Editorial

Non-discrimination Law and Equal Treatment of Employees: Recent Developments and Future Challenges

This special issue, with four articles on non-discrimination law, is the result of a seminar organized by the International Journal of Comparative Labour Law and Industrial Relations at the Inaugural Conference of the Labour Law Research Network in Barcelona in June 2013. This topic is particularly timely, given important and far-reaching legal reforms of non-discrimination law in many countries, including the introduction of comprehensive non-discrimination legislation, and important case law developments, for example at EU level; an increased focus on fundamental rights and decent work; the segmentation of labour markets with increasing numbers of precarious and vulnerable workers; deregulatory labour law reforms and austerity measures following the global financial and economic crisis. All these developments suggest that in future labour law protection for individual employees will increasingly be found in non-discrimination law. The contributors to this special issue are all distinguished scholars and experts in the field of non-discrimination law and labour law.

The starting point for the article 'Human Right to Non-discrimination as a Legitimate Part of Workplace Law: Towards Substantive Equality at Work in Australia' by Beth Gaze and Anna Chapman is that in Australia, employment discrimination has traditionally been treated as a human rights issue, and not as a key issue for labour and industrial relations law. However, in 2009 new provisions on adverse action on a number of grounds were introduced in the Fair Work Act. The article aims to critically examine the context and developing interpretation of these provisions to ascertain whether the position of employment discrimination in labour and industrial relations law has changed. Gaze and Chapman argue that:

> underlying the reluctance to fully include employment discrimination claims is an understanding or insistence that the workplace relations system should continue to cater primarily for the paradigmatic worker, who follows the traditionally male pattern of full-time work, is available for overtime and to relocate, and has no domestic or community responsibilities.

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The authors find evidence of:

> 'continuing resistance in Australian industrial relations law to dealing with discrimination issues which may hamper giving full effect to the potential of the adverse action provisions to protect disadvantaged workers in the Australian workforce'.

In her article, 'The Contribution of Labour Law and Non-Discrimination Law to Empowerment and Social Justice in an Unequal Society: A South African Perspective', Nicola Smit discusses the contribution and potential of labour law and non-discrimination law to achieve equal treatment in the workplace in a society marked by social and economic inequality such as South Africa. The article provides an overview of the vast and comprehensive constitutional and statutory framework for promoting equality and eliminating unfair discrimination in South African workplaces, and discusses certain remaining legal challenges in this area. The author concludes that labour law alone cannot address the problems facing a highly unequal society such as South Africa, and that labour law needs to be supported by the regulation of financial markets, taxation, social welfare, skills development, education, and the environment. '[G]reater emphasis must be placed on the coordination and integration of all relevant statutory instruments and on cultivating fundamental values and rights across the wide spectrum of society'.

A common denominator for the remaining two articles is a focus on EU non-discrimination law and a discussion of the ban on age discrimination. The aim of the article 'The EU Ban on Age Discrimination and Older Workers – Potentials and Pitfalls' by Ann Numhauser-Henning is to discuss the potentials and pitfalls of non-discrimination law, and especially the ban on age discrimination, in relation to EU strategies for active ageing. She discusses recent developments in EU non-discrimination law in terms of comprehensive and transformative equality, and the widening and deepening of non-discrimination law, respectively. With reference to Hendrickx, Numhauser-Henning highlights how the ban on age discrimination reflects the 'double bind' of non-discrimination law, and a complex tension between human rights and (internal) market arguments, as well as between an individual approach and a collective-interest approach. She analyses recent case law developments in the area of compulsory retirement which reveal the acceptance by the Court of Justice of the European Union (CJEU) of Member State traditions in this area, and discusses the implications for active ageing. Numhauser-Henning concludes by posing a crucial question for the future:

> 'Can demands for decent work, non-discrimination, equal treatment and reasonable accommodation suffice to counteract the risks implied by both the acceptance and the abandonment of age as a social stratifier?'

In the final article, 'An EU Perspective on Age as a Distinguishing Criterion for Collective Dismissals: The Case of Belgium and the Netherlands', Petra Foubert et al. discuss the way in which the workers' social right to equal treatment influences the possibilities of the employer to decide which workers are to be made redundant. The economic crisis forms the background for this comparative analysis of the regulation and case law in Belgium and the Netherlands on collective redundancies, with the Belgian 'age-pyramid principle' and the Dutch 'mirror-principle' in particular focus. The analysis is conducted in light of the EU ban on age discrimination. Foubert et al. thus analyse the CJEU's interpretation of the justification of differential treatment on grounds of age, especially the recent *Odar* case (Case C-152/11), which relates to collective redundancy, social plans and the disadvantageous treatment of older workers. The authors conclude that although both the Belgian and the Dutch principles are 'prompted by a concern to combat age discrimination, they may in the end become counterproductive'. Given previous disappointing experiences in relation to the eradication of sex discrimination, they also express concern that 'the CJEU's tendency – followed by the national courts – of giving more leeway to the social partners is not necessarily the best way to achieve greater equality'.

Non-discrimination as a human right is discussed in the articles, and important regulation is found in international and regional human rights sources. At the same time there is a continued tension between human rights and other perspectives, and this tension plays out somewhat differently in different jurisdictions. In South Africa, equality is one of the founding values of the Constitution, and the Constitutional Court has emphasized the role of human dignity in non-discrimination law. In Australia, employment discrimination has been treated predominately as a human rights issue, resulting in its marginalization within labour and industrial relations law. In the EU, the conflict between human rights and social protection on the one hand and (internal) market values on the other is a continuing theme. In this context, Numhauser-Henning argues that the Lisbon Treaty and its new emphasis on the social market economy and fundamental rights are important and promising for future progress towards a strengthening of non-discrimination law.

The articles also reveal a complex – and important – relationship between non-discrimination law and employment protection. Gaze and Chapman describe how the new provisions on 'adverse action' build on existing protection against unlawful termination of employment. Numhauser-Henning discusses the intricate connection between employment protection and provisions on compulsory retirement, and highlights how strengthened protection against age discrimination along with the abolition of compulsory retirement give rise to a risk of diminishing employment protection before the actual retirement age is

reached. 'If retirement practices are to become more diffuse or more individualized, there is no possibility to uphold a practice such as that found in Sweden where, as a general rule, "normal ageing" does not compensate for just-cause dismissal.' Foubert et al. analyse how age may be used as a distinguishing criterion in employment protection when it comes to collective redundancies and the selection of employees for dismissal.

The multi-level regulation of labour law is also reflected in non-discrimination law, where regulation can be found in international and regional sources, national constitutions, and statutory regulation at different levels. These levels may reinforce each other and increase the protection against discrimination, but they may also come into conflict and weaken protection. At a more practical level, the articles also highlight potential practical difficulties when it comes to achieving effective individual dispute resolution, with the co-existence of different courts, procedures, rules on burdens of proofs and sanctions and so on.

The development towards comprehensive equality is also reflected in the articles. Comprehensive equality implies more and more broadly protected discrimination grounds, without a hierarchy of grounds, and has manifested itself in the introduction of comprehensive, single, non-discrimination acts. Different grounds are protected in different jurisdictions, and so-called open lists of discrimination grounds may be used by courts to strengthen the protection against non-discrimination, also in cases of compound and intersectional discrimination.

It is clear from these articles that courts and case law crucially shape the protection offered by non-discrimination laws. In this context, the interpretation of basic concepts in non-discrimination law is essential for its development and strength – or weakness. Here it is interesting to note the seemingly different developments in the EU and Australia. In the EU, as discussed by Numhauser-Henning, the CJEU has recently made innovative and transformative interpretations and developed concepts such as transferred discrimination (the *Coleman* case, Case C-303/06), and discrimination by declaration (the *Firma Feryn* case, Case C-54/07, confirmed by the *Accept* case, Case C-81/12), and has aligned its interpretation of the concept of disability with the UN Convention on the Rights of Persons with Disabilities (the *HK Danmark* judgment, Case C-335/11). In contrast, Gaze and Chapman show how the courts in Australia have interpreted the new provisions on adverse action in the Fair Work Act by turning to dictionary understandings of central concepts such as discrimination and disability, thus reducing the importance of existing case law and understandings in human rights law.

Together, these articles offer an interesting international, comparative and multifaceted discussion and analysis of recent developments and future challenges in the field of non-discrimination law and equal treatment.

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