UNLAWFUL EMPLOYMENT DISCRIMINATION: A DISCUSSION OF BELGIAN LAW AND RELATED ISSUES

*Professor Blanpain**:

First, as far as Belgium is concerned, the European Communities have had an extremely great impact on national developments in this area of law. I dare to say that without international legislation I think we would have made very little progress, and so I think that the contribution here is great. Undoubtedly, EC law, with the effect which Professor Vogel-Polsky described in her introduction, is of great importance; but I would not underestimate also the political importance of discussions like the ones which takes place in Geneva. Although the public at large does not read the expert reports produced, undoubtedly some specialists do. Often one sees in Parliament criticism in this area based on the report of experts; I think this is one of the ways in which, for example, ILO conventions and declarations politically help to improve the situation.

Second, Belgian laws in the area of anti-discrimination are unsophisticated. We are, I think, 200 years behind the United States. For that reason, I believe it is impossible for a non-American to enter into a detailed discussion of American anti-discrimination legislation. Even though Belgium has a number of laws, these laws are paper tigers. Our legal system has no teeth whatsoever.

On its face, a review of the numerous Belgian employment discrimination laws reveals that the field is extremely well covered. Our laws address the self-employed, employees, and independents, in the private and public sectors. The conditions covered include access to employment, promotions, and even job announcements published in the newspapers. So, when considering laws on the books, Belgian law is exemplary. But there the contribution stops, notwithstanding the Women's Labor Commission, the President of which is here with us today, and its active work. We have a Minister for Emancipation in the cabinet, who is doing her best, but with limited results.

As in the United States, we in Belgium address the problems Americans define as discrimination and equal treatment, and we

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too strive for equal opportunity, equality regarding pay, wages, the chance of promotion, and access to employment. We also distinguish between direct and indirect discrimination. Belgian law is progressive in that we do not require that the employer reveal his or her discriminatory intent; he or she does not have to have a tee-shirt saying "I'm discriminating" for the action to be discriminatory. Evidence of discriminatory effect is enough if the consequences of the action result in separate and unjustified different treatment; the employer is acting contrary to the law. We not only consider texts like parliamentary acts, collective agreements, or labor contracts, but also practices which may be contrary to equal treatment.

I would say the definition and scope of our laws is very broad. We cover well working conditions, in the broader sense. We also recognize the classic exceptions such as the protection of motherhood and the bona fide occupation qualification. Like everyone, we have a legal-framework for positive discrimination as well as equal opportunity plans. I understand that some hundred-thousand workers in Belgium now benefit from equal opportunity plans (agreements concluded with the employer and the Ministry, in consultation with the social departments). Our legislation covers the field rather well.

Belgian anti-discrimination law, however, is basically toothless. One small tooth is that the trade unions can be given the legal capacity to sue. Those who are not Belgians, however, must understand that unions in Belgium are not legally incorporated. As such, the unions do not have the right to sue. But from time to time, Parliament, which is not controlled by but is strongly influenced by the unions, grants the unions legal personality to sue. Nowhere and in no way, however, does the Union have a duty or the obligation of representation. So, the decision whether to sue is entirely up to the Union. Most often, Unions will not sue because, to do so, they would have to attack the collective agreements they themselves negotiated.

We have no Equal Employment Opportunity Commission in Belgium. We do not shift the burden of proof; the burden of proving discrimination as well as damages rests completely on the employee. We have only the beginnings of protection against dismissal. If an employee complains about discrimination, the employer seeking to dismiss the employee must specify the reasons for discriminating. If the employer can not prove those specific reasons, he or she may have to pay compensation. There is no

remedy of reinstatement. The most the courts will grant is compensation. Thanks to the Women's Labor Commission, we now have a compilation of these laws in both Flemish and in French.[1]

Unlike the United States, Belgian case law is rather limited. Some 30 cases are reported for a period covering almost 20 years: 7 cases relate to equal pay, 11 to equal treatment, and the rest to social security issues. The courts play, as you see, a very limited role for a number of well-known reasons. It is considered an act of war for an employee to sue his or her employer. Moreover, in cases involving hiring or promotion, it is absolutely impossible to sue, for practical reasons. First, the employer is not required to keep records of entrance exams or other hiring criteria. Second, the procedures are time consuming by nature. Third, the trade unions have conflicting roles and represent conflicting member interests.

We have yet to engage in handling sexual harassment cases; there are studies in this area and some ideas, but I do not know of any real cases as of now. The evaluation I would make is that the laws are not that effective; they play a rather marginal role since they are not equipped with teeth. Employers and politicians really do not care; the greatest impetus for change is now coming from the labor market itself. The skill shortage itself is promoting equality because employers need female labor. I think this will be the most forceful catalyst to promote equal treatment. But the problem, again, is that we are reinforcing dual labor markets, between those who have jobs (the skilled) and those who do not have jobs due to their lack of skills or due to discrimination.

*Ms. Walgrave**:

I fully agree that the European Community directives and the laws in Belgium are not the basis for determining the place of women in the labor market, so in this I agree with the German point of view. I think the place of women is determined by the labor market itself and the economic demands of employers. I first wish to comment on several developments before turning to Belgium.

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[1] MINISTÈRE DE L'EMPLOI ET DU TRAVAIL, SECRÉTARIAT DE LA COMMISSION DU TRAVAIL DES FEMMES, EGALITE ENTRE HOMMES ET FEMMES (Brussels, 1989).

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First, in December 1988, at an ILO conference on the metal industry, the employers' group for the first time sought a resolution for positive action on the education of females, on the vocational training of women, and on the increased employment of women in the metal industry. Second, in June 1989, in a discussion on night work in the ILO, again the group of employers was the one speaking the whole time of equality. I found it rather interesting to see the employers' group unanimously speaking about equality and the consequences this will have on night jobs too.

I fully agree with Professor Blanpain's statement concerning the need for better vocational training for women. Because of demographic changes, places exist for greater numbers of qualified people. The labor market does not have nearly enough men, so employers must seek women to fill traditionally "male" jobs.

I will now give you a few examples of positive and affirmative action in Belgium. First, a national agreement exists between the social partners, the national trade unions and the federation of employers. This agreement speaks of positive action. We hope to have collective agreements on the branch level as well.

A joint committee of 300,000 white collar employees exists, made up of employees from different branches. This poses the opportunity to use broad-based pressure to bring about affirmative action in several areas. For example, we now have positive action plans in department stores. I served as the chairperson of this joint committee, and we never spoke about equality; we never spoke about discrimination. We brought about positive and affirmative action in department stores by addressing the economic reasons for and benefits of such plans.

The German participants were saying that education is determinative; but in Belgium, and I think it is so in other countries too, some very important recent studies of university graduates reveal the existence of discrimination against women, even though they have the same diplomas as men. For example, a study of law graduates of Leuven, which followed 2,000 male and female graduates, revealed from the beginning segregation based on sex. Studies of other universities reached similar conclusions. A study of male and female graduates with engineering degrees from Ghent evidenced that even when women have the same training or the same diploma as men upon graduation, they will be segregated into another part of the labor market; they are not equal. Integration has yet to occur. Thank you.

*Mr. Jacqmain**:

There are many reasons to be as pessimistic as Professor Blanpain is concerning the effectiveness of Belgian legislation. However, I think it is a small miracle that in such a short time such sophisticated legislation has developed in our country under the direct pressure of the European Communities. But one must understand that on the one hand, our social system is built on permanent conflict and negotiation between the social partners, i.e. employers and trades unions. In that regard, Belgium is often presented as a model of permanent contact between the social forces. On the other hand, we are an incredibly backward country as far as anything related to sex in general is concerned. So it is not surprising that our sophisticated legislation is so infrequently applied so long as employers are not interested in change, and they were not interested until they suddenly rediscovered for economic reasons the virtues of women in the work force.

By "backward" in relation to sex, I think Belgium might be one of the least advanced countries as far as the sharing of traditional roles is concerned. For instance, people have been speaking for 20 years about "new" fathers and the redistribution of domestic tasks. In Belgium, however, I think we have progressed little in that direction. Similarly, attitudes towards anything related to sexual behavior are also extremely traditional. We are the last country in Western Europe, along with Ireland, in which abortion is still a crime even for the aborting woman (although the laws are in the process of being changed).[2] Anything related to nudity and to pornography is treated in an incredibly hypocritical manner. So, that is why I say we are an extremely backward country.

But to come back to our theme, I think it is not very surprising that our equal opportunity legislation has been so infrequently applied. What we need are some good test cases; I think that we can accomplish a lot through winning some important cases.

Obstacles to the bringing of these suits, however, continue to exist. Even under favorable Belgian legislation, a woman seeking to sue her employer is in for a very difficult time. Not only does she risk losing her job with doubtful prospects for finding another

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[2] In late March of 1990, Belgium adopted legislation partially legalizing abortion.

job, but also society exerts terrible social pressure on her. Many female victims of discrimination have also revealed that they are subjected to pressure from their companions, from their family, urging them not to "rock the boat."

Still, possibilities for litigation exist because not all situations related to equal opportunity disputes entail a risk of dismissal. Some people work in environments where the employer has no reason at all to dismiss them. There is also the whole field of social security legislation where the complainant is opposing the state, so there is no risk of losing anything at all in a trial. And in that area, for instance, Belgium has been the scene of some important judicial victories. Julian Currall mentioned this morning that it was in a Belgian case that the Court of Justice, for the first time, recognized the direct effect of Article 119 of the Treaty of Rome.[3] While the case came to the Court of Justice as a preliminary question, Article 119 was invoked before a Belgian tribunal.

Recently, the Belgian courts delivered another favorable decision, although the tribunal must still rule on indemnification, involving the University of Louvain-la-Neuve and a matter of complementary social security benefits.[4] I will not go into the details, but it is a fascinating novelty. We also nearly had the first case applying European and Belgian legislation on equal opportunity to a self-employed person, a barrister. The case did not go to the courts because a solution was found.[5] It would, however, have been quite novel to raise the question of equal opportunity for female barristers as compared to male barristers. So I think a number of means exists to apply the legislation. Probably, when a number of cases are won, the unions will slowly change their position of cautious reserve and discover it is high time to win some victories in that field too. I think there are indications of that already.

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[3] Defrenne v. Sabena, [1976] E.C.R. 455.

[4] Judgment of May 24, 1989, [1989] J.L.M.B. 915; the tribunal ruled on indemnification on January 10, 1990, and posed a preliminary question to the European Court of Justice, [1990] CHN.D.S. 5.

[5] This case did eventually go to court. On December 21, 1989, the Court of Appeals in Brussels stated that the Office for Social Security had been discriminating against female barristers by terminating their contracts at age 60, while male barristers' contracts were renewed until they reached 65. Judgment of Dec. 21, 1989, Court of Appeals, Brussels, Belg. [1990] CHR.D.S. 5.

*Judge Groenen**:

For the benefit of our American friends, I will elaborate a bit on the remedies available under the 1978 "toothless" Act, as Mr. Blanpain calls it.[6] In fact, we only have two teeth to work with, but the judges do work with those two teeth. The 1978 law contains two provisions on remedies: Article 133 provides the court with a power to enjoin parties to put an end to discriminatory practices; and Article 136 provides the court with the power to sanction termination or dismissal occurring after the victim of a discriminatory practice has filed a complaint. Under Article 136, the victim is allowed 6 months indemnity unless the employer can prove the termination or the dismissal had absolutely nothing to do with the complaint.

I now wish to summarize briefly three cases in which judges have utilized these provisions. In 1984, the court decided the *Bekaert* case.[7] This case involved 13 women laid off because of their refusal to accept a part-time work schedule. The women involved went on strike without first filing a complaint with the company. In fact, the company provided no procedure for filing such a complaint. Neither had these women filed a complaint with the *Inspection des lois sociales*. Their only action, again, was to go on strike. The court, in a very courageous move, decided that the action of striking was sufficient in itself to reveal the workers' discontent and their disagreement with the proposal of part-time work. This conclusion by the court was enough to make Article 136 available to the women; this provision granted them a supplemental indemnity of six months pay. Article 133 was inapplicable.

Another interesting case involved a woman working in a printing shop.[8] This woman had mastered the techniques of photo-composition by computer. She was, without notice, moved into an exclusively male workshop and was placed there behind her computer desk. The male workers reacted very strongly. Backed by the *Syndicat du Livre*, the union, they pressured the employer to remove this woman immediately from that particular position. The

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[6] Loi du 4 Octobre 1978 de Réorientation Economique (M.B. 17 Octobre 1978).

[7] Judgment of Nov. 12, 1984, Trib. Trav. Charleroi, Belg. [1984] CHR.D.S. 531.

[8] Judgment of Jan. 7, 1987, Trib. Trav. Brussels, Belg., [1987] J.T.T. 206.

employer asked this woman to stay home, and refused to reinstate her when she asked. She complained almost immediately to the *Inspection des lois sociales*. After her complaint, she was fired.

Here, of course, the employer argued that the worker had in fact been dismissed for other reasons, a defense which the court clearly rejected based on the evidence. The employer's second argument was that he was unaware of the complaint; I believe the dismissal came the day after the complaint was filed. The Tribunal concluded that the employer need not necessarily know about the complaint. It suffices, the tribunal held, that the dismissal comes after the complaint. The court more or less tried to extend as far as possible the application of Article 136, which seemed to be the only sanction available.

The third case involves an air hostess at Sabena who was forced to retire at age 55, whereas an understanding or an enclosure to a collective agreement existed with the company saying that male cabin employees could elect to stay on until age 60. The plaintiff proved this to be a discriminatory practice. Here, the labor court used Article 133 and said something to this effect: We have this power of injunction, and we are going to try and do away with this situation. The court gave Sabena three months to put an end to the discriminatory policy, meaning, in effect, to reinstate this woman or to extend the period of notice. This decision, however, was subsequently reversed. The Supreme Court actually held that Article 133 does not grant, under any circumstances, a judge the power to reinstate anybody who has been terminated.[9] Article 133 only allows the court to put an end to certain norms, to certain regulations which exist within the enterprises. This is just a brief summary of how the courts have dealt with certain cases.

Mr. Jacqmain:

I would just like to add that in other cases of victimization, similar to the ones just mentioned, the award was six months salary, which is not very much. But in the air hostess case, for the first time the Industrial Court,[10] after fumbling around and through very convoluted reasoning based on general principles of tort in civil law, granted the plaintiff here 5 million Belgian francs

[9] Judgment of June 20, 1988, Cour de Cassation, Belg. [1988] CHR.D.S. 345.
[10] Judgment of Sept. 9, 1987, Cour Trav. Bruxelles, Belg. [1988] CHR.D.S. 340.

(more than $100,000), the highest sum ever granted in a discrimination case.[11] This sanction will give pause to some employers.

Professor Vogel-Polsky:

I have two brief remarks. First, it is certainly important to discuss case law. However, it is also important to consider what later happened to these women. They are all still on the dole, unemployed and without prospects of employment (for many reasons such as their age, the region in which they live, their low-level of skill, etc.). While litigation is undoubtedly important to commentators and attorneys, litigation under Belgian law is very risky for women. The possibility of reinstatement in their former jobs does not exist, and finding new jobs is nearly impossible. The final and actual result of the *Bekaert* case,[12] as far as the victim of discrimination is concerned, has been to exclude women from the labor market!

Second, by concluding that the case is a victory because the air-hostess finally received significant financial reparations, one is welcoming a very narrow and limited definition of success. In the field of anti-discrimination, the central issue remains unresolved when the Court has no legal authority to end discriminatory practices or to reinstate the victim and restore her rights.

Ms. Walgrave:

I also wish to add two remarks. First, I agree that, even after the *Bekaert* case,[13] we are still very behind in the field of remedies and sanctions. Second, I am afraid when I hear very good, liberal lawyers like Blanpain and others basing their analyses on supply and demand within the labor market. I do not accept that kind of analysis. I believe that as jurists and legalists we must defend human rights. Advances in this area should not occur only when

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[11] The judgment of March 2, 1988 was canceled by the Cour de Cassation on November 13, 1989. Judgment of Nov. 13, 1989, Cour de Cassation, Belg., [1990] CHR.D.S. 60. There will be a new ruling as to indemnification. *See generally* Jacqmain, *La dissolution du contrat de travail à l'âge de la pension: et l'égalité?* [1988] CHR.D.S. 321; De Vos, *L'âge de la retraite: une condition de travail très particulière* [1989] J.T.T. 1.

[12] Judgment of Nov. 12, 1984, Trib. Trav. Charleroi, Belg. [1984] CHR.D.S. 531.

[13] *Id.*

the employer will stand to benefit. Such a view fails to recognize and to respect human rights. Our role as lawyers is to develop positive strategies and not just to offer explanations on how circumstances will create change. While it is true that if we have another war, of course we will have full employment. But is war a good means of creating job opportunities for those who are not on the firing line? So I really believe that it is important to continue to support development, stressing international law, and to further the recognition that the right to work is a fundamental and basic economic and social right. This goal will not be accomplished automatically. We need compulsory acts, protective legislation, and affirmative action programs; monetary damages alone are not enough.