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An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissal: The Case of Belgium and The Netherlands

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As a result of the economic crisis in the European Union, many companies have been forced to reorganize their activities in an attempt to cope with the substantial difficulties they face. Collective dismissals may be the ultimatum remedium for the company to survive. This article considers whether an employer can dismiss an employee, merely based on age and, more specifically, pursuant to national legislation containing an age-pyramid principle (Belgium) or mirror-principle (the Netherlands). EU legislation and case law on discrimination on the basis of age are analysed to establish whether age can be used as a criterion to distinguish among employees within the framework of collective dismissals. Since the Court of Justice of the EU (CJEU) judgment in Odar, age-based measures taken by the social partners to ensure the survival of the undertaking would appear to be acceptable, in line with a more substantive approach to equality. However, a number of critical points need to be examined in this respect, such as whether the social partners can act as institutions promoting equality of all kinds.

Keywords: Economic Crisis, Collective Dismissals, Age Discrimination, EU, Comparative Law, Belgian Age-Pyramid Principle, Dutch Mirror-Principle

1 INTRODUCTION

The European Union (hereinafter ‘EU’) is going through an economic crisis, with several countries being severely hit.¹ As a consequence, companies across the EU may be forced to reorganize their activities in an attempt to cope with the substantial economic difficulties they face. They take preventive measures to safeguard the company’s viability and maintain employment, for example by requesting that employees work part-time for a number of months (mostly on a

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¹ For more information on the economic and social situation in the EU, see e.g., Eurofound, *Social and employment policies for a fair and competitive Europe. Foundation Forum 2013. Background paper*. <http://www.eurofound.europa.eu/pubdocs/2013/09/en/1/EF1309EN.pdf> (accessed 9 Apr. 2013).

voluntary basis).² At a later stage, however, (collective) dismissals may be the only option left for the company to survive.³

The question arises as to how such collective dismissals should affect different categories of workers. Can the employer select workers on the basis of a mere economic rationale? Can a random selection of employees be adopted? Should the employer take social rights into account?

This article considers how the social right to equal treatment shapes the possibilities of the employer to decide which workers are to be made redundant. The specific focus is on age as the criterion to distinguish among workers. The question regarding age discrimination in restructuring relates to the debate about the conciliation between the economic crisis and social rights and can also be framed within the EU flexicurity debate.⁴ The Belgian and Dutch measures and case law on collective dismissals are examined to see how age currently serves as a distinguishing criterion.

2 EU GUIDELINES FOR COMPANIES FACING ECONOMIC DIFFICULTIES

In order to establish the extent to which age can play a role in the selection of workers to be made redundant, there is a need to take account of EU legislation regarding discrimination on the basis of age, and the possible justifications for such discrimination.

2.1 NON-DISCRIMINATION ON THE BASIS OF AGE

2.1.1. *Provisions of Non-Discrimination on the Basis of Age*

A number of EU provisions are relevant for the discussion regarding age discrimination in collective dismissals. In the first place, Article 21(1) of the Charter of Fundamental Rights of the EU (hereinafter 'the Charter') generally prohibits discrimination on any ground such as age. In the *Küçükdeveci* case the

² For more information, see European Commission, *La restructuration en Europe en 2011* 31–33 (Publications Office of the European Union 2012).

³ In the ongoing economic crisis it seems that (collective) dismissals have become the last resort for many employers, though for some countries Eurofound has reported that redundancies of core staff were less common than in previous recessions. See Eurofound, *Factsheets regarding the Resource pack on 'Unleashing the potential – Flexibility in European companies'*, <http://www.eurofound.europa.eu/resourcepacks/flexibility.htm> (accessed 10 Apr. 2013).

⁴ Flexicurity is an integrated strategy for enhancing, at the same time, flexibility and security in the labour market. The flexicurity debate pays particular attention to the position of older workers, who make up one of the vulnerable groups on the labour market. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, COM(2007) 359 final.

Court of Justice of the EU (hereinafter ‘the CJEU’) referred for the first time to the binding force of Article 21 of the Charter.⁵ This was only done in a subsidiary way, probably because only Member States and public authorities, as opposed to private parties, come within the ambit of the Charter. Recently, however, the CJEU has started to refer explicitly to Article 21 in discrimination cases.⁶ As regards the equal treatment of workers in particular, reference should be made to the Framework Directive (2000), based on Article 19 TFEU (ex Article 13 TEC).⁷ This directive guarantees the right of workers not to be discriminated against on the basis of age, among other factors.

2.1.2. *Justification of Age-Based Differences*

Although the Framework Directive prohibits discrimination on the basis of age, not all age-based instances of differential treatment amount to discrimination. The Framework Directive contains several provisions that allow justifications for age-based differences in treatment. The provisions relating in particular to justifications have been the basis of a vast body of recent CJEU case law.⁸

For the purposes of this article, the key provision of the Framework Directive is Article 6(1). On the basis of this provision, Member States are required to ensure that differences in treatment on grounds of age:

shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

As opposed to the other provisions offering justificatory possibilities for differential treatment,⁹ Article 6(1) only relates to age-based

⁵ Case C-555/07 *Kücükdeveci* [2010] ECR I-365, para. 22. Thomas Papadopoulos, *Criticising the horizontal direct effect of the EU general principle of equality*, EHRLR 437, 444 (2011).

⁶ Papadopoulos, *supra* n. 5, at 445. In *Test-Achats* (Case C-236/09, [2011] ECR I-773, para. 17) the CJEU stated that the principle of equal treatment for men and women, which is also included in Arts 21 and 23 of the Charter, applies to horizontal situations.

⁷ Council Directive 2000/78 of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

⁸ The age discrimination provisions of the Framework Directive have generated more preliminary references to the CJEU than all other discrimination grounds of this Directive together. See Colm O’Cinneide, *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age*, RAE 253, 259 (2009–2010) and Willem Swinnen, *The Economic Perspective in the Reasoning of the CJEU in Age Discrimination Cases*, E.L.L.J. 254, 254 (2010).

⁹ Provisions that offer general justificatory possibilities for treatment based on all criteria mentioned in the Framework Directive include: Art. 2(2), (b)(i) offering a general justification for indirect discrimination; Art. 2(5) setting aside measures relating to public security, public order, protection of

treatment.¹⁰ As a result, and on the condition that Member States have actually implemented Article 6(1) of the Framework Directive,¹¹ there is an interesting way out of the age discrimination debate. The exact nature of this way out is largely dependent on the CJEU's interpretation of the 'legitimate aim' mentioned in Article 6(1) of the Directive.

2.2 THE CJEU'S INTERPRETATION OF THE JUSTIFICATION OF AGE-BASED TREATMENT

The CJEU has stated that legitimate aims within the meaning of Article 6(1) of the Framework Directive include those that have a public interest nature distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. However, the Court has stated that a national rule may recognize a certain degree of flexibility for employers.¹² Member States can take account of budgetary considerations when such considerations are linked to social policy. However, the Court has specified that such considerations cannot by themselves constitute a legitimate aim.¹³

In a number of countries, like Belgium and the Netherlands, the social partners play an important role in addressing economic or social issues in employment. In the 2011 *Hennigs*¹⁴ case the CJEU made clear that collective agreements differ substantially from measures adopted unilaterally by the Member States, by way of legislation or regulation. When exercising their fundamental right to collective bargaining recognized in Article 28 of the Charter, the social partners seek to strike a balance between their respective interests. The mere fact that the social partners have adopted a rule would allow for a less rigorous examination of the appropriate and necessary character of the means.¹⁵

health and protection of rights and freedoms of others; Art. 4(1) regarding measures in which age constitutes a genuine and determining occupational requirement.

¹⁰ This extra justificatory possibility shows that age is a criterion that is different from all other criteria enumerated in the Framework Directive. Malcolm Sargeant, *The law on age discrimination in the EU* 10, 17 & 19 (Kluwer Law International 2008); Helen Meenan, *Age Equality after the Employment Directive*, 10 MJ 9, 16 & 23 (2003); Lisa Waddington & Mark Bell, *More Equal than Others: Distinguishing European Union Equality Directives*, 38 CMLRev 587, 599 & 610–611 (2001); Dagmar Schiek, *Age Discrimination before the ECJ Conceptual and Theoretical Issues*, 48 CMLRev 777, 784 (2011).

¹¹ Meenan, *supra* n. 10, at 18.

¹² Case C-388/07 *Age Concern England* [2009] ECR I-1569, para. 46; Cases C-159/10 and C-160/10 *Gerhard Fuchs and Peter Köhler* [2011] ECR I-6919, para. 52.

¹³ *Fuchs and Köhler*, para. 74; Case C-447/09 *Reinhard Prigge and Others* [2011] ECR I-8003, para. 81.

¹⁴ Cases C-297/10 and C-298/10 *Sabine Hennigs* [2011] ECR I-7965, para. 66.

¹⁵ In e.g., *Palacios de la villa* and in *Rosenblatt* the CJEU decided that 'the fact that the task of striking a balance between their respective interests is entrusted to the social partners [...] [offers] considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement'. Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 74 ; Case C-45/09 *Rosenblatt* [2010] ECR

On the basis of the above, it appears that the CJEU has given the Member States and the social partners a relatively wide margin of discretion when making use of age-based distinctions.¹⁶

One could imagine that measures taken by Member States or the social partners, in order to safeguard companies' viability during an economic crisis, could come within the ambit of the CJEU's approach of accepting budgetary considerations when linked to social policy.¹⁷ Until recently, the CJEU did not have the occasion to rule on such anti-crisis measures. In the recent *Odar*¹⁸ judgment, however, the CJEU laid down a number of guidelines regarding the use of age as a criterion in collective dismissals.

In *Odar*, an Austrian occupational social security scheme including a social plan was put to the test. Under this scheme, workers over 54 years of age who were made redundant on operational grounds were compensated on the basis of the earliest possible date on which their pension would begin. This was a deviation from the standard method of calculation, which takes account in particular of the length of service. The result was that the compensation paid to those older workers was lower than the compensation resulting from the application of the standard method. The idea was that older workers would soon be entitled to a retirement pension.

The CJEU eventually decided that a difference based on age in a social plan like the one mentioned:

pursues an objective based on the view that, since the economic disadvantages will manifest themselves in the future, certain workers who will not be faced with such disadvantages resulting from loss of their employment, or only to a limited extent compared with others, may, as a rule, be excluded from entitlement to compensation.¹⁹

The CJEU reiterated what it had already stated in *Ingeniörföreningen i Danmark*, namely that 'the aim of preventing compensation on termination from being claimed by persons who are not seeking new employment but will receive a

I-9391, para. 67. Frédérique Rolin, *Quelques précisions quant à la nature et au régime de justification des discriminations fondées sur l'âge*, 3 RAE 609, 614 (2011); Albertine G. Veldman, *Contouren van het Europese leeftijdsdiscriminatierecht*, 1 TRA 15, 18 (2012).

¹⁶ Case C-144/04 *Mangold* [2005] ECR I-9981, para. 63; *Palacios de la Villa*, para. 68. See also O'Cinneide, *supra* n. 8, at 259.

¹⁷ The CJEU has already accepted several aims as legitimate aims of social policy, which could also be used in the context of an economic crisis: increasing the flexibility of personnel management (*Küçükdeveci*, para. 35), giving priority to appropriate and foreseeable planning of personnel and recruitment management over the interest of employees in maintaining their financial position (*Rosenbladt*, para. 59), regulating the national labour market and combating unemployment (*Palacios de la Villa*, para. 62); sharing out employment opportunities among the generations (Case C-341/08 *Petersen* [2010] ECR I-47, para. 65).

¹⁸ Case C-152/11 *Odar* [2012] ECR I-0000.

¹⁹ *Ibid.*, para. 40.

replacement income in the form of an occupational old-age pension must be considered to be legitimate'.²⁰

The CJEU also cited the German Government's observation that 'a social plan must provide for a distribution of limited resources, so that it may fulfill its "transitional function" in respect of all workers, not just older workers. Such a plan cannot, in principle, jeopardize the survival of the undertaking or the remaining posts'.²¹

The CJEU then went on to consider whether 'the means employed [were] appropriate and necessary and [did] not go beyond what is required to achieve the objective pursued'.²² It confirmed its opinion:

that the Member States and, as necessary, the social partners at national level have broad discretion in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it (see, to that effect, Case C-141/11 *Hörmfeldt* [2012] ECR I-0000, paragraph 32).²³

The appropriateness of the means was accepted on the basis of the idea that it made sense to reduce the severance pay of employees who are financially secure, and to facilitate the transition to new employment of employees with more limited financial resources.²⁴ The need for the measure was accepted on the basis of considerations relating to the fact that the social plan only provided for a *reduction* in the amount of compensation paid to older workers.²⁵ Moreover, the CJEU noted that the social plan:

is the result of an agreement negotiated between employees' and employers' representatives exercising their right to bargain collectively which is recognized as a fundamental right. The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement (see, to that effect, Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 67).²⁶

²⁰ Case C-499/08 *Ingeniörföreningen i Danmark* [2010] ECR I-9343, para. 44.

²¹ *Ibid.*, para. 41.

²² *Odar*, para. 46.

²³ *Ibid.*, para. 47.

²⁴ *Ibid.*, para. 48.

²⁵ *Ibid.*, paras 51–52.

²⁶ *Odar*, para. 53. In the recent *Kenny* case on equal pay for men and women, the CJEU voiced an equally tolerant view vis-à-vis social partners. Case C-427/11 *Margaret Kenny and Others* [2013] ECR I-0000, paras 49–50.

3 RESTRUCTURING OF ENTERPRISES IN BELGIUM: DOES AGE MATTER?

3.1 BELGIAN RULES ON COLLECTIVE DISMISSALS

Belgium has an extensive and not always coherent legislation on collective dismissals. The most well-known parts involve the regulation of three different aspects of collective dismissals: (1) the procedure of information and consultation of workers' representatives,²⁷ (2) the special indemnity for collective redundancies²⁸ and (3) employment units.²⁹ As far as the selection of employees to be made redundant is concerned, employers are basically free in their selection of employees. However, each employer has to take account of existing Belgian legislation and avoid discrimination between employees. For the purposes of this contribution the rules to be mentioned include the Law of 10 May 2007 on certain forms of discrimination,³⁰ implementing the Framework Directive, and Collective Labour Agreement (hereinafter 'CLA') No. 95 of 10 October 2008 concerning equal treatment at all stages of the employment relationship.³¹ These two pieces of legislation prohibit discrimination on the basis of a number of criteria, including age.³²

Similar to the facts underlying the *Odar* judgment, collective dismissals in Belgium often go hand in hand with the adoption of a social plan. However, the adoption of such a plan is not compulsory. A social plan is typically laid down (1) in a CLA, (2) in a collective agreement between the works council, the trade union representatives, the employees' representatives or the employees themselves, (3) in an individual agreement, or (4) by unilateral decision.³³ In practice the

²⁷ Articles 62–70 of the Law of 13 Feb. 1998 on measures to promote employment, *Belgian Official Gazette* 19 Feb. 1998; Royal Decree of 24 May 1976 on collective dismissals, *Belgian Official Gazette* 17 Sep. 1976; CLA No. 24 of 2 Oct. 1975 on the procedure for informing and consulting workers' representatives with regard to collective redundancies, *Belgian Official Gazette* 17 Feb. 1976.

²⁸ CLA No. 10 of 8 May 1973 on collective dismissals, *Belgian Official Gazette* 17 Aug. 1973.

²⁹ Articles 31–41 of the Law of 23 Dec. 2005 on the Generation Pact, *Belgian Official Gazette* 30 Dec. 2005; Royal Decree of 9 Mar. 2006 on the activation policy in case of restructuring, *Belgian Official Gazette* 31 Mar. 2006.

³⁰ Law of 10 May 2007 to combat certain forms of discrimination, *Belgian Official Gazette* 5 Jun. 2007.

³¹ Wim Vandeputte, *Ontslagrecht en de arbeidsmarkt, naar een modernisering van het Belgische ontslagrecht* 259–268 (die Keure 2012).

³² The list of protected grounds in the Law of 10 May 2007 is slightly different from the one in the CLA No. 95. The Law of 10 May 2007 prohibits discrimination on the basis of criteria like age, sexual orientation, marital status, birth, wealth, religion or belief, political opinion, trade union conviction, language, current or future state of health, disability, physical or genetic characteristic and social origin. The CLA No. 95 prohibits discrimination on the grounds of age, sex or sexual orientation, marital status, medical history, race, colour, ancestry or national or ethnic origin, political opinions or beliefs, disability, union membership or membership in another organization.

³³ Frédéric Robert, *Pacte de solidarité. Les mesures d'accompagnement des travailleurs dans le cadre des restructurations d'entreprises*, 7 Ors 1–4 (2007).

first option is most commonly used. A social plan usually contains a set of measures mitigating the impact for employees of a reorganization. Such measures come in addition to an employer's obligations on the basis of supranational and national legislation and other rules at sectoral and company level.³⁴ Typical measures include retraining and reclassification, financial support and assistance for older workers (e.g., reallocation outplacement, voluntary departure, retirement bonuses, guaranteed income, early retirement).³⁵ However, social plans may also include provisions regarding the criteria for the selection of employees to be made redundant.

3.2 AGE AS A SELECTION CRITERION FOR REDUNDANCY IN SOCIAL PLANS

The question arises as to the selection criteria to be used in social plans to identify the employees to be made redundant. There is a risk that such a selection of employees may amount to discrimination.³⁶ Belgian labour courts have already dealt with this specific question in a handful of cases.

The first and most well-known case concerned the reorganization of the Ford production facility in Genk in 2002–2003.³⁷ The social plan provided for both voluntary and compulsory dismissals. The workers who opted for *voluntary* redundancy received a bonus with a deduction for the number of days of absence (including absence due to illness) in the period starting from the information sessions on the restructuring of the company. In order to decide on *compulsory* redundancies, the CLA provided a system under which workers who had repeatedly been on sick leave or absent without justification were given

³⁴ For example: the employer must pay the wage until the last day of work, severance pay, holiday pay until the termination of employment, the pro rata end of year bonus, the closure or collective severance pay, bonuses at sectoral or company level (if provided), as well as providing outplacement for workers aged 45 and older. (Vicky Buelens, *Reeks collectief ontslag: het sociaal plan*, 8 P&O 11–11 (2006); Bart Vanschoebeke & Els Matthys, *Collectief ontslag en sluiting van onderneming*, 137 (Larcier 2003).

³⁵ Buelens, *supra* n. 35, at 11–14.

³⁶ Inger Verhelst & Stephanie Raets, *Discriminatie op de arbeidsplaats: gewikt en gewogen – een overzicht van de rechtspraak van de arbeidsgerechten betreffende de antidiscriminatie wetten van 10 mei 2007*, 4 Or 90–116 (2011); Stéphanie De Ridder, *Vervroegd(e) brugpensioen(leeftijd) als selectie criterium bij collectief ontslag onder de discriminatieloop*, 14 RABG 1000–1001 (2009) annotation under Ghent Labour Court, 22 Oct. 2008 RABG 990 (2009).

³⁷ Antwerp Labour Court (Hasselt division), 3 Sep. 2008, RABG 970 (2009), annotation Jan Herman, *Gezondheid is de grootste schat. Collectief ontslag en selectie van werknemers op grond van hun gezondheidstoestand*, 14 RABG 987 (2009); Tongeren Labour Tribunal, 26 Jun. 2006, Limb. Rechtsl. 340 (2006).

penalty points.³⁸ The higher the number of penalty points, the greater the chance that the worker would be made redundant. Certain employees claimed that this system was discriminatory, on the grounds of previous health conditions (in the case of voluntary redundancy) and on the grounds of age (in the case of compulsory redundancy). The Antwerp Labour Court eventually decided that a previous health condition did not constitute a protected ground under European and national law. After all, the CJEU had stated in its case law that illness as such does not come within the ambit of disability protected by the Framework Directive.³⁹ Moreover, Belgian discrimination law⁴⁰ only protects the current or future state of health. The Antwerp Labour Court also stated that the potential indirect discrimination based on age was justified due to the objective and reasonable character of the system of penalty points. This system is considered to be necessary in enterprises in order to penalize absenteeism and misbehaviour. Moreover, the employees did not object to the proposed sanctions.⁴¹

In 2008, the Ghent Labour Court⁴² had to deal with a social plan including a difference in treatment on the grounds of age. The court ruled that, when only workers aged 55 years or older are dismissed within the framework of a collective dismissal, such a difference in treatment can be objectively and reasonably justified. After all, the court ruled that such a selection of employees achieves a dual objective. It limits both the social impact of the collective dismissal and the number of dismissals without any material or financial benefits (by using the technique of early retirement).⁴³ The labour court was obviously inspired by the *Palacios de la Villa* case in which the CJEU noted that during social dialogue a balance is struck between different interests. In doing so, the

³⁸ The number of penalty points was dependent on the number of times the worker had been on sick leave or unlawfully absent within a certain time span, e.g., ten penalty points were given to a worker who had been ill nine times or more over a period of five years.

³⁹ Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paras 43 and 47; Cases C-335/11 and C-337/11 *HK Danmark* [2013] ECR I-0000, paras 36–39.

⁴⁰ The Law on anti-discrimination of 25 Feb. 2003 replaced by the Law of 10 May 2007 on certain forms of discrimination.

⁴¹ Antwerp Labour Court (Hasselt division), 3 Sep. 2008, RABG 970 (2009), annotation Jan Herman, *Gezondheid is de grootste schat. Collectief ontslag en selectie van werknemers op grond van hun gezondheidstoestand*, RABG 987 (2009); Tongeren Labour Tribunal 26 Jun. 2006, Limb. Rechtsl. 340 (2006); Marc De Vos, *De bestrijding van discriminatie in de arbeidsverhoudingen: van impasse naar doorbraak?*, 7 RW 323–337 (2006); Verhelst & Raets, *supra* n. 36, at 90–108.

⁴² Ghent Labour Court, 22 Oct. 2008, RABG 990 (2009), annotation Stéphanie De Ridder, *Vervroegd(e) brugpensioen(leef tijd) als selectie criterium bij collectief ontslag onder de discriminatieloop*, RABG 1000 (2009).

⁴³ Early retirement is a favourable unemployment status which combines a guaranteed unemployment benefit with an additional amount paid by the last employer until the statutory pension age is reached. (Annelies Gielen, Inger Verhelst, and Ann Witters, *Vlinderakkoord: langer en meer werken*, 1 Or 2–4 (2013).

Belgian court created the impression that the outcome of a social dialogue is sufficient to justify the difference.

Both the above-mentioned cases were decided when the Law of 10 May 2007 was not yet applicable. In contrast with the Law of 10 May 2007, which only accepts justifications explicitly prescribed by law, in these cases a general justification was allowed for. A difference in treatment was seen to be justifiable if an objective and reasonable justification was available. As a result, it is unclear whether the courts would have ruled similarly under the current justification test. If the national courts were to follow the CJEU case law, they would probably need to reach a similar decision.

The Belgian judges also addressed the differentiation in the compensation of employees during reorganization. A social plan including a special closure indemnity for all workers, except those whose contract has been suspended for more than two years, was found to be objectively and reasonably justified, as it aims at compensating for the sudden loss of wages of active employees.⁴⁴ This seems to be in line with CJEU case law as well. With reference to *Odar*, it could be argued that certain workers will not suffer, or suffer only to a limited extent, from the disadvantages resulting from their loss of employment.⁴⁵

3.3 THE 2012 LAW ON THE AGE-PYRAMID PRINCIPLE

The Law of 29 March 2012 (that has not yet entered into force)⁴⁶ introduced the age-pyramid principle in order to avoid situations in which mostly older (and more highly paid) employees lose their jobs in collective redundancies.⁴⁷ This is not seen solely as a way to prevent age discrimination. It also has financial implications, because the (re)employment opportunities for older employees are more limited than for other workers.⁴⁸

The Law of 29 March 2012 states that the age-pyramid principle has to be taken into account in the case of collective dismissals as defined in the Royal Decree of 24 May 1976.⁴⁹ This principle lays down that when an employer

⁴⁴ Brussels Labour Tribunal, 25 Jun. 2009, JTT 398 (2009); Verhelst & Raets, *supra* n. 36, at 90–116.
⁴⁵ *Odar*, para. 40.

⁴⁶ Law of 29 Mar. 2012 containing various provisions, *Belgian Official Gazette* 30 Mar. 2012.

⁴⁷ Bill, *Parl.St.* Kamer 2011–2012, nr. 2097/001, 53.

⁴⁸ Bill, *Parl.St.* Kamer 2011–2012, nr. 2097/001, 54.

⁴⁹ Article 62 of the Law of 29 Mar. 2012 containing various provisions, referring to the Royal Decree of 24 May 1976 on collective dismissals, *Belgian Official Gazette* 17 Sep. 1976. This principle will not apply when the (collective) dismissals are given during (1) a procedure to bankruptcy; (2) a judicial dissolution pursuant to Art. 41 sec. 1 of the Law of 31 Jan. 2009 on the continuity of enterprises; (3) a closure of the company within the meaning of Art. 3 sec. 1 of the Law of 26 Jun. 2002 on the conclusion of companies where this closure is complete and covers all employees of the company (Art. 62 (2)).

implements a redundancy scheme, the number of redundancies has to be evenly spread over three different age categories: (1) employees up to the age of 30; (2) employees aged from 30 to 49 years and (3) employees 50 years or older.⁵⁰

However, this principle has been tempered in a significant manner. The first mitigation is when a collective dismissal has an impact only on one or more departments or in one or more business sectors. In that case, the employer has to reapply the age-pyramid principle within the departments or business sectors concerned.⁵¹ The second modification allows for a deviation of 10% in each age category. This percentage can be further modified by Royal Decree depending on the size of the company.⁵² Moreover, employees with a key position in the company need not be taken into account when applying the scheme based on the age-pyramid principle.⁵³ Failure to respect the age-pyramid principle has financial consequences for the employer, who will be required to reimburse the National Office of Social Security for any reductions⁵⁴ on social security contributions over the previous eight quarters for employees aged 50 years or older.⁵⁵ However, since a Royal Decree is required to implement this principle and to declare when it will enter into force, the age-pyramid principle is currently a mere theoretical concept.⁵⁶

Moreover, the social partners were given the chance to look for an alternative to the various provisions regarding the age-pyramid principle

⁵⁰ Art. 63 sec. 1(1) of the Law of 29 Mar. 2012 containing various provisions. It takes into account the age of the employees at the time of the notification of the intention to proceed with collective redundancies mentioned in Art. 7 of the Royal Decree of 24 May 1976 (Art. 63 sec. 1 (2)). Moreover, employees with a fixed-term contract or a contract for a specific work are excluded, unless the termination of employment due to a collective redundancy takes place before the expiry of the term or the completion of the work (Art. 63 sec. 4).

⁵¹ Article 63 sec. 2 of the Law of 29 Mar. 2012 containing various provisions.

⁵² Article 63 sec. 3 of the Law of 29 Mar. 2012 containing various provisions.

⁵³ Article 63 sec. 5 of the Law of 29 Mar. 2012 containing various provisions. Key employees play such an important role that the work organization of the company would be jeopardized and no solution can be found by shifting of the personnel or internal mutation. National Labour Council (Nationale Arbeidsraad), Opinion 1.803, 27 Jun. 2012 on the Law of 29 Mar. 2012 containing various provisions – implementing the National Labour Council, Opinion No. 1.795 – Respect for the age pyramid in collective dismissals, <http://www.cnt-nar.be/ADVIES/advies-1803.pdf>, 12 (accessed 6 Jun. 2013); Ann Vanderschaeghe, *Collectief ontslag: toekomst via leeftijdspiramide*, 1 P&O 14–15 (2013).

⁵⁴ Structural reductions reduce an employer's social security contribution. Employers can benefit from this reduction for all employees who are subject to all rules of social security and have worked for the entire preceding quarter. Target reductions are fixed reductions of the social security contributions granted on top of the structural reductions. These reductions are targeted at particular groups of employers and the amount of reduction given, is dependent on the target group.

⁵⁵ Article 327 of the Programme Law of 24 Dec. 2002, *Belgian Official Gazette* 31 Dec. 2002. This is the only sanction when breaching the age pyramid principle. The legislator has not given individual protection to the employee, in order not to affect the negotiated social plan (Bill, *Parl.St.* Kamer 2011–2012, No. 2097/001, 54).

⁵⁶ Article 63 sec. 6 and Art. 65 of the Law of 29 Mar. 2012 containing various provisions.

contained in the Law of 29 March 2012. The Belgian Minister of Work asked for the opinion of the National Labour Council in this regard. The Council suggested three modifications to the Law of 29 March 2012. It also proposed the adoption of a CLA in which the proportional distribution between the age groups is dealt with (see below).⁵⁷

First, the Council expressed the view that age should not be taken into account at all when determining the criteria to select workers to be made redundant. Second, as a subordinate position, the Council suggested the introduction of an age-pyramid principle with only two instead of three age groups.⁵⁸ In this way consistency would be ensured with other legislation.⁵⁹ However, the three exemptions provided in the Law of 29 March 2012 would remain valid. Third, the Council suggested the introduction of a defence against individual dismissal disputes by providing a mechanism that increases legal certainty.⁶⁰ The social partners outlined two situations. The first situation occurs when the employer respects the proportional distribution. In this case three possible solutions are suggested: (1) to introduce into the Law the provision that such proportional distribution can never amount to discrimination based on age; (2) to introduce into the Law a rebuttable presumption, in favour of the employer; (3) to introduce another solution in order to achieve greater legal certainty.⁶¹ The second situation occurs when the employer fails to comply with the proportional distribution for reasons approved by the Belgian federal employment authorities (e.g., economic, technical or organizational reasons). In this case, a rebuttable presumption, in favour of the employer, should be applicable.⁶² However, it remains to be seen whether the social partner recommendations will be taken up by the legislator.

⁵⁷ National Labour Council, Opinion 1.803 27 Jun. 2012 on the Law of 29 Mar. 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age pyramid in collective dismissals, <http://www.cnt-nar.be/ADVIES/advies-1803.pdf>, 5 (accessed 6 Jun. 2013).

⁵⁸ Workers up to the age of 45 and workers aged 45 or over.

⁵⁹ National Labour Council, Opinion 1.803 27 Jun. 2012 on the Law of 29 Mar. 2012 containing various provisions – implementing the National Labour Council, Opinion nr. 1.795 – Respect for the age-pyramid in collective dismissals, <http://www.cnt-nar.be/ADVIES/advies-1803.pdf>, 9 (accessed 6 Jun. 2013) (hereinafter ‘National Labour Council, Opinion 1.803’). This division has already been made in the context of active management in reorganization (Royal Decree of 9 Mar. 2006 on activation policies in cases of restructuring, *Belgian Official Gazette* 31 Mar. 2006) and in outplacement (Law of 5 Sep. 2001 on improvement of the employment rate, *Belgian Official Gazette* 15 Sep. 2001 and CLA No. 82 of 10 Jul. 2002 on outplacement for redundant employees aged 45 years and older, *Belgian Official Gazette* 5 Oct. 2002).

⁶⁰ National Labour Council, Opinion 1.803, 13–14 (accessed 6 Jun. 2013).

⁶¹ National Labour Council, Opinion 1.803, 14–15 (accessed 6 Jun. 2013).

⁶² National Labour Council, Opinion 1.803, 15–16 (accessed 6 Jun. 2013).

3.4 A COMPARISON WITH THE DUTCH 'MIRROR-PRINCIPLE'

The Dutch Law on the Notification of Collective Dismissals⁶³ applies in cases in which an employer intends to make twenty or more employees redundant within the work area of the same social security institution,⁶⁴ over a period of three months.⁶⁵

Unlike the Belgian situation (in which the age-pyramid principle is currently just a theoretical concept), Dutch employers cannot decide on a discretionary basis which employees to dismiss. In addition to respecting the general legislation on equal treatment in employment⁶⁶ (as is clearly the case also in Belgium), the selection of employees to be dismissed for economic reasons must be based on the 'mirror-principle'.⁶⁷

The aim of this mirror-principle (in determining the order of dismissal) is twofold: (i) to maintain a balanced composition of the company's workforce, and (ii) to determine in an objective manner which employees must be dismissed.⁶⁸

This principle requires that the employer divides all employees in comparable (interchangeable) positions into age-categories (15–24, 25–34, 35–44, 45–54, and 55 and over) and determines on that basis the percentage of each age-category. Based on the total number of intended dismissals, the employer must then use the above percentage per function/position, in order to establish how many employees are to be made redundant in each age-category.⁶⁹ The seniority principle will then be applied to the effect that, in each age group, the employee with the fewest years of service will be dismissed. The Dutch mirror-principle is, in fact, a mere variant of the 'lifo-principle'.⁷⁰

The mirror-principle does not apply (a) in the case of a company closure, (b) when just one position/function is to be eliminated or (c) when a whole category of interchangeable positions/functions is to be eliminated.

⁶³ Law of 24 Mar. 1976 on the Notification of Collective Dismissals, *Dutch Official Gazette* 1976, 223 ('Wet Melding Collectief Ontslag').

⁶⁴ Social security institution = 'Uitvoeringsinstituut Werknemersverzekeringen' (hereinafter 'UWV').

⁶⁵ Article 3.1. of the Law on the Notification of Collective Dismissals.

⁶⁶ General legislation, such as the Law of 17 Dec. 2003 on equal treatment on grounds of age in employment, *Dutch Official Gazette* 2004, 30.

⁶⁷ The 'mirror-principle' is governed by the Dismissal Decree of 7 Dec. 1998, *Dutch Official Gazette* 1998, 238 ('Ontslagbesluit') which was concluded pursuant to the Extraordinary Labour Relations Decree of 5 Oct. 1945, *Dutch Official Gazette* 1963, 271 ('Buitengewoon Besluit Arbeidsverhoudingen' (BBA 1945)). Art. 4 of the Dismissal Decree deals with dismissals for economic reasons and provides the 'mirror-principle'.

⁶⁸ Marjolijn Lips & Anneke Meulenveld, *Stoelendansen in het land van de bollebozen*, 4 *ArbeidsRecht* 19–19 (2011).

⁶⁹ Russell Advocaten B.V., *Handboek ontslagrecht*, 62–63 (Maklu 2012).

⁷⁰ Until 1 Mar. 2006 (i.e., the date of entry into force of the mirror-principle) the 'lifo-principle' (last-in-first-out) was the main rule for determining the dismissal order. The Dutch case law cited in this contribution and dating from before 1 Mar. 2006 therefore relates to the lifo-principle.

Apart from the above and under strict conditions, an employer can deviate from the mirror-principle,⁷¹ (a) on the ground of a severity clause (in case of posting of workers), (b) in the case of an indispensable employee or (c) if the employee selected for dismissal has a weak labour market position whereas this is not the case for the employee who is next in line for dismissal.

Under Dutch legislation (collective) dismissals are normally processed by the social security institution, UWV,⁷² which is strictly bound by the Dismissal Decree (imposing the 'mirror-principle').⁷³

Another option for the employer consists in pursuing the dismissal ('dissolution of the employment agreement') before the Dutch Cantonal Courts.⁷⁴ The employer can even file a 'collective request' for dismissal.⁷⁵ Formally the aforementioned regulation (i.e., the Dismissal Decree and other) does not directly apply to the cantonal courts. The so-called reflex-effect⁷⁶ may, however, entail that the cantonal courts will nevertheless respect these regulations.⁷⁷ This consideration is important as it gives the (cantonal) courts more room for deviation from the mirror-principle.⁷⁸

An analysis of case law and doctrine on (the application of) the mirror-principle shows that Dutch employers tend to be creative in circumventing the relevant regulation.⁷⁹ Employers still prefer 'quality' (the employee's capability) over the mirror-principle, as a selection criterion for collective dismissal. The cantonal courts' rather wide discretion in this matter⁸⁰ creates opportunities for Dutch employers. Under certain conditions (shaped by case law and doctrine),

⁷¹ Article 4:2, 3–4–5 of the Dismissal Decree.

⁷² 'Uitvoeringsinstituut Werknemersverzekeringen'. According to the Extraordinary Labour Relations Decree (BBA 1945), the social security institution 'UWV' must grant the employer a 'dismissal permit' prior to any dismissal (Art. 6.1. of the Extraordinary Labour Relations Decree). The employer can then proceed with the dismissals by giving due notice of termination. See also: Russell Advocaten B.V., *Handboek ontslagrecht*, 54 (Maklu 2012); Jan Dop, *Reflexwerking afspiegelingsbeginsel bij ontbinding door kantonrechter: Goldewijk*, annotation 7 JAR 121 (2012).

⁷³ The social security institution UWV is in this context also bound by the Extraordinary Labour Relations Decree (BBA 1945) and by the Law on the Notification of Collective Dismissals.

⁷⁴ Article 7:685, 1 of the Dutch Civil Code (Art. 685, 1. 'Burgerlijk Wetboek Boek 7, Bijzondere overeenkomsten'). Russell, *supra* n. 72, at 117–161 (Maklu 2012).

⁷⁵ Dop, *supra* n. 72, at 121.

⁷⁶ The so-called 'reflexwerking'.

⁷⁷ Dop, *supra* n. 72, at 121.

⁷⁸ René Hampsink, *Selectie op basis van kwaliteit*, 6/7 TRA 55 (2012). Marjolijn Lips & Anneke Meulenveld, *Stoelendansen in het land van de bollebozen*, 4 ArbeidsRecht 19–19 (2011).

⁷⁹ Hampsink, *supra* n. 78, at 55; Lips & Meulenveld, *supra* n. 78, at 19; Albertine G. Veldman, *Voorbij het 'lifo-beginsel' bij reorganisatie: wat zijn wenselijke en geoorloofde selectiegronden voor ontslagkeuze en afvloeiingsvoorwaarden?*, 1 Arbeid integraal 43–59 (2005). All these contributions contain several references to Dutch case law.

⁸⁰ See previous paragraph (on the reflex-effect).

employers can deviate from the mirror-principle.⁸¹ If the alternative selection method⁸² is based on objective and verifiable criteria and is written down in a social plan (with the consent of the trade unions/works council), it will gain extra credibility and enforceability (which seems to conform to the above mentioned CJEU case law).⁸³ Cantonal courts acknowledge the principle that the ‘employer is basically free to run the organization in an optimal way’.⁸⁴

The majority of claims concerning the mirror-principle relate to the interchangeability of functions, the notion ‘company/branch’, and the weak labour market position.⁸⁵ Claims based on age discrimination are not as frequent, and seem to surface mostly with respect to alternative selection methods. The cantonal court of Alphen a/d Rijn recently ruled that the selection criteria (namely ‘performance’ and ‘potential’) concluded in a social plan (and deviating from the mirror-principle), were directed mostly at older employees.⁸⁶ Therefore the cantonal court rejected the employer’s request to dismiss the employee concerned.

Some authors ask whether the solutions offered (in this case, the mirror-principle) are not worse than the disease (possible age discrimination).⁸⁷ It is indeed surprising to note that in the proposals on the introduction of the mirror-principle, not a single word was spent on the fact that this principle may

⁸¹ The aforementioned doctrine (more specifically René Hampsink’s article) retained following conditions for justifying a deviation from the mirror-principle and selecting employees on the basis of quality/capability:

- the employer underpins the economic reasons for collective dismissal;
- the employer shows that trade unions and the works council agree on the deviation from the mirror-principle and the application of alternative selection criteria;
- the employer provides a redundancy period (‘boventalligheidsperiode’) during which redundant employees can follow courses, can retrain and/or apply for a new job;
- the employer allows redundant employees to apply for alternative (new) functions within the company. These new functions may not be interchangeable with the lapsed functions. Selection of candidates must occur on the basis of objective and verifiable criteria;
- after expiry of the redundancy period, the employer must request dismissal before the cantonal courts (based on Art. 7:685 of the Civil Code) and grant an adequate compensation;
- the employer provides an independent assembled committee where redundant employees can file their claims.

The fewer the conditions fulfilled, the greater the chance that the alternative selection method will not be accepted by the cantonal courts.

⁸² I.e., a method different from the mirror-principle.

⁸³ Hampsink, *supra* n. 78, at 55; Lips & Meulenveld, *supra* n. 78, at 19.

⁸⁴ Lips & Meulenveld, *supra* n. 78, at 19–20.

⁸⁵ *Ibid.*, 19.

⁸⁶ Cantonal court Alphen a/d Rijn, 11 Sep. 2012, JAR 2012/15.

⁸⁷ Veldman, *supra* n. 78, 43–47.

differentiate by age in a more direct manner.⁸⁸ Therefore the answer to the preliminary question lodged with the CJEU by a German labour court in February 2010 would have been extremely relevant and interesting:⁸⁹ the question was whether the German mirror-principle was compliant with Article 6(1) of the Framework Directive. Unfortunately the preliminary question became devoid of purpose and the CJEU did not hand down a judgment.

It is worth mentioning that the Dutch government intends to reform its dismissal law.⁹⁰ One of the intended reforms concerns self-regulation: in case of dismissals for economic reasons, it would be allowed to deviate from the mirror-principle by concluding a CLA. This should create more space to develop 'quality criteria' to determine the order of dismissals. However, due to the current recession, these government plans have been put on hold until 2016.

4 CONCLUSION

This article aimed to address the question as to whether age can be used as a criterion to distinguish among workers within the framework of collective dismissals. It has been shown that the CJEU offers the Member States and to an even greater extent also the social partners a wide margin of discretion when using age-based distinctions.

In the recent *Odar* judgment the CJEU explicitly confirmed this position with respect to a social plan that included a distinction on the basis of age for redundancy on operational grounds. Also in this case, the social partners at national level were given broad discretion in choosing the appropriate aims and measures to safeguard the company's viability. The required legitimate aim was found in the fact that the social plan under consideration must provide for a distribution of limited resources, so it may fulfil its 'transitional function' in respect of all workers, not just older workers.⁹¹

⁸⁸ *Ibid.*, at 43–48.

⁸⁹ Reference for a preliminary ruling from the Arbeitsgericht Siegburg (Germany) lodged on 12 Feb. 2010 – Hüseyin Balaban (Case C-86/10): 'Should Article 6 of Council Directive 2000/78/EC (1) of 27 November 2000 be interpreted as precluding national legislation which, in the selection of workers to be dismissed on operational grounds, allows age groups to be formed in order to ensure a balanced age structure and to ensure that the selection between comparable workers will be made in such a way that the ratio of the number of workers to be selected from the respective age groups to the total number of comparable workers to be dismissed corresponds to the ratio of the number of workers employed in the respective age groups to the number of all comparable workers of the undertaking?'

⁹⁰ Cees J. Loonstra, *Naar een nieuw ontslagrecht?* 12 *Arbeid & Recht* Special Dec., 2 (2012).

⁹¹ *Odar*, para. 48.

This can be seen as an indication that, with regard to age discrimination, the CJEU is moving away from a formalistic approach to the view of equality and equal treatment that it often took in the past, adopting a more substantive approach instead. The question is, however, how far the CJEU is ready to go in stretching the Member States' and, in particular, the social partners' leeway to justify age-based measures.

We have taken the age-pyramid and mirror-principles, laid down in the Belgian and Dutch legislation respectively, as examples. Although these principles are inspired by a concern to combat age discrimination, they may in the end become counterproductive. Strictly speaking, the mirror-principle differentiates in a more direct way on the basis of age than is the case with a mere selection of employees on the basis of years of service. From a purely formalistic point of view, there are reasons to argue that the age-pyramid and mirror-principles breach the principle of equal treatment of workers.

However, the recent CJEU case law has put this into perspective. The CJEU has already accepted that maintaining a balanced composition of the company's working population is a legitimate aim.⁹² It can also be assumed that the determination, in an objective manner, of the employees to be made redundant is legitimate as an aim. The age-pyramid and mirror-principles can easily be accepted as appropriate to achieve these aims. Moreover, it looks as if the Belgian and Dutch national courts have embraced the more substantive approach taken by the CJEU (though it may actually have been the other way round).

However, a problem could arise with respect to the necessity of these measures. After all, the many exceptions to these age-pyramid and mirror-principles could interfere with the consistency of the said legislation and lead to a result that is contrary to the objectives mentioned.⁹³ In spite of the fact that there are several reasons to believe that the CJEU would approve of the Belgian and Dutch positions, a number of critical points can be made here.

In the first place, a review of Dutch case law shows that deviations from the mirror-principle may be relatively easily accepted if the social partners support the derogation. This trend can, in our view, also be extended to the Belgian practice on equality. Agreements entered into by the social partners are considered of paramount importance. Furthermore, the current Belgian Law on the age-pyramid principle does not provide a specific dismissal order within the different age-categories (contrary to the Dutch legislation that applies the *lifo*-principle). This could lead to further weakening of the age-pyramid principle.

⁹² See n. 17.

⁹³ *Petersen*, para. 53; *Fuchs*, paras 85 and 91 and *Hütter*, para. 46.

In the second place it is clear that individual employees may bear the brunt of this evolution to a more substantive approach. The well-being of all workers is given priority over the well-being of the individual. In this respect, it may well become harder for the individual employee to successfully file a claim based on age discrimination.

Our biggest concern, however, is that the CJEU's tendency – followed by the national courts – to give more leeway to the social partners is not necessarily the best way to achieve greater equality.⁹⁴ With respect to sex discrimination in particular, it has been argued that the collective negotiation structure in itself reproduces inequality.⁹⁵ Trade unions indeed appear to be bastions in which inequality is often deeply ingrained. As a result, one may wonder whether the permissive CJEU approach to agreements between the social partners does not risk consolidating inequality. Only time will tell whether or not the social partners are more wary of age discrimination than they are of sex discrimination.

⁹⁴ A. Neal has also questioned the social partners' influence with respect to 'taking forward agendas such as that for "active ageing"'. Alan C. Neal, 'Active ageing and the limits of labour law', in *Active Ageing and Labour Law. Contributions in Honour of Professor Roger Blanpain* (E. Hendrickx, ed.) 55 (Intersentia 2012).

⁹⁵ Petra Foubert, *The Gender Pay Gap in Europe from a Legal Perspective* 13 (Publications Office of the European Union 2010), http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gender_paygapfromlegalperspective-nov2010_en.pdf (accessed 9 Jul. 2013).

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