EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

20th ANNUAL CONGRESS

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"Too Young or Too Old?":
Protecting Working Conditions for the New Age

DRAFT REPORT

1. Introduction

The twentieth Congress of the European Association of Labour Court Judges took place on the 10th and 11th June 2016 at the Amsterdam Court of Appeal, Amsterdam, Holland, at the kind invitation of our hosts, the President and Judges of the Amsterdam Court of Appeal. The subject of the Congress was

> **"Too young or Too Old": Protecting Working Conditions for the New Age.**

The Congress was attended by Judges from 15 countries of the EU and the EEA.

Amsterdam is one of the most popular tourist destinations in the European Union, with good reason. Its meandering network of canals, wealth of famous art galleries and laid back atmosphere mean that there is something for everyone.

We were very fortunate to be able to hold the Congress in the Palais de Justice, a purpose built Court designed by Claus en Kann, Architecten. The Palias de Justice architecturally stunning and is situated on land reclaimed from the sea. It consists of two linked buildings housing the Amsterdam Court of Appeal, two large Courts of first instance and the Public Prosecutor's office. Its central location gives commanding views of Central Station and of the Eye Film Institute, itself a remarkable building, which is across the bay. There are three open, outdoor spaces, each with living walls. The largest is adjacent to the staff restaurant and features a mosaic, the detail of which can only be seen from above. Parts of the same image feature throughout the building.

We were warmly welcomes by the President of the Court of Appeal who explained that 350 people work in the building including125 Justices. The Court deals with about 15,000 cases a year, half of which are criminal.

2. First Technical Session – Part 1: Health & Safety a cautionary tale

The Congress was addressed by Professor Barend Barentsen of Leiben University. His presentation was both thought provoking and amusing and very much underscored the content of the national reports, many of which made the point that there is a very real tension between health and safety legislation, which in some instances carries strict liability and individual responsibility.

Professor Barentsen pointed out that in many of the Member States the contrast between self employed status ("no safety net") and the protection

afforded to employees could not be greater. Employers have legal responsibilities to implement safe systems of working and to provide protective clothing and equipment. However, there are some types of employment which are of their nature high risk occupations. In those types of cases how much must an employer do? Applying completely safe practices could prevent the employer from carrying out their core business or, in some cases, change the fundamental nature of that business to a degree which is not commercially viable. Would a circus owner be required to provide safety nets for trapeze artists or to prevent the lion tamer from putting his or her head in the lion's mouth?

In the Netherlands under the Occupational Health & Safety Act and employer is liable unless the risk cannot reasonably be expected. Relevant criteria include: the cost of preventing the risk; the foreseeability of the risk; and whether the job can be done without an element of risk. Studies have shown that routine erodes fear of harm. It may perhaps seem counter-intuitive but more experienced workers, who may well be older, may require additional protection because their employer cannot rely on them to be hyper-attentive. Consequently some legislation requires age-related health and safety measures. That is by no means the case across other Member States – indeed it might argued that such measures are based on stereotypical assumptions about age.

Delegates were also informed that the legislation in the Netherlands has procedural norms and that there may be very specific requirements in different fields, such as the construction industry. It is not sufficient to warn employees of risk. There is a sequence to be followed. Firstly the source of risk must be identified; the level of exposure to risk must be assessed; collective safety measures may be necessary; thereafter individual safety measures may be necessary; and safety gear is very much a measure of last resort. Delegates agreed that this approach appears to be common across the legal systems of the different Member States.

Another common feature was state regulation i.e. public health and safety enforcement by a body such as a Health and Safety Inspectorate, which could result in very large fines or even imprisonment of the officers of a company. The object of this is not to compensate the employee it is to punish the employer.

For that reason there is also a parallel system of private rights enforced by individuals bringing civil actions. In some Member States (such as the UK) employers are required to insure against accidents in the workplace and any civil claim is dealt with by the insurer.

In addition there may also be state benefits for employees injured at work, which may vary in amount depending on the applicable collective agreements for particular sectors. Any such benefits would, of course, have to be given credit for in the calculation of any compensation for loss of earnings.

Professor Barentsen explained that the Supreme Court in the Netherlands has laid down conditions for a duty of care to arise in a private civil action for personal injury damages. These are: likelihood/foreseeability of injury; the nature and seriousness of the damage; and the costs/practicalities of prevention. An employee must prove (to the civil standard) that they were hurt in the course of their employment and the burden then shifts to the employer to prove that they did enough to prevent the injury and./or that there was contributory negligence. The test for contributory negligence is high – that the employee was willing to hurt themselves or was utterly reckless. A number of examples from cases were discussed. The first concerned a construction worker who was carrying a large tub of plaster and because he was unable to see over it fell into a hole. It was held that his employer was liable because a reasonably even workplace was to be expected. The second example involved café. A member of staff carrying a crate of Coca Cola fell into the cellar through a trapdoor which had been left open. The employer was held to be liable. The third case concerned a nurse who was injured when a patient opened a lavatory door outwards as she was walking down the corridor. Considerations in that case included: whether such an accident could occur at home. It was held that the employer was liable because the patient lacked control and because the door was large and the corridor narrow. Another case involved a probationary employee who was dismissed because he was a risk to himself and colleagues. He pleaded for his job back and his employer reinstated him. He sustained a chest injury when using a sandblaster and said he could not remember the incident. Because of the nature of the injuries, his employer suspected that he may have been attempting suicide. The employer was held to be liable because of having taken him back on when he was known to be a risk and because the suicide theory could not be proved. In the circumstances, the employer had not done enough. Finally there was the case of the 50 year old woman who injured herself rollerblading at the office party. Although the court accepted the injury was not sustained during the course of employment, the employer was nevertheless held liable.

The above cases tended to show that the test is approaching strict liability. One case which went the other way involved a worker who was cycling between buildings on their employers premises and fell off the bicycle because of a rabbit (or possibly a hare!). The employer was held not to be liable because: street lamps were working on the site; the “mere possible presence of animals” did not require safety measures, whereas a veritable plague would; the risk was low; the accident could have happened anywhere; and the employer was not required to cull rabbits on the site or to install a rabbit proof fence.

The consensus amongst delegates was that because some risk is very hard to prevent (e.g. a nurse being injured by a psychiatric patient; or a postman slipping and falling due to ice; or road traffic accidents occurring while in transit on the employer’s business) the only solution may be insurance.

Professor Barentsen did highlight the fact that in some instances (such as industrial disease caused by asbestos) there is retro-active liability whereby

norms are established. It can however be difficult for an employee to prove that a disease was caused at work, particularly if it does not manifest itself for years. Case law suggests that exposure at work to dangerous substances may reverse the burden of proof if the disease was probably caused by it. However, the burden of proof on the employee may be insurmountable if a multi-causal disease is involved.

Following Professor Barentsen's excellent presentation there was a lively debate amongst delegates which centred on a number of themes extracted from the national reports. Firstly it was noted that there are three types of system: one where enforcement is legal (whether regulatory or civil or both); one where everything is dealt with by insurance; and one which is a hybrid of the two. In systems which combine insurance and regulation by way of criminal law, the labour court has a limited role. As already noted, insurance is usually a good option for employers as a way of limiting civil liability for health and safety related accidents at or associated with work. However, even in legal systems which involve a workers compensation system of some kind (such as the US where this is an exclusive remedy) or Austria (where there can only be litigation if the employer has deliberately committed a criminal act) it may be possible for an employee to seek redress against an employer directly using discrimination legislation e.g. a claim that dismissal was discriminatory because it was disability-related.

In Germany there is a National Insurance scheme but it does not extend to immaterial loss e.g. damages for injury to feelings, or to damage to the worker's property e.g. clothing damaged during an accident at work.

The system in Poland is very similar but insurance companies have insufficient money to pay losses in full. In addition, the amount of litigation is staggering. Of a country of 38 million, over 15 million cases were brought during 2015.

Similarly, in Italy although there is insurance, it may not compensate in full. There has been a very long running case involving compensation for a ship builder who contracted mesothelioma and later died. His family sued his former employer because the insurance pay out was insufficient. At the time he was employed there was no concrete scientific data about the dangers of asbestos although there was ongoing research. The employer was held to be liable because they were obliged to know of that ongoing research.

Our Belgian delegate reported that the insurance based system there works well.

In Slovenia there is National Health Insurance which pays normal salary for thirty days and then a diminishing rate, but it is also possible to sue for negligence in the labour court in which case it is open to the employer to argue contributory fault.

In the UK the labour court has a limited role as regards regulatory action by

the Health and Safety Executive and can also hear discrimination claims but claims for personal injury are brought in the civil courts unless the personal injury is said to result from discriminatory behaviour. Employers must have insurance, so it is the insurance company which generally deals with the litigation. Measures have been taken to reduce the cost of personal injury proceedings in the civil courts by applying very strict rules on recoverable costs and it is anticipated that disputes will be dealt with by an on-line court in the future.

In Ireland employers are required to have Employers' Liability Insurance but there is no strict liability for accidents at work. In order to reduce costs of personal injury litigation there is now a Personal Injury Board which assesses damages in cases where liability (both in respect of breach of duty and causation) is admitted.

In Hungary the social security system covers wage loss but the employer is strictly liable for all other damages unless loss cannot be anticipated or the employee was solely at fault. Criminal sanctions are rarely used and there is no private insurance. The meaning of "cannot be anticipated" is as yet unclear because this is a new concept.

There was also discussion around the approach taken in different Member States to industrial diseases. The Austrian system overcomes the causation problem by having a long list of diseases caused by work. If an employee has such a disease the national insurance compensation scheme pays out irrespective of which employer caused the disease. All employers pay contributions to the national scheme.

3. First Technical Session – Part 2: Age discrimination – the battle between young and old

Our second speaker was Ruben van Arkel, who is an Associate. He is one of the leading specialists in the field of equal treatment in the Netherlands and lectures at the Grotius Academy. He has represented the Dutch state in proceedings relating to age discrimination.

The speaker explained that his objective was to provoke delegates into looking at age discrimination in a different way because when judging whether age discrimination is legal a more holistic and contextual approach is required.

By was of setting the scene he explained that across Europe there is an aging population with the percentage of over 50s increasing and the percentage of under 50s decreasing. This creates a tension between the rights of younger and older workers. The ageing population creates enormous challenges

across Europe. Figures from Eurostat, the statistical office of the EU, show that average life expectancy in 2003 was 78 and by 2014 it was 81. In 2003 over 40% of people aged 55 to 65 were in employment and by 2014 it was over 50%.

The speaker argued that age discrimination is not simple and cannot be judged on a micro level. By way of example, an employee aged 40 is entitled to 25 days holiday per year but a colleague aged 60 gets 40 days. That is age discrimination but the question of whether it is legal or illegal (i.e., justified or unjustified) requires full consideration of the context including: the type of company; the reason the older employee gets extra holidays; the type of work; the age composition of the workforce; and the working conditions.

The speaker explained that as in many Member States, the Government of the Netherlands is trying to raise the state retirement age (in this instance from 65 to 67). The Trade Unions are opposed to this. There is also an issue around the fact that entitlement to redundancy pay for civil servants ceases at 65. The argument is that if the normal retirement age is 67 then the cut off of redundancy pay entitlement at 65 is direct age discrimination towards the over 65s. Conversely, if more employees choose to work beyond 65 there are fewer job opportunities for young people and youth unemployment will increase which, it could be argued discriminates against younger people. The speaker said the latter could be solved by imposing a three-day week on the over 60s and queried whether this would be justifiable in the context of Articles 2 and 6 i.e. could the measure be said to be appropriate, reasonable and necessary.

In the KLM case, pilots brought a challenge to a collective agreement forcing them to retire at 60. The Amsterdam Court of Appeal decided this constituted age discrimination. The case was appealed to the Dutch Supreme Court. The Advocate General's opinion was that the measure was not discriminatory because the same arrangements applied to all pilots throughout their careers. The Supreme Court disagreed with that argument but concluded that the measure was justifiable because the aim was to have sufficient qualified pilots and to offer opportunities for career progression to younger pilots. The Supreme Court's judgment made reference to the case of Rozenblatt C45/09 ECJ, in which the ECJ (as it then was) held that a compulsory retirement age was justified age discrimination, saying that the aims of sharing employment amongst the generations and avoiding capability dismissals were legitimate (one might query whether the latter is based on a stereotypical assumption about the performance of older workers!). The ECJ also said that a balance had been struck between the competing interests of different age groups. In this regard, the Member States and social partners have considerable flexibility. The same point was made by the ECJ in the Odar case – the right to collective bargaining is fundamental with the consequence that although collective agreements are not immune to review by the Courts, ostensibly age discriminatory provisions are presumed to be objectively justified unless they are manifestly unjustifiable.

The speaker expressed the view that the Dutch Supreme Court ruling in KLM illustrated the balance that has to be found between the interests of different age groups – young people want to have a place in the labour market and older people want to keep their jobs and salaries. The Court has to find the solution which means the groups involved are not disproportionately affected. The need for that balance is evidenced by paragraph 25 of the Preamble to the Framework Directive. The ECJ decision in Odar illustrates the discretion available to Member States and the social partners.

A debate amongst delegates followed which concerned the conflict between the Dutch Supreme Court decision in the KLM case (which followed the approach in Rozenblatt) as compared to the ECJ's decision in Prigge C-447/09 ECJ. In the latter, which also concerned a compulsory retirement age of 60 for pilots enshrined in a collective agreement, it was held that such a measure was not necessary. In that case the ECJ said that EU law did not prohibit social partners adopting measures in furtherance of the aim of stopping human failures causing aeronautical accidents, but that because the applicable national and international law did not prohibit commercial pilots from flying up to age 65, the requirement to retire at 60 was disproportionate. Delegates agreed that the explanation for the difference in approach in KLM and Prigge was probably because the former put forward a social policy need as justification, whereas the latter put forward health and safety as the explanation in circumstances where the measure went beyond the requirements of the applicable health and safety legislation.

As noted above, some Member States (such as Italy) have an ever increasing retirement/pension age. In the UK this varies depending on the date of birth of the worker. In Hungary the age is 65 for men but women can retire after 40 years' service which includes time off to have children – so retirement can occur after 32 years of actual work. Following the ECJ's decision in Barber it might be thought that different pension ages for men and women are not possible however, as was pointed out during the discussion, it is lawful for them to be brought in to line over time, as has happened in Austria and the UK. In some countries, such as Germany and the UK, an employer cannot terminate employment at the statutory retirement age but there can be a contractual retirement age. Of course some older workers choose to work on beyond pension age. However many workers are compelled to work longer than they would like because they have not reached pension age and cannot afford to retire. This may have consequences for them (such as ill-health and lack of morale); for their employer (such as impaired performance); and for the wider workforce (lack of jobs for young people and lack of career progression opportunities for younger workers). The consequences of working longer may differ depending on job role (for example as between manual and office workers).

Apart from retirement age and pension age, which clearly demonstrate the battle of rights between younger and older workers, in many Member States workers' benefits vary according to age. This also undoubtedly creates a tension between the interests of one age group as compared to another.

There was discussion of the Cadman case which establishes there is no special right to pay progression with length of service, although such pay systems can be justified in most Member States, usually by reference to gaining experience and improved performance rather than solely length of service. The Polish delegate explained that in Poland pay and pay progression must be based on performance.

Another example was the National Minimum Wage. In many Member States it is lower for younger workers and increases at age 18 or 19. In the Netherlands and Denmark the consequence has been that some employers dismiss young people when their hourly rate is about to increase because they are "too expensive" to employ. In the Netherlands employees who reach the state pension age are "cheaper" because the employer no longer pays premiums for employing them. By contrast, in Italy young people receive the same rate as other workers as a result of a ruling by the Constitutional Court. However, there is a very high rate of youth unemployment because the age for pension eligibility increases each year which combined with very slow economic growth has led to a shortage of jobs. In Slovenia the National Minimum Wage is the same for all workers.

The speaker suggested that the role of the Court in assessing justification should be even more reserved if the social partners have agreed to pursue an "age-group awareness policy". This is defined by the Netherlands Institute for Human Rights as a policy with the goal of achieving durable and optimal employability of all employees of all ages within an organisation, containing measures which take physical, mental and social circumstances of employees related to their age or life stage into account.

Delegates were able to provide some examples of policies which appeared to fit that definition such as collective agreements which provide for holiday entitlement to vary with age. In Hungary young people under 18 get additional holidays. The same applies in Slovenia but some older workers are also entitled to extra holiday entitlement because of collective agreements which provide for additional holidays for parents, depending on the number of children (a life stage measure which indirectly relates to age). The social policy considerations mean that any age discrimination (whether direct or indirect) resulting from adopting such measures is very likely to be justifiable. The Belgian delegate said that in Belgium age-group awareness policies are a very important part of collective bargaining. In the UK however, whilst the Courts acknowledge the need to balance competing rights as part of considering whether age discrimination is justified, there is a reluctance to allow the margin of appreciation to be too wide. This could very likely be a reflection of the lack of collective bargaining in the UK.

It became clear during the group discussion that across Europe there appears to be a low threshold in relation to justification of age-related measures with a social policy objective. That is no doubt because the CJEU (and consequently the national Courts) have been slow to interfere with the flexibility which is required to be able to implement social policy measures. Such measures may

vary from one Member State to another and, indeed, from one sector of employment to another. The social priority may be to enable access to the workplace and career progression for younger workers, or it may be to retain older workers. In all cases competing interests must be balanced. In that regard the UK delegate explained that context is all important but is relevant to justification rather than the question of whether there has in fact been less favourable treatment. The delegate from Ireland explained that the national case law demonstrates a low threshold for justification. It was also noted that the CJEU case law demonstrates that justification by reference to social policy objectives is not limited to the state and social partners - private employers may also justify age discrimination on social policy grounds.

The speaker suggested that social policy questions are best dealt with by the social partners rather than the Courts. There was agreement that this would require delegation of quasi-legislative functions to the social partners. It was agreed that this would work better in Member States where there is a strong tradition of collective bargaining and sectors of work are regulated by collective agreements. In the UK, where this is not the case, the Trade Unions did not act in the best interests of female workers (more accurately, workers engaged in roles which are predominantly staffed by women) in respect of negotiating pay and other benefits which led to large scale equal pay litigation against public sector employers.

The speaker concluded by saying that age discrimination occurs quite often but is not always undesirable. It provides clarity in many situations and there is often a good reason for it. That is why it must be assessed broadly, especially if the rule is the result of an agreement by the social partners and even more so if it is part of an age-group awareness policy.

4. Third technical session – Health and safety, whistle blowing and prevention of mental harm/injury to feelings

The starting point is Directive 89/391 which requires employers as part of the risk assessment process to consider whether there are hazards to mental health. This is not straightforward because frequently it is the actions of colleagues or the worker themselves rather than any feature of the workplace (such as equipment, nature of the risk etc.) which causes the risk to an individual worker.

A person may be at risk of psychiatric injury because of a protected characteristic (harassment or victimisation), because of retaliation for being a whistle blower or because of bullying and/or “mobbing”.

A person may also be at risk because of their own actions for example by

working excessive hours.

In most Member States there are two kinds of legal protection: legislation prohibiting discrimination – which may compensate for both personal injury and injury to feelings; and civil actions for personal injury damages. Typically the question to ask is: is this a breach of a civil obligation?; does it fall within the definition of victimisation or harassment?; is it disability discrimination?; or is it about "dignity at work"? If the worker can only rely on "dignity at work" then the issue may not be justiciable.

The problem for the employer is demonstrating they have taken all reasonable steps to prevent the injury occurring. The kinds of defences which may be available are summarised above in the report from the first technical session.

The problem for the worker is causation. By way of example: in cases involving stress at work or "burn out" due to overwork, the employer will argue that the worker chose to work additional hours and there was no pressure to do so. Whilst this may be strictly accurate, the reality is that in some types of profession, such as corporate law, expectations, peer pressure and the desire to progress may mean that in reality there is no choice at all. Another example is where a worker claims to have been victimised for whistle blowing. Frequently an employer will argue that the detrimental conduct complained of had no connection with the worker's disclosure – or that it was the way the worker behaved in making the disclosure, rather than the fact that they had done so, which led to the treatment complained of.

Delegates from different countries explained the types of legal protection provided for in national legislation. In Finland "burn out" is not a problem because there is a right to seek paid leave deriving from ICD-10 plus provisions in collective agreements. Employers have duties under health and safety legislation to prevent stress caused by an excessive workload. There is also protection from harassment and "other improper conduct" which requires an employer to intervene as soon as they are aware of a problem, or be deemed to be negligent. If the conduct is systematic and/or takes place over a period this would also constitute a violation of the employer's health and safety obligations. In Hungary a worker sustaining injury to mental health can claim damages for a one-off occupational accident or wages. If an expert decides there is psychiatric damage then injury to feelings can also be claimed. In Norway there is protection from harassment and an expert committee has been set up to look into regulations to protect whistle blowers from retaliation. In the Netherlands legislation protecting whistle blowers whose disclosure was made in good faith has only recently been accepted by the Senate so the law is still to be tested – there is a good faith requirement. In Belgium there is sophisticated protection from harassment and the process requires: attempts at internal resolution; then the involvement of a specialist Labour Agency; and only after that the involvement of the court, which would usually be after employment has ended. In the UK and Ireland there is extensive protection for whistle blowers and for workers who have been discriminated against, harassed or victimised. In the UK there used to be a

requirement that the disclosure was made in good faith but that is no longer the case – good faith may be relevant to causation and/or compensation but not to whether the whistle blower has made a disclosure qualifying for legal protection. However the labour courts in the UK and Ireland have no jurisdiction to hear cases involving bullying/mobbing which means that claims must be brought in the civil courts under health and safety legislation and/or the common law which is expensive. In Italy harassment and mobbing are social concepts and there is no specific legislation prohibiting such conduct although it can be taken into account in cases involving employment relationships. In the Czech Republic there is also no specific legal protection for whistle blowers but it is unlawful to dismiss someone for having done so. If the worker complains to the Labour inspectorate their identity is kept confidential. The delegate from Luxembourg reported on a case where a whistle blower had broken the criminal law but did so in the public interest. There is clearly a dilemma for the courts in such cases.

There was a general discussion about the negative connotations of the term "whistle blower". It can be seen to be synonymous with "trouble maker" or "crazy person". One of the UK delegates reported attending a presentation by Dr Mike Drayton, a clinical psychologist with expertise in the psychology of workplace relationships. Dr Drayton is frequently brought in by large corporations to try to resolve whistle blowing issues internally. He explained that the act of whistle blowing causes anxiety for the worker and the employer. Anxiety leads to bad decisions on both sides. There is a need to see whistle blowing positively as highlighting problems which need addressing internally. This means supporting the whistle blower and addressing the issue promptly and properly. His belief was that if the issue is not resolved internally then the situation becomes toxic because it can lead to media coverage and have an adverse impact on the reputation and share value of the company. Put another way, litigation equates to failure and frequently has adverse consequences for both parties. The employment relationship is usually broken.

There was a consensus that litigation is not an ideal solution and internal resolution is far better. It was also agreed that the term "whistle blowing" is unhelpful and that the use of more positive terms such as "raising a public concern" would be help to change the image of the whistle blower as a villain (see for example the press coverage about Edward Snowden or Julian Assange).

The discussion then turned to the tension between health and safety responsibilities and the worker's right to privacy. This arises when an employer insists on testing breath and/or blood for alcohol or drugs in order to protect the health and safety of the wider workforce or the public The Netherlands Supreme Court (in a case involving the Hyatt hotel chain) held that it was lawful to dismiss a worker whose blood test showed they had taken drugs 72 hours before attending work and being tested. In another case a worker who refused to take a blood test before and after visiting a site to ensure there was no chemical contamination was held by the Supreme Court

to have been lawfully dismissed. There is an ongoing court case involving KLM and a member of cabin crew who drank one glass of beer less than 8 hours before flying in contravention of an occupational requirement. The case is on appeal but the Courts thus far have held that her immediate dismissal was lawful. In Hungary, the UK and Ireland, refusal to take a blood test if it is a contractual requirement to do so, can constitute grounds for immediate dismissal. In Norway control measures around alcohol and drugs are set down in collective agreements which usually require reasonable grounds for suspicion but may go further. In Slovenia zero tolerance of alcohol in workplaces is usually lawful. However the position is not so clear cut with cannabis which can stay in the bloodstream for over a month. The worker may argue they were fit to work normally and without risk to themselves or others. In such cases Article 8 may require the Court to determine the correct balance between work and private life. The Austrian delegate provided details about a case involving breath testing of streetcar drivers. The outcome came as a surprise to most delegates because it went against the general trend of national Courts to endorse testing. She explained that there was a problem with streetcar drivers not being sober. To address this issue the employer imposed breath tests without warning. The Austrian Supreme Court held that it was not lawful to impose blanket testing and that testing should only take place where the employer suspected a particular employee was drunk!

Conclusion

It is perhaps surprising that the topics of age discrimination and health and safety contain so much overlap. A summary of the key points which emerged from the national reports and discussions around these topics is set out below.

The Directive requires employers to take preventative measures to avoid risk but how far dos this go? All Member States have special protection for young workers such as a minimum working age and a maximum number of working hours depending on age. In some Member States health and safety may require special protection against risk for older workers. In most Member States there is no strict liability, or if there is then it is in specific contexts. In some Member States insurance rather than legislation is the primary means of dealing with accidents caused at work. The protection afforded to workers is in sharp contrast to the self-employed who are without any safety net. The ability of an employer to have blanket control policies to protect other workers or the public from risk is variable across the Member States. In most countries health and safety obligations are more important than the Article 8 right to privacy.

The overlap between health and safety obligations and civil actions for

personal injury damages is another common theme as regards accidents at work. In most European countries defences such as lack of forseeability and contribution are available. Employers may be required to have insurance or to pay towards a national insurance scheme. When injury to mental health is involved EU legislation prohibiting discrimination, harassment and victimisation, and national legislation protecting whistle blowers is also part of the jigsaw.

As can be seen from the report of the discussions, whistle blowers are often portrayed negatively. In some countries the malicious whistle blower has no protection because of the need for the concern to have been raised in good faith. There may of course be mixed motives. Good faith may also be accompanied by a desire for profit and/or publicity. In some instances the worker may be acting in good faith but be mistaken or have mental health problems which result in a genuine but wrong belief. Is the worker in Luxembourg who committed an offence when he made a disclosure a “good criminal”? What emerged as a consensus view was that whistle blowers should be seen in a more positive light. It was also very clear that in whistle blowing cases litigation is the worst outcome and that internal resolution is the best option. Resolution by an external agency is also better than legal action.

As to age discrimination generally, it is clear that the rights of younger and older workers frequently do not coincide and that a balance must be struck. Justification must be assessed having regard to the broader context in which the measure differentiating between age groups (or life stages) came about. Social policy allows a wide margin of appreciation in this regard, and this clearly extends to private employers as well as the social partners. In many Member States (such as the Nordic countries, Germany and Belgium) this balance is struck via the mechanism of collective bargaining. There was a strong view that provisions of collective agreements which favour one age group as compared to another should not readily be held to be unjustifiable, especially if the rule was the result of an age-group awareness policy. The proposal that the state could delegate quasi-legislative powers to the social partners is interesting and would work well where the strength of the social partnership is recognised. It would not work in countries such as the UK and Ireland due to the way that the importance of collective bargaining has been eroded during that last few decades.

As always, the Congress was thought provoking and interesting and the very high quality of contributions from our speakers and from all delegates made it a memorable occasion. As Judges, we have much to learn from each other and the opportunity to share experiences and perspectives is invaluable.