was as a result of international age restrictions imposed by international aviation agreements and were found to give rise to organizational and rostering difficulties that formed the basis for a successful inherent requirements defense on the part of the airline.

138. *See, e.g.*, *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56 (Austl.); *New South Wales v Amery* (2006) HCA 14 (Austl.).

A landmark Australian case involving discrimination against older female workers is that of *Hopper v Virgin Blue Airlines Pty Ltd.*[139] It was litigated under anti-discrimination legislation in the state of Queensland.[140] The case centered on the post-redundancy recruitment by Virgin airlines of flight attendants, who lost their jobs following the collapse of the Ansett airline. At issue was Virgin's recruitment process, which involved a number of different stages. The allegations of discrimination centered on the group assessment phase of the process, where the performance of certain activities by applicants was assessed with respect to particular behavioral competencies, such as assertiveness, teamwork, communication and "Virgin Flair."[141] The last of these criteria was defined to include "a desire to create a memorable positive experience for customers – an ability to have fun. . . ."[142] A group of former attendants, all women, who were over 35 years of age and were unsuccessful in obtaining employment, challenged this part of the process on the basis that it unfairly excluded them based on their age, as the ability to make it fun was equated "with youth and its outward physical manifestations."[143] They claimed the process was akin to a beauty pageant.

A striking feature of this case is that despite all the claimants being women, the case was framed solely in terms of age discrimination, when their experience was fundamentally that of *older women*. It is intriguing that the claim was not framed to reflect the fact that the behavioral competencies, such as making it fun, are not simply ageist, but reflect the integration of ageism and sexism into the assumption that younger women make the experience of flying "more fun." The failure to plead sex discrimination can be possibly explained in two ways. First, is the fact that in Australia, direct discrimination is dominated by the concept of identifying a comparator without the relevant attribute, but who is in similar circumstances. This comparative analysis can become difficult to plead and argue where more than one ground is identified. Secondly, it may be in part a consequence of the prevailing occupational gender segregation with respect to the work of flight attendants at the time, with 75% of cabin crew being female.[144] Moreover, it was not a standard age-based scenario where their skills were considered outdated, or that they were regarded as not willing to adapt to new technology. It was a situation of an oversupply of labor due to the decline of a major airline, where there was scope for aesthetic preferences to prevail,

139. *Hopper v Virgin Blue Airlines Pty Ltd* [2006] QADT 9; and on appeal *Virgin Blue Airline Pty Ltd v Hopper* [2007] QSC 075.

140. *Anti-Discrimination Act 1991* (Qld) (Austl.).

141. *Virgin Blue Airline Pty Ltd v Hopper* [2007] QSC 75, at para 14.

142. *Id.*

143. *See* Sally A. Weller, *Discrimination, Labour Markets and the Labour Market Prospects of Older Workers: What Can a Legal Case Teach Us?*, 21 WORK, EMP. AND SOC'Y 417, 428 (2007).

144. *Id.* at 423.

whether unconscious or not, and where "the demand for older flight attendants was weak at best."[145]

Weller highlights the change in nature of the work of flight attendants from a focus on safety and crisis management to being part of a market brand, with flight attendants "required to expend 'emotional' or 'aesthetic' labour as they perform an idealized feminine role,"[146] bringing with it the "emergence of overtly sexualized expectations."[147] With the appearance from the early 2000s and onwards of new low cost airlines and significant investment in marketing strategies by competitors in the aviation industry, "the social construction of the flight attendants' role – and the normative preference for engaging, young and physically attractive employees – is naturalized as an uncomplicated response to customer preference,"[148] and that "even airlines that eschew the sexualized service model emphasize employees' physical appearance and demeanour."[149] In this context, the sexualization of young women's bodies "is seen to be an asset conducive to commercial success".[150]

While both direct and indirect age discrimination were pleaded, the Queensland Anti-Discrimination Tribunal preferred to categorize what had occurred as a form of direct discrimination. To establish that direct discrimination had occurred, the Tribunal relied on the statistical evidence that showed that the proportion of people selected from the group assessment procedure, who were over 35 years in the period September 2001 to September 2002, were far lower than the proportion of the people under 35 years. The Tribunal concluded that "the anomaly indicated that 'older' applicants were treated less favourably than 'younger' thus the complainants 'made out their complainant of discrimination based on age.'"[151] In this way, the Tribunal did not regard the behavioral competencies, such as "having fun", as being inherently discriminatory on the basis of age. However, it went on to point out the cause of the statistical variation was that the assessors, in applying the otherwise neutral age criteria, were unconsciously discriminating on the basis of age. The assessors, most of whom were young themselves, were seen as adopting a "similar to me" bias. In essence, they "filtered by their own stereotypical assumptions that equated youth with fun".[152]

145. *Id.* at 425.
146 *Id.*
147. *Id.*
148 *Id.*
149. *Id.*
150. Thornton & Luker, *supra* note 10, at 166.
151. *Virgin Blue Airline Pty Ltd v Hopper* [2007] QSC 075 at para 30.
152. Juliet Bourke, *Are We Having Fun Yet? Age Discrimination in Recruitment*, 153 AUSTRALIAN EQUAL OPPORTUNITY ALERT (2005).

In terms of a remedy, the Tribunal identified the loss as being "the loss of a chance to be judged on merit and thus possibly obtain paid employment."[153] Added to this calculation of economic loss was the sum of $5,000 for each of the complainants in respect of personal damages. In considering the remedy, the Tribunal noted that the complainants were in a vulnerable situation as most had been flight attendants for all their working lives, with limited prospects of obtaining employment in this field. Despite this, the awards of damages for each complainant were depressingly low, as is common in many Australian discrimination cases. Further, in referring to the vulnerability of the complainants, gender was not specifically mentioned, nor was it acknowledged as contributing to any precariousness. A potential remedy that is more tailored to redressing poor employment prospect (a recurrent problem for older women) that could have applied to the *Virgin* litigation, is an order that allows an applicant to progress to the next stage in the recruitment process, when the initial assessment is tainted by discrimination.[154]

There is a small sample of Australian cases that did not proceed to a full hearing but had they done so could have lent themselves to an intersectional analysis on the basis of age and gender. Interestingly, summary dismissal applications represent a notable proportion of all reported age discrimination cases.[155] Other cases not involving a full hearing include situations where a lack of success in preliminary proceedings, such as in seeking injunctive relief to preserve the employment relationship, ends any prospect of the person pursuing the claim further. Alternatively, a claim might not proceed to a full hearing for other reasons, such as a settlement was reached, but there may be no formal reporting of this outcome.

The case of *Fernandez v University of Technology*[156] involved a successful summary dismissal application that ended any further consideration of the treatment Ms. Fernandez received. The applicant was employed by the University as an administrative officer for over 20 years. The proceedings raised the question of whether, following a grievance process dealing with a complaint about her conduct, she had been forced to give up her tenured position and enter into a pre-retirement contract because of her age. The alleged evidential link was the statement made by her supervisor that "why don't you consider retiring; 20 years is a long time. . .

153. *Hopper v Virgin Blue Airlines Pty Ltd* [2006] QADT 9 at para 6.

154. This type of approach has been used in the disability discrimination context to advance an applicant to the next stage of the recruitment process, so as to preserve the possibility of the complainant actually obtaining employment. *See Vickers v The Ambulance Service of NSW* [2006] FMCA 1232.

155. A previous study noted that approximately one-quarter of the reported age discrimination cases are summary dismissal applications. *See Resolving Federal Age Discrimination Complaints*, *supra* note 13, at 106.

156. [2015] FFCA 3432 (Austl.) [hereinafter *Fernandez*].

."[157] The reference to retirement and substantial service raises questions of what part her age placed in this decision-making process. But it also potentially involves sex-based assumptions that a worker will have accumulated sufficient retirement benefits and can afford to retire. This does not necessarily match the experience of those women who have had interrupted paid working lives, may have worked in low waged employment, or have limited retirement savings.

The case itself raised a number of jurisdictional issues that may have made it difficult for Ms. Fernandez to establish her claim. However, it is the way that the Federal Circuit Court viewed her claim in terms of age discrimination, and the absence of any reference to her gender, that is of most interest to this analysis. First, the Court was at pains to point out that a reference to how long a person had worked in a place, does not give rise to an accurate indication of their age, even when that period is 20 years. The Court also pointed out that while "a reference to retirement might give rise to some inference connected to a person's age, the matter specifically mentioned . . . was the length of the applicant's employment."[158] However, it is a fairly reasonable inference to draw from the fact that she had worked for 20 years and from suggestions that she should consider retiring, that she was around retirement age. Comments of this kind warranted further investigation and testing of the available evidence, rather than a summary dismissal. The summary dismissal of her claim foreclosed any consideration of what references to a person's extensive length of service, made together with comments about the prospect of retirement, indicate if they are not about her age. The dismissal of these proceedings at this early stage prevented any exploration of how her gender may also have been a factor. How was she viewed as part of that workplace, as a woman around retirement age? The comments about length of service and retirement suggest that the prevailing view was that there was no longer a place for her in that workplace. But the closing down of this claim at the stage of the preliminary proceedings foreclosed any opportunity to view this situation through the lens of her experience as an *older woman.*

The Court went on to find that even if Ms. Fernandez could establish that her age was a reason for the conduct, her version of events did not articulate a clear narrative of less favorable treatment or disparate impact, so as to amount to discriminatory conduct. However, it is possible to see an argument framed around less favorable treatment, on the basis that a man with her length of service, and not around retirement age, would not have been pushed towards a pre-retirement contract. Given she was self-

157. *Id.* at para 19.
158. *Id.* at para 39.

represented in the proceedings, it is not surprising that she did not formulate precise categories of discriminatory treatment in making her claims.

Another type of preliminary proceeding is where injunction relief is sought. Often this has a significant impact on whether an applicant is in a position to pursue the matter to a full hearing or not. In *Setchell v Alkira Centre Box Hill Inc*,[159] the applicant was a 62-year-old woman, who had been employed for approximately 22 years by the respondent, a not-for-profit provider of services to adults with intellectual and other disabilities, where the applicant's health and capacity to perform the inherent requirements of the job were at issue. The respondent contended that as a consequence of its funding situation it was not in a position to fund any extra assistance for the applicant to perform her duties and as such this constituted an unjustifiable hardship. The applicant had lodged a discrimination complaint on the basis of both her age and disability (but not her gender). The employer sought to proceed with a termination of her employment without waiting for these claims to be determined.

While the Federal Magistrates Court accepted that for the purposes of granting injunctive relief, there was an arguable case regarding capacity to perform the inherent requirements of the position, its conclusion on where the balance of convenience lay favored the employer's financial constraints, despite evidence of significant financial hardship to the applicant if the injunction was not granted. An important dimension was that if the applicant's employment was terminated, she would only have four weeks in which to gain employment to retain her membership of a defined benefits superannuation scheme, with the Court acknowledging her chances of obtaining other employment in this time frame as "remote."[160] It went on to state that: "One cannot ignore the reality of the respondent's position in respect of finances and the service it provides. The respondent would be, in my view, significantly inconvenienced and disadvantaged should it have to employ help for the applicant."[161] It determined that "the expense and inconvenience to the respondent of lengthy forced continued employment of the applicant" outweighed the "inconvenience to the applicant where she may be reinstated or compensated, or both, in due course if she succeeds in her complaint."[162]

A number of factors are worth exploring further in this weighing up of the balance of convenience. First, while the Court acknowledged that the applicant's retirement savings would be impacted and that her chances of other job prospects were remote, the expense to the employer of providing her with assistance was given greater priority. Moreover, remedies by way of

159. [2009] FMCA 288 (Austl.).
160. *Id.* at para 18.
161. *Id.* at para 21.
162. *Id.* at para 22.

reinstatement or compensation were both seen as available to her if she succeeded in her complaints. However, even if she had the resources to pursue her claim to a full hearing, reinstatement is only rarely ordered and any compensation is unlikely to make up for the fact that as a 62-year-old woman, she would have very limited prospects of future employment. As noted above, the Court was cognizant of not ignoring the "reality" of the respondent's position, but with scant regard to what a failure to preserve the applicant's employment while the substantive claim was determined would mean in the long term for a *woman* of the applicant's *age.* In addition, an order for the payment of costs was made in favor of the respondent, with this likely to have operated as a significant disincentive to pursuing the matter any further.

A final case where gender is absent from consideration is the case of *Keech v State of Western Australia Metropolitan Health Service*.[163] In this case, the discriminatory treatment challenged was the manner in which weekly payments of compensation were payable for incapacity to work under the *Workers Compensation and Injury Management Act 1981* (WA). The entitlement payable under this statutory scheme depended on whether the worker had attained 64 years before or after the injury occurred. The applicant contended that she was treated less favorably than a younger worker because the respondent ceased payments to her one year after the injury, as a consequence of her being 66 years of age at the time of the injury, in circumstances where the respondent would have continued payments to a younger worker injured at the same time.

The Federal Court found that the respondent had met its obligations to make payments in accordance with the statutory scheme and that in any event, the conduct was not unlawful as it came within the exemption for acts done in direct compliance with state legislation. Because of the existence of this exemption, the court did not need to consider Ms. Keech's gender or the broader context of the hardship caused to her by the termination of the payments as an *older woman* with an established workplace injury, who may have had an interrupted paid work experience so as to not have accumulated significant retirement savings, and very few real prospects of obtaining other employment. While this particular arbitrary age limit was removed through a subsequent amendment to the legislative scheme,[164] the problem remains where cut-offs for other schemes are not linked to the age pension qualifying age.[165]

163. *Keech v W. Austl. Metro. Health Serv. (WA)* [2010] FCA 1332.

164. *See Workers' Compensation and Injury Management Amendment Act 2011* (WA).

165. *See* AUSTRALIAN HUMAN RIGHTS COMMISSION, WILLING TO WORK REPORT, *supra* note 129, at 19. There are related concerns with respect to the tax treatment of payments made to older workers and the ability to access insurance coverage.

2. Analysis of age discrimination cases which also explicitly involved sex discrimination

The case of *Thompson v Big Bert Pty Ltd*[166] bears some resemblance to the *Virgin* litigation, but in *Thompson* the preference for recruiting young and attractive staff is more explicit, and it concerns the treatment of an individual rather than the statistical prospects of a group of women seeking employment. The applicant was employed as a casual bar attendant at a hotel, where she had worked for five years with fixed and regular shifts. From October 2005, her shifts were reduced and became irregular. At the time, she was 37 years old. She alleged both direct and indirect age discrimination, as well as indirect sex discrimination, but was unsuccessful on all counts. Both the pleadings and the judgment compartmentalize each aspect of the claim, and deals with each in isolation, with her gender not visible in any way in the age discrimination complaint, and her age invisible in her sex discrimination complaint. Moreover, neither claim gives a full account of her experience in terms of the intersection of these two attributes. Her evidence included that the owner of the hotel had been heard to say "that he wanted to replace older staff with 'young glamours.'"[167] The applicant's overall experience as an *older woman* in a service industry where attractiveness is a focus is not examined. In fact, it is her behavior and relations with other workers that are discussed at length, and the emphasis seems to be that she was a difficult employee.

Ms. Thompson alleged that it was a characteristic appertaining generally or generally imputed to persons in their late 30s that "they are less attractive and less glamorous than persons in a younger age group". As such, it was a requirement that "in order to continue in her usual shifts she look attractive and/or glamorous and young". Despite the fact that one could regard this as being attributable to a combination of her age *and* her sex, it was only pleaded and analyzed by the Federal Court in terms of her age. The Court rejected the direct age discrimination claim based on a lack of proof of the basis for the treatment, finding that the applicant had failed "by a considerable margin" to show that her age was at least a reason for the change in the work arrangements.[168] It relied on a number of other factors relating to the organization of the business and to personal conflict between the applicant and the manager. This is despite a witness confirming in his evidence the owner's statement that older staff needed to be replaced with "some young glamours."[169] However, this is downplayed in the judgment: "[n]o instruction to that effect was given. Mr. Allan understood it as Mr. Wakeford's [the

166. [2007] FCA 1978 (Austl.) [hereinafter *Thompson*].
167. *Id.* at para 1.
168. *Id.* at para 45.
169. *Id.* at para 42.

owner] *general desire.*"[170] The Court pointed to the fact that one feature of the changes in her work arrangements was that the applicant was working shifts with a greater number of customers, and that "[s]uch a result is quite inconsistent with any suggested desire to replace her with 'young glamours.'"[171] The Court found instead that the change was entirely consistent with the manager not wanting the applicant to be present on shifts when the manager was working to avoid conflict with the applicant and her complaints about other staff. Somewhat ironically, these complaints were alleged to be age-based because the applicant objected to being supervised by younger persons. But had the situation been viewed as one where the combination of age and sex was the reason for her treatment, this may have strengthened the argument regarding the discriminatory basis for the treatment. Moreover, the comparative dimension would be to that of a man in his late 30s, who would be unlikely to have been judged by his attractiveness in contrast to the treatment the applicant received.

By relying on a lack of evidence that the treatment was because of her age to reject the claim, the decision leaves unresolved whether it was appropriate to frame the age-based imputation in the way the applicant presented it, or who would be an appropriate comparator for the purposes of direct discrimination in these circumstances. In separate but related proceedings, the applicant alleged she was terminated unlawfully under the then applicable labor laws, but this claim was also unsuccessful on the basis that the casual nature of her employment meant that she had "no legal basis upon which to insist that she be offered further work, nor any obligation to accept such work if offered."[172] In that context, the shifts allocated to Bruno, a bottle shop attendant, were mentioned and reference made to his shifts being "interchangeable and hers [the applicant's] weren't."[173] This potential comparator, and the flexibility given to him, did not feature elsewhere in the judgment.

The Court dismissed the indirect age discrimination claim in two short paragraphs. The first merely reproduces a paragraph from the applicant's written submissions, to the effect that it was a requirement that "in order to continue in her usual shifts she look attractive and/or glamorous and young", and that persons of Ms. Thompson's age group would find it more difficult to comply with this requirement. The Court dismissed this claim in one line, simply stating "[t]his submission also cannot be accepted for the reasons given above". If this was referring to the preceding paragraphs, they dealt with the finding that the applicant had not established that her age was the reason for the changes to her shift allocation. Establishing a discriminatory

170. *Id.*
171. *Id.* at para 44.
172. *Id.* at para 61.
173. *Id.* at paras 51, 54.

basis for the treatment is not a requirement for an indirect discrimination claim. Alternatively, the Court could have been suggesting that there was no evidence that any condition or requirement was imposed regarding being young and glamorous. A lack of any requirement or condition regarding age could have been grounded in the observation earlier in the judgment that no instruction was given regarding the owner's "general desire" for "young glamours". However, the brevity of the discussion leaves the basis for the swift rejection of the indirect discrimination claim unclear. Moreover, the pleadings and the judgment ignore the key point that the alleged requirement of being attractive/glamourous and young is not simply about age, but has a gender dimension requiring further consideration.

The allegation of indirect sex discrimination was also rejected succinctly in a few paragraphs. The applicant argued that the requirement was that she be available to work any shifts in irregular patterns and that not having regular shifts had the effect of disadvantaging women, who as a group are responsible for undertaking the majority of caring for children. The applicant relied on case law involving a refusal to provide part-time work that acknowledged the social reality that women are more likely to be the caregivers for young children.[174] After dismissing the referenced decision as having no application to Ms. Thompson's claim, as her claim was not one dealing with part-time work, the Court simply stated without any further discussion, that there was no basis for any finding of indirect sex discrimination and that there was "no basis to distinguish her circumstances from that of other single parents."[175] Her experience as an *older woman* with family responsibilities, who might find irregular working patterns difficult to manage, was not the subject of any detailed consideration, other than a passing reference to the fact that sometimes her father looked after her children when she worked in the evenings.

The Court was clearly of the view that the evidence showed that it was her behavior that led to the changes in shift allocations. Reading what is set out in the judgment is not the same as hearing all the evidence in person, so a court is better placed to draw such conclusions. However, the confirmed evidence that the owner had a "general desire" for "young glamours" hangs awkwardly over the outcome. It seems plausible that it may have been a reason for the treatment the applicant received. Moreover, the rejection of the direct age discrimination complaints because of a lack of proof seems to have also colored the view of the Court as to whether any form of indirect discrimination arose, without full consideration of what such a claim might entail.

174. *Howe v Qantas Airways Ltd* [2004] FMCA 242 at para 118.
175. *Thompson*, *supra* note 166, at para 50.

In *Gabriel v Council of Box Hill Institute of TAFE*,[176] preliminary summary dismissal proceedings were instituted with respect to a complaint of age, sex, and impairment discrimination. The Victorian Civil and Administrative Tribunal dismissed certain parts of the claim based on the long delay in pursuing some of the allegations, but it did allow certain allegations to proceed regarding her treatment by the Council on the basis of her age and/or her sex. Ms. Gabriel had made a number of claims regarding an organizational restructure and access to promotions that she claimed favored younger men. Ms. Gabriel also alleged that inappropriate gender-based and age-based comments, made around the time of the restructure, showed that age and sex discrimination affected the decision-making regarding who would have on-going roles following the restructure. The applicant pointed to comments directed to her regarding "over mothering,"[177] which are reflective of a distinct view of her as an *older woman*. Although these proceedings did not constitute a full hearing and the reasons given are brief, the Tribunal did approach the question of whether there was any prospect of establishing the claims of discrimination by referring to both her age and her gender. However, these grounds were discussed in the summary dismissal proceedings as alternatives, so it is possible that had the matter gone to a hearing they would have been dealt with separately rather than in unison. Ultimately, there is no record of the matter proceeding to a hearing, which suggests it may have been resolved out of court.

V. DISCUSSION

The scarcity of cases in this area that go to a full hearing, especially in Australia, means that trends and implications are not easy to draw. It also means that the jurisprudence is under-developed, particularly regarding what constitutes direct as opposed to indirect discrimination in this context. Moreover, the Australian cases heard to date do not give a good basis on which to accurately predict who the right comparator would be. This leaves some of the fundamentals of pleading discrimination quite unclear and may account in part for why so few claims are pursued to a full hearing. However, there are some common factors worth noting and are discussed below. The impact of the structure of the legislative scheme is a factor and was canvassed in Part III.

176. [2002] VCAT 302 (Austl.).
177. *Id.* at para 19(e).

A. Meeting the Threshold

A common feature of age discrimination complaints is the difficulty of convincing a court or a tribunal that age was a factor in the treatment received, in the absence of blatant discrimination comments.[178] This has had an impact not only on the hearing of substantive claims but also on preliminary proceedings that may in fact be the only viable chance for a complainant to argue her claim. In some Australian workplace age discrimination cases, adjudicators have described allegations of age discrimination as a "bald assertion"[179] in an otherwise "grab-bag" of alleged breaches[180] and as failing to establish that the treatment was based on age "by a considerable margin", as well as dismissing potentially ageist comments as only indicative of a "general desire"[181] or as taken "out of context".[182] While it could be that these litigated cases were weak in terms of the available evidence, another way of looking at these cases is to observe that there appears to be a reluctance on the part of adjudicators to acknowledge that age could be the operative reason. From this case analysis it is possible to discern a tendency on the part of courts and tribunals to discount the possibility that age was a factor, despite the circumstances being open to the drawing of an inference that age was a reason for the treatment in question.[183] This has been described as being a "propensity of courts to seek out more 'innocent' explanations, and their reluctance to draw inferences from the surrounding circumstances, suggests an inability to conceive that age could present such a barrier."[184] For example, in a case involving specific references by another employee to the employer's desire for a "youthful and vibrant" work atmosphere,[185] the Federal Circuit Court, despite acknowledging that it was probably that the statement was made, was not prepared to draw any inference regarding age from the circumstances. The court looked for other

178. *Fair Work Ombudsman v Theravanish Investments Pty Ltd* [2014] FCCA 1170 (Austl.) (This is one of the few successful outcomes for workplace age discrimination complaint in Australia, where the employer communicated in writing that it did not employ any staff once they reached 65 years of age). *See also Bloomfield v Westco Jeans Pty Ltd* [2001] ACTDT 4, para 4 (where the complainant, when enquiring about the availability of employment was told they were looking for someone 17-21 years of age). In Canada, examples of successful cases include those where the employer asked for job applicant's birth certificate or date of birth or withdrawal of interview after inquiring about the age of the applicants (*see e.g.*, *Shaw v Ottawa (City)*, 2012 HRTO 593; *Kosovic v Niagara Caregivers and Personnel Ltd*, 2013 HRTO 433; *Rocha v 1339835 Ontario Ltd*, 2012 HRTO 2234).

179. *Prolisko v Knight* [2005] VCAT 1754, at para 14.

180. *Id.* at para 7.

181. *Thompson*, *supra* note 166, at para 42.

182. *Gardem v Etheridge Shire Council* [2013] FFCA 1324, at para 81. Similarly, in Canada, see *Arias, supra* note 89, where a comment about whether the complainant planned to dye her hair was found to taken out of context.

183. *See, e.g.*, *Girdharrie*, *supra* note 77; *Fernandez*, *supra* note 156.

184. *Giving a Voice to Age Discrimination Complainants in Federal Proceedings*, *supra* note 13, at 257. *See also Legal Barriers to Age Discrimination in Hiring Complaints*, *supra* note 13.

185. *Vink v LED Technologies Pty Ltd* [2012] FMCA 917, at paras 18, 32.

explanations for the reference to a desire for a youthful workplace, and found that "[i]t may be that Mr. Clerk [the other employee] told the applicant that Mr. Ottobre wanted a vibrant and youthful culture because he thought that would be less hurtful than telling the applicant that Mr. Ottobre thought he was incompetent."[186]

B. Pleading a Single Attribute

Despite the extensive evidence on how gender and age operate inextricably to create unique forms of disadvantage and vulnerability, this is not translated into legal action. Generally, older female complainants do not appear to frame age-based workplace discrimination complaints as gendered. In other cases, there is an incomplete portrayal of the person subject to the alleged discrimination. This is despite the fact that their experiences, as portrayed in some of the decisions, often reveal otherwise. The identification of a single ground could be attributable to the individual complainants, in terms of how they view their experience. However, a more likely explanation is that the reduction of their experience to the identification of a single attribute is done by others on their behalf, such as legal advisers, whose role is to translate the complainants experience into an acceptable legal form. Discrimination laws largely rely on comparative unfavorable treatment or group disadvantage. This necessitates looking to the treatment of others and drawing distinctions that are in accordance with the law and are also reflected in the facts. In some cases, such as *Virgin*, *Clennon*, or *Byers*, where gender segregation meant the workforce was predominantly women, the comparative treatment of men becomes less of a focus. But in others claims, there is no reason to ignore other aspects of a complainant's identity. A potential explanation for the reluctance to pursue claims in a form that relies on more than one attribute is that it makes the pleadings more complex and compounds problems with proving each distinct form of discrimination. Another explanation in our specific context could be that the combined impact of gender and age is often overlooked and comparatively devalued, as each attribute is treated as a biological characteristic rather than as a socially constructed phenomenon.

C. Analyzing Attributes in Silos

Because there are so few cases where a claim has been made on both the grounds of sex and age, it is difficult to draw distinct conclusions. But it seems that our case analysis is corroborated by studies on the general tendency to frame multiple discrimination claims as ordinary or additive

186. *Id.* at para 35.

multiple discrimination claims.[187] As such, the breaches relating to age and gender are pursued as cumulative but discrete claims, rather than as a distinct form of discrimination pertaining to the status of being an older woman.[188] In determining such claims, courts and tribunals tend to examine the grounds separately, rather than viewing the experience of the person subject to the discrimination as a distinct form of discrimination.

D. Chances of Winning

It is hard to predict whether cases, where gender was relevant but was not pleaded, would have been more successful had gender been pleaded. This is specifically true when discrimination in hiring is litigated, as the evidentiary challenge is significant for all ground of discrimination.[189] At the same time, given the tendency of some adjudicators to accept "innocent" explanation in cases of age discrimination, together with the generally weaker protection of the law against age discrimination, some consideration of the relevance, overlap and intersection of other grounds including gender could be beneficial.[190] It is also hard to predict whether cases where gender and age were pleaded but analyzed separately, would have been more successful had they been analyzed as intersectional discrimination cases. Some of the cases we analyzed suggest that the outcome could have been different.[191] Furthermore, it seems as though there is value in examining and weighing the evidence of discrimination in the broader context of the experience of older women in the labor market, in order to fully appreciate the disproportionate impact of some workplace practices and policies on older women. For example, as the cases of *Ying* and *Keech* show, age-based cut-off schemes can be particularly harmful to older women, as they are based on social norms and expectations of a typical life-cycle of employment. As discussed, doing so ignores the experience of many women who bear significant caregiving responsibilities and may have interrupted paid working lives.

E. Remedies

Because there are so few cases where a claim has been successfully pursued, it is difficult to point to specific trends or outcomes in terms of remedies. One factor that is worth noting is that there seems to be a general

187. *See, e.g.*, the cases of *Ellis*, *supra* note 111, *Knox-Heldmann*, *supra* note 115 and *Thompson supra* note 166.

188. See studies cited in *supra* notes 35, 36 & 52.

189. *See Legal Barriers to Age Discrimination in Hiring Complaints*, *supra* note 13.

190. *See, e.g.*, *Girdharrie*, *supra* note 77.

191. *See, e.g.*, the cases of *Ellis*, *supra* note 111, *Thompson*, *supra* note 166, and *Terra*, *supra* note 122.

lack of acknowledgment of how difficult it is in fact for older women to gain alternative employment where the discriminatory treatment results in a termination of employment or a failure to hire. Even where some form of vulnerability is recognized, such as in the *Virgin* case or the *Knox-Heldmann* case, this does not necessarily result in a remedy that tries to address the precarious position of older women in the labor market.

Further, the way in which compensation is awarded is also problematic. For example, in a case where age discrimination was established, in considering the hurt and humiliation arising for an older woman being informed that they wanted someone younger for the advertised job, the Australian Capital Territory Discrimination Tribunal focused on the discrimination as an isolated incident. It was seen as "capable of being redressed by the making of an appropriate apology," rather than as a systemic problem.[192] The Tribunal observed "that the complainant has resumed employment and that she said that she had been able to block the incident from her mind. I do not regard the evidence presented as indicating any basis upon which to conclude that the humiliation which she experienced was severe or of long duration."[193] Similarly, in *Deane v Ontario (Community Safety and Correctional Services)*, the Ontario Human Rights Tribunal viewed the comments made towards the complainant to encourage her to retire as an isolated incident that had nothing to do with her failure to obtain the position for which she applied despite the fact that the person who made the comments was the interviewer. It therefore held that she was not entitled to reinstatement or compensation for any lost wages, and the financial compensation for injury to dignity was limited to $7,000 as the comments about retirement "were not such that they resulted in a 'poisoned work environment.'"[194]

VI. CONCLUSION

The experience of older women in the workplace has been described in the literature as qualitatively different from that of older men. Some of these experiences have been strongly portrayed in our case analysis. Notably, older women are often unfairly treated as greater emphasis is placed on their physical appearance or perceived attractiveness. Our analysis also shows that while structural factors position older women at a disadvantage due to caregiving responsibilities, interrupted careers, and limited retirement savings, such factors rarely feature in the case law. Additionally, few older women bring an age discrimination complaint, and when they do, they often

192. *Bloomfield v Westco Jeans Pty Ltd* [2001] ACTDT 4, at para 21.
193. *Id.*
194. 2012 HRTO 1753 (Can.), at paras 30, 35.

do not conceptualize their age discrimination experience as gendered. Unfortunately, as we have seen, a single-ground analysis fails to capture the unique and complex experience of older women in the workplace. Even when adjudicators consider and analyze both age discrimination and sex discrimination, this experience is usually framed as additive or cumulative rather than distinct. This allows adjudicators to consider and dismiss each alleged ground independently. But when considering the experience of older women, gender should not be simply added to age as a set of physical attributes. Rather, the analysis of how age and gender intersect should be informed by the historical context, the social relationships and in terms of the economic realities which have shaped women's distinct experiences in the labor market. Such an intersectional analysis, we believe, is significant as it may lead to more effective systemic responses to the lived experiences of older women. This is especially critical against the background of the ongoing demographic changes in Canada and Australia as well as in many other jurisdictions.

The potential for an intersectional analysis of age and gender in both Canadian and Australian law is real, yet unfulfilled. The role of legal advisers, human rights commissions, and advice centres in increasing awareness, supporting and helping complainants to translate their experiences into an appropriately framed legal action cannot be underestimated. Reconsideration of the structure of the formal application form, which complainants are required to complete in order to launch their claim, is also warranted. Currently, the standard approach is that complainants are asked to check the boxes next to the most relevant prohibited grounds of discrimination, with an opportunity to identify an intersectional claim usually not available. Finally, given that the majority of the complainants are self-represented, the role of adjudicators in conceptualizing claims as intersectional is significant. This may suggest that more careful consideration of some cases should occur in the form of a full hearing rather than summary dismissal proceedings. That is, care needs to be taken that cases are not dismissed at a preliminary stage before the full picture of the experience of the complainant as an *older woman*, and what this in fact entails, has emerged.