ACTIVE AGEING AND LABOUR LAW

Contributions in honour of Professor Roger Blanpain

Edited by
Frank Hendrickx

With contributions by:
Sarah De Groof
Chris Engels
Alvin L. Goldman
Frank Hendrickx
Bob Hepple
Antoine T.J.M. Jacobs
Ruud Muffels
Alan C. Neal
Birgitta Nyström
Jacques Rojot
Daniela Skugor
Andrzej Świątkowski
Manfred Weiss
Ton Wilthagen
FOREWORD

This book is dedicated to professor Roger Blanpain. It is offered to him at the occasion of his 80th anniversary.

It deals with active ageing and labour law. For the European Union, “active ageing means growing old in good health and as a full member of society, feeling more fulfilled in our jobs, more independent in our daily lives and more involved as citizens”. For labour law, it covers a wide variety of issues, such as age discrimination in recruitment and selection, seniority rules, pay and working conditions, or modern concepts such as work-life-balance, involving working time regulations and adjustments made for older people in order to allow them to stay on the labour market. This book has a focus on Europe, both the European Union as well as the member states. However, in the tradition of Blanpain’s school of thought, a global perspective is used including a perspective from the United States.

The European Union has declared the year 2012 as the “European Year for Active Ageing and Solidarity between Generations”. The year is intended to raise awareness and to stress the positive contribution that older people make to society. This book examines the role that labour law can play in contributing to the agenda of active ageing. It also aims to gain insight on how the active ageing agenda can contribute to the development of labour law.

It is evident that the title of this book, “active ageing and labour law”, is deliberately chosen. There is not only the challenging context mentioned above, but it also seems that Roger Blanpain manages to combine these terms ‘in real life’.

First of all, it is well-known that Roger Blanpain is an ‘active’ person. His activities have a very wide scope. He is known as a teacher, writer, motivator, moderator and debater in the wide labour law community. His energy has boosted many labour law scholars and his academic production is legendary. The number of his books, articles, papers and students is countless and still counting. He made great contributions to the scholarship of labour law.

Secondly, Roger Blanpain can be seen as a lively representative of ‘labour law’. He is not only a great presenter and defender of labour law (and industrial
relations), but he has ‘lived through labour law’ by assuming all kinds of roles on
the labour market: student, trainee, assistant, professor, employee, employer,
civil servant, emeritus. Most of the time, he has been a unique combination of
those functions. But above all, he is and will remain forever, a professor.

Thirdly, one may wonder whether the term ‘ageing’ is really applicable to Roger
Blanpain, although, for sure, there is the unavoidable biological factor and a
calendar on which we can count the days. But Blanpain’s attitude and spirit have
something of an eternal youth. He remains an active labour market participant
in high gear. The word ‘retired’ has not yet found recognition in his agenda and,
most likely, it never will. Old and young students enjoy his teaching and age will
not be a real matter of distinction for him. Instead, creativity and additional
value are Blanpain’s most preferred reference points.

It is this combination of professor Blanpain’s uniqueness and characteristics as
well as the major challenge of active ageing, in Europe and the world, that
inspired us for this book. We hope, in this way, to have brought honour to a great
master and a great friend.

Frank Hendrickx
9 November 2012
ABOUT PROFESSOR ROGER BLANPAIN

Roger Blanpain (* 5 November 1932) is Professor Emeritus of the Faculty of Law of the University of Leuven, Belgium. He has been a visiting professor at the Universities of Florida, Georgia (USA), Illinois (USA), Insead (France), Kentucky, Michigan State (USA), Paris (France), and Sophia (Japan). He is a professor at the Law School of the University of Tilburg (the Netherlands) where he teaches international and comparative labour law, globalisation and international labour law. He is also a visiting professor at the University of Modena (Italy). He is a member of the Flemish Royal Academy (1992–). He has been Dean of the Leuven Faculty of Law (1984–1988) and is Past President of the International Industrial Relations Association (1986–1989), former member of the Belgian Senate (1987–1989) and Honorary President of the International Society of Labour and Social Security Law (2000–2003). He is a doctor honoris causa of the University of Szeged, Hungary (1997). Professor Blanpain has been the editor of the *International Encyclopaedia of Labour Law and Industrial Relations* since 1975 and is the general editor of the *International Encyclopaedia of Laws*, the *Bulletin of Comparative Labour Law* and of the book *Comparative Labour Law and Industrial Relations*. 
CONTENTS

Foreword ................................................................. v
About Professor Roger Blanpain................................. vii

PART 1.
EU AND US PERSPECTIVES

Age and European Employment Discrimination Law
Frank Hendrickx ...................................................... 3

1. Introduction ......................................................... 3
2. European age discrimination legislation ....................... 6
   2.1. Evolution ......................................................... 6
   2.2. Principles and approaches in Directive 2000/78 ............... 7
      2.2.1. The Preamble ................................................ 8
      2.2.2. The provisions .............................................. 8
3. Testing grounds for justification in Mangold and Palacios .... 11
   3.1. Mangold ......................................................... 11
   3.2. Palacios ......................................................... 12
4. Towards a flexible standard on compulsory retirement: cleaners and professors ........................................... 14
   4.1. Rosenbladt ...................................................... 15
   4.2. Georgiev ......................................................... 17
5. Age discrimination, fitness and right to work (longer) ........... 18
6. Recruitment and young age ........................................... 22
7. Age related pay or employment rights and seniority ............. 23
   7.1. Kucukdeveci .................................................... 24
   7.2. Hennigs ........................................................ 25
8. Discussion and conclusions ........................................... 26

“Active Ageing” and the Limits of Labour Law
Alan C. Neal ........................................................... 31

1. Introduction ......................................................... 31
2. The demographic context .......................................... 33
3. The developing notion of “active ageing” ....................... 40
4. Challenges for social policy-makers in resorting to labour law .... 43

Sarah De Groof

1. Introduction

2. A need to review the Working Time Directive
   2.1. Introduction to the Working Time Directive
   2.2. Failing of the directive
      2.2.1. Working time
      2.2.2. Opt-out

   3.1. Two attempts to review the Working Time Directive
      3.1.1. First attempt: 30 December 2003 – 4 February 2009
      3.1.2. Second attempt: 24 March 2010 – ?
   3.2. Necessity of a work-life balance approach in the review attempts
      3.2.1. Work-life balance as an important topic in the review attempts
      3.2.2. Work-life balance as part of the WHO’s health definition

4. Conclusion

Age as a Justifiable Reason for Employees’ Differentiation?

Andrzej Świątkowski

1. Prohibition of discrimination on grounds of the employee’s age

2. Differentiation based on age in matters relating to the establishment of labour relations

3. Age as a selection criterion for an employment contract

4. Age of the employee as a condition of employment termination

5. Age as a legitimate reason for revoking a professional licence

6. Reviewing the validity of the differentiation of workers and the employed

7. An attempt to provide equal opportunities for employees discriminated against on the grounds of age

8. Concluding remarks

Age Discrimination Law – A Perspective from the USA

Alvin L. Goldman

1. Introduction

2. Retirement profile of the workforce
3. Protecting older workers from age discrimination .................................................. 119
  3.1. Government employees – Constitutional protection ............................... 120
  3.2. Statutory protection – Generally ................................................................. 121
  3.3. Federal government employees ................................................................. 125
  3.4. State government employees ................................................................. 125
  3.5. Prohibited and permitted grounds for age related employment
      decisions ........................................................................................................ 129
4. Effectiveness of legal prohibition against age discrimination ................. 134
5. Retirement income programs in the US ...................................................... 139
  5.1. Early history ................................................................................................. 139
  5.2. Railroad Retirement Act ............................................................................ 141
  5.3. Social Security retirement insurance ......................................................... 141
  5.4. Privately financed retirement benefits ...................................................... 143
6. Policy considerations ....................................................................................... 145

PART 2.
EU COUNTRY PERSPECTIVES

Active Ageing and Labour Law in Belgium
Chris ENGELS ........................................................................................................ 157

1. Introduction – Legal sources ............................................................................. 157
  1.1. Act of 10 May 2007 to fight certain forms of discrimination .............. 157
  1.2. Other relevant measures ........................................................................... 158
      1.2.1. Collective Bargaining Agreement No. 38 concerning
            recruitment and selection .............................................................. 158
      1.2.2. Collective Bargaining Agreement No. 95 concerning Equal
            Treatment ....................................................................................... 159
      1.2.3. Regional rules and regulations ....................................................... 159
            a. Flemish Decree with respect to the proportionate
               participation in the labour market ............................................. 159
            b. Brussels Ordinance of 4 September 2008 ............................... 160
            c. Walloon Decree to fight certain forms of
               discrimination ............................................................................ 160
            d. Decree of the French Community ............................................ 160
            f. Decree of the German Community .......................................... 160
  2. Theme 1. Age and employment selection, working conditions and
            termination – Jurisprudence ..................................................................... 161
  2.1. A few facts ................................................................................................. 161
  2.2. Court cases .................................................................................................. 161
      2.2.1. Selection ......................................................................................... 161
      2.2.2. Working conditions ................................................................. 163
      2.2.3. End of the employment relationship ............................................. 163
## Contents

- Termination at mandatory retirement age .......................... 163
- Genuine and determining occupational requirement .................. 164
- Loss of (extra) protection against dismissal ............................ 166
- Determination of the terms of notice in case of dismissal ............... 170
- Economic justifications for termination and seniority based justifications .......... 174
- Dismissals in the framework of company restructuring ............... 176

3. Theme 2. Age, seniority and remuneration .......................... 177
   - Relevant provision of the 2007 Act against Discrimination .......... 177
   - Pay scales ................................................. 178
   - Working time related benefits .................................. 180
   - Other benefits ............................................... 180

4. Theme 3. Age and corporate restructuring .......................... 181
   - Company in difficulties or in restructuring ........................ 181
   - Activating policy in case of restructuring .......................... 183
   - Age pyramid ................................................. 186

5. Theme 4. Age, work-life balance and active ageing strategies .......... 189
   - Introduction ................................................ 189
   - Time credit and career reduction .................................. 190
   - Bridging pension – Unemployment with company allowance .......... 191
   - Employment plan for older employees in the company .......... 195
   - Outplacement and the employment cell ................................ 197

6. Conclusion ..................................................... 198

### Active Ageing and Labour Law in France

Jacques Rojot ......................................................... 201

1. The exclusion of the aged from the labour force ........................ 201
2. Basic outline of the French retirement system .......................... 202
3. Changing circumstances ............................................... 203
4. The roots of change ................................................. 205
5. Attempts towards generalised reform .................................... 206
6. A deeper reform .................................................. 209
7. Old habits die hard! ................................................ 210
8. Conclusion: Discrimination against the aged .......................... 212

### Active Ageing and Labour Law in Germany

Manfred Weiss ......................................................... 215

1. Introduction .................................................. 215
2. Recruitment .................................................. 217
3. Termination .................................................. 219

xii

Intersentia
3.1. Automatic Termination ........................................... 219
3.2. Dismissal and age discrimination .......................... 222
4. Working conditions according to age and seniority ...... 223
4.1. Wages ............................................................. 223
4.2. Vacation .......................................................... 225
4.3. Working time ....................................................... 225
5. Corporate restructuration and age .......................... 227
6. Active ageing strategies .......................................... 228
7. Conclusion .......................................................... 230

Active Ageing and Labour Law in Sweden
Birgitta Nyström ....................................................... 233
1. Introduction .......................................................... 233
1.1. Background and statistics ..................................... 233
1.2. Legislative developments ..................................... 234
1.3. The 2008 Discrimination Act ................................ 235
1.4. The 1982 Security of Employment Act .................. 239
1.5. Age limits, pension system etc............................... 241
1.6. Collective agreements ............................................ 243
2. Age and employment selection .............................. 244
2.1. Age discrimination in recruitment, selection and employment termination ......................... 244
2.1.1. The Discrimination Ombudsman ......................... 246
2.1.2. The Labour Court .......................................... 246
2.2. Impact of European legislation and case law .......... 247
3. Age, remuneration and benefits .............................. 251
4. Age and corporate restructuring ............................. 252
4.1. Seniority rules .................................................... 252
4.2. Activation strategies ............................................ 254
4.3. Early retirement schemes ..................................... 255
5. Age, work environment and work-life balance .......... 256
6. Concluding remarks ............................................... 258

Active Ageing and Labour Law in the Netherlands
Antoine T.J.M. Jacobs .................................................. 263
1. Introduction .......................................................... 263
2. The 50–65 workers .................................................. 267
3. Retirement at 65 and beyond .................................... 271
4. Conclusion .......................................................... 273
Active Ageing and Labour Law in the United Kingdom
Bob Hepple and Alan C. Neal  .............................................................. 275

1. The United Kingdom demographic and labour market context .................. 275
2. The policy context ........................................................................... 276
3. The domestic United Kingdom legislative framework .......................... 277
4. The Equality Act 2010 ..................................................................... 281
5. Balancing individual dignity with the rights and interests of others ....... 282
6. Direct and indirect discrimination ...................................................... 283
7. Justification of direct discrimination .................................................. 284
8. Seniority practices ........................................................................... 286
9. Corporate restructuring .................................................................... 289
10. Early retirement schemes ................................................................. 290
11. Positive action ................................................................................ 291
12. Public sector equality duty ............................................................... 292

PART 3.
INTERDISCIPLINARY PERSPECTIVES

Labour Law, Social Norms and the Early Retirement Decision. An Empirical Study
Daniela Skugor, Ruud Muffels and Ton Wilthagen ..................................... 297

1. Introduction ...................................................................................... 297
2. Theorising early exit behaviour .......................................................... 299
2.1. Pathways to retirement ................................................................. 299
2.2. Incentives to retire ....................................................................... 300
2.3. Personal preferences ................................................................... 301
2.4. Differences across countries and specific groups of people ............ 303
2.5. Conceptual model ....................................................................... 303
3. Data and sample ............................................................................... 304
4. Descriptive results .......................................................................... 306
5. Explaining retirement patterns ............................................................ 307
5.1. Transitioning from work to early retirement: main effects ............ 307
5.2. Transitioning from work to other non-work: main effects .......... 309
5.3. Differences across skill levels ........................................................ 309
5.4. A further look into gender differences ......................................... 310
6. Conclusions and discussion ............................................................... 311
Reference list ......................................................................................... 314

About the Contributors .......................................................................... 319