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Legal Case Teach us?*

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Discrimination, Labour Markets and The Labour Market Prospects of Older Workers: What Can a Legal Case Teach Us?

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ABSTRACT

As governments become increasingly concerned about the fiscal implications of the ageing population, labour market policies have sought to encourage mature workers to remain in the labour force. The 'human capital' discourses motivating these policies rest on the assumption that older workers armed with motivation and vocational skills will be able to return to fulfilling work. This paper uses the post-redundancy recruitment experiences of former Ansett Airlines flight attendants to develop a critique of these expectations. It suggests that policies to increase older workers' labour market participation will not succeed while persistent socially constructed age- and gender- typing shape labour demand. The conclusion argues for policies sensitive to the institutional structures that shape employer preferences, the competitive rationality of discriminatory practices, and the irresolvable tension between workers' human rights and employers' property rights.

KEY WORDS

age / discrimination / recruitment / older workers / flight attendants

Introduction

In Australia, as in other Western nations, policymakers have become increasingly concerned about the economic implications of the ageing population. Recent labour market reforms encouraging mature age workers to remain in (or return to) the labour force recognise the multiple economic and social benefits of extending labour market participation. Meaningful work reduces the fiscal burden of pension and other social security payments, improves health outcomes, reduces healthcare costs and promotes well-being (Commonwealth of Australia, 1999). To promote higher participation rates, policies have focused on removing the regulatory impediments that discourage work, stimulating the demand for older workers' labour and encouraging older people into work. These interventions are underpinned by the discourse of

'human capital' and its belief that failure to utilise older workers' skills is both irrational and inefficient. This paper contends that human capital perspectives and their focus on economic efficiency underestimate the entrenched difficulties faced by older workers and argues for a renewed emphasis on employment rights and social justice.

Mature age workers are clearly disadvantaged in the Australian labour market. Many leave the labour force unwilling, well before the nominal retirement age of 65 years, most commonly for reasons of involuntary redundancy, ill-health or caring responsibilities. Redundancy is an especially significant trigger to labour market exit: in the three years to July 1997, almost one in five (18%) of all employed men aged 55-64 were retrenched at some time (ABS, 1997).¹ Mature age workers in Australia find it difficult to return to employment after losing a job. In 1998, the average duration of unemployment for job seekers aged over 45 years was 85 weeks, compared to 40 weeks for younger jobseekers (ABS, 1998a). In 1997, 64 per cent of all 'discouraged' jobseekers (that is, workers who wanted to work but were no longer actively looking for work) were aged 45 and over (ABS, 1998b). Over 40% of retrenched 55-64 year olds subsequently withdraw from the labour force (compared to 16% across all age groups). These patterns persist across occupation and skill categories (Murtough and Waite, 2000), indicating a serious age-related structural problem in the Australian labour market. Research by the Australian Human Rights and Equal Opportunity Commission has identified employer discrimination the most important factor inhibiting older workers' employment (HREOC, 2000). However, effective policy interventions depend on how the causes and motivations for discrimination are understood. Currently, policy settings reflect the assumptions of human capital theory, which focuses on individual interactions between employers and employees and views discrimination either as a costly preference or as a rational means of identifying desirable attributes. Institutional theories, on the other hand, explore the social and cultural barriers that *differentiate* labour markets into multiple, essentially non-competing and inherently discriminatory segments.

Human capital theory (Becker, 1962) emphasises the skills and attributes that workers bring with them to the labour market. It views labour market participation as a personal choice – a trade-off between work and leisure made after rational assessment of the associated costs and benefits. For employees, the economic returns to education, training and knowledge investments accrue over a lifetime and differences in earnings and status are understood as returns to skill (Ben-Porath, 1967). In this view, the labour market operates in the same way as other markets, through the interaction of supply and demand equilibrated by price. Both buyers (firms) and sellers (workers) are expected to enter the market voluntarily and behave rationally to maximise their personal utility. Because workers choose the conditions of their participation, the appearance of structured patterns in the labour market reflects preferences that arise from personal tastes or biological dispositions that are exogenous to the market. Thus, for example, the sex-based division of labour is attributed to women's preference for caring occupations in and out of the paid workforce, while older workers' low rates of participation reflect a preference for early retirement.

In this vision, the labour market is an aspatial and seamless aggregate of individual choices, a place where labour demand reflects technical production requirements. Since skills, knowledge and experience (stocks of human capital) increase with age, mature age workers should be attractive to employers – except, that is, in cases where contingent factors or technological change render their skills ubiquitous or obsolete (Pissarides, 1976). The adjustment problems faced by older displaced workers arise because their overly firm-specific skills, attitudes and socialisations do not transfer smoothly to new contexts and because industrial change creates a frictional mismatch between their skills and the skills demanded in the market (OECD, 1990). In theory, these deficits can be 'repaired' by skill upgrading training courses, although the returns to retraining are poorer for older workers, compared to their

younger colleagues, because they have less time over which to realize the benefits of their skill investments.

Failing to utilise older workers' valuable human capital is inefficient for firms, the economy and society (Spiezia, 2002). Older workers' poor employability is attributed to discrimination, which appears in 'direct' or 'indirect' forms. In the former, employers' neglect of older workers' skills reveals a 'taste' or preference that excludes talented candidates. Since this is costly and inefficient, discrimination should disappear as market forces penalise discriminating firms (Becker, 1971). In the latter, the assumed characteristics of a group are used as an indicator of the suitability of an individual. Here, employers use signals such as age or gender as proxies for unobservable attributes associated with productivity (Arrow, 1973). This form of discrimination compensates for inadequate knowledge of individual capacities and is therefore a rational response to an uncertain context. It implicitly estimates the distribution of the probabilities of making a recruitment error by taking into account both the perceived average difference between two groups (for example, older and younger workers) and the extent of within-group variation. In instances where the pay-off for discrimination is high—for example, by attracting better quality workers or reducing labour turnover—discriminatory practices can be eliminated by increasing their costs, via regulatory sanctions, until they become uneconomical.

Contemporary policies aiming to raise the labour market participation rates of older workers reflect the human capital theory assumption that in an efficient and informed market, employers would recruit workers on individual merit. The concept of discrimination is then constructed as a distortion of the optimal relationship between skill and price. Interventions therefore seek to lubricate market processes at the scale of individual buyers (firms) and sellers (workers). Policies incorporate four related instruments. First, regulatory structures that impede the market and discourage older workers from remaining in employment are identified, modified or removed. Second, information campaigns target inaccurate perceptions of older workers' attributes – the stereotypes that cast them as less productive, less flexible, harder to manage, lacking initiative, unwilling to master new technologies and prone to illness, injury, shirking or quitting (Pickersgill, 1996; Steinberg *et al*, 1996). Campaigns stress the efficiency of assessing each individual on her merits and highlight older workers' skills, reliability and commitment (COTA, 2000; Brooke, 2003; Encel, 2003). Third, new discourses discourage mature age workers from exiting the labour force by invoking a moral imperative to 'earn' social inclusion through paid labour. Fourth, legal sanctions penalise employers that discriminate against older workers. By promoting rational, objective and market-responsive recruitment processes, these measures aim to increase the likelihood that older workers will find employment.

In contrast to human capital theory, institutional perspectives view the market for labour as a social institution with norms and values structured by other mutually reinforcing institutions. As a result, the labour market is separated or *differentiated* into multiple quasi-independent submarkets or segments, each of which operates according to a unique set of rules and norms that reflect the influence of multiple technological, regulatory and social forces. The market transforms dynamically, constantly recreated by the interaction of processes of labour demand, the conditions of labour supply and the manner in which the state and other institutions condition and regulate demand and supply in specific places (Rubery and Wilkinson, 1994). A shift in supply—for example, the collapse of a large firm that spills labour into the market, or a change in the regulatory framework that increases the availability of older workers—will induce shifts in demand as employers alter their competitive strategies. These changes do not play out as human capital theory predicts because price adjustments are constrained by industrial rules, wages agreements, social obligations and the inertia of path dependent trajectories.

Labour cannot be traded in the same way as other commodities because skills and effort cannot be separated from the needs of their (embodied) owners. For workers, household, family and community responsibilities as well as personal ambitions condition how options are perceived (Harris *et al*, 1987). Assessments are also framed by the nature of accessible jobs, knowledge of employer preferences and the incentives and disincentives built into the regulatory framework. For employers, labour inputs to the production process can be organized in a variety of ways: by substituting labour for capital (automation); intensifying the work rate; reorganizing the internal division of labour; relocating the enterprise to a lower wage site or recruiting additional workers. Employers' choices are framed by competition from other firms, industry conditions and firm strategies as well as with the quality of job applicants. Institutional perspectives agree that processes associated with recruitment are central to the labour market's operation. However, rather than viewing recruitment as a meeting of the choices of autonomous agents in the context of a required technical skill set, it becomes a complicated instance in a continuing relationship between internal, firm-specific labour markets and the external labour market in which firms are embedded and from which they meet their labour needs (Rubery and Wilkinson, 1994). Issues of power and control shape the specific form of this 'coupling' (Peck, 1994; after Gordon *et al*, 1982). Skills are important, but from an institutional perspective the concept of skill is recognized as a social construct reflecting the distribution of social, economic and political power in society (Phillips and Taylor, 1980; Steinberg, 1990). Since the attribution of skill is shaped by social institutions, it can never be independent of the personal characteristics of workers. It therefore makes no sense to view employment and wages as a return to skill (human capital) if the idea of skill is fundamentally entangled with power-infused social relations such as gender and age.

In institutional approaches, the tendency for personal attributes to cluster around certain occupations and lifestyles is not just a matter of individual preference but reflects wider patterns of differentiation that typecast both workers and jobs. The market's segmentations create impermeable barriers to access that consistently disadvantage some groups of workers. These operate in multiple dimensions simultaneously. Recruitment or promotion barriers associated with age, for example, interact complexly with other stratifying characteristics especially gender (Itzin and Phillipson, 1995: 85). This relationship can be imagined as orthogonal – gender stratifies the labour market horizontally by occupation, industry and sector, while age tends to stratify vertically, by seniority (although the pattern is less clear due to the 'stickiness' of long-term incumbents). As McDowell (1997: 31) notes, since age relations in the workplace are infused with issues of personal power that cross-cut employer-employee interactions, they have the potential to disrupt hierarchical regimes of control. Firms therefore have a strong incentive to match authority and age hierarchies.

It follows that instances of discrimination are not aberrations, but are the routine expressions of barriers that are complexly entwined with social, cultural and economic norms. Older workers' employability is linked to their fit into hierarchical regimes of control at least as much as to their personal skills and attributes. It follows that age-related exclusions will more pronounced in some occupations and industries than others, depending on the specific job-related intersections of skill, authority and physical demands (Duncan and Loretto, 2004), as well as on the way in which age segmentations are superimposed over gendered occupational divisions. From this perspective, policy should focus on reconfiguring the employment relation and the social customs that labour markets reflect and reproduce.

This paper highlights the problems encountered by former Ansett Airlines flight attendants as they sought new jobs after Ansett's collapse in 2001. It uses this example to illuminate the relationship between age and gender and highlight the deficiencies of human capital's understanding of age discrimination. The paper forms part of five-year longitudinal study analysing the labour market destinations of the Ansett Airlines workforce. This example

is particularly useful for understanding the labour market situation of older workers because—in contrast to the much-studied redundancies in declining male-dominated industries such as manufacturing or mining, where technological and structural change evaporate the demand for older workers' skills—displaced aviation workers might reasonably have expected to find new jobs in their area of specialisation, given that other airlines were rapidly expanding to fill the gap left by Ansett's demise. Moreover, since the aviation industry employs both men and women in service, professional and technical specialisations—albeit in gendered occupational roles—this case provides an opportunity to compare outcomes when older and younger workers with similar sets of skills enter the market at the same time and encounter similar (in this case, relatively buoyant) overall economic conditions.

The discussion proceeds as follows. The next section introduces the study's novel methodology, which draws on evidence presented in a legal case. This is followed by a description of the labour market situation of mature age flight attendants who sought new jobs in the aviation industry after being made redundant when Australia's second largest airline, Ansett Airlines, closed down in September 2001. The paper then uses a legal case—a complaint of age-related discrimination—to explore how employer preferences, worker aspirations and the regulatory framework meet to create exclusionary outcomes at the crucial moment of recruitment. The penultimate section discusses the implications of this case, highlighting the competitive rationality of discrimination and its foundation in institutional priorities rather than individual worker skills. It argues that policy interventions based on a human capital's individualized and skill-based understanding of discrimination will not be effective and also identifies issues for further research. The conclusion suggests that human capital's discourses of discrimination conceal the expansion of employer discretion and proposes that policies should place more emphasis on social justice considerations.

Methodological Approach

The September 2001 collapse of Australia's second largest airline, Ansett Airlines, flooded the labour market with experienced workers with similar skills and work histories. At the time, this was the largest firm failure in Australia's history. It resulted in the loss of approximately 20,000 jobs – 15,000 at Ansett and an estimated 5,000 in Ansett-dependent firms. The displaced workforce included a range of specialisations: flight crew, trade and technical workers, ground staff, customer service and office workers, management and professional occupations. The majority of displaced workers expressed a strong desire to return to jobs in the aviation industry and formed a deep queue from which the remaining airlines could staff their rapidly expanding services.

In August 2002 and April 2004, follow-up surveys of the labour market destinations of Ansett's employees were conducted by the author as a consultancy project for the government of Ansett's home state in Victoria, Australia. In August 2002, a random sample of 2000 former employees was drawn anonymously from the 12,742 employment records held in Ansett's retrenchment database.² The sample was stratified by gender, age and occupation. The mailed survey generated 715 useable responses. The second survey, in April 2004, elicited 271 responses.³ Bi-variate comparisons and logistic regression analyses of these data concentrated on understanding workers' post-retrenchment career trajectories. Three binary outcomes—return to paid work (or not), return to aviation work (or not) and return to secure work (or not)—revealed that Ansett's flight attendants had poorer labour market outcomes than other occupational groups within the cohort. Their outcomes were especially poor in respect of their likelihood of returning to work in the aviation industry. This is shown in Table 1, which summarises occupational continuity and change among five major subgroups within the Ansett workforce. The diagonal entries show the proportions of ex-Ansett workers who had returned

to their Ansett occupation (or a near approximation of it), although with a new employer, as at August 2002. Overall more than 50% of the sample had returned to their Ansett occupation. Occupational continuity was strongest among non-aviation specialisations, such as accountants and human resources managers and weakest among cabin crew. Only 12% of former cabin crew had found new cabin crew jobs. Table 1 also shows the age and gender profile of survey respondents to highlight the mature age of Ansett workforce and the correlation between poor re-employment outcomes and gender. Although the average age of former Ansett cabin crew was younger than other segments of the Ansett workforce, 38 years of age would nonetheless be considered 'old' for flight attendants. According to survey respondents, discriminatory recruitment practices by some airlines played a crucial part in this outcome. This assessment was confirmed in semi-structured interviews with former employees and key informants.

Put Table 1 about here

However, questions about whether specific practices are discriminatory are methodologically challenging because they involve complexly interrelated factors that do not lend themselves to statistical measurement. They also touch on socially undesirable, illegal and commercially sensitive factors that invite misrepresentation in both survey and interview contexts. Former Ansett employees' questionnaire self-reports do not constitute practically adequate evidence of discrimination, but supplementing their comments with the views of airline recruitment personnel would not necessarily improve matters, since discriminators rarely perceive their own conduct as discriminatory (Donohue, 2005).

Fortuitously, an opportunity to investigate employers' discriminatory recruitment practices arose when a group of eight mature age (over 35 years-old) former flight attendants who had failed to secure jobs at Virgin Blue Airlines (Virgin Blue) took action, accusing the airline of discrimination against them on the basis of their age. Their legal case represents a single event case study in which the intricacies of discrimination can be explored through the evidence presented in the legal case. As Johannes von Kries (1927) has argued, the insights drawn from legal proceedings are illuminating because the causal linkages they identify are not certainties but plausible judgments based on probabilistic or 'nomological' knowledge (cited in McKeown, 1999: 171). Single cases have the capacity to expose theoretical disjunctures and disconfirm the models on which policy responses have been formalized (Emigh, 1997). Before examining how the recruitment process at Virgin Blue Airlines worked to exclude older applicants, the next section sets the context by describing the structure of the market for flight attendants' labour.

The Employment of Flight Attendants

Employment outcomes are always framed by the interactions of labour supply, labour demand and the regulatory environment. Ansett's demise created a situation in which the supply of aviation-specialised labour greatly exceeded the numbers in demand, creating an environment in which employers could choose which former Ansett employees, if any, they would recruit.

There were few supply-side impediments to Ansett flight attendants' re-employment. Since former Ansett cabin crew were long term, full-time aviation industry employees, their poor re-employment outcomes cannot be explained away in terms of human capital theory's trade-off between work and leisure, women's weaker attachment to the labour force, their preference for work in more family-friendly industries, or the pressures of balancing paid and unpaid work. These workers had a proven commitment to work and a proven ability to manage its demands.

After being made redundant, few flight attendants were eligible for government income support and even those with an employed spouse needed to replace Ansett's contribution to household income. From a human capital perspective, the poor employability of displaced workers is a function of a mismatch between workers' technical skills and airlines' technical skill requirements. Yet former Ansett Airlines staff had highly tradeable technical skills, a legacy of Ansett's commitment to continuous, nationally accredited training. The major supply-side impediment to re-employment was that some workers (mainly women) were not able to relocate to search for work and consequently had a narrow job search range. Ansett Airlines had been based in the southern Australian city of Melbourne, where the majority of its employees lived, while the major beneficiary of its exit, Virgin Blue Airlines, was based in Brisbane, some 2000 kilometres to the north.

Although other airlines were expanding their services and recruiting new staff to fill the gap left by Ansett's exit, the demand for older flight attendants' labour was weak at best. In recent years, across the international aviation industry, flight attendants have been required to expend 'emotional' or 'aesthetic' labour as they perform in an idealised feminine role (Bolton and Boyd, 2003; Morris and Feldman, 1996; Williams, 2003). As the job's interactive demands are fashioned to portray the corporate ethos and reinforce brand marketing strategies, flight attendants' formal duties in safety and crisis management are overshadowed. The emergence of overtly sexualised expectations of flight attendants can be related directly to the deregulation and internationalisation of the aviation industry. After low-cost Asia-based airlines entered the international market in the 1980s, the submissive service delivery model pioneered by Singapore Airlines' 'Singapore Girls' quickly diffused through the industry (Chan, 2000). It was especially favoured by low-cost carriers (Taylor and Tyler, 2000; Spiess and Waring, 2005). Over time, service quality has become more important to airline competitiveness as other aspects of their operations (aircraft types, routes and ticketing technologies) become more similar (Leinbach and Bowen, 2004). In this context, the social construction of the flight attendants' role—and the normative preference for engaging, young and physically attractive employees—is naturalised as an uncomplicated response to customer preferences (Samson, 1984: 213-14). In this image-conscious industry, even airlines that eschew the sexualised service model emphasise employees' physical appearance and demeanour. In other words, the skills that aviation firms seek are intimately tangled with the personal characteristics of workers.

The regulatory context conditions the interaction between supply and demand. Here, the ambiguous role of flight attendants has set the precedents for legal understandings of gender and age discrimination. When the United States introduced its ground-breaking Equal Opportunity laws in 1964 (Title VII of the Civil Rights Act), airlines sought exemption on the grounds that youth and beauty were intrinsic to the flight attendant role and to customer expectations of it. The courts however maintained that discriminatory expectations are not a justification for further discrimination (Binder, 1971). Although airlines have complied with Equal Opportunity rulings and allowed older flight attendants to remain in their jobs, they have rarely employed older workers in entry level positions (Binder, 1971). Following the United States' lead, the Australian High Court has also ruled that the grounds for exceptions to Anti-Discrimination laws cannot themselves be discriminatory, a principle that holds regardless of the plausibility of the reasoning behind discriminatory practices.⁴ Nonetheless, the regulation of airline recruitment remains a site of conflict between states and firms. In 2001, when the Ansett Airlines workforce began seeking new jobs, Australia's neo-liberal Howard Federal government was in the process of introducing employer-friendly workplace reforms that strengthened employer discretion and curtailed union activity. Although the nation's fragile structure of Anti-Discrimination laws was retained, the changing regulatory context provided opportunities for firms to exert pressure that might extend their freedoms. Recruitment is one

area in which employers are keen to assert their right to choose, and one in which it is difficult to 'prove' that an outcome is discriminatory.

As well as the general conditions of supply and demand, employer strategies have a significant influence on workers' outcomes (Rubery and Wilkinson 1994). Employer strategies are influenced by firm-based institutional considerations that have only a peripheral relationship to the tasks of jobs or the technical skills of workers. The accumulation strategies of airlines link services, personnel profiles and target markets in a coherent brand message. Ansett's exit left two major airlines to service the Australian domestic market: Qantas and Virgin Blue. Like Ansett, Qantas' hierarchical organisational structures were developed in the era of Keynesian regulation, when service quality rather than competition ruled workplace norms. Qantas eventually employed large numbers of former Ansett personnel. The new entrant, Virgin Blue Airlines, on the other hand, entered the industry after Australia's labour market deregulation process and began operation with highly competitive employment practices. Cost savings were achieved by flattening work hierarchies, removing penalty wage rates and tightening rosters: that is, by the intensification of flight attendants' work. Long (2002) estimated that after loss of penalties and benefits, the average wage of a flight attendant at Virgin Airlines was 34% lower than for equivalent work at Ansett Airlines.

Virgin distanced itself from the hierarchical workplace structures that had been characteristic of Ansett. According to Virgin Blue (Virgin Airlines, 2005):

The [workplace] culture demands that people are given far more accountability and responsibility at an earlier age. The role of a more senior person is to help the more junior person, rather than tell him or her what to do task by task. Structures tend to be very flat so quite often there isn't a junior person at all.

In this context, experienced and qualified Ansett flight attendants were over-qualified for Virgin's predominantly entry level jobs. Equivalently, older workers did not 'fit' with the flat hierarchy of Virgin's internal organization. In addition, according to the Australian Services Union, Virgin Airlines discriminated against former Ansett workers as a group, using employment with Ansett Airlines as a proxy for high wage expectations, 'uncompetitive' work practices and union activism (White, 2005).

The Legal Case of Hopper and Others vs. Virgin Blue

Recruitment is the crucial site at which supply, demand and regulation meet in concrete contexts where entrenched, socially constructed views about occupationally-appropriate age and gender characteristics are materialized. Flight attendant recruitment is a high-risk activity for employers because interactive services workers retain a high level of control over their actual work performance; for example, over whether a smile is heartfelt or condescending. Since in these contexts directive management styles tend to be counter-productive, firms are encouraged to recruit cooperative workers and identify 'amenable characters' that can be molded through training to the corporate style (Witz *et al*, 2003). At Virgin Blue, few former Ansett flight attendants were successful in this process.

Subsequently, a group of Ansett flight attendants complained to the Anti-Discrimination Commission of Queensland that Virgin Blue's recruitment process discriminated against them on the basis of their age. Each complainant was over 35 years of age and had unsuccessfully sought employment with Virgin Blue in the year following Ansett's collapse. All were experienced flight crew and all displayed the high standards of personal presentation expected in this occupation. To establish whether or not Virgin Blue's recruitment practices were

discriminatory, the Tribunal's interest centred on whether or not age was being used as a proxy for the characteristics Virgin sought in its employees.

The characteristics of Virgin's ideal candidate reflect its marketing strategy, which builds the brand around 'fun, value for money, quality, innovation, competitive challenge and brilliant customer service' (Virgin Airlines, 2005). The qualities of the 'ideal' employee, as listed in Table 2, are a combination of personality and physical traits, rather than a compendium of technical skills. It can be assumed that people applying for jobs at Virgin consider themselves an adequate fit to the profile, and that people who do not fit the profile would be discouraged by Virgin's clear statement of its preferences.

Put Table 2 about here

In the Tribunal proceedings, the recruitment process at Virgin Blue was described as involving three stages: first, an electronic application (which included a 'mandatory' field requiring applicants to reveal their age); second, a group assessment activity that processed up to 30 applicants at a time; and third, a more rigorous individual assessment for short-listed applicants. The complaint before the Tribunal focused on the perceived age discrimination in the group assessment hurdle, which assessed competencies such as 'assertiveness', 'team work', 'communication', and 'Virgin Flair'. Controversy centred on the concept of 'Virgin Flair' which was defined as '*a desire to create a memorable, positive experience for customers. The ability to have fun, making it fun for the customer.*' This directly links the qualities of recruits to the firm's brand positioning in the 'holiday-maker' market.

To determine their suitability as creators of fun, each applicant attending Virgin Blue's group assessment was required to prepare and perform a dramatic routine depicting a marketing promotion. This process tested workers' capacities for conscious masquerade, their ability to think on their feet and their disposition toward making 'fun'. Virgin Blue's lawyers argued that this screening process followed a recognized framework based on the identification of 'behavioural competencies' that assess the presence of underlying characteristics known to be associated with superior job performance. However, the complainants asserted that Virgin Blue placed undue emphasis on a work culture equating the ability to 'have fun' with youth and its outward physical manifestations. Former Ansett workers perceived the recruitment process as a smokescreen for selecting on the basis of physical attributes. One described the process in the following terms:

Applicants attend in a large group and are asked to sing or perform a dance or act out a commercial about Virgin. Then they select the 'Under 40s' who are 'Size 10 and under' to go to the real interview.

However, a young and physically attractive appointee emphasised the attitudinal competencies revealed by the screening test:

We each got a picture of a destination and we had to get up and talk for five minutes about this place, and try and sell it. I just made up all this stuff. Like, this is the grass they have here; in different regions they have purple grass and pink grass and bluegrass. I was just going off on a tangent and they seemed to like the imagination and creativity. They look for someone who engages people in conversation, and is easy to talk to, and is more light-hearted and bubbly I guess...

Later in the same interview, this affirmation of the process was qualified with an awareness of the backgrounded physical assessment:

You had to be pristine ... to look like the perfect picture of a flight attendant ... looking professional. It's definitely appearance, yeah, it's number 1.

Although this modern recruitment process is wrapped in the language of 'behavioural competencies,' it closely resembles the two-stage process as it occurred in the years before gender-neutral language and the transparent policies of human resource management. Hochschild (1983: 95) described the screening process in similar terms, as identifying both physical attributes ('weight, figure, straight teeth, complexion, and facial regularity') and personality traits ('outgoing middle-class sociability'). Although contemporary processes are more sophisticated, recruitment technologies continue to deliver recruits that conform to a stereotyped ideal of the flight attendant role.

The Tribunal, however, found that the ability to have or create 'fun' could not be seen as directly involving age discrimination, primarily because the process studiously avoided any reference to the age of 'fun' and 'not fun' applicants. The adjudicator found no factual evidence to support the complainants' interpretation of the recruitment process as an 'elaborate ruse' to mask a preference for physically attractive, younger employees (Savage, 2005). It is important to note, however, that the criterion of 'fun' is technically discriminatory if it is *socially accepted* as a proxy for age, regardless of its application in this particular case.

Although the case for direct discrimination was rejected, the complainants also attempted to establish a case for indirect discrimination. This relied on the circumstantial evidence provided by the unequal outcomes of the recruitment process. As in other jurisdictions, anti-discrimination legislation reduces the incidence of overt discrimination (or at least makes it more difficult to prove), and as a result, courts have relied increasingly on circumstantial evidence, such as the differences between applicant and appointee populations (Knopff, 1986). In undisputed evidence, the Tribunal heard that after considering 750 applicants for cabin crew employment in the period September 2001 to September 2002, Virgin Blue had employed only one person who was aged over 35 years. About 10% of applicants had been over 35 years of age. This was a persuasive statistic. However, since the tribunal accepted the airline's evidence that the technologies of behavioural competence were designed to produce an age-neutral result, the process could not have been the source of discrimination. The Tribunal concluded that the discriminatory outcome must have arisen from the subjective aspects of the process. It therefore found that Virgin was unintentionally although directly discriminatory. This was attributed to flaws in implementation: the process was deficient in that it lacked a multiple rating structure, assessors were not adequately trained in psychological assessment procedures and the relatively young and inexperienced assessors were more likely to identify with applicants of the same age and experience (Savage, 2005). Thus, the legal case replicated the explanations of discrimination found in recruitment psychology, which suggest a positive recruiter bias toward applicants of a similar age and gender (Dipboye and Macan, 1994).

At the time of writing, Virgin Blue's appeal against the decision was yet to be heard, but legal firms have already advised their corporate clients on the decision's implications and the changes to recruitment processes that it necessitates. Legal firm Blake Dawson Waldon (2005), for example, recommended that firms improve staff training in the use of psychometric instruments, increase the diversity of recruitment managers, and introduce 'double blind' assessments to remove the accusation of subjectivity.

Nonetheless, the design of a transparent and legalistically 'non-discriminatory' process does not alter the reality of employer preferences, which remain unequivocally weighted,

through a socially constructed association between the central skill (the capacity for fun) and age and gender, toward the recruitment of engaging, physically attractive younger (mostly female) workers. From a firm perspective, this preference is rational, efficient and consistent with competitive strategies. Achievement of the desired employee profile is complicated but not impeded by Anti-Discrimination laws.

The Tribunal's assessment of the recruitment process was framed by human capital theory's understanding of both the labour market and discrimination, and therefore precluded consideration of employer strategy and the social construction of the market for flight attendant's labour. The narrow and individualised nature of the process could not take into account the complexities of the interaction between job and worker characteristics, nor the role of institutional priorities in shaping their character. As a result, it was forced to attribute the observed outcome to deficient implementation.

This case illuminates the limitations of human capital theory's understanding of discrimination and the problems of older workers. The employers' preferred candidates met a set of rational criteria that were supposedly age-neutral, but those criteria were socially constructed as associated with youth. The key quality of a 'fun' persona is the antithesis of technical skill, and a quality socially constructed to amortize with both age and life experience. It focuses on an individual's untrained raw material, enabling the firm to favour new entrants who can be 'produced,' through organizational acculturation, to the corporate ideal. The recruitment strategy not only perpetuates and reinforces a sexualised, aesthetic stereotype of flight attendants' work, but it conceals the institutional objectives of the process, which focus on securing managerial control over the extraction of emotional labour (power) from a compliant workforce. In this way, age and gender issues are entangled with the imperatives of workplace control and managerial authority.

Policy Implications

The policy implications of this case concern the efficacy of human capital's understanding of the situation of older workers in the labour market and the means by which policy interventions might assist mature age workers to secure fulfilling employment. Above all, the experiences of Ansett flight attendants demonstrate that discrimination, as defined by human capital theory, is not necessarily irrational or inefficient. Nor is it the outcome of incomplete information about prospective employees. Discrimination in this case arose from the employer's deliberate preferences, consistent with its competitive strategies in both product and labour markets. This case also shows that discrimination not only persists in the market, but flourishes as firms strive to match the international industry norm. This confirms the evidence of employment statistics: that market forces will not eradicate discrimination against mature age workers.

When selective recruitment is an instrument of competition between firms and a means by which firms secure worker compliance, recruitment practices will not be altered by improving information about potential recruits, enhancing the efficiency of market mechanisms or discouraging older workers from retirement. In highly segmented markets, the extent of age-related exclusions varies from occupation to occupation (Duncan 2003), but is especially prevalent in service occupations that rely on ascribed rather than technical skills, such as the interactive service occupations that employ high proportions of women. If recruitment to these occupations is based on a combination of physical attributes and youthful outlook rather than on technical skills, retraining programs for older workers will make little difference to their employment outcomes. And, if discrimination is integral to firms' accumulation strategies, education and awareness campaigns promoting the skills of older workers will not alter their preferences. Furthermore, given discrimination's high perceived pay-offs for firms, legal sanctions – at least in their contemporary form – will not effectively alter their behaviour (as

shown by Bennington and Wein, 2000). Stronger sanctions against discriminatory practices may simply compel employers to create more sophisticated systems to obscure the realities of their preferences; for example, by outsourcing recruitment to specialist firms.⁵

In addition, the filtering processes built into sophisticated recruitment technologies obscure the social nature of the recruitment process. They tend to exclude mismatches between worker aspirations and employer preferences at an early stage, where 'unsuitable' applicants are more easily discouraged. Virgin's ideal applicant specification, for example, appears to have successfully filtered out many older aspirants. When age and gender define the social construction of both an occupation and its workforce, employer preferences are naturalised to the extent that they no longer appear discriminatory at the individual scale that is the focus of Anti-Discrimination legislation. As a result, complaint-based Anti-Discrimination surveillance is likely to be triggered only in exceptional circumstances such as those created by the Ansett collapse.

The experiences of former Ansett flight attendants have important implications for understanding the future development of the labour market and the impact of the ageing population. In Australia, perhaps 30-40% of all women who are employed work in interactive service jobs, many of them in part-time and casual jobs that offer minimal job security. Since many of these jobs have been socially defined as 'younger women's' jobs, mature women returning to the labour market after child-rearing or job loss will have limited prospects of returning to the occupations of their youth, except in contexts where services are oriented to older age consumers. This example therefore raises a number of issues for further research. Given the interaction between age and gender, it follows that women's future labour force participation rates cannot be extrapolated from the participation of currently employed women or from men's participation rates. Therefore, there is an urgent need for further research to (1) accurately identify jobs that are both age and gender typed, or which demand a youthful embodied disposition; (2) identify the age thresholds of specific to occupations, and assess the extent to which they vary with demand conditions; (3) examine more closely the nature of women's movements in and out of the labour market during the critical years (35-40) of transition from 'young women's jobs' to 'older women's jobs'; and (4) explore the ways in which these segmentations vary with workers' skill, class and seniority.

Conclusion

In sum, the legal case example analyzed in this paper disconfirms human capital's view of age in the labour market and suggests that contemporary policy approaches to improving the employment prospects of mature age workers are fundamentally flawed. The problem stems from a reliance on human capital theory's overly individualized, voluntaristic and skill-based understanding of older workers' position in the labour market. A more useful approach would recognize the irresolvable tension, inherent in profit-oriented capitalist economic relations, between the property rights of firms and the individual liberties of workers (Bowles and Gintis, 1986). Policy approaches stressing justice and universal rights to fair treatment would have greater leverage than those based human capital's efficiency arguments because they shift the parameters of the discussion from economic to social and political concerns, where liberal notions of individual justice can challenge employers' property rights. By defending citizens' democratic rights to equal treatment and enforcing universal rules, Anti-Discrimination regulation could then play a more decisive role in securing the long term legitimacy of the market for labour.

This paper's examination of the recruitment of flight attendants also suggests that as capitalist accumulation is increasingly linked to service quality and brand identity, the nature of

interactive service occupations is changing in ways that exclude mature workers, particularly if they are women. This re-orientation of women's labour reflects inequitable capital-labour relations in which the extension of employer prerogative is increasingly justified in terms of customer preferences. The power of these new discourses, and their associated ('fun') languages, obscure the basic realities of the wage relation and create an apparently value-neutral expression of an industrial relations philosophy based on work intensification, the transfer of risk to workers and the pursuit of internationally competitive (low) labour costs. If all jobs are age and gender 'typed', then policy-makers proposing more stringent measures to push under-employed mature workers back into the labour force need to think seriously about which jobs these people might be recruited to in the future.

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Notes

¹ The definition of retrenchment is broader in Australia than in the United States, where the term is restricted to job loss associated with structural change. In Australia, employers often retrench rather than dismiss workers. In this way, firms avoid potentially costly 'unfair dismissal' claims and workers qualify for more immediate access to government income support.

² At that time, about 3,000 people were still employed in winding up the company and selling off its assets.

³ Many of the 715 people who responded to the first follow-up in 2002 elected not provide information that would enable them to be contacted again in 2004. From 496 possible contacts, the 2004 survey achieved a response rate of 74.7%. The results of a third follow-up survey, conducted in September 2005 to mark five years since the collapse, are yet to be analysed. For additional detail see Webber and Weller (2002), Weller (2004) and Weller and Webber (2004).

⁴ See *Qantas Airways v Christie* (1998) 193 CLR 280 (Christie's Case).

⁵ The practicalities of subcontracting relationships promote recruitment by stereotypes, since the recruitment company has an incentive to minimize costs and an incentive not to challenge their clients' often stereotypical expectations (Neckerman and Kirschenman, 1991).

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Table 1 Patterns of Occupational Change, First Follow-up Survey

Ansett Occupation:	Occupation in 2002:	Managers & Profess. %	Trade & Technical %	Cabin Crew %	Customer Service %	Ramp Service %
Managers & Profess.		58.3	24.3	21.0	9.8	5.8
Trade and Technical		3.3	52.9	1.1	2.4	5.8
Cabin Crew		2.5	0.0	12.1	2.4	0
Customer Service		26.7	8.7	56.1	63.4	8.2
Ramp Service		9.1	13.5	8.8	20.0	77.9
Total		100.0	100	100.0	100.0	100.0
Average age		42.1	41.7	38.6	40.9	43.2
% women		27.8	0.6	75.0	56.5	5.1

Source: Survey of former Ansett employees.

Note 1: Sample stratified by occupational group.

Note 2: In the Australia and New Zealand Standard Classification of Occupations (ANZSCO), on which this table is based, Pilots are included in the category 'Managers and Professionals.' Cabin Crew includes Flight Attendants and Purser. Customer Services includes land-based white collar occupations (reservations, ticketing and sales) as well as less skilled office workers. Included under 'Ramp Service' are all occupations involved in the loading and unloading of aircraft and passengers (baggage handlers, drivers, porters etc).

Table 2 Characteristics of a 'Virgin Person'

Service Attitude	Physicality	Creativity
Desire to please	Attentive eyes	Signs of creativity
Friendly demeanour	Friendly smile	Passion for new ideas
Listens to customers	Reassuring voice	Thinks differently
Appropriate use of humour	Multi-tasking arms	Smells new business opportunities
Calm under pressure	Nice bum	
Understated air of self-confidence	Fidgety fingers	
Flexibility	Hates standing still	
Well-balanced		

Source: Listed verbatim from 'Virgin Equals People'
<http://www.virgin.com/aboutvirgin/howitalworks/virginequalspeople> (accessed Jan. 2006).